

Commentary on the New Maryland Rules of Civil Procedure

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Civil Procedure Commons](#)

Recommended Citation

Commentary on the New Maryland Rules of Civil Procedure, 43 Md. L. Rev. 669 (1984)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol43/iss4/4>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**COMMENTARY ON THE NEW MARYLAND RULES
OF CIVIL PROCEDURE**

TABLE OF CONTENTS

	Page
TITLE 1. GENERAL PROVISIONS	
Chapter 100. APPLICABILITY AND CITATION	
RULE	
1-101. Applicability	673
1-102. Circuit and Local Rules	674
1-103. Method of Citation	674
Chapter 200. CONSTRUCTION, INTERPRETATION AND DEFINITIONS	
RULE	
1-201. Rules of Construction	675
1-202. Definitions	677
1-203. Time	679
1-204. Motion to Shorten or Extend Time Requirements	680
Chapter 300. GENERAL PROVISIONS	
RULE	
1-301. Form of Court Papers	683
1-302. Forms	685
1-303. Form of Oath	685
1-304. Form of Affidavit	685
1-311. Signing of Pleadings and Other Papers	686
1-312. Requirements of Signing Attorney	688
1-313. Certification by Signing Attorney With Out-of- State Office	690
1-321. Service of Pleadings and Papers Other Than Original Pleadings	690
1-322. Filing of Pleadings and Other Papers	692
1-323. Proof of Service	692
1-324. Notice of Orders	693
1-325. Prepayment of Filing Fees — Waiver	693
1-331. Attorney May Act for Party	694
1-341. Bad Faith — Unjustified Proceedings	694
1-351. Order Upon Ex Parte Application Prohibited — Exceptions	695

Chapter 400. BOND

RULE

1-401. Applicability	696
1-402. Filing and Approval.....	696
1-403. Relief to Surety and Interested Persons	697
1-404. Proceeding Against Surety.....	698
1-405. Judgment on Bond.....	698
1-406. Bond Premiums as Costs	699

TITLE 2. CIVIL PROCEDURE — CIRCUIT COURT

Chapter 100. COMMENCEMENT OF ACTION AND
PROCESS

RULE

2-101. Commencement of Action	699
2-111. Process — Requirements Preliminary to Summons	700
2-112. Process — Issuance of Summons.....	701
2-113. Process — Duration, Dormancy and Renewal of Summons.....	702
2-114. Process — Content	703
2-115. Attachment Before Judgment	704
2-121. Process — Service — In Personam	716
2-122. Process — Service — In Rem or Quasi in Rem	718
2-123. Process — By Whom Served	719
2-124. Process — Persons to be Served	720
2-125. Process — Service on Sundays and Holidays ..	723
2-126. Process — Return	724
2-131. Appearance	725
2-132. Striking of Attorney's Appearance	726

Chapter 200. PARTIES

RULE

2-201. Real Party in Interest	727
2-202. Capacity	728
2-211. Required Joinder of Parties	730
2-212. Permissive Joinder of Parties	732
2-213. Misjoinder and Nonjoinder of Parties.....	733
2-214. Intervention	733
2-221. Interpleader	734
2-231. Class Actions	735
2-241. Substitution of Parties	740

Chapter 300. PLEADINGS AND MOTIONS

RULE

2-301.	Form of Action.....	742
2-302.	Pleadings Allowed.....	743
2-303.	Form of Pleadings.....	744
2-304.	Pleading Special Matters.....	744
2-305.	Claims for Relief.....	746
2-311.	Motions.....	746
2-321.	Time for Filing Answer.....	749
2-322.	Preliminary Motions.....	750
2-323.	Answer.....	755
2-324.	Preservation of Certain Defenses.....	760
2-325.	Jury Trial.....	760
2-326.	Transfers From District Court on Demand for Jury Trial.....	762
2-327.	Transfer of Action.....	763
2-331.	Counterclaim and Cross-claim.....	764
2-332.	Third Party Practice.....	766
2-341.	Amendment of Pleadings.....	766
2-342.	Amendment of Other Papers.....	768

Chapter 400. DISCOVERY

RULE

2-401.	General Provisions Governing Discovery.....	769
2-402.	Scope of Discovery.....	770
2-403.	Protective Orders.....	774
2-404.	Perpetuation of Evidence.....	775
2-411.	Deposition — Right to Take.....	778
2-412.	Deposition — Notice.....	778
2-413.	Deposition — Place.....	779
2-414.	Deposition — Officer Before Whom Taken....	779
2-415.	Deposition — Procedure.....	780
2-416.	Deposition — Videotape and Audiotape.....	782
2-417.	Deposition — Written Questions.....	782
2-418.	Deposition — By Telephone.....	782
2-419.	Deposition — Use.....	783
2-421.	Interrogatories to Parties.....	784
2-422.	Discovery of Documents and Property.....	785
2-423.	Mental or Physical Examination of Persons....	785
2-424.	Admission of Facts and Genuineness of Documents.....	785
2-431.	Certificate Requirement.....	787
2-432.	Motions Upon Failure to Provide Discovery...	788

2-433.	Sanctions.....	789
2-434.	Expenses for Failure to Pursue Deposition	789
Chapter 500. TRIAL		
RULE		
2-501.	Motion for Summary Judgment	790
2-502.	Separation of Questions for Decision by Court.	791
2-503.	Consolidation; Separate Trials.....	792
2-504.	Pretrial Conference.....	793
2-505.	Removal	795
2-506.	Voluntary Dismissal	795
2-507.	Dismissal for Lack of Jurisdiction or Prosecution.....	796
2-508.	Continuance	796
2-509.	Jury Trial — Special Costs in First, Second and Fourth Judicial Circuits	798
2-510.	Subpoenas	798
2-511.	Trial by Jury	799
2-512.	Jury Selection	801
2-513.	Exclusion of Witnesses.....	802
2-514.	When Court May Require Production of Evidence	803
2-515.	View	804
2-516.	Exhibits	805
2-517.	Method of Making Objections.....	805
2-519.	Motion for Judgment	806
2-520.	Instructions to the Jury	807
2-521.	Jury — Review of Evidence — Communications	808
2-522.	Court Decision — Jury Verdict	809
2-532.	Motion for Judgment Notwithstanding the Verdict.....	810
2-533.	Motion for New Trial	811
2-534.	Motion to Alter or Amend a Judgment — Court Trial	811
2-535.	Revisory Power	813
2-536.	Disability of Judge	814
2-541.	Masters	814
2-542.	Examiners.....	814
2-543.	Auditors	815
2-551.	In Banc Review	817
Chapter 600. JUDGMENT		
RULE		
2-601.	Entry of Judgment	819

2-602.	Judgment — Multiple Claims	820
2-603.	Costs	822
2-604.	Interest	824
2-611.	Confessed Judgment	824
2-612.	Consent Judgment	828
2-613.	Default Judgment	829
2-614.	Judgment of Contribution or Recovery Over ..	833
2-615.	Judgment on Claim and Counterclaim	833
2-621.	Lien of Judgment	833
2-622.	Transmittal to Another Court	834
2-623.	Recording of Judgment of Another Court	835
2-624.	Assignment of Judgment	835
2-625.	Expiration and Renewal of Judgment	836
2-626.	Satisfaction of Judgment	837
2-631.	Enforcement Procedures Available	838
2-632.	Stay of Enforcement	838
2-633.	Discovery in Aid of Enforcement	840
2-641.	Writ of Execution — Issuance and Content ...	841
2-642.	Writ of Execution — Levy	844
2-643.	Release of Property From Levy	847
2-644.	Sale of Property Under Levy	849
2-645.	Garnishment of Property — Generally	852
2-646.	Garnishment of Wages	858
2-647.	Enforcement of Judgment Awarding Possession	860
2-648.	Enforcement of Judgment Prohibiting or Mandating Action	861
2-649.	Charging Order	862
2-651.	Ancillary Relief in Aid of Enforcement	862

I. TITLE 1—GENERAL PROVISIONS

A. Chapter 100—APPLICABILITY AND CITATION

Rule 1-101—Applicability

Rule 1-101 delineates the scope of the new rules and simplifies Former Rule 1. The rules, adopted on April 6, 1984, by the Court of Appeals of Maryland, are divided into titles, each title having its own scope. Title 1, General Provisions, applies to all Maryland courts, including the District Court. The former general provisions were inapplicable to the District Court;¹ the Rules of the District Court were

1. See Former Md. R.P. 1 a 1.

separate and distinct from the procedural rules of the other courts.² The new rules thus reflect the Committee's intent to consolidate all rules governing Maryland practice into a single set.³

Title 2, because it applies only to civil matters in the circuit courts, recognizes that a separate set of rules will be necessary for civil matters in the District Court. The separate rules are needed to retain the informal character of the District Court, to provide an expedited and inexpensive means of resolving disputes of less complexity than those within the circuit courts' subject matter jurisdiction.⁴ Instead of appearing in a separate volume, as is presently the case, the Maryland District Rules for Civil Practice appear in Title 3 of the new rules.⁵ Consistent with the elimination of the distinction between pleadings in law and in equity,⁶ the rules dispense with procedural rules based on that difference.⁷ Another result of the Committee's intent to consolidate all rules is that Title 4 governs all criminal matters, post-conviction procedures, and expungement of records in both the circuit and District courts.⁸

Rule 1-102—Circuit and Local Rules

Rule 1-102 is derived from Former Rule 1 f and preserves the effect of circuit and local rules regulating certain procedures, provided the local rules are not inconsistent with the new rules. Following the former rule, this rule prohibits the adoption of circuit and local rules dealing with matters not specifically listed in the rule.

Rule 1-103—Method of Citation

Rule 1-103 changes the permissive method of citation of the rules. Former Rule 3 d provided that the rules be cited as "Maryland Rules"; this rule provides that the rules may be cited as "Md. Rules." In addition, the new rule specifies that a specific rule may be cited as, e.g., Rule 1-102. The old rule did not specify any method of referring to a rule individually.

2. *See* MD. DIST. RULES.

3. Proposed Rule 1-101 reporter's note.

4. C. BROWN, INTRODUCTION TO MARYLAND CIVIL LITIGATION 225-26 (1982).

5. *See* Proposed District Court Rules, MD. ADMIN. REG., Dec. 9, 1983.

6. *See infra* notes 354-62 and accompanying text.

7. Proposed Rule 1-102 reporter's note.

8. *See* Proposed Criminal Rules, MD. ADMIN. REG., Dec. 9, 1983.

B. Chapter 200—CONSTRUCTION, INTERPRETATION, AND DEFINITIONS

Rule 1-201—Rules of Construction

Rule 1-201 draws its general statement of policy from both the federal and Maryland rules and modifies several former Maryland rules. The first sentence of section (a), consistent with Federal Rule 1 and almost verbatim from Former Rule 701, states the general policy that all of the rules “shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay.” To secure these objectives, section (a) contains new provisions regarding the consequences of noncompliance with the rules. Compliance with both mandatory and prohibitory provisions is to be compelled through the measures prescribed by the rules or by statute. If the rules do not establish any particular enforcement procedure, the court may compel compliance or determine the consequences of noncompliance “in light of the totality of the circumstances and the purpose of the rule.” One member of the Committee stated that this provision, despite its lack of any clear direction, was intended to guide the court’s discretion in imposing sanctions.⁹ Challenging this assertion, another member recommended that the Committee try to minimize abuse by inserting restrictions on the exercise of judicial discretion.¹⁰ The Committee did limit the amount of discretion available to a judge in criminal and in juvenile cases by adding a clause stating that a court may dismiss a charging document only if the state’s noncompliance results in a violation of the defendant’s constitutional rights. This addition was described by one member as intending to serve a dual purpose. On the one hand, it prevents the defendant’s arbitrary dismissal due to the state’s excusable or unintentional noncompliance with a mandatory rule.¹¹ On the other hand, it discourages the state’s callous or cavalier disregard of time limitations.¹²

The rest of Rule 1-201 does not change Maryland procedure. Section (b) consolidates Former Rule 1 h and 1 i. The new rule eliminates

9. Comments of Mr. Niemeyer, Minutes, May 21-22, 1982, at 42 (“this provision is designed to provide some guidance to the court in deciding what sanction to impose where none is expressly provided in the rules”). See also Proposed Rule 1-201 reporter’s note, stating that the last two sentences of the rule were added in response to concerns of the Committee and the judiciary regarding court interpretation of mandatory language in the rules. The added language is intended to provide necessary guidelines so that the rules will not be interpreted in such a way as to cause unintended effects.

10. Comments of Judge Proctor, Minutes, May 21-22, 1982, at 42, 44.

11. Comments of Senator Connell, *id.* at 43.

12. *Id.*

the reference in Former Rule 1 i to law and equity, in accordance with the new rules' consolidation of the forms of action. The only other changes are changes in style. Section (c) is derived from Former Rules 1 g and 701, and provides that rules or omissions do not repeal the common law or statute unless the common law or statute is inconsistent with the rules. This rule does not represent a change in Maryland procedure, but merely rewords the former rule to modify its confusing language.¹³ Section (d) carries forward Former Rule 2 c almost verbatim and reflects the Committee's intent that the rules operate in a sex-neutral manner.¹⁴ The wording adopted parallels that in the prior rule and states that "words in any gender include all genders *except as necessary implication requires.*"¹⁵

The Committee discussed two other possible means of advancing their goal of sex-neutrality.¹⁶ The first alternative provided that "words in any gender include all genders *unless specifically provided otherwise.*"¹⁷ This alternative was originally considered because a Maryland delegate expressed dissatisfaction with the wording of the rule as adopted.¹⁸ Criticisms of this second proposal included comments by one member that it would place undue emphasis on gender, giving rise to unintended inferences and requiring that each sex-specific term be accompanied by explanatory language.¹⁹ The Committee also considered having no exceptions to a general rule that applies all gender-oriented words to both sexes.²⁰ But the Committee apparently rejected both of these alternatives, eventually leaving the exception the same as in the former rules.²¹

Section (e) carries forward Former Rule 2 b (Headings Not Rules) and, provides that the headings, subheadings, cross references, committee notes, source references, and annotations are not part of the rules.

13. See Minutes, Oct. 13-14, 1978, at 6 (where the Committee referred this section back to the Style Subcommittee because it felt its wording was confusing).

14. See Minutes, Jan. 4, 1980, at 13 (announcement of the Chairman discussing the Committee's decision to draft on the basis of sex-neutrality).

15. MD. R.P. 1-201(d) (emphasis added).

16. Minutes, Sept. 14, 1979, at 3-5.

17. *Id.* at 4.

18. *Id.* at 3. According to the Committee minutes, Delegate Maurer was dissatisfied with the Committee's version and favored this alternative, which paralleled that in H.B. 1298, Acts of 1979, ch. 185, a bill she had introduced to replace MD. ANN. CODE art. 1, § 7. H.B. 1298 stated: "Unless the General Assembly specifically provides otherwise in a particular statute, all words in the Code imparting one gender include and apply to the other gender as well."

19. Comments of Mr. Sykes, Minutes, Sept. 14, 1979, at 4.

20. Comments of Mr. (now Judge) Rodowsky, *id.*

21. The Committee agreed to draft, in response to Delegate Maurer's concerns, an alternative rule to propose along with that chosen by the Committee. Minutes, Jan. 4, 1980, at 14. No such rule was ever proposed.

Rule 1-202—Definitions

The definitions section, Rule 1-202, generally adopts the former definitional section, Rule 5, with very few substantive changes. Many of the changes in, and additions to, the definitions are the result of changes in practice and therefore will be discussed later in the context of those changes. Some of the more important changes, however, should be noted here. Section (a) changes the definition of the word "action" as used in the rules. Former Rule 5 a defined "action" as referring only to the steps of a civil action and specifically excluding criminal proceedings; the new rule defines the term to include the steps of both civil and criminal proceedings. Although the change does not affect practice, several rules that used the word "action" to designate only civil proceedings had to be changed to conform with the new definition of the word.²²

Section (b) is derived from Former Rule 5 c and eliminates reference to the old notions of oath, verification, and affidavit, thus eliminating confusion caused by references to these three different terms.²³ With this deletion, the new rule combines the use of these terms in the rules under the common definition of affidavit and thus achieves a clearer definition of the concept of affidavit.²⁴ The deletion effects no substantive change. Consistent with prior practice, when an affidavit is required, the affiant must make a written statement and affirm the statement to be true. The section merely clarifies the practice mandating personal knowledge only where expressly required.²⁵ Also, the affirmation must be reflected within the statement, either by the affiant's signing of an oath or by a notary's attesting that the affiant has so sworn.²⁶

Section (c) adds to the definitional section the meaning of the term "body attachment." Previously set out separately in Former Rules 114 d for body attachment of a witness who fails to obey a summons in a civil action, 742 e for body attachment of a witness who fails to obey a summons in a criminal cause, and 743 c for body attachment of a material witness in a criminal cause, the new rule provides one uniform definition to be applied in three situations: (1) a witness who fails to obey a subpoena, pursuant to Rule 2-510(h), (2) a material witness in a crimi-

22. See, e.g., MD. R.P. 1-341, 1-401.

23. Minutes, Oct. 13-14, 1978, at 7. See also Niemeyer, *The Maryland Rules—A Time for Overhaul*, 9 U. BALT. L. REV. 1, 9-11 (1979) (discussing the clarity of style and concept being sought by the reorganization project, and using as an example the proposed changes to the definitions of affidavit, oath, and verification).

24. Minutes, Oct. 13-14, 1978, at 7.

25. Proposed Rule 1-202(c) reporter's note (now MD. R.P. 1-202(b)).

26. Minutes, Oct. 13-14, 1978, at 7. See also MD. R.P. 1-304 (Form of Affidavit).

nal action, and (3) a party to a civil action who fails to obey an order of court. This third application is not represented in the former rules, and therefore represents a change from existing practice.

Section (d), defining "certified mail," is derived from Former Rule 5 aa. This definition is intended to include both certified and registered mail, although the latter is rarely used because of the expense.²⁷ Section (n) is new and defines "levy" to refer to any act by a sheriff to bring property under the control of the court to satisfy a money judgment. The Committee felt that this definition was necessary because of the extensive use of the term in the rules governing enforcement of money judgments.²⁸ In defining the term "levy," the Committee noted that it is not used with enforcement proceedings that do not involve the sheriff, such as garnishment proceedings pursuant to Rule 2-668.²⁹

Section (p) extends the term "person" to include expressly "the State, its agencies or political subdivisions, or any other governmental entity."³⁰ This should clear up past confusion over whether a governmental entity was to be considered a person.³¹ Section (q) defines "pleading" and greatly simplifies the definition in Former Rule 5 v. The change is intended to coordinate the Maryland concept of pleading with that of federal practice set forth in Federal Rule 7(a),³² and thus limits the definition of a pleading to the particular list set forth in the rule.³³ Former Rule 5 v provided no limiting language; thus almost any paper filed in an action fell under the definition of a pleading.³⁴ That definition included several papers that will no longer be referred to as pleadings, specifically motions and preliminary objections. Although

27. Explanatory Note, Minutes, Mar. 13, 1982, at 2.

28. *Id.*

29. *Id.*

30. Compare MD. R.P. 1-202(p) (specifically including government entities within the definition of person), with Former Md. R.P. 5 q (defining person as "any natural person, partnership, joint stock company, unincorporated association, or society, or municipal or other corporation of any character whatsoever").

31. See, e.g., *United States v. Coumantaros*, 165 F. Supp. 695 (D. Md. 1958) (holding that United States is "person" under Former Md. R.P. 5 q).

32. Compare the papers considered a "pleading" under MD. R.P. 1-202(q) with those under FED. R. CIV. P. 7(a).

33. MD. R.P. 1-202(q) includes the following as pleadings: a complaint, a counterclaim, a cross-claim, a third-party complaint, an answer, an answer to a counterclaim, cross-claim, or third-party complaint, a reply to an answer, or a charging document as used in Title 3.

34. Former Md. R.P. 5 v defined a pleading to include

any paper filed in an action, setting forth a cause of action or ground of defense, or filed with the object of bringing an action to issue or trial or obtaining any decision or act by the court including, but not limited to a declaration, bill of complaint, petition, demurrer, dilatory plea, plea in bar, answer, demand for particulars, bill of particulars, exception, replication and an order of court requiring a reply.

the change would seem to warrant a new section defining "motion," the Committee considered the necessity of such a provision (especially to clarify what kinds of paper a third-party plaintiff would have to provide to a third-party defendant),³⁵ but no such definition was adopted.

Section (v) defines "sheriff" in a manner similar to the definition in Former Rule 5 cc, but amends the definition to include District Court constables and elisors who perform the duties of the sheriff.³⁶ Former Rule 5 ee included a subpoena under the definition of "summons," but the terms are distinguished in the new rules.³⁷ Under new Rule 1-202 a summons can issue only to notify the person named therein that an action has been filed against that person, and that failure to answer a civil complaint may result in entry of judgment against that person, or failure to attend in a criminal action may result in issuance of a warrant for that person's arrest. Section (w) essentially adopts the definition of summons set forth in Former Rule 5 ee, and defines a subpoena as a written order used to compel a person's attendance. Therefore, under the new rules the subpoena has broader application than the summons. The definition of "process" in section (s) also has been changed to reflect the distinction between summons and subpoena by including both terms.

Rule 1-203—Time

Rule 1-203 preserves prior practice for computation of time, and adds a new provision from the federal rules. Sections (a) and (b) explain the method of computing a period of time prescribed by the rules, by order of court, or by statute, particularly by explaining when weekend days and holidays are or are not included in the time period. These two sections follow Former Rule 8 a and b with only minor stylistic changes.

Section (c) adopts Federal Rule 6(e) almost verbatim and adds three days to the prescribed period to respond when a notice or paper is served by mail. Thus, although it may be more convenient to mail notice to the opposing party, a party desiring to move the case forward as quickly as possible should personally serve the opposing party, when the opposing party is required to do some act or take some proceeding

35. Minutes, Mar. 8, 1980, at 39 ("During the course of the discussion of [Proposed Rule 2-331] it became clear that there needed to be included in Rule 1-202 (Definitions) a definition of the term 'motion.' This definition would, among other things, clarify what kinds of papers the third-party plaintiff would have to provide to the third-party defendant.")

36. Minutes, Jan. 5, 1979, at 16-17. The Committee thought that this definition might depend on the constable rules, and agreed that on completion of the proposed rules they should examine this definition to see if it could be simplified or eliminated. *Id.* at 17.

37. Minutes, Oct. 13-14, 1978, at 10-11. Compare Former Md. R.P. 5 ee, stating that " 'summons' shall include 'subpoena,' " with MD. R.P. 1-202(w), (x), where these terms are defined differently.

within a prescribed period after service.³⁸ The mere fact that notice must be mailed to a party, however, does not extend the time for doing an act if the prescribed time within which the act must be done is controlled *not* by the date of notice but by some other act.³⁹ For example, the time for an appeal begins to run from entry of the judgment and not from service of the notice; therefore, this new rule will not extend the time in which the party must appeal.⁴⁰ This lack of effect on time periods that are not governed by the date of notice is similar to practice in federal courts, where Federal Rule 6(e) has been found inapplicable in determining whether timely filing has been made of a petition to review an order of a bankruptcy referee,⁴¹ a motion to vacate summary judgment,⁴² and a petition for removal.⁴³

Rule 1-204—Motion to Shorten or Extend Time Requirements

Rule 1-204(a) is derived from Federal Rule 6(b) and Former Rule 309 and establishes the standard for determining whether to shorten or expand time requirements. Following both the federal rule and the former rule, Rule 1-204(a) requires that a party show cause for a change in time limits.⁴⁴ Unlike Former Rule 309, but following Federal Rule 6(b), the new rule distinguishes between filing a motion to extend time before the expiration of time to act, and filing a motion after such time.⁴⁵ If the time period has expired, the court may extend the time to act only if the failure to act resulted from "excusable neglect." Although one Committee member felt that Rule 1-204(a) will drastically change Maryland practice by allowing an extension of time in certain cases of excusable neglect,⁴⁶ the new rule is not significantly different from Former Rule 309 b, which, although never thoroughly interpreted by case law, provided that a court, "[f]or good cause shown" and "at any time," might

38. 2 J. MOORE, W. TAGGERT & J. WICKER, *MOORE'S FEDERAL PRACTICE* ¶ 5.07, at 1357 (2d ed. 1981) [hereinafter cited as *MOORE'S FEDERAL PRACTICE*], states:

While mailing is a convenient method of making service, a party who desires to push his case and to avoid the delay of even a few days may find it advisable to make personal service upon an opposing party, if the opposing party is required to do some act or take some proceeding within a prescribed period after the service of the pleading or other paper.

39. *Id.* ¶ 6.12, at 1500.209-210.

40. *Id.*

41. *See Goff v. Pfau*, 418 F.2d 649, 654 (8th Cir. 1969).

42. *See Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858, 860 (3d Cir. 1970).

43. *Youngson v. Lusk*, 96 F. Supp. 285, 289 (D. Neb. 1951).

44. *See* FED. R. CIV. P. 6(b); Former Md. R.P. 309.

45. *Compare* Former Md. R.P. 309 a *with* FED. R. CIV. P. 6(b) *and* MD. R.P. 1-204(a).

46. Comments of Judge McAuliffe, Minutes, Oct. 13-14, 1978, at 12 (This section results in "a drastic change from prior practice in that it allows an extension of time where a person neglected to act during the time prescribed.').

order a time requirement shortened or extended.⁴⁷

The true change instituted by the rule is the imposition of explicit requirements for changing a time period; Maryland practice now must conform to federal practice. The rule balances the Committee's reluctance to allow extensions based on culpable neglect and its desire to allow extensions in "certain compelling circumstances" when the time to act has expired.⁴⁸ The Committee rejected a suggestion to allow an extension for "excusable failure" rather than "excusable neglect."⁴⁹ The Committee decided to use "excusable neglect," because this language tracks that of Federal Rule 6(b), and thus should be interpreted in accordance with federal case law.⁵⁰ In order to work substantial justice, federal courts have generally given Federal Rule 6(b) a liberal construction, but have refused to condone carelessness and laxity.⁵¹ The burden of proving that the failure was the result of excusable neglect falls on the moving party,⁵² and absent that showing the court cannot grant relief.⁵³ In order to prevent overuse of the provision, the Committee decided that, like Federal Rule 6(b), the rule should include several situations in which no extensions should be permitted.⁵⁴ Essentially following the federal rule, Rule 1-204(a) provides that the court may not shorten or extend the time for filing a motion for judgment notwithstanding the verdict, a motion for new trial, a motion to alter or amend judgment, a motion addressed to the revisory power of the court, or a notice of appeal.⁵⁵

Although generally following Federal Rule 6(b), the rule does diverge from the federal rule in several respects. Unlike Federal Rule 6(b), which provides only for the *extension* of time requirements, Rule 1-

47. *See, e.g.*, *Fitzgerald v. Somerset County Sanitary Comm'n*, 231 Md. 242, 245, 189 A.2d 601, 602-03 (1963) (affirming a trial court's shortening of the defendant's time to plead following notice by publication on grounds that good cause was shown and no actual prejudice was alleged).

48. Minutes, Oct. 13-14, 1978, at 12-13. The Committee agreed with a suggestion by Mr. Nilson that the rule should provide for extensions of time in certain compelling circumstances, but also felt that they should make sure that this section include all situations where no extensions should be allowed. *Id.* at 12.

49. *Id.* Judge McAuliffe, supporting Judge Proctor's recommendation to change "neglect" to "failure," noted that "neglect" connotes culpability, and no extension should be granted for culpable failure to file. *Id.*

50. *Id.* Dean Kelly supported the use of "neglect" specifically because it would track FED. R. CIV. P. 6(b), and thereby give Maryland courts the benefit of federal case law. *Id.*

51. 2 MOORE'S FEDERAL PRACTICE, *supra* note 38, ¶ 6.08, at 1500.72-73.

52. *Id.* at 1500.70.

53. *Id.* at 1500.70 n.5.

54. Minutes, Oct. 13-14, 1978, at 12.

55. FED. R. CIV. P. 6(b) provides that the court may not extend the time for acting under FED. R. CIV. P. 50(b), 52(b), 59(b), (d), (e), and 60(b).

204(a), consistent with Former Rule 309, allows a Maryland court to shorten *or* extend time requirements. Furthermore, although Rule 1-204(a) does not specifically require notice to the opposing party, such requirement can be implied because Rule 1-204(b) sets forth specific requirements to be met before such motion can be made *ex parte*.⁵⁶ Federal Rule 6(b)(1) on the other hand, specifically provides that if the request is made before the expiration of the period, the court may order an enlargement with or without notice. Finally Federal Rule 6(b) allows a court to extend time "with or without motion," but Rule 1-204(a) restricts the courts' extensions to those made upon a party's motion.⁵⁷

Section (b) of Rule 1-204 is new and incorporates the prior practice of counsel informally seeking a change in time requirements.⁵⁸ The rule allows the court to enter an *ex parte* order to shorten or extend the time period under two circumstances. First, under Rule 1-204(b)(1), an order can be entered if the court is satisfied that the moving party has notified the opposing parties of the time and place that the moving party intends to confer with the court and that the moving party attempted, but was unable, to reach an agreement with the opposing party. Second, under Rule 1-204(b)(2) the court may enter an *ex parte* order if satisfied that the moving party "would be prejudiced" if required to comply with 1-204(b)(1).

Rule 1-204(c) is also new and provides that an order *shortening* the time to respond to original process must be served in the same manner as the original process, which is governed by Rules 2-121 through 2-126.⁵⁹ All other orders should be served in accordance with Rule 1-321, which describes the method of service for pleadings and papers other than original pleadings.⁶⁰ The rule states: "Otherwise [having established the method for serving an order shortening the time for a response to original process], it shall be served in the manner provided by Rule 1-321." "Otherwise" could be interpreted restrictively to refer only to orders extending the time for responding to original process. But a more reasonable interpretation is that the sentence refers to all other orders concerning extensions or shortenings of time requirements. This new rule has no counterpart in the federal rules or in the former Maryland rules.⁶¹

56. See also MD. R.P. 1-321 (requiring service of every pleading and other paper filed).

57. Proposed Rule 1-204(a) reporter's note ("This section modifies the federal rule by requiring a motion.")

58. Proposed Rule 1-204(b) reporter's note ("This section . . . incorporates into the rule the current informal practice of counsel seeking delayed or expedited action.")

59. See *infra* notes 232-60 and accompanying text.

60. See *infra* notes 104-08 and accompanying text.

61. Proposed Rule 1-204(c) reporter's note.

*C. Chapter 300—GENERAL PROVISIONS**Rule 1-301—Form of Court Papers*

Rule 1-301 combines provisions from federal and Maryland practice, and adds several innovations. Section (a) draws from Federal Rules 10(a) and 7(b)(2) as well as Former Rule 301 e and h. Like the federal rules, the provisions of section (a) specifically apply to “[e]very pleading and paper filed,” which presumably includes motions.⁶² This section requires a caption setting forth the parties (or matter), the court’s name, the docket reference, and a brief descriptive title.⁶³ Both Former Rule 301 e and Rule 1-301(a) require an original pleading to contain either the parties’ names and addresses or a statement that they are unknown. The rule expressly states that the name of the first party for both sides is sufficient for other pleadings and papers, thus making clear what was implicit in Former Rule 301 e.

Unlike Former Rule 301 e, the new rule does not expressly require the party against whom relief is sought to include in his first pleading the name and address of any party omitted from, or incorrectly stated in, the previous pleadings. But the rule requires that a party’s original pleading contain, if known, the names and addresses of all parties to the action. This requirement arguably applies to the first pleading of *either* party and thus should be construed to mean the correct name and address if stated incorrectly or omitted from the other party’s original pleading.

Section (b) is new, simplifies Maryland practice, and is consistent with the elimination of law-equity pleading distinctions.⁶⁴ Under subsection (b)(1) of the new rule, regardless of the nature of the action, the party bringing the action is the “plaintiff” (except in criminal cases where the party will be the state) and the party against whom the action is brought is the “defendant.” This rule takes the place of Former Rule 5 j and s, and eliminates the references in those definitions to the equitable labels of respondent, complainant, and petitioner. Subsection (b)(2) applies this scheme to subsequent claims, i.e., cross-claims, counter-claims, and third-party claims.

Subsection (b)(3) was added to provide uniformity in the designa-

62. Although motions are not included in the MD. R.P. 1-202(q) definition of pleading, MD. R.P. 2-311 mandates that every motion, unless made during a hearing or trial, be made in writing.

63. *See* Proposed Rule 1-301(a) reporter’s note (“This section enlarges the rule to make provision for situations where a matter, in lieu of parties, is captioned and to require inclusion of any assigned docket reference.”).

64. Proposed Rule 1-301(b) reporter’s note.

tion of parties to appeals from the District Court.⁶⁵ After extensive discussion over whether the designation plaintiff/defendant or the designation appellant/appellee would help clarify the referent on appeal, the Committee decided that the former would be better and provided in subsection (b)(3) that parties are to retain their original designation in appeals to a circuit court.⁶⁶ Subsection (b)(4) provides that the member of the bar who appears for a party will be called an attorney, regardless of the nature of the action. This provision apparently replaces Former Rule 5 d, but eliminates reference to the term solicitor, formerly used to identify counsel in an action in equity.

In an effort to promote uniformity, practicality, and economy, the Committee approved section (c), which declares that all papers filed henceforth must not exceed eight and a half by eleven inches in size.⁶⁷ The Committee was surprisingly resistant to this practical change.⁶⁸ Members favoring the change cited the ease and reduced cost of handling of the files by the clerks; those opposed relied on the fact that this was a radical change from present practice and that some papers, such as FNMA mortgages and deeds, would still have to be on legal size paper.⁶⁹ Also contrary to current practice, the new rule specifically prohibits backs and covers.

Section (d) represents the Committee's effort to eliminate copies which are difficult to read or which self-destruct,⁷⁰ and states that the paper and writing must be legible and of permanent quality. An earlier draft contained a provision that required typewritten papers to be double-spaced.⁷¹ Although consistent with several current rules,⁷² the provision was deleted. Section (e) excepts existing documents filed as exhibits (but not those prepared as exhibits) from the requirements of

65. Minutes, Jan. 5, 1979, at 17-19.

66. *Id.*

67. This rule is derived from Former Md. R.P. 1217 b, and, consistent with Former Md. R.P. 811 a 2, 831 a, and 1031 a, reduces the maximum length from 13 inches to 11 inches. Proposed Rule 1-301(c) reporter's note. The restriction on paper size, however, is not scheduled to go into effect until January 1, 1985. Order, Court of Appeals of Maryland, Apr. 6, 1984.

68. *See* Minutes, Oct. 13-14, 1978, at 16-17; *id.*, Jan. 5, 1979, at 19.

69. Minutes, Oct. 13-14, 1978 at 16-17.

70. *Id.* at 15-16; *see also* Proposed Rule 1-304(d) reporter's note ("This section is consistent with Rules 811 a 2, 831 a and 1031 a, enlarged to cover durability of the paper and writing and narrowed by not allowing reproduction on both sides of the paper.").

71. Section (d) of an earlier draft stated: "A paper shall be legible. A typewritten paper shall be double spaced. The paper and the writing must be of permanent quality."

72. *See* Former Md. R.P. 811 a 2, 831 a, and 1031 a, which require a typewritten paper to be double-spaced.

sections (a), (c), and (d).⁷³ Finally, section (f) consolidates Former Rules 301 k and 303 a which eliminated, except where expressly required, the requirements of verification of pleadings and papers by affidavit and the corporate seal for pleadings or papers filed by a corporation.⁷⁴

Rule 1-302—Forms

Rule 1-302 is derived from Former Rule 301 l, and applies to the Appendix of Forms. The new rule expressly states that the forms are not mandatory and does not change the former rule in this regard.⁷⁵

Rule 1-303—Form of Oath & Rule 1-304—Form of Affidavit

Rules 1-303 and 1-304 preserve the practice under Former Rules 5 c and 21. Although effectuating no substantive change, the rules distinguish between an oath and an affidavit. Former Rule 5 c defined "affidavit" in terms of an "oath," something not done under the new definition of affidavit in Rule 1-202(b).⁷⁶ The Committee changed the definition because it thought that "affidavit" should refer only to written materials.⁷⁷ Thus the rules modify the former rules to reflect the prevailing practice. Rule 1-304 expressly requires an indication in writing of the fact that an oath was taken, either by an authorized person's written certification that the oath has been administered to the affiant, or by the affiant signing an affirmation that is prescribed by the rule.⁷⁸

Rule 1-304 also diverges from Former Rule 5 e by providing two methods of affirming a written statement, one by swearing that the contents are true to the best of the affiant's knowledge, information, and belief, the other by affirming that upon personal knowledge the affiant knows the contents to be true. Former Rule 5 c only provided for one form of affirmation: that the information is true and correct. The Com-

73. See Minutes, Jan. 5, 1979, at 19. This exception is consistent with prior practice under Former Md. R.P. 828 and 1028. Proposed Rule 1-301(e) reporter's note.

74. See also FED. R. CIV. P. 11 ("Except where otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit.").

75. Proposed Rule 1-302 reporter's note ("This Rule is derived from Rule 301e, with the additional proviso clarifying that, unless specifically required, usage of the forms is not mandatory."). The rule thus conforms to Maryland case law, which holds that it is the substance rather than the form of the pleading that controls. See, e.g., *Lapp v. Santon*, 116 Md. 197, 199, 81 A. 675, 676 (1911); *Gott v. State*, 44 Md. 319, 336 (1876).

76. See MD. R.P. 1-202(b), which consolidates the former definitions of oath, verification, and affidavit. See *supra* notes 23-26 and accompanying text. The Committee intended that MD. R.P. 1-304 be consistent with the merger of these concepts. Proposed Rule 1-304 reporter's note.

77. See Minutes, Oct. 13-14, 1978, at 7 ("The decision was 10 to 2 to have the affidavit apply only to written materials.").

78. *Id.*

mittee Note to this rule expressly states that the rule is not intended to abrogate the additional affirmation requirements that are set forth in other rules such as those required in a motion for summary judgment under Rule 2-501.⁷⁹

Rule 1-311—Signing of Pleadings and Other Papers

Rule 1-311 combines sections of the former rules with Federal Rule 11; the result is very similar to the federal rule. Section (a) (Requirement), combines Former Rules 301 f and 302 a with Federal Rule 11, and changes Maryland practice to coincide with federal practice by requiring that *every* pleading or paper filed with the court, not just the initial pleading as required in Former Rule 301 f, contain the address and telephone number of the attorney (if the pleading or paper is filed by an attorney) or of the party (if the pleading or paper is filed by the party). The section also requires that each pleading or paper be signed by either an attorney, consistent with Former Rule 302 a, or by the party if unrepresented.

One difference in wording is that under Former Rule 301 f the address and telephone number of the attorney contained in the pleading must be that of his *office*. Rule 1-311 has no such requirement.⁸⁰ Although this difference appears insignificant at first glance, it is interesting because Former Rule 301 f originally required only that the pleading filed by an attorney contain "his address immediately below his signature, followed by his telephone number, if any."⁸¹ That language was interpreted by the Court of Appeals as "impl[ying] that the address need not be that of a law office,"⁸² and the rule was subsequently amended to require the attorney to give an office address.⁸³ The Committee notes do not indicate whether the change was purposeful or simply an unintentional consequence of redrafting. Therefore it is impossible to determine whether the change should be construed as actually effectuating a change or whether the case law should be followed.

Section (b) carries forward prior practice under Former Rule 302 b, but rewords the requirement to essentially follow Federal Rule 11. The new rule, however, follows the former version of Federal Rule 11, not

79. Proposed Rule 1-304 reporter's note.

80. MD. R.P. 1-311(a) states: "Every pleading or paper filed shall contain the address and telephone number of the person by whom it is signed," without specifying whether the address given by the attorney must be that of his office.

81. Former Md. R.P. 301 f, Md. Code Ann. (1963) (superseded).

82. *Bastian v. Watkins*, 230 Md. 325, 331, 187 A.2d 304, 307 (1962).

83. Former Md. R.P. 302.

the recently amended form.⁸⁴ The Maryland rule provides that an attorney's signature constitutes a certification that: (1) the attorney has read the pleading or paper; (2) to the best of his knowledge, information, and belief there is good ground to support it; and (3) it is not interposed for improper purpose or delay.

Section (c) is new, and is derived from Federal Rule 11. It allows the court to strike unsigned pleadings or papers, or those signed with intent to defeat the rule's purpose. Consistent with the recent amendments to Federal Rule 11, the rule states that the court may not strike a pleading or paper that has been inadvertently unsigned, if the omission is promptly corrected.⁸⁵ The rule also provides that an attorney who willfully violates the rule will be subject to appropriate disciplinary action.

In its effort to keep the rule simple, the Committee apparently left several important procedural questions unanswered. First, the new rule does not establish guidelines for determining when a correction is "prompt," nor does it require or provide for notification of the person who has filed but inadvertently failed to sign. Because this option has recently been added to the federal rule, interpretation of Federal Rule 11 by federal courts will be instructive for interpreting Rule 1-311(c).⁸⁶

84. FED. R. CIV. P. 11 previously read: "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." MD. R.P. 1-311(b) adopts this form almost verbatim. As recently amended, FED. R. CIV. P. 11 reads:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

85. FED. R. CIV. P. 11 now states: "If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant."

86. The previous version of FED. R. CIV. P. 11 did not provide a remedy for a pleading inadvertently unsigned, but federal courts had treated its provision for striking pleadings as discretionary, holding that an inadvertent failure to sign was merely a technical defect that did not invalidate the pleading. *See, e.g.,* *Holly Coal Co. v. Glove Indem. Co.*, 186 F.2d 291, 295 (4th Cir. 1950); *Burak v. Pennsylvania*, 339 F. Supp. 534, 535 n.2 (E.D. Pa. 1972); *In re Legion*, 85 F. Supp. 946, 947 (S.D.N.Y. 1949). But where there are multiple parties and not all have signed the pleading, courts will generally strike the pleadings as to those parties who have not signed in order to make certain that the named parties are actually in assent to the filing of the action. *See, e.g.,* *Scarella v. Midwest Fed. Sav. & Loan*, 536 F.2d 1207, 1209 (8th Cir. 1976); *People ex rel. Snead v. Kirkland*, 462 F. Supp. 914 (E.D. Pa. 1978); *Huffman v. Nebraska Bureau of Vital Statistics*, 320 F. Supp. 154, 156 (D. Neb. 1970).

Ultimately, federal courts have relied on the rule's purpose of preventing sham and

The rule does not provide for a hearing before the court strikes a pleading that is not signed as required, and does not supply any indication as to what disciplinary action would be appropriate for an attorney's willful violation of the rule. As recently amended, Federal Rule 11 permits the court to impose attorneys' fees on the violating attorney, the represented party, or both.⁸⁷ Although Rule 1-311(c) does not provide for recovery of attorneys' fees, Rule 1-341 incorporates this provision from the federal rule⁸⁸ and allows the court to impose attorneys' fees on "the offending party or the attorney advising the conduct or both of them" whenever the court finds that party's conduct was "in bad faith or without substantial justification."⁸⁹ Prior to awarding fees, the court would be required to hold a hearing. Furthermore, if the sanction is disbarment, at least one federal court has held that there must be notice and an opportunity to be heard.⁹⁰

Rule 1-312—Requirements of Signing Attorney

Rule 1-312 is derived from Former Rule 302 c, but has been changed significantly. Subsection 1-312(a)(1) requires a signing attorney to maintain an office for the practice of law in the United States, a change from Former Rule 302 c's requirement that the signing attorney's office be either in Maryland or in a city or county "adjoining the

false claims, and have decided to strike a pleading only in compelling situations. *See, e.g.*, *Incomco v. Southern Bell Tel. & Tel. Co.*, 558 F.2d 751, 753 (5th Cir. 1974); *Lau Ah Yew v. Dulles*, 236 F.2d 415, 416 (9th Cir. 1956); *American Auto. Ass'n v. Rothman*, 104 F. Supp. 655, 656 (E.D.N.Y. 1952); *Muchison v. Kirby*, 27 F.R.D. 14, 19 (S.D.N.Y. 1961).

87. *See* FED. R. CIV. P. 11. Prior to this change, there was confusion in the federal courts as to whether Federal Rule 11 provided a basis for imposition of attorneys' fees on either the attorney or the party represented.

The Supreme Court has held that a federal court may "award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974); *Hall v. Cole*, 412 U.S. 1, 5 (1973). Some federal courts have interpreted this as allowing recovery of attorneys' fees under Rule 11. *See, e.g.*, *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1332 (9th Cir. 1981) (citing Rule 11 in affirming an award of attorneys' fees); *Misegades, Douglas & Levy v. Sonnenberg*, 22 F.R. Serv. 2d 578, 579 (E.D. Va. 1976). Other courts have denied an award of attorneys' fees under Rule 11 where there is no showing of bad faith. *See Nemeroff v. Abelson*, 620 F.2d 339, 350 (2d Cir. 1980). Still other courts have recognized that Rule 11 does not authorize the imposition of attorneys' fees. *See United States v. Standard Oil Co.*, 603 F.2d 100, 103 n.2 (9th Cir. 1979); *Orenstein v. Compusamp, Inc.*, 19 F.R. Serv. 2d 466, 469 n.6 (S.D.N.Y. 1974).

88. MD. R.P. 1-341 permits recovery of attorneys' fees for proceedings in bad faith or without substantial justification. MD. R.P. 1-311, however, refers to pleadings or papers signed "for improper purpose or delay." Presumably these standards will be found to exist at the same time, so that the new rules will have the same result as FED. R. CIV. P. 11.

89. For a discussion of MD. R.P. 1-341, see *infra* notes 118-24 and accompanying text.

90. *See In re Los Angeles County Pioneer Soc'y*, 217 F.2d 190, 194 (9th Cir. 1954).

county in which the court is situated.”⁹¹ This change will allow members of the Maryland Bar who maintain an office for the practice of law anywhere in the United States to sign pleadings filed in any court of the state. Originally, a much more limited change was made in the rule by the Committee.⁹² The Court of Appeals, however, then changed the rule to its present form.⁹³

The Subcommittee pointed out that Former Rule 302 c was aimed primarily at District of Columbia attorneys who practiced part-time in Maryland.⁹⁴ When Former Rule 302 c was adopted, Maryland residency was a prerequisite to admission to the Maryland Bar; therefore it was improbable that many members of the Maryland Bar were practicing in a county not abutting the state.⁹⁵ Because the domicile requirements have been deleted from the Rules Governing Admission, there may be out-of-state practitioners who do not practice within an abutting county. For the first time, these practitioners will be permitted to sign pleadings filed in Maryland courts.

Despite the change, Rule 1-312 retains the discrimination in Former Rule 302 c against part-time lawyers. Proponents of the rule believed that it would promote the expedient handling of cases and ensure the court's and opposing counsel's access to the attorney, especially for the inevitable last minute phone calls.⁹⁶ One member of the Committee noted that Former Rule 302 c was designed to apply to “moonlighters” as well as non-residents;⁹⁷ a part-time attorney practicing out of his or her residence may be inaccessible during business hours⁹⁸ and may have no answering service.⁹⁹ In effect, the rule appears to require a full-time attorney to sign for a “moonlighter.” This would not circumvent the rule, because the full-time attorney would provide “one responsible

91. See Former Md. R.P. 302 c 2 iii, c 4.

92. The version of MD. R.P. 1-312 submitted to members of the Bar during the comment period allowed an attorney to sign a pleading if the attorney maintained an office for the practice of law in Maryland or in a city or county adjoining the state. The practical effect of this change would have been to “expand the perimeter of this state by the width of one county all around for the purpose of permitting members of the Maryland Bar who maintain offices for the practice of law to sign pleadings in any court of this State.” Letter from the Hon. John F. McAuliffe, Chairman of the Standing Committee on Rules of Practice and Procedure, to the Judges of the Court of Appeals of Maryland (Sept. 22, 1983) [hereinafter cited as McAuliffe letter (Sept. 22, 1983)].

93. Conversation with Julie Friet, Research Assistant for Standing Committee on Rules of Practice and Procedure, May, 1984.

94. See Explanatory Note, Minutes, May 21-22, 1982, at 45.

95. *Id.* at 46.

96. Comments of Judge McAuliffe, *id.* at 48.

97. Comments of Mr. Ryan, *id.* at 47.

98. *Id.* at 48.

99. Minutes, May 21-22, 1982, at 49.

point of contact.”¹⁰⁰

One member questioned the competence of part-time practitioners who litigate infrequently, suggesting that the “minimal amount of oversight by a full-time practitioner now provided by the rules” would be helpful in preventing malpractice.¹⁰¹ Assuming, however, that the established measure of a lawyer’s competence is successful completion of law school and admission to the Bar, this rule treats part-time attorneys, who have earned their credentials in the same manner as their full-time colleagues, unfairly. In practice, noncompliance by part-time practitioners with a Maryland address is less obvious than that of their out-of-state counterparts and is rarely challenged.¹⁰² The Subcommittee observed that in the unlikely event that opposing counsel discovers the noncompliance and seeks enforcement, this action may be motivated more by a desire to harass the opposition than by an interest in securing a more accessible and proficient adversary.¹⁰³

Rule 1-313—Certification by Signing Attorney With Out-of-State Office

Rule 1-313 carries forward Former Rule 301 g with only stylistic changes and requires that the signing attorney with an out-of-state office provide with the first pleading or paper filed a signed certificate of admission to the Maryland Bar. The requirements in Former Rule 301 g that the signing out-of-state attorney provide his office and home address and telephone number in the first pleading or paper have not been included in Rule 1-313, but new Rule 1-311 now provides that every pleading or paper filed by an attorney contain his address or telephone number. Rule 1-311 does not differentiate between an attorney’s office and home, requiring simply the signing person’s “address and telephone number,” but this would presumably be interpreted as the signer’s office address and telephone number, if the signer has one, in order to foster the rule’s purpose of availability. This rule will, however, relieve the signing attorney with an out-of-state office from providing *both* his office and his home address and telephone number.

Rule 1-321—Service of Pleadings and Papers Other Than Original Pleadings

Rule 1-321 combines provisions of Federal Rule 5 and Former Rule 306, and thereby simplifies the procedures for serving parties with filed papers other than original pleadings. Section (a) follows Federal Rule

100. Comments of Mr. Jones, *id.* at 48.

101. Comments of Judge McAuliffe, *id.* at 49.

102. Explanatory Note, *id.* at 45.

103. *Id.*

5(a) in requiring that every paper filed must be served on each party unless the rules or the court provide otherwise. The new rule's approach is opposite from that taken in Former Rule 306 c, which mandated service only of those papers that the rules required to be served.¹⁰⁴ But this change is unlikely to effect any change in practice. Next, consistent with both Federal Rule 5(b) and Former Rule 306 c, section (a) states that service is to be made upon the party's attorney unless service upon the party himself is ordered by the court.

Section (a) then lists the methods by which service of non-original pleadings and papers may be accomplished, namely, delivery or mailing. Unlike Former Rule 306, the new rule allows parties to be served in the same manner as attorneys.¹⁰⁵ In defining service by delivery, the new rule borrows almost verbatim from the provision in Federal Rule 5(b), and makes available new methods for delivering service. For example, both attorneys and parties can be served by delivering the paper to the person's office and leaving it in a conspicuous place, if there is no one in charge. Additionally, if the office is closed, the attorney or party may be served at home.

Service by mailing under section (a) provoked Committee debate.¹⁰⁶ One point of discussion concerned the time at which service is to be deemed complete. The Committee decided to key the time of service to the date of mailing, and therefore added the clause: "Service by mail is complete upon mailing."¹⁰⁷ This provision is identical with the provision in Federal Rule 5(b), but will allow Maryland practitioners additional time to serve over that allowed by Former Rule 306 c 3, under which service by mail was not complete until "one day after the day of mailing, if in the same city or county, and one day additional for each 500 miles or fraction thereof between the place of mailing and the place of address." The new rule simplifies practice by instituting a uniform time for date of service by mail, by eliminating the need to compute the appropriate date of mailing necessary under Former Rule 306 c 3 and by making the new rule conform with the federal requirement. Accordingly, the date of service will be the date of mailing, with Rule 1-203(c) providing a three-day cushion for response to papers served by mail, identical to the cushion provided by Federal Rule 6(e). Addition-

104. Compare Former Md. R.P. 306 c (applying whenever service of a pleading or paper was required), with MD. R.P. 1-321(a) (every pleading or paper filed must be served "[e]xcept as otherwise provided").

105. See Former Md. R.P. 306 c (providing different methods for service on an attorney and service on a party).

106. See Minutes, Oct. 13-14, 1978, at 14-16.

107. Comments of Mr. Brault, *id.* at 14.

ally, after discussion the Committee amended a draft of section (a) to allow a person to mail papers to the last known address if no address has been stated in a previous pleading or paper.¹⁰⁸

Section (b) follows Former Rule 306 b, as well as Federal Rule 5(a), and provides that no paper need be served on a party in default for failure to appear. This section preserves the exception in Former Rule 306 b that a pleading asserting a new or additional claim against a defaulting party must be served, but parallels the federal requirement by specifically providing that the pleading asserting the new or additional claim be served in accordance with the requirements for service of original process found in new Rules 2-121 through 2-126. Former Rule 306 b did not state the manner in which such a pleading was to be served. Section (c) is new, and excepts from service requests directed to the clerk for the issuance of process or any writ.

Rule 1-322—Filing of Pleadings and Other Papers

Rule 1-322 is new and incorporates Federal Rule 5(e). It defines filing with the court to mean filing with the clerk of the court, but allows the judge, at his discretion, to accept the papers for filing. This may be necessary for the protection of parties, for example, where the delay occasioned by first filing with the clerk would cause irreparable harm.¹⁰⁹

Rule 1-323—Proof of Service

Rule 1-323 consolidates and streamlines the provisions of Former Rule 306 a 2 and d, without major substantive changes. One minor change was instituted by including in the new rule a provision that allows the clerk to accept a paper for filing, even though it has not been served, if it is accompanied by a waiver of service.¹¹⁰ Hence, a clerk may accept a pleading or other paper, other than an original pleading, only if it is accompanied by an admission or waiver of service by the party to be served, or by a signed certificate that service has been made.

108. Comments of Mr. Niemeyer, *id.* at 14-15.

109. *See* IBM Corp. v. Edelman, 526 F.2d 37, 46 (2d Cir. 1975) ("Filing directly with the Court may be necessary for the protection of the parties where, for example, the delay occasioned by first filing with the clerk will cause irreparable harm."); Application of President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1006-07 (D.C. Cir. 1964) (judge accepted application from hospital and signed order allowing hospital to administer blood transfusions to woman who refused to consent based on religious beliefs); 2 MOORE'S FEDERAL PRACTICE, *supra* note 38, ¶ 5.11 ("[U]nder this provision when it is necessary for a party to obtain immediate court action which would be delayed by first filing papers with the clerk, a party may file his papers with the judge, if the latter permits such filing, and obtain such order as the judge deems proper.")

110. Minutes, Oct. 13-14, 1978, at 18.

As under the existing rule, a certificate of service constitutes prima facie proof of service.

Rule 1-324—Notice of Orders

Rule 1-324 is derived from Former Rule 1219 and presents no substantive changes to the rule. The rule requires the clerk, upon entry in the docket of any order or ruling of the court not made in the course of a hearing or trial, except for show cause orders, to send a copy of such order or ruling to all parties entitled to service under Rule 1-321, unless the record shows that such service has already been made.

Rule 1-325—Prepayment of Filing Fees—Waiver

Rule 1-325 is derived from the Maryland Code, Courts Article, section 7-201¹¹¹ and Maryland District Rule 102, and effects significant changes in the manner in which the court may waive the prepayment of filing fees. The prior district court rule required only that the court satisfy itself that the party was unable by reason of poverty to pay the filing fees.¹¹² The code provision, governing the circuit courts, requires in addition to the court's determination that the party is unable to pay, that if the petitioner is represented by an attorney, the attorney certify that the suit, appeal, or writ is meritorious.¹¹³ The new rule requires the party, whether or not he is represented by an attorney, to file with the request for waiver an affidavit verifying the facts set forth in the pleading, order for appeal, or request for process, and stating the grounds for requesting the waiver.¹¹⁴ The court must review the party's affidavit and the attorney's certification, and satisfy itself not only that the petitioner is unable to pay, but also that the claim, appeal, or request for process is not "manifestly frivolous." This requirement was included in response to concerns of the District Court Subcommittee that the state should not have to bear the cost of the filing of a pleading or other paper that is manifestly defective and subject to dismissal as soon as it is

111. MD. CTS. & JUD. PROC. CODE ANN. § 7-201 (1984) (governing the prepayment of filing fees and providing for waiver in case of indigency in the circuit courts).

112. Former Md. Dist. R. 102.

113. MD. CTS. & JUD. PROC. CODE ANN. § 7-201(b)(1984). The prepayment of filing fees has been held to serve a twofold purpose: "the discouraging of frivolous litigation and assuring payment of at least a part of the costs should the plaintiff be the losing party." *Glanville v. David Hairstylist*, 249 Md. 162, 166, 238 A.2d 917, 920 (1968); *Wigginton v. Wigginton*, 16 Md. App. 329, 331, 295 A.2d 889, 891 (1972). Furthermore, the determination of whether a person is indigent is within the discretion of the court. *Wigginton*, 16 Md. App. at 333-34, 295 A.2d at 892.

114. For a discussion of the new rules governing the affidavit requirements, see *supra* notes 76-79 and accompanying text.

filed.¹¹⁵ Although the Committee did not provide a definition of “manifestly frivolous,” it did supply as an example the situation in which a petition for judicial review of an inmate grievance is filed by a petitioner who has not exhausted all of his other available remedies.¹¹⁶

Rule 1-331—Attorney May Act for Party

Rule 1-331 carries forward Former Rule 3 a with minor stylistic changes. The only addition is that under the new rule the attorney may perform “any act required or permitted” by the rules, whereas the former rule applied to any rule under which “a party may act.” It is unlikely, however, that this addition will effect any substantive change. Additionally, the new rule, in order to make clear what an attorney may do, retains the language of the old rule that whenever notice is to be given by or to a party, the notice may be given by or to the attorney for that party.¹¹⁷

Rule 1-341—Bad Faith—Unjustified Proceedings

Rule 1-341 is derived from Former Rule 604 b, but contains several important changes. The dominant purpose of the rule remains the same: Under the new rule the court shall assess costs, including attorneys’ fees, against parties whose conduct in maintaining or defending any proceeding is in bad faith or without substantial justification. The first difference between Rule 1-341 and Former Rule 604 b is that language in the rule has been removed which allowed a party to recover costs resulting from a proceeding brought “for purposes of delay.”¹¹⁸ This eliminates one of the three factors that Maryland courts have recognized as permitting them to award costs.¹¹⁹ The purpose of this change is unclear, and judicial interpretation will be necessary to clarify its practical effect. If the courts interpret the omission as a conscious determination not to allow recovery of costs for actions taken for purposes of delay, recovery will be denied. On the other hand, actions designed solely to delay a proceeding are unlikely to be either in good faith or with substantial justification. A better interpretation is that the

115. McAuliffe letter (Sept. 22, 1983), *supra* note 92.

116. *Id.*

117. Minutes, Oct. 13-14, 1978, at 18.

118. *See* Former Md. R.P. 604 b (requiring court to award costs whenever it “finds that any proceeding was had (1) in bad faith, (2) without substantial justification, or (3) for purposes of delay”).

119. *See, e.g.*, *Colonial Carpets, Inc. v. Carpet Fair, Inc.*, 36 Md. App. 583, 591, 374 A.2d 419, 424 (1977); *Hess v. Chalmers*, 33 Md. App. 541, 545, 365 A.2d 294, 296 (1976).

third factor was removed because it was redundant, and courts should allow petitioners to recover under one of the other two factors.

The second change in Rule 1-341 concerns the party against whom such action for costs can be maintained. Former Rule 604 b was vague, allowing recovery when the court found that "any proceeding was had" in violation of the rule. Apparently in an effort to clarify the rule and to show that both a plaintiff or a defendant can be required to pay costs, Rule 1-341 allows recovery where the court finds that "the conduct of any party in maintaining or defending any proceeding was" in violation of the rule.

The third change in the rule, and probably the most significant, authorizes the court to compel the offending party's attorney to pay costs. This change is consistent with Federal Rule 11 as recently amended,¹²⁰ as well as new Rule 2-433, which allows recovery of costs for bad faith discovery proceedings.¹²¹ The language in the rule instructing that the court "shall require" the payment of costs where one of the factors is found indicates that the mandatory nature of the rule will remain intact.¹²² But because the rule provides no instructions as to when the offending party should pay or when his attorney should be liable, this decision apparently is in the discretion of the trial judge.¹²³ Therefore, if a judge finds that a proceeding was maintained or defended in bad faith or without substantial justification, the judge must assess costs against the offender, but has discretion whether to charge them to the party, to his attorney, or to both. A fourth change in the rule, one which will have no practical effect, is a change in the language designating the cases in which the rule will apply from "actions" to "civil actions." The alteration was necessary because the new definition of "action" in Rule 1-202(a), includes criminal proceedings.¹²⁴

Rule 1-351—Order Upon Ex Parte Application Prohibited—Exceptions

Rule 1-351 is new and establishes a general requirement that all *ex parte* proceedings are prohibited except when expressly provided for "by these rules or other law," or when the moving party certifies that he has given notice or has made "specified efforts commensurate with the cir-

120. See *supra* note 87 and accompanying text.

121. See *infra* notes 699-701 and accompanying text.

122. See, e.g., *Waters v. Smith*, 277 Md. 189, 193, 352 A.2d 793, 797 (1976); *Singer v. Steven Kokes, Inc.*, 39 Md. App. 180, 186, 384 A.2d 463, 467 (1978); *Colonial Carpets, Inc. v. Carpet Fair, Inc.*, 36 Md. App. 583, 591, 374 A.2d 419, 424 (1977).

123. Because this rule is similar to the recently amended form of FED. R. CIV. P. 11, developing federal case law will be instructive in interpreting the new Maryland rule.

124. See *supra* note 22 and accompanying text.

cumstances” to give notice. The purpose of this rule is to render unnecessary an express reference to requirements for notice and an opportunity to be heard, which would otherwise be needed in several rules.¹²⁵ As the source note appended to Rule 1-351 indicates, this rule is consistent with EC 7-35 and DR 7-110(B) of the Code of Professional Responsibility, adopted into the Maryland Rules pursuant to Rule 1230, which prohibit an attorney’s private communication with a judge without notice to opposing counsel.¹²⁶ In addition, it is consistent with Canon XVI of the Canons of Judicial Ethics, which precludes a judge from granting *ex parte* communications except where provided by law.¹²⁷

D. Chapter 400—BOND

Rule 1-401—Applicability & Rule 1-402—Filing and Approval

Rule 1-401 states the scope of the rules pertaining to bonds, and is the same as its predecessor, Former Rule H1.¹²⁸ Rule 1-402 incorporates with little change several provisions from Former Rules H2, H3, H4, and H7. Section (a) reproduces the filing provision of Former Rule H2 a, and leaves the recording provision for 1-402(f); section (f) now requires that only approved bonds be recorded. Section (b) clarifies the approval provisions of Former Rule H2 b and retains the provision that the clerk approve all bonds as to form, amount, and surety, and adds the possibility of approval by the court. Under the former rule, the court decided whether to approve a bond whenever the clerk refused to approve the bond or an adverse party objected in writing to a bond that had been filed with the clerk.¹²⁹ In addition to these two circumstances, section (b) states that the court must decide “if a rule requires that the court approve the bond.”¹³⁰ Although no explanation for this change was provided, it apparently reflects an attempt to coordinate this section with other sections of the rule which allow the court to approve bonds of

125. Minutes, Oct. 13-14, 1978, at 18; Proposed Rule 1-351 reporter’s note.

126. MD. R.P. 1230 adopted the Code of Professional Responsibility, as set out in Appendix F of the Maryland Rules.

127. See MD. R.P. 1231 (Canons and Rules of Judicial Ethics).

128. The term denoting the applicability of the bond rules was changed from “actions” in Former Md. R.P. H1 to “civil actions” in MD. R.P. 1-401. This change coincides with the change in the definition of “action” to include criminal proceedings as well as civil proceedings. See MD. R.P. 1-202(a); *supra* note 22 and accompanying text.

129. See Former Md. R.P. H2 b 2 which states, “In case of the clerk’s refusal to approve any bond submitted to him, or in case an adversary party objects in writing to a bond which has been filed with the clerk, the issue of whether or not such bond should be approved shall be determined by the court.”

130. See Proposed Rule 1-402(b) reporter’s note (“This section is derived from Rule H2 b 1 and 2 with additional proviso for court approval where required by a rule.”).

a specific type, such as a bond in the name of the state when the obligees on the bond are numerous, under Rule 1-402(c).

Section (c) combines Former Rule H7 a and b and allows bonds in the name of the state but omits the catch-all phrase "or for other good excuse shown." The rule thus limits the availability of bonds in the name of the state to situations where the obligees "are numerous." The new rule, however, does not define this term; presumably this will be decided on a case-by-case basis. Section (d) consolidates Former Rule H4 a and b, and allows the court to change the face amount of a bond. The only change from the former rule is the substitution of the term "face amount" for "penalty." Section (e) combines Former Rule H3 a 2 and b, and changes the rule to provide uniform treatment of all bonds. Under the former rule, a deposit in lieu of sureties on a supersedeas bond must have equaled the amount of the bond; other types of security could be accepted only on bonds other than supersedeas bonds.¹³¹ The new rule eliminates the reference to supersedeas bonds, providing simply that "[i]nstead of surety on a bond, the court may accept other security for the performance of a bond." In addition, the examples of "other security" listed in Former Rule H3 a 2, including a deposit of money, a pledge of securities, and a mortgage of land, have been deleted. Thus, money is no longer the exclusive alternative security for a supersedeas bond.

Rule 1-403—Relief to Surety and Interested Persons

Rule 1-403 consolidates the various provisions of Former Rule H6 into two sections. Section (a) incorporates the rules concerning relief to a surety, and contains one major change. Under Former Rule H6 c 1, if a surety requested countersecurity or relief from further liability for future acts or omissions of the principal, the court was required to grant relief. According to the new rule, however, the decision whether to grant relief is discretionary, providing that the court "may grant the motion for good cause shown." This change will make it more difficult for the surety to obtain relief, because he must meet a burden of demonstrating good cause. Section (b) governs relief to an interested person other than a surety, but effects no substantive changes from prior practice. The section also requires the court to make a finding of good cause before granting relief; unlike relief for sureties, relief was discretionary under the old rule.

There are minor changes in the rule, applicable to both section (a)

131. Under Md. R.P. 1017, a supersedeas bond is used to stay the execution of a civil judgment from which an appeal is being taken.

and section (b), that should be noted. First, the new rule requires the surety or other interested person seeking relief to make a motion, whereas the former rule required him to file a petition.¹³² Second, the new rule eliminates the court's authority in the former rule for granting an *ex parte* injunction. Therefore, notice to the principal will be required under Rule 1-351 unless such notice cannot be effected despite "special efforts commensurate with the circumstances."¹³³ The former rule also has been simplified by making a more general reference to injunctive relief and periodic accountings, eliminating unnecessary language present in the former rule.¹³⁴

Rule 1-404—Proceeding Against Surety

Rule 1-404 is the only new provision in this chapter and provides the procedural mechanism by which the surety's liability on the bond is established. Essentially a restatement of Federal Rule 65.1, the rule first provides that a surety submits to the court's jurisdiction and irrevocably appoints the clerk as agent for the receipt of papers affecting liability. In addition, filing an independent action to enforce the surety's liability is unnecessary; "[t]he liability of a surety may be enforced on motion" The motion can be served on the clerk, who must promptly notify the surety by mail. The only distinction between Rule 1-404 and Federal Rule 65.1 is a provision in the Maryland rule authorizing the court, in its discretion, to provide for additional notice to the surety.

Rule 1-405—Judgment on Bond

Rule 1-405 is derived from Former Rule H8, and in addition to carrying forward Former Rule H8's statement that judgment shall be for the amount due, adds a clause that limits any judgment to the face amount of the bond. The addition, however, represents a clarification of, rather than a change from, present practice. Former Rule H8 itself was intended to change preexisting practice; prior to 1962, Maryland Code article 75, section 40¹³⁵ provided that judgment was to be entered for the amount of the bond, and that the bond was to be released upon

132. The Maryland Rules do not distinguish between a petition and a motion, but historically a motion could be made either orally or in writing, whereas a petition was always in writing. *Bergen v. Jones*, 45 Mass. (4 Met.) 371 (1842); *see also* *Gibbs v. Ewing*, 94 Fla. 236, 113 So. 730 (1927).

133. *See* MD. R.P. 1-351.

134. *Compare* MD. R.P. 1-403(a), (b) (allowing the court to grant any appropriate relief including "injunctive relief or periodic accountings"), *with* Former Md. R.P. H6 C 2 (providing lengthy descriptions of the relief available by injunction or accounting).

135. MD. ANN. CODE art. 75, § 40 (1957), *repealed by* 1973 Md. Laws ch. 2, § 2.

payment of the amount actually found to be due.¹³⁶ The statute was an outgrowth of the common law doctrine that the claimant could obtain a judgment for the entire penalty of the bond, regardless of the actual damage suffered.¹³⁷ The defendant's only recourse was to seek the intervention of an equity court to prevent execution for the entire amount of the judgment.¹³⁸ In 1963, article 75, section 40 changed existing practice to provide that judgment would still be entered for the entire amount of the bond, but would be released automatically upon payment of the amount of damages actually awarded.¹³⁹ Former Rule H8 eliminated the two step process and required simply that the judgment be for the amount found to be due.¹⁴⁰ The clause in the new rule that limits the judgment to the face amount of the bond thus does not change Maryland practice; it merely clarifies existing practice. Maryland has never permitted the judgment to be for an amount greater than the penalty of the bond, and there is no indication that this was intended when Former Rule H8 was developed.

Rule 1-406—Bond Premium as Costs

Rule 1-406 preserves Former Rule H5's provision that a party entitled to costs may have the premium for a bond included in such costs. In addition, the rule deletes the requirement that the surety company be authorized by the laws of Maryland to qualify as surety.¹⁴¹ The only other changes to this rule are stylistic.

II. TITLE 2—CIVIL PROCEDURE—CIRCUIT COURT

A. Chapter 100—COMMENCEMENT OF ACTION AND PROCESS

Rule 2-101—Commencement of Action

Rule 2-101 incorporates Federal Rule 3 almost verbatim and reflects the Committee's intent to abolish the pleading distinctions be-

136. Former Md. R.P. H8 committee note. See also 3 J. POE, POE'S PLEADING AND PRACTICE § 355 (H. Sachs 6th ed. 1975).

137. Former Md. R.P. H8 editor's note.

138. *Id.*

139. *Id.* The practice of entering judgment for the entire penalty of the bond was retained because the statutes of 8 & 9 Will. 3, ch. 11, § 8—in effect in Maryland at the time—authorized the entry of a judgment for the penalty of the bond to stand as security for subsequent breaches that could be recovered by *scire facias* rather than bringing an independent action. *Id.*

140. See also MD. CTS. & JUD. PROC. CODE ANN. § 11-201 (1984) (providing that the judgment in an action for the penalty of a bond shall be for the amount due).

141. The statutory qualifications for a surety are set out in MD. ANN. CODE art. 48A, §§ 483-485 (1957).

tween law and equity.¹⁴² The new rule unifies and replaces Former Rules 140 a and 170 a, and states simply that “[a] civil action is commenced by filing a complaint with a court.” The Committee noted with approval that the statute of limitations, tolled at common law only by impetration of the writ of summons, is currently tolled by statute by the filing of the action, and the filing of a complaint under the rule will have the same effect.¹⁴³ The Committee also agreed that filing a complaint with a judge, at night for example, commenced an action because a judge is a court.¹⁴⁴ This is consistent with Rule 1-322, under which a judge is authorized to accept papers for filing, then transmit them to the clerk. One Committee member expressed concern that in certain situations, such as an Order for Appeal, and with some types of petitions, the initial pleading cannot be characterized as a “complaint.”¹⁴⁵ Although it was suggested that the rule may have to be amended to accommodate such pleadings,¹⁴⁶ no such change has yet been made.

Rule 2-111—Process—Requirements Preliminary to Summons

Rule 2-111 states the prerequisites for the issuance of a summons. Section (a) is derived from Former Rule 103 g and requires that the plaintiff supply the clerk with copies of the complaint and each exhibit, and with all other papers filed with the complaint for each summons. The rule expands the former rule, which only required copies of the original pleading and exhibits.¹⁴⁷ The Committee agreed that delivery of the necessary copies should not be a filing requirement as the current rule provides, but only a prerequisite to the issuance of a summons.¹⁴⁸ Consequently, a plaintiff could meet the time requirements for filing, but fail to provide sufficient copies to cause the summons to issue. In addition, the rule omits the exceptions in Former Rule 103 g which allowed the court to order that the exhibits not be served on the defendants, or that the plaintiff not be required to furnish a copy of the complaint for each defendant if there were five or more defendants.¹⁴⁹

142. See *infra* notes 354-59 and accompanying text.

143. See Minutes, Nov. 17, 1978, at 7.

144. *Id.*

145. Comments of Judge McAuliffe, *id.*

146. *Id.*

147. Proposed Rule 2-111(a) reporter's note.

148. Comments of Judge McAuliffe, Minutes, Nov. 17, 1978, at 7-8.

149. The new rule takes a different approach to the problem of numerous defendants than did the prior rule. Compare Former Md. R.P. 103 g (requiring a copy for each defendant, but permitting the court to change that if there are five or more defendants), with MD. R.P. 2-111(a) (requiring a copy for each summons to be issued).

These omissions significantly reduce the discretionary power afforded the court with respect to issuance of a summons.

Section (b) parallels Former Rule 103 b and incorporates several changes in language which simplify the rule but which make no substantive change in practice. For example, the new rule eliminates the list of specific information that must be supplied to the clerk and states instead that the person requesting service of process must supply "all available information as to the name and location, including the county where service is to be made, of the person to be served."¹⁵⁰ The rule also requires only that a person requesting service "by the sheriff" furnish this information. Thus, the information need not be provided when service is to be performed by a person other than a sheriff;¹⁵¹ the plaintiff can directly provide his private process server with any necessary information. Although section (b) does not carry forward the language in Former Rule 103 b requiring that "in the case of a corporation, the name, county and address of the person, resident agent, state agency or official to be served" be provided, that information is still required. Rule 2-111(b) requires that all available information about the "person" to be served be furnished; a person, as defined in Rule 1-202(p), includes corporations, partnerships, and the like. Finally, a new provision which expressly allows the required information to be furnished in the caption of the case, is consistent with current practice.¹⁵²

Rule 2-112—Process—Issuance of Summons

Rule 2-112 is derived from Federal Rule 4(a), which it closely resembles, and from Former Rule 103 c and e. The new rule retains the automatic nature of the issuance of summons when an action is filed, but does not expressly limit the automatic issuance of summonses to defendants "in the State."¹⁵³ Thus, under the new rule, process will also automatically issue against out-of-state defendants. The former rule also stated that the plaintiff may request "an additional summons" to issue, without clearly stating whether the additional summons was limited to one. The new rule clarifies this by stating that upon request, "more than one summons" shall issue. One noteworthy difference between the new rule and the federal rule is that when the sheriff is not to

150. Compare the general requirement with that in Former Md. R.P. 103 b: "The person requesting the issuance of process shall furnish to the clerk the name, county, residence and mailing address of the person to be served if it is an individual, and in the case of a corporation, the name, county and address of the person, resident agent, state agency or official to be served."

151. Proposed Rule 2-111(b) reporter's note.

152. *Id.*

153. Proposed Rule 2-112(a) reporter's note.

serve process, Rule 2-112 permits the plaintiff to designate the process server. The federal rule, however, directs the clerk to issue process only to either the marshal or the person authorized by Federal Rule 4(c), under which the court is to specially appoint the process server. Because appointments are to be made freely under the federal rule, the distinction may be merely semantic.

Section (b) retains prior practice under Former Rule 103 j, with one minor change. The former rule authorized the clerk to designate a person to deliver process to the sheriff of another county rather than mailing it, if the party paid the cost of personal delivery. The new rule allows the party to designate, with the clerk's approval, the person to deliver the process.

Rule 2-113—Process—Duration, Dormancy, and Renewal of Summons

Rule 2-113 is new, and simplifies former practice under Former Rule 112. Former Rule 112 automatically renewed a summons after the first *non est* return to the second return day, but after the second *non est* return, the summons was allowed to lie dormant until the plaintiff renewed it. The new rule eliminates the "outmoded concept" of return days,¹⁵⁴ which, pursuant to Former Rules 103 d and 102, provided that a summons was returnable, and hence expired, on the first Monday of the month following its issuance. The Committee rejected a proposal to follow the federal rule that a summons never expires,¹⁵⁵ and adopted a uniform sixty-day expiration date.¹⁵⁶ This change should simplify the rule by providing a standard period of time for each summons before it becomes dormant; however, it may present difficulties for the clerks, because summonses will no longer all be due on only one day each month. Although the proposed rule eliminates the automatic reissuance provision of Former Rule 112, by extending the period within which the summons is effective, it compensates for this elimination and prevents any substantive change in practice. A summons not served within the sixty-day period will lie dormant, unless renewed by the plaintiff's written order. Furthermore, the provision of Former Rule 112(b) that allowed the plaintiff to direct that the summons be issued to a later return date has been deleted.

The new rule retains the unlimited dormancy period of Former

154. Former Md. R.P. 103 d permitted the plaintiff to direct that the summons be made returnable at the second return day after its issuance.

155. Minutes, Nov. 17, 1978, at 9. The Committee decided to provide for expiration of a summons after Judge McAuliffe noted that a non-expiring summons would create limitation problems. *Id.*

156. *Id.* at 9-10.

Rule 112, so that a summons returned *non est* may remain dormant indefinitely without allowing the statute of limitations to become a bar to the action. The Court of Appeals has approved this practice, despite its potential to perpetuate claims.¹⁵⁷ Providing an indefinite dormancy period relieves the plaintiff of the need to keep renewing the summons and prevents punishing the plaintiff for the defendant's ability to evade service.

Rule 2-114—Process—Content

Rule 2-114 governs the content of a summons and contains several changes from its predecessor, Former Rule 103 f. Section (a) of the new rule carries forward Former Rule 103 f's requirements that the summons be under the seal of the court and signed by the clerk. Section (b) lists the information that a summons must contain; it adds a requirement that a summons under the new rule contain the docket reference, but deletes the requirement that the summons must contain the name and address of the plaintiff's attorney. Consistent with the new sixty-day expiration provision of Rule 2-113, Rule 2-114 also requires the summons to state the date of issuance, the time within which service must be made, and the time within which return of service is to be made.¹⁵⁸ The provision in Former Rule 103 f requiring the summons to include the names and addresses of the parties has been limited to the name and address of the party requesting service. Furthermore, the new rule requires the summons to include "the name and address of the person to be served as set forth in the complaint," eliminating the clause in Former Rule 103 f which limited the necessity for such information to when "service is not to be made upon a defendant personally." The words "as set forth in the complaint" were added to the rule, because the Committee did not want issuance of the summons to be delayed simply because the plaintiff does not know the defendant's address.¹⁵⁹ If the plaintiff knows the defendant's address, he is required by Rule 1-301(a) to include this information in his original pleading. If the plaintiff does not know this information, the summons will issue without it, and the plaintiff can employ a private process server to locate and serve the defendant.¹⁶⁰

157. See *Neel v. Webb Fly Screen Mfg. Co.*, 187 Md. 34, 41, 48 A.2d 331, 332 (1946); *Renewal of Process and the Statute of Limitations*, 9 MD. L. REV. 74 (1948).

158. See Proposed Rule 2-114 reporter's note.

159. McAuliffe letter (Sept. 22, 1983), *supra* note 92.

160. *Id.*

Rule 2-115—Attachment Before Judgment

Rule 2-115 consolidates the procedures for attachment before judgment contained in the rules of Former Subtitle G (Attachment on Original Process), and adds several new procedural requirements designed to safeguard the debtor's due process rights. Attachment proceedings find their roots in the state's right to subject all property within its borders to its laws,¹⁶¹ and the purpose of attachment before judgment is two-fold: to compel the defendant's appearance in court, and to provide the plaintiff with security for enforcing a judgment once his claim is established as being due.¹⁶² The debtor's due process rights in attachment cases result from Supreme Court holdings that a prejudgment deprivation of property, even though only temporary, is nonetheless a deprivation which must be preceded by appropriate procedural safeguards to assure that the fourteenth amendment due process requirements are met.¹⁶³ To be valid, attachment proceedings must be consistent with the Supreme Court's decision in *Sniadach v. Family Finance Corp.*, which held that the defendant must be given notice and an opportunity to be heard prior to seizure of the property, unless there are extraordinary circumstances that justify postponing notice and hearing.¹⁶⁴ Efforts to comply with these requirements are noticeable in several of the rule's provisions.

An important change from the former rule results from recent statutory changes that allow attachment at any time before judgment. The draft rule originally was entitled Attachment on Original Process, but was amended to coordinate the rule with the 1983 revision of the statutory provisions governing attachment, specifically sections 3-302 to -305 of the Maryland Code, Courts Article.¹⁶⁵ The previous statute, as well as the former G rules, allowed attachment only when the case was commenced. If a defendant thereafter acted to conceal, fraudulently convey, or abscond with property, the plaintiff had to resort to equitable remedies.¹⁶⁶ The Committee discussed the need for a change, but noted

161. See *Belcher v. Government Employees Ins. Co.*, 282 Md. 718, 720, 387 A.2d 770, 772 (1978); *Coward v. Dillinger*, 56 Md. 59, 60-61 (1881); 4 J. POE, *supra* note 136, § 502.

162. See *State v. Friedman*, 283 Md. 701, 706, 393 A.2d 1356, 1359 (1978); *Philbin v. Thurn*, 103 Md. 342, 351, 63 A. 571, 574 (1906); see also C. BROWN, *supra* note 4, at 195 ("In addition to providing security for the payment of the claim once it is established, this procedure also had the practical effect of forcing the defendant to enter his appearance in court.").

163. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 85-88 (1972).

164. 395 U.S. 337, 342 (1969) (in the context of prejudgment garnishment); see also *Fuentes*, 407 U.S. at 85-86 (finding a violation of due process, following *Sniadach*, for prejudgment replevin of personal property, despite a provision allowing recovery by posting a bond).

165. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-302 to -305 (1984).

166. See Comments of Mr. Brault, Minutes, May 21-22, 1982, at 57.

that this was a matter of legislative concern, because the state statute limited attachment to the time of commencement of the action.¹⁶⁷ As the applicable statutes have been amended to allow attachment at any time before judgment and the new rule has been changed to incorporate this addition, a plaintiff will now have access to the provisions if, after he has filed his original process, he becomes entitled to prejudgment attachment due to the actions of the defendant. The Committee's concern for economy is represented in section (a), as it is cross-referenced to the Maryland Code, Courts Article, sections 3-302 to -305, the current statutory requirements for obtaining a writ of attachment before judgment.¹⁶⁸ The former rules reiterated these statutory provisions, but the provisions have not been reproduced in the new rules.¹⁶⁹

Section (a) is derived from Former Rule G42 a and b. Its requirement that the attachment process issue only after the creditor has filed an application stating under oath the basis of the claim stems from court decisions that an application under oath is necessary to protect against arbitrary and mistaken seizure.¹⁷⁰ The new rule, consistent with Rule 2-101, requires the plaintiff to file a "complaint" rather than a "declaration," as was required under Former Rule G42.¹⁷¹ Three other changes in the rule were also necessary to provide consistency with other new rules. First, the provision allowing the request for issuance of a writ of attachment to be made *ex parte* is consistent with Rule 1-351(a)'s requirement that the rules expressly state if such relief will be allowed.¹⁷² Second, section (a) states that the request and affidavit need not be served pursuant to Rule 3-321. This complies with the new approach taken by Rule 1-321 requiring every pleading and paper filed to be served upon each of the parties "[e]xcept as otherwise provided" in the rule.¹⁷³ Third, the new rule eliminates two references in Former Rule G42 b that allowed someone other than the plaintiff to file the affidavit on behalf of the plaintiff. Under Rule 1-331 these express allowances are unnecessary, and the plaintiff's attorney may still perform this act instead of the plaintiff. Furthermore, Rule 2-115(a) eliminates the requirement in Former Rule G42 that the plaintiff state, except in an action for unliquidated damages, that the debtor is bona fide indebted to the plaintiff in the amount claimed. Instead, the rule contains only the general statement that the plaintiff file "an affidavit verifying the facts

167. *See id.*; Minutes, June 18-19, 1982, at 26.

168. *See* Explanatory Note, Minutes, May 21-22, 1982, at 56.

169. *See* Former Md. R.P. 640, G41, G45 a.

170. *See, e.g.,* Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3d Cir. 1976).

171. *See supra* notes 142-46 and accompanying text.

172. *See supra* notes 125-27 and accompanying text.

173. *See supra* note 104 and accompanying text.

set forth in the complaint and stating the grounds for entitlement to the writ.”

Section (b) is derived from Former Rule G43 and changes Maryland practice by providing that a writ of attachment and a complaint shall constitute a single action on the docket in all cases. Under prior practice, the attachment and complaint were consolidated only when the ground for attachment on original process was that a resident debtor was evading service. As the Committee Note appended to the rule states, the provision is designed to abolish the practice of having two distinct parts in an attachment proceeding, the “short note case” and the “attachment case,” each with its own docket number.¹⁷⁴ Under the former system, the filing of the affidavit commenced the “attachment case,” in which the sheriff made the return to the writ of attachment, showing how he has executed it.¹⁷⁵ The action of the plaintiff against the defendant was contained in a separate action, the “short note case,” which was commenced by the filing of the declaration and resulted in the issuance of a writ of summons.¹⁷⁶ If the defendant in the case appeared, the merits of the case were tried in the short note case.¹⁷⁷ In this situation, the defendant appeared only in the short note case, and therefore could only use pleas which denied liability to the plaintiff, not those which denied the validity of the attachment, for example, that the defendant was not a nonresident.¹⁷⁸ The attachment case generally remained outstanding until the short note case was concluded; however, the defendant might dissolve the attachment by appearing in the action and giving an approved bond or by filing a motion to quash the attachment. Under the last possibility, the defendant could assert the lack of residency as grounds for quashing the attachment.¹⁷⁹ The new rules eliminate the bifurcated procedure. Thus, the defendant in the attachment case will no longer divide his pleadings between two separate cases. Placing all of the proceedings within a single case should thus simplify attachment cases.

Section (c) is in part developed from Former Rule G44 and is in part new. This section describes the proceedings to be followed upon request for a writ of attachment and includes two important procedural requirements to safeguard the debtor's due process rights. First, section

174. See MD. R.P. 2-115(b) committee note.

175. See 4 J. POE, *supra* note 136, § 554.

176. See *Overmeyer v. Lawyers Title Ins. Corp.*, 32 Md. App. 177, 183, 359 A.2d 260, 264 (1975).

177. See *Overmeyer*, 32 Md. App. at 183, 359 A.2d at 264; 4 J. POE, *supra* note 136, § 554; Minutes, June 18-19, 1982, at 24.

178. 4 J. POE, *supra* note 136, § 554.

179. *Id.* §§ 536-537.

(c) states that the court review the complaint, the supporting affidavit, and any supporting exhibits, instead of having only the clerk review the filings. In order for the writ of attachment to issue, the court must find that the plaintiff is entitled to the writ. This requirement is consistent with the requirement for judicial review in Former Rule G44, which was adopted in response to the United States District Court decision in *Roscoe v. Butler*.¹⁸⁰ *Roscoe* held the Maryland District Rule that governed attachment unconstitutional because it did not provide for notice and an opportunity to be heard prior to attachment of the debtor's property.¹⁸¹

Section (c) also requires that the plaintiff post a bond as a condition to obtaining the writ, and changes the prior rule. Under Former Rule G42 e, a bond did not have to be filed in a contract claim for liquidated damages.¹⁸² The distinction, according to one Committee member, was based on the provability of the plaintiff's claim and the probability of damages being incurred by the defendant.¹⁸³ Because a defendant may have defenses to an unliquidated damages claim, however, he may suffer losses because of the deprivation of using and possessing the property.¹⁸⁴ For this reason, the Committee decided that it would be better to make the bond requirement apply in all claims, thereby promoting both fairness and uniformity.¹⁸⁵ The change will also release the courts from having to determine whether the damages claimed in a particular case are liquidated or unliquidated.¹⁸⁶

Another change instituted by section (c) concerns the amount of the bond which must be filed. Under Former Rule G42 e, the amount of the bond must be "the sum alleged to be due from the defendant," i.e., an amount equal to the claim.¹⁸⁷ Former Rule H4 a, however, governed bonds generally and provided for the court to order the penalty of a bond increased or decreased at any time, for good cause shown.

180. 367 F. Supp. 574 (D. Md. 1973).

181. *Id.* at 582.

182. *See* *Metal Distrib. Co. v. Solar Heating & Air Conditioning Corp.*, 263 Md. 663, 284 A.2d 229 (1971).

183. Comments of Judge McAuliffe, Minutes, May 21-22, 1982, at 59.

184. *See* Comments of Mr. Brault, *id.*

185. Minutes, May 21-22, 1982, at 59.

186. *See, e.g.,* *Panamerican Consulting Co. v. Broun*, 238 Md. 438, 447-48, 209 A.2d 575, 580 (1964); *Eisenberg v. Air Conditioning, Inc.*, 225 Md. 324, 331-32, 170 A.2d 743, 745-46 (1960).

187. *See* *Overmeyer v. Lawyers Title Ins. Corp.*, 32 Md. App. 177, 182, 359 A.2d 260, 263 (1976) ("Upon the filing of a declaration, affidavit in support thereof, documentary evidence of a claim, a bond to the State in an amount equal to the claim, and instructions to the sheriff as to the description and location of the property to be attached, Md. Rule G42, the court may issue an order directing the attachment.").

Under former statutory provisions, the amount of the bond was required to be double the sum alleged to be due from the defendant.¹⁸⁸ Rule 2-115(c) does not correlate the amount of the bond with the amount of the plaintiff's claim, but simply requires that the court that orders issuance of the writ "shall prescribe the amount and security of the bond." The change is reasonable, because there is not necessarily any correlation between the amount of the plaintiff's claim and the loss that the defendant may suffer because of the deprivation of the use of the property. In making the change, however, the new rule offers no guidance for the court to use in determining the amount of the bond.¹⁸⁹ The Committee's failure to fix the amount of the bond either to the amount of the plaintiff's claim or the value of the property attached will place the burden on the judge to determine, based solely on the documents submitted by the plaintiff, the appropriate amount of the bond.

Section (d) is new and provides instructions on which section will govern the procedure for writs of attachment. It provides that for a levy of property, the procedures in Rules 2-641 and 2-642 shall govern, and for garnishment, the procedures in Rule 2-645 shall control.¹⁹⁰ It directs that for purposes of attachment before judgment, a writ obtained under Rule 2-115 shall be treated as a writ of execution, with the procedures governed by Rules 2-641, 2-642, and 2-643. In applying these rules, the parties shall be treated as judgment creditor and judgment debtor, and the amount of the plaintiff's claim shall be treated as the amount owed under the judgment. This last provision, located in the last sentence of section (d), was necessary because Rules 2-662 and 2-668 both require a statement in the writ of the amount owed under the judgment, but because there is no judgment at the time of the writ of attachment, the statement of the amount of the plaintiff's claim was substituted.¹⁹¹ The rule, however, makes an exception with respect to garnishments; a judgment cannot be entered against a garnishee until the plaintiff has obtained a judgment on the claim. The new rule, therefore, has moved the levy and garnishment provisions from the Former G rules to the judg-

188. See MD. ANN. CODE art. 9, § 37 (1957), *repealed by* Acts of 1962, ch. 36; see also *Burton v. Halley*, 236 Md. 42, 43-44, 202 A.2d 380, 381 (1963); Rhynhart, *Attachments in the People's Court of Baltimore City*, 14 MD. L. REV. 235, 248 (1954).

189. In response to Judge McAuliffe's question concerning guidance in the rule for the court, "Mr. Brault suggested that the amount of potential damages correlates with the nature and value of the property seized and that the plaintiff might be required to include in his affidavit a description of the property to be attached." Comments of Judge McAuliffe and Mr. Brault, Minutes, May 21-22, 1982, at 60.

190. See *infra* notes 1130-1225 and accompanying text.

191. Comments of the Reporter, Minutes, June 18-19, 1982, at 30.

ment section, Chapter 600 of Title 2.¹⁹² Although these rules were originally repeated in substance in this section of Rule 2-115, the Committee viewed this as unnecessary and agreed to simply cross-reference them.¹⁹³

Section (e) is also new, and tracks the new rules for issuance and service of process. Historically, in cases of attachment on original process, no real service was attempted on the absconding or non-resident debtors.¹⁹⁴ Instead, the summons was merely posted by the sheriff on the courthouse door.¹⁹⁵ When an order directing attachment was issued by the court under former practice, two separate writs issued: the writ of attachment, which could be served by either posting a copy of the writ on real or leasehold property of the defendant or by seizing the defendant's tangible personal property,¹⁹⁶ and a writ of summons.¹⁹⁷ Former Rule G48 provided that if the defendant could not be served with the writ of summons and did not voluntarily appear, the plaintiff had to make "reasonable efforts" to ascertain his whereabouts and notify him of the pending attachment.

The new rule is consistent with both the elimination of the practice of having two separate cases, and the trend toward increasing the service requirements in attachment cases.¹⁹⁸ With respect to the former, the old short note and attachment cases are combined in one action, with section (e) directing that the clerk shall issue a writ of summons pursuant to Rule 2-112. Rule 2-112 requires that copies of all filed documents accompany the summons served, and it was the Committee's intent that both the summons and the writ of attachment be served on the defendant.¹⁹⁹ With respect to the latter, section (e) carries forward the requirement in Former Rule G48 that the plaintiff use "reasonable efforts" to effect service, but also adds two other provisions designed to increase the defendant's likelihood of receiving service. First, the section provides

192. See *infra* notes 987-1249 and accompanying text.

193. See Explanatory Note, Minutes, June 18-19, 1982, at 22; Comments of Mr. Niemeyer, Minutes, May 21-22, 1982, at 62.

194. See Explanatory Note, Minutes, June 18-19, 1982, at 22, 24; Comments of Judge McAuliffe, Minutes, May 21-22, 1982, at 62; 4 J. POE, *supra* note 136, § 525 (The writ of summons "is never served or attempted to be served in attachments against nonresidents.").

195. Minutes, June 18-19, 1982, at 24.

196. Former Md. R.P. G44, G46; see 4 J. POE, *supra* note 136, §§ 518, 524.

197. Former Md. R.P. G48. See, e.g., *Tonns v. Collins*, 116 Md. 52, 56, 81 A. 219, 220 (1911); *Stone v. Magruder*, 10 G. & J. 384, 385-86 (1839); 4 J. POE, *supra* note 136, § 525 ("Indeed, the groundwork of the proceeding being the averment of the defendant's nonresidence, and the consequent inability of the plaintiff to reach him by the usual process, it is not easy to understand why a writ of summons is required to be issued. But the provision of Rule G48 is express, and the omission of the summons will vitiate the whole proceeding.").

198. See Explanatory Note, Minutes, June 18-19, 1982, at 23 (discussing the increase of service requirements in attachment cases).

199. Comments of the Reporter, Minutes, May 21-22, 1982, at 63.

that if service cannot be achieved despite reasonable efforts and the defendant does not voluntarily appear, the plaintiff may seek substituted service by publication pursuant to Rule 2-122 for in rem jurisdiction.²⁰⁰ Rule 2-122 requires that if the whereabouts of the defendant are unknown, the court may order service by posting or publishing a notice and by mailing a notice to the defendant's last known address. Although Rule 2-115(e) refers only to publication, the provision was intended to include the mailing requirement of Rule 2-122 as well.²⁰¹ The second way that the new rule will strengthen the service requirement is that it allows the court in its discretion to provide for additional notice to the defendant "by any means it deems appropriate."

In addition to helping to satisfy due process concerns, the Committee cited the additional notice provisions as the reason for the absence of a provision for restitution bond.²⁰² Originally, when the defendant did not appear, the short note case would lie dormant and the plaintiff would prove his claim in the attachment case.²⁰³ If the plaintiff prevailed in the attachment case, and sale of the attached property or payment by the garnishee was sought within a year and a day of the judgment, the plaintiff was required to post a restitution bond.²⁰⁴ The restitution bond was designed to safeguard the interests of the unserved defendant.²⁰⁵ After a year and a day, execution did not require the posting of a bond. The rule was relaxed in Former Rule G59, which required the posting of a restitution bond only if execution was sought within six months from the return of the writ of attachment.²⁰⁶ The relaxation of the bond requirement, according to the Committee, resulted from the imposition of stricter notice requirements.²⁰⁷ With the addition of a provision for substituted service, the Committee felt that

200. *See* Minutes, June 18-19, 1982, at 25.

201. *See* Explanatory Note, *id.* at 23.

202. *See id.*:

As the requirement for service on the defendant has been upgraded, the time within which a restitution bond is required has been shortened. Current Rule G59 requires such a bond where execution on the judgment entered in the attachment case is sought at any time within 6 months from the return of the writ. Current Rule G48 does not require substitute service where the defendant's whereabouts are unknown. It is suggested that the addition of a mailing and publishing requirement, where the defendant is not personally served, will make unnecessary the restitution bond requirement for enforcement of the judgment rendered.

See also Minutes, June 18-19, 1982, at 31.

203. *Id.*

204. *See* *Western Nat'l Bank v. National Union Bank*, 91 Md. 613, 623, 46 A. 960, 963 (1900); Explanatory Note, Minutes, June 18-19, 1982, at 23.

205. Minutes, June 18-19, 1982, at 31.

206. *See* 4 J. POE, *supra* note 136, § 551.

207. Minutes, June 18-19, 1982, at 24.

the provision for a restitution bond was unnecessary and deleted it in its entirety.²⁰⁸

The strengthening of notice requirements extends into Rule 2-115 (f), which provides that an attachment made before service of original process automatically dissolves sixty days after levy or service on the garnishee, unless within that time the defendant is served, or publication is commenced pursuant to Rule 2-122 and the publication is subsequently completed.²⁰⁹ The rule further provides that, upon request during the initial sixty-day period and for good cause shown, the court may extend the attachment for not more than sixty additional days to permit service to be made or publication to be commenced.

If a defendant subject to an attachment before judgment subsequently appears, he may obtain the release of the attached property via Rule 2-115(g). Section (g) will protect the debtor by furnishing him a prompt method for releasing property from the original attachment. The first paragraph of section (g) is derived from Former Rule G57 and provides that a defendant who has appeared, that is, a defendant who has entered a general appearance thereby subjecting himself to the court's jurisdiction, may obtain release of the property by posting a bond in an amount equal to either the value of the property or the amount of the plaintiff's claim, whichever is less. The rule thus carries forward almost verbatim Former Rule G57, which has been attacked as an unconstitutional violation of equal protection in the context of non-resident debtors.²¹⁰ For example, if a non-resident's property is attached in order to ensure appearance, and the defendant has entered a general appearance allowing in personam jurisdiction to be obtained, any judgment validly obtained by the creditor will be enforceable in any other state.²¹¹ Because the requirement of posting a bond is itself a taking of property,²¹² it has been argued that the requirement is unconstitutional if the defendant has submitted to the court's jurisdiction, because the justification for either the original attachment or the bond requirement no longer exists.²¹³

The second and third paragraphs of Rule 2-115(g) contain various

208. *Id.* at 25.

209. *See id.* at 32.

210. *See* Tatelbaum, *New Balance in the Rights of Creditors and Debtors: The Effect on Maryland Law*, 2 U. BALT. L. REV. 236, 248-49 (1973); *see also* Roscoe v. Butler, 367 F. Supp. 574, 575 (D. Md. 1973) (claim asserted by plaintiff, but court did not reach contention because it found the Maryland rule unconstitutional on other grounds).

211. *See, e.g.*, Milliken v. Meyer, 311 U.S. 457 (1940); Harris v. Balk, 198 U.S. 215 (1905); Tatelbaum, *supra* note 210, at 248.

212. Fuentes v. Shevin, 407 U.S. 67, 85 (1972).

213. Tatelbaum, *supra* note 210, at 249.

grounds upon which the defendant may be able to quash the attachment. Under the second paragraph, the property may be released if the complaint has been dismissed or settled, if the plaintiff has failed to comply with the provisions of Rule 2-115 or an order of the court, if property of sufficient value to satisfy the claim and probable costs will remain subject to the attachment, or if the attachment of the specific property will cause undue hardship to the defendant and he has made available alternative property sufficient in value to satisfy the claim and probable costs. The third paragraph allows the court to release the attached property if the property is exempt or if the plaintiff is not entitled to attachment before judgment. The defendant who desires release based on any of these grounds must do so by motion. Although the new rule does not use the term, the motion corresponds to the motion to quash permitted to be filed under Former Rule G51. Unlike the former rules, the new rules set out the specific grounds that must be alleged if a defendant files a motion to quash an attachment.

A defendant asserting one of the grounds in the second paragraph must have entered a general appearance, but a motion alleging one of the two remedies available in the third paragraph is treated as a limited appearance for that purpose only. Some members of the Committee argued that some of the specified grounds listed in the second paragraph actually constituted reasons why the plaintiff was not entitled to the attachment, and therefore should be available to defendants entering a limited appearance.²¹⁴ Another member, however, countered that expansion of the limited appearance provision would undermine the rule's attempt to compel defendants to appear.²¹⁵ Furthermore, the specified grounds of the second paragraph constitute meritorious defenses to the claim or to the attachment which justify release of the property, but the grounds in the third paragraph represent challenges to the plaintiff's legal entitlement to attachment before judgment.²¹⁶

Nevertheless, the dissenting members seem to have a valid objection. For example, a motion to release property because the plaintiff has failed to comply with the provisions of Rule 2-115 is dealt with in section (g)'s second paragraph, available only to a defendant who has appeared. Such a plaintiff, however, arguably is not entitled to the attachment, a defense that is available to a defendant who has entered only a limited appearance. It is unclear whether the defendant must submit to the court's jurisdiction simply to challenge this aspect of the attachment's validity; however, it appears that he would. The rule does

214. Comments of Professor Bowie and Mr. Niemeyer, Minutes, June 18-19, 1982, at 33.

215. Comments of Mr. Brault, *id.* at 33-34.

216. *Id.* at 34.

suggest an implicit rationale supporting the rule's effect as written. If a plaintiff is not entitled to attachment due to some substantive reason, for example, because the defendant is not a nonresident or that title to the property sought to be attached is not in the defendant, then the defendant should not be forced to appear in order to move to quash the attachment. When, however, the plaintiff has made a procedural error but is otherwise entitled to the attachment, the defendant should not be allowed to circumvent the rule's objective by avoiding appearance.

Section (g)'s last sentence provides that either party may request a hearing on the motion, and if requested, the hearing shall be held promptly. This provision makes a hearing on a motion to quash optional for the parties, while the former rule required that when a motion to quash was filed, "[t]he court shall upon notice to the adverse party hear the motion to quash forthwith,"²¹⁷ thereby making the hearing a requirement.

Section (h) governs when a third person claims an interest in property attached pursuant to this rule. The rule simply directs the claimant to proceed pursuant to Rule 2-643(d) of the judgment section of the rules.²¹⁸ The rule thus takes the same approach as section (d) which provides that the procedure for a levy or garnishment will be in accordance with the rules governing levy or garnishment on a judgment.²¹⁹ Possibly an oversight, section (h) does not state, as does section (d), that in applying Rule 2-643(d) the defendant shall be treated as the judgment debtor and the plaintiff shall be treated as the judgment creditor. Presumably, that was intended by the Committee, and is implicit in the rule.

In consolidating the procedure of this section with that in the judgment section, the rules eliminate Former Rule G58, which governed claims by third persons. Under the former rule, the claimant was required to file a petition under oath, serve a copy upon the plaintiff and the defendant if he had appeared, and establish the validity of his claim at a hearing.²²⁰ The former rules were interpreted, however, as not superseding the previously existing remedies, and therefore allowed the claimant to proceed either under this rule or by a motion to quash.²²¹ It is unclear whether Rule 2-643(d) is intended to be the exclusive remedy for the claimant under the new rule, but unlike Former Rule G58, the

217. Former Md. R.P. G51 b.

218. See *infra* note 1167 and accompanying text.

219. See *supra* note 192 and accompanying text.

220. See 4 J. POE, *supra* note 136, § 561.

221. See *H.L. Neuman Co. v. Duhadaway*, 154 Md. 595, 597, 141 A. 342, 343 (1928); *Kean v. Doerner*, 62 Md. 475, 478 (1884); 4 J. POE, *supra* note 136, § 561.

new rule provides for the claimant to proceed by motion. Thus, it seems that this is the exclusive method for third persons to attack an attachment.

Section (i) requires the sheriff to retain the attached property unless the court directs otherwise. Unlike its predecessor, Former Rule G60, this rule restricts the court's discretion to sell attached property. Under Former Rule G60, the court could order attached property to be sold "whenever the court may deem such sale expedient." Under the new rule, the court may order the attached property sold only if one of the parties requests the sale and the property is perishable. Evidence in the minutes, however, suggests that the section was intended to allow the court to act *sua sponte* if it felt it was necessary.²²² Nevertheless, the language of the rule does not provide *sua sponte* action.

Section (j) is new and for the first time the rules explicitly direct the court to dissolve the attachment if judgment is entered for the defendant. Under former practice, if the defendant appeared, the merits of the case were tried in the short note case before determining the attachment's validity.²²³ If the defendant prevailed in the short note case, then the attachment failed by necessity. With the proposed rule combining the two cases, it was necessary to include a mechanism for dissolving the attachment when the defendant prevails on the merits. Section (j) provides that mechanism.

The defendant also may move for the court to assess and enter judgment for "any damages sustained by the defendant by reason of the attachment." The rule, unfortunately, provides no direction concerning the proper method of calculating such damages; thus, the calculation will be left to the discretion of the court.

Section (k) is also new and governs the effect of a judgment for the plaintiff in an attachment proceeding. This section draws a distinction between cases where personal jurisdiction is obtained and where it is not obtained. When judgment for the plaintiff is entered, the judgment is to be satisfied by applying any funds collected by the sheriff, the proceeds of any pre-judgment sales, and, to the extent necessary, the proceeds from the sale of any other attached property. If no personal jurisdiction has been obtained, the court has jurisdiction only over the attached property, and any judgment will be an *in rem* judgment against that property. The proceeds from the attached property, therefore, will limit the plaintiff's recovery. If personal jurisdiction has been obtained, how-

222. See Comments of Mr. Nilson, Minutes, June 18-19, 1982, at 34 ("As written, the section gives the court discretion to act *sua sponte* or upon request of the parties.").

223. See, e.g., *Philbin v. Thurn*, 103 Md. 342, 351, 63 A. 571, 574 (1906).

ever, the plaintiff receives an in personam judgment against the defendant, and to the extent that the proceeds fail to satisfy the judgment, the plaintiff may enforce the judgment through the normal enforcement procedures in Rules 2-631 to 2-649.²²⁴

The Committee recognized the rule's importance to the substantive law of res judicata and accordingly inserted a provision clarifying that entry of a judgment for the plaintiff, when personal jurisdiction has not been obtained, is an in rem judgment against the property and does not bar a subsequent action for the unpaid balance.²²⁵ The Committee also discussed the collateral estoppel effect of the rule when the defendant does not appear and the plaintiff fails to establish his claim on the merits.²²⁶ One member expressed the opinion that a plaintiff who failed to establish his claim would be barred from relitigating the same claim by nonmutual collateral estoppel.²²⁷ Another member, however, was concerned that the plaintiff's failure to provide adequate proof may be due to the defendant's absence, and therefore the plaintiff should not be barred from relitigating the claim.²²⁸ Historically, when this situation occurred the attachment case was dismissed, but there was no effect on the short note case.²²⁹ The Committee did not change the rule to resolve this problem, and potentially a plaintiff who fails to prove his case may be precluded from relitigating the same claim.

Section (k) simplifies Maryland practice by eliminating the distinction between a condemnation *nisi* and condemnation absolute. The new rules also eliminate the rules prescribing the procedure for awarding judgment to the plaintiff when the defendant does not appear. Under the former rules, if the defendant did not appear, a judgment of condemnation *nisi* was entered. Fifteen days thereafter the plaintiff could prove his claim pursuant to Former Rule 648, and a judgment of condemnation absolute was entered against the property.

Rule 2-115 does not provide procedures for the entry of judgment against the property; section (k) merely states that if the defendant does not appear, the judgment will be an in rem judgment against the attached property. The rule does not require proof by the plaintiff when the defendant fails to appear, even though the Committee intended this to continue as a requirement.²³⁰ Furthermore, Former Rule 648, which

224. See *infra* notes 1110-1245 and accompanying text.

225. See Minutes, June 18-19, 1982, at 35-38.

226. *Id.*

227. Comments of Judge McAuliffe, *id.* at 35.

228. Comments of Mr. Brault, *id.* at 36.

229. *Id.*

230. See Minutes, May 21-22, 1982, at 67-68.

Judge McAuliffe called attention to Rules G45 and 55 which require the plaintiff to

allowed the court or jury to determine the plaintiff's damages and costs upon entry of an interlocutory or default judgment, has not been carried forward. Although Rule 2-613(e)²³¹ does allow the court to require the plaintiff to prove his claim, that section is inapplicable because it requires the court to find that personal jurisdiction over the defendant has been obtained. Nevertheless, the language of Rule 2-115 ("any judgment . . . shall be in rem") should be interpreted to require the plaintiff to prove the claim to obtain a judgment against the property of a non-appearing debtor.

Rule 2-121—Process—Service—In Personam

Rule 2-121 is derived from and consolidates various provisions of Former Rules 104, 105, and 107, effecting few changes in current practice. Section (a), which generally describes the manner of service, combines Former Rules 104 b, 105 a, 107 a 1, 107 a 2, and 107 a 4 to eliminate much superfluous and repetitive material present in the former rules, without changing the substance of the rules. The new rule requires service to be accomplished "by delivering to the person to be served a copy of the summons, complaint, and all other papers filed with it." The rule is thus consistent with Rule 2-111, which is derived from Former Rule 103 g, but it unnecessarily repeats Rule 2-111's requirement that the defendant be served with a copy of the summons, the complaint, and all other papers filed with it.²³²

The new rule also takes a different approach than Former Rule 104 b 1 by establishing separate rules to determine the persons who are to serve and be served, rather than by specifying a particular method in the rule, then making exceptions in a number of separate rules. For example, Former Rule 104 b 1 (i) and (ii) prescribed delivery "by the sheriff," but then provided exceptions in various other rules, most notably Former Rule 116 a which allowed almost any process to be served by a private person. Rule 2-121 does not state the person who is to serve process, placing this instead in a separate rule, Rule 2-123, which combines all of the provisions of the former rules governing the persons who may serve process.

prove his claim against the defendant. He noted that the type of judgment employed under the existing practice is one for condemnation of the attached property. He proposed that judgment of condemnation be retained by the proposed rule, in lieu of using judgment in rem. Mr. Hermann recommended that the proposed rule expressly provide for the plaintiff's proof of claim.

Id. The Committee apparently agreed that such a provision would be helpful, and referred the rule back to the Subcommittee, but no such provision was ever added to the rule.

231. See *infra* text accompanying notes 1082-84.

232. See *supra* notes 147-52 and accompanying text.

Former Rule 104 b 1 (i) and (ii) required service to be made on the party to be served *or* to an agent authorized by appointment or by law to receive service of process. When the defendant was not an individual, the plaintiff had to search various other provisions to determine the proper person to be served.²³³ The new rules effectively eliminate this inconvenience; Rule 2-121 simply requires service on “the person to be served,” while Rule 2-124 (Process—Person to be Served) defines this term and includes the relevant provisions governing particular situations that were previously embodied in several separate rules.²³⁴

Section (a) permits service by certified mail, restricted delivery. In addition, the endorsement must read: “‘Restricted Delivery—show to whom, date, address of delivery.’” The section also provides that service by certified mail is complete upon delivery.²³⁵ This differs from the provision in Rule 1-321, which allows service by regular mail for pleadings and papers other than original pleadings and states that service is complete upon mailing. Apparently the Committee believed that service of original process required more safeguards than service of subsequent papers.

The new rule does not distinguish service outside the state and service in a foreign country. Rule 2-121(a) deletes the former rules’ requirements for service in a foreign country and substitutes instead a general alternative service provision which authorizes service outside the state in the manner prescribed by the court, or by the foreign jurisdiction “if reasonably calculated to give notice.” The Committee used the term “foreign jurisdiction” intending this to include both states and countries.²³⁶

Section (b) is derived from Former Rules 104 h 1 and 107 a 3 and describes the procedures available to the plaintiff when the defendant acts to evade service. The rule retains the former requirement that the plaintiff offer proof of the defendant’s evasion of service by affidavit, and authorizes the court to order service by mail to the defendant’s last known address and delivery to “a person of suitable age and discretion” at the defendant’s “place of business, dwelling house, or usual place of abode.” This procedure essentially mirrors prior practice. The Committee rejected a suggestion that service by leaving the summons with a

233. *See, e.g.*, Former Md. R.P. 106 (service on a corporation); *id.* 108 (service on the United States); *id.* 119 (service on a defendant under disability).

234. *See infra* notes 224-51 and accompanying text.

235. *See* McAuliffe letter (Sept. 22, 1983), *supra* note 92 (stating this clause was inserted in response to the District Court Subcommittee’s observation that Md. R.P. 1-321 expressly states when service by ordinary mail is complete, but this rule did not specify when service by certified mail is complete).

236. Minutes, Nov. 17, 1978, at 11-12.

person of suitable age and discretion be adopted for all service, as is allowed under Federal Rule 4(d)(1).²³⁷

Section (d) (Methods Not Exclusive) preserves prior practice and provides that the methods outlined in the rules do not exclude other means of service provided by rule or statute. The Committee, however, provided no insight as to the necessity of retaining this rule or as to what other possible methods of service exist; presumably this is merely a safety device.

Rule 2-122—Process—Service—In Rem or Quasi in Rem

Rule 2-122 is derived from Former Rules 105 b and 111 a and prescribes the options for constructive service available to a plaintiff who cannot locate the defendant. In accordance with established due process requirements, constructive notice is authorized under section (a) only where the defendant's whereabouts are unknown.²³⁸ Additionally, the rule applies only to in rem or quasi in rem actions, not where personal jurisdiction over the defendant is sought.²³⁹

Section (a) includes several changes from Former Rule 105 b worth noting. First, unlike the mandatory requirement in Former Rule 105 b, even if the plaintiff satisfies the rule's requirements, the court's order for substituted service is discretionary. Second, the section reverses the order in which it lists the various forms of substituted service. Although the rule simply lists the options, without stating any preference, the Committee's discussion implies that a preference was intended.²⁴⁰ Under the new rule, courthouse posting precedes publication and land posting as substitute process; under Former Rule 105 b, publication was listed first and posting was to be used "in lieu of publication." Third, regardless of whether publication or posting is used, section (a) requires notice to be mailed to the defendant's last known address. Under Former Rule 105 b, mailing of process was required if the substitute method of service was posting, but not if the substitute method of service was by publication.

A fourth change requires a plaintiff, in order to satisfy the publication requirement, to publish the notice in "one or more newspapers of general circulation published in the county in which the action is pending." The section eliminates the exception in Former Rule 105 b 1 (a) for counties in which no newspaper is published. (The rules define

237. *See id.* at 11.

238. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950).

239. *See Minutes*, Jan. 5, 1979, at 26.

240. *See Proposed Rule 2-122(a)* reporter's note; *Minutes*, Jan. 5, 1979, at 27-28.

“county” to include Baltimore City;²⁴¹ thus, the apparent omission of Baltimore City effects no change.) Finally, subsection (a)(3), unlike Former Rule 111 a, expressly requires posting of the notice “in a conspicuous place” on the land.

Section (b) (Time) governs the time limits for substitute service. Adapted from Former Rule 105 b 2, this section shortens from sixty to thirty days the time by which service by mailing and posting or publication is to precede the date when the defendant’s response is to be filed.

Section (c), based in part on Former Rule 105 b 1 (a), prescribes the notice’s contents. The rule’s narrative replaces the mandatory form for publication in the Appendix of Forms, but retains its essential requirements.²⁴² Under section (c), the notice must: (1) be signed by the clerk; (2) include the caption of the case; (3) describe the substance of the complaint and relief sought; (4) inform the defendant of the latest date for response; (5) warn the defendant that failure to respond may result in a default judgment; and (6) contain any other information required by the court. The Committee narrowly defeated a motion to reinstate the form in lieu of the narrative.²⁴³

Rule 2-123—Process—By Whom Served

Rule 2-123 simplifies the Maryland Rules by consolidating several former rules governing who may serve court orders demanding compliance or requiring action. Section (a) states the general rule that process can be served by either a sheriff or a competent private person who is eighteen years of age or older, including an attorney of record, but not by a party to the action. This rule effects no substantive change in Maryland practice, but merely combines several former rules. Although the new rule eliminates the wording in Former Rule 116 a that “the person shall have the same power and duty to execute such process as the sheriff,” that power would seem to be implied.

Section (b) limits section (a) by restricting service by a private person to cases in which process is simply to be delivered, mailed, or published. Consequently, writs of execution, replevin, or attachment of property or person must still be served by the sheriff. Unlike the former rule, the new rule explicitly authorizes the court to order service by a private person when service by the sheriff would otherwise be required. Unfortunately, the rule provides no guidance as to when such service

241. MD. R.P. 1-202 (h).

242. See MD. R.P. Appendix of Forms, Form 2.

243. See Minutes, Jan. 5, 1979, at 29 (Judge Proctor moved that a brief form be inserted instead of section (c), but the vote resulted in a tie, and the Chairman broke the tie by voting against the motion.).

would be appropriate. Section (c) carries forward former practice with only stylistic changes in the rule. The provision adopts the practice of substituting an elisor to serve or execute process instead of the sheriff when the sheriff is a party to or interested in an action.

Rule 2-124—Process—Persons to be Served

Rule 2-124 specifies the persons who can or must be served to effectuate service of process. By combining several provisions previously contained in separate rules, the new rule simplifies practice and makes it easier for attorneys to determine the proper person to be served. Although Rule 2-124 generally parallels the former rules, it makes new methods of service available for particular persons. Section (a) provides that service upon an individual is made by serving either the individual or an agent authorized to receive service for the individual.

Section (b) is derived from Former Rule 119, but considerably shortens the former rule by omitting several provisions. First, the Committee deleted the express limitation that service on the parent, guardian, or other persons is required only if there is such a person within the jurisdiction of the court. Consequently, the rule can only be read to require service of the disabled individual *and* the parent, guardian, or custodian, whether or not such parent, guardian, or custodian is within the court's jurisdiction. The change will ensure that service will not be deemed complete if only the infant or incompetent person has been served.

A second difference between the former rule and Rule 2-124(b) is the elimination of the special provision for notice to disabled defendants in in rem or quasi in rem actions. Although substituted service may be accomplished if the whereabouts of the defendant are unknown, pursuant to Rule 2-122, the court is no longer authorized to appoint an attorney to conduct proceedings on behalf of a disabled defendant who fails to appear and answer. The Committee did not address a suggestion by the Subcommittee that the definition of "Individual Under Disability" be expanded to include persons under physical disability.²⁴⁴ Thus, an "Individual Under Disability" under Rule 1-202 (k) (Definitions—Individual Under Disability) remains "an individual under the age of 18 years or an individual incompetent by reason of mental incapacity."

Rule 2-124 (c) consolidates the provisions of Former Rule 106 while providing for more liberal service procedures. The new rule continues the former rule's designation of the resident agent, president, secretary, and treasurer as the individuals upon whom process can be served. Sim-

244. See Minutes, Jan. 5, 1979, at 30-31.

ilarly, this section generally follows prior practice when a corporation has no resident agent, or a good faith attempt to serve the resident agent, president, secretary, or treasurer has failed. In that event, service may be made on "the manager, any director, vice president, assistant secretary, assistant treasurer, or other person expressly or impliedly authorized to receive service of process."

The new rule, however, makes several changes. First, the former rule required an unsuccessful attempt at service upon *each* party—the resident agent, president, secretary, and treasurer—before process could be served on an alternate.²⁴⁵ The new rule requires only a good faith attempt "to serve the resident agent, president, secretary, *or* treasurer." By stating the categories in the disjunctive, the new rule requires only one good faith attempt upon one of the persons listed. Second, Former Rule 106 b 3 established a preference system for alternates; only if the resident agent could not be served or did not reside in the state and the listed officers did not reside or could not be found in this state could process be served on another person expressly or impliedly authorized to accept service.²⁴⁶ The new rule suggests no preference and allows service upon any of the listed officers *or* any other authorized person if there is no resident agent or a good faith attempt has failed.

Finally, the new rule omits the definition of an "Unsuccessful Attempt to Serve" found in the former rule. The former rule required service to be attempted during normal business hours at the address of the resident agent as certified by the Department of Assessments and Taxation. It defined an unsuccessful attempt as one in which the resident agent could not be found or the place was closed. Rule 2-124(c) requires an unproductive "good faith attempt," without defining the term. Thus, whether an attempt has failed for purposes of the rule will have to be determined on a case-by-case basis.

Rule 2-124(c) carries forward the provision in Former Rule 106 e which allows service on the State Department of Assessments and Taxation if the corporation has no resident agent or two good faith attempts to serve have failed. The new rule does not extend the time for filing an initial pleading when the corporation is served through the Department of Assessments and Taxation. That provision, however, is contained in Rule 2-321 (b)(3) in the pleadings and motions chapter.²⁴⁷ Unlike For-

245. *See* J. Whitson Rogers, Inc. v. Hanley, 21 Md. App. 383, 390-91, 319 A.2d 833, 838 (1974) (finding service on a person expressly or impliedly authorized to receive service void because, "she could be validly served only after failure to find in Maryland any of the other specifically designated officers or officials of the corporation who reside in the State").

246. *Id.*

247. *See infra* notes 401-15 and accompanying text.

mer Rule 106 e 2, the new rule does not cross reference section 6-307 of the Maryland Code, Courts Article, which sets out the duties of the Department of Assessments and Taxation when it is served with process for a corporation.²⁴⁸

Sections (d) and (e) are new. Section (d) provides that service upon the State of Maryland is made by serving the Attorney General; this is consistent with article V, section 3 of the Maryland Constitution, which authorizes the Attorney General to prosecute and defend cases by or against the state. Sections (d) and (e) also provide that if an action attacks the validity of a state officer's or agency's order, then the officer or agency must also be served.

Sections (f) and (g) carry forward with few changes the provisions of Former Rule 108 a and b, which govern service on the United States. As in the former rule, section (f) requires service upon the United States to be made upon the United States Attorney, an Assistant United States Attorney, or a clerical employee designated by the United States Attorney. Unlike the former rule, the designation of such a clerical employee must be by "a writing filed with the clerk of the court."

Sections (f) and (g) expand the allowable methods of service. Former Rule 108 a provided that the official had to be served by delivery; Rule 2-124(f) does not specify any particular method of service. Therefore, service in any permissible form will be acceptable under the new rule.²⁴⁹ Also, although Former Rule 108 a and b directed that an additional service on the Attorney General of the United States and an officer or agency (in an action attacking the validity of an order of such officer or agency) be made by registered mail, the new rule provides that they be served, making available any permissible form of service. As with section (c), the provision in Former Rule 108 f allowing the United States sixty days after service in which to file an answer has been moved to Rule 2-321(b).

Section (h) is new and replaces the list of express statutory exceptions in Former Rules 105 c and 106 f. If any statutes require or permit methods of service different from those allowed under Rule 2-124, they preempt this rule to that extent.²⁵⁰ This section is necessary because in the event of a conflict between a rule of procedure and a statute, or judicial decision, in Maryland the rule of procedure governs. Unfortunately, the Committee did not cross-reference this section to the statutes that were listed in Former Rules 105 c and 106 f; those statutes will now

248. See MD. CTS. & JUD. PROC. CODE ANN. § 6-307 (1984).

249. See Proposed Rule 2-124 (d) reporter's note (now MD. R.P. 2-124(f)).

250. See Minutes, Jan. 5, 1979, at 31.

be much more difficult for a practitioner to locate because they are scattered throughout the Maryland Code.²⁵¹

Rule 2-125—Process—Service on Sundays and Holidays

Rule 2-125 is derived from Former Rule 104 c, but changes the rule in a way that conflicts with Section 6-302 of the Maryland Code, Courts Article.²⁵² The Committee, under a belief that the former rule conflicted with the statute,²⁵³ changed the rule in a way they felt would make it conform.²⁵⁴ Section 6-302 prohibits service of a writ of distraint or for eviction or possession on Sunday, but permits such service on holidays.²⁵⁵ Former Rule 104 c, although drafted unclearly, appears to

251. Former Md. R.P. 105 c listed the following exceptions:

This Rule shall not require or permit process by publication in substitution for the following methods of service against:

1. Foreign Corporations, pursuant to Rule 106 (Service of Process — Corporation).
2. Defendants in actions involving the Maryland Securities Act, pursuant to Code, Article 32A, section 38(g), (h).
3. Insurers pursuant to Code, Article 48A, section 57.
4. Fraternal Benefit Societies, pursuant to Code, Article 48A, section 347.
5. Unauthorized Insurers, pursuant to Code, Article 48A, sections 201-211.
6. Foreign Electrical Corporations, pursuant to Code, Article 23, section 406.
7. Nonresident Real Estate Brokers or Salesmen, pursuant to Code, Article 56, section 219.
8. Insurance, Surety or Bonding Companies having accredited agents pursuant to Code, Section 6-306 of the Courts Article.

Former Md. R.P. 106 f provided:

The provisions of this Rule shall be inapplicable to the parties provided for in the following statutes to the extent that service of process is provided for therein:

1. Insurers pursuant to Code, Article 48A, section 57.
2. Defendants in actions involving the Maryland Securities Act, pursuant to Code, Article 32A, section 38(g), (h).
3. Fraternal Benefit Societies, pursuant to Code, Article 48A, section 347.
4. Unauthorized Foreign or Alien Insurers, pursuant to Code, Article 48A, sections 202-211.
5. Foreign Electrical Corporations, pursuant to Code, Article 23, section 406.
6. Nonresident Real Estate Brokers or Salesmen pursuant to Code, Article 56, section 219.
7. Insurance, Surety or Bonding Companies having accredited agents, pursuant to Code, § 6-306 of the Courts Article.

252. MD. CTS. & JUD. PROC. CODE ANN. § 6-302 (1984).

253. See Proposed Rule 2-125 reporter's note, Minutes, Jan. 5, 1979, at 32 ("Mr. Brault, in presenting this rule which had also been approved by the Style Subcommittee, stated that the present Rule 104(c) and the statute (Courts Article § 6-302) were in conflict.")

254. See Proposed Rule 2-125 reporter's note, Minutes, Jan. 5, 1979, at 32.

255. Section 6-302 states in its entirety:

- (a) *When permitted.* — The process of a court or administrative office or agency of the state or local government may be served on a Sunday or holiday.
- (b) *Service of certain writs on Sunday prohibited.* — A writ of distraint, or for eviction or possession may not be served on Sunday.

have been consistent with the code provision.²⁵⁶ The new rule, however, prohibits service of such writs on holidays as well as Sundays. Because the rules control in an event of conflict, writs of distraint and writs for eviction or possession should not be served on Sundays or holidays.

Rule 2-126—Process—Return

Rule 2-126 consolidates several former Maryland rules and draws upon Federal Rule 4(g) to simplify practice and to add several provisions. Consistent with the elimination of the concept of return days, Rule 2-126 measures the time for return in terms of the time fixed for the response of the person served. Although a debate among Committee members over whether the rule should be termed "return" or "proof of service" resulted in its title of return, most of the rule actually speaks to proof of service.²⁵⁷ Section (a) continues former practice with several minor changes. First, section (a) requires that if process is served by mail, the original return receipt must be filed with the clerk as proof of service. It does not require an additional affidavit showing that process was mailed and received, as did Former Rules 104 b 2 and 107 a 2. Second, similar to Rule 2-121, 2-126(a) consolidates the return provisions for service inside and outside the state. These provisions were stated separately in the former rules.

Finally, section (a) restates the requirements of proof contained in Former Rule 116 c, "the name of the person served, the date, and the particular place and manner of service." The application of these requirements has been changed in two respects. First, although Former Rule 116 required that that information be set out in an affidavit, Rule 2-126(a) imposes no similar requirement. Second, the rule appears to impose those requirements on every service of process, including that by a sheriff. Former Rule 116 applied only to service by a private party. Both Former Rule 116 c and Rule 2-126(a) require an affidavit when process is served by a private person, stating that the server is at least eighteen years of age.

Section (b) continues the prior requirement that the server file proof of compliance with Rule 2-122. As under the former rule, the publisher's certificate constitutes proof of publication. Unlike the former rule, however, the new rule also requires the server to file a copy of the publication or posting notice.

MD. CTS. & JUD. PROC. CODE ANN. § 6-302 (1984).

256. Former Md. R.P. 104 c stated: "Except for a writ of distraint, or for eviction or possession, on Sunday, process may be served on Sunday or a holiday."

257. *See* Minutes, Jan. 5, 1979, at 33; Minutes, Mar. 2-3, 1979, at 8-10.

Section (c) is new and governs service by a method other than or in addition to delivery, mailing, posting, or publication. In such cases, the section mandates return as "prescribed by rule or law promptly after execution of the process." Thus, the rule departs from the general timing scheme of Rule 2-126, which requires return within the time during which the person served must respond. Unfortunately, the rule does not direct the reader to any rule or statute under which it would apply.

Section (d) is also new and requires return of unserved process as soon as practicable, but no later than ten days from the process's expiration. The Committee decided that requiring return of process not served was better than simply including a built-in expiration date.²⁵⁸ Although the Committee considered requiring an affidavit stating the reasons for non-service, no such provision was included.²⁵⁹ Section (e), another new provision, demands that return include a copy of the process if service is effected, and the original if service is not effected.

Section (f) consolidates Former Rules 104 a 2 and 622 h 2 and carries forward the prior requirement that return be filed with the court issuing process. The rule also continues to require that a writ of execution be returned to the county court where the property is located, and in addition, requires that a writ of attachment or any other writ against property be returned to the county court where the property is located.

Section (g) adopts verbatim the last sentence of Federal Rule 4(g): "Failure to make proof of service does not affect the validity of the service." The new rule thus incorporates Former Rules 104 h 3(c) and 116 c 3 in clearer language. The rule prevents a defendant who has been served from attacking the validity of service on the ground that the plaintiff failed to make proof of service.²⁶⁰

Rule 2-131—Appearance

Rule 2-131 is derived from Former Rule 124, and although it effects minor changes, it primarily makes explicit what was accepted practice. Section (a) is new and incorporates Maryland District Rule 3 b.²⁶¹ The section allows an individual to enter an appearance by counsel or in proper person; Former Rule 124 did not state who was entitled to enter an appearance on behalf of a party. Rule 2-131(a) also prohibits entry of appearance on behalf of a corporation by anyone other than an attorney. Corporate officers are therefore prohibited from entering an

258. See Minutes, Mar. 2-3, 1979, at 11.

259. *Id.*

260. See 2 MOORE'S FEDERAL PRACTICE, *supra* note 38, ¶ 4.43.

261. See Explanatory Note, Minutes, Mar. 13, 1982, at 71.

appearance for the corporation unless they represent the corporation as counsel or unless a statute or rule provides otherwise.²⁶²

Section (b) repeats Former Rule 124 a with only stylistic changes. Under that section, an appearance may be entered by filing a motion or pleading, filing a written request for entry of an appearance, or requesting entry of an appearance orally in open court if the court permits. Section (c) is derived from Former Rule 124 b and c, also with only minor changes. Like its predecessor, Rule 2-131(c) states explicitly that special appearances are abolished. Unlike Former Rule 124 c, the new rule does not expressly provide for a limited appearance for raising preliminary objections, but such an appearance is implicit in its language. The new rule omits the provision in Former Rule 124 d dealing with appearance by out-of-state attorneys. The omission does not change prior practice, because the rule cross-references the relevant rules of civil procedure and Rules Governing Admission to the Bar that set out the procedures for and limitations of such appearances.²⁶³

Rule 2-132—Striking of Attorney's Appearance

Rule 2-132 incorporates much of Former Rule 125, but makes several changes in the procedural requirements for withdrawal of an attorney's appearance. Section (a) is new and permits an attorney to withdraw as a matter of right if the client has another attorney of record. The attorney may withdraw simply by filing a notice of withdrawal with the court. That procedure departs from Former Rule 125 c 1 under which the attorney was required to serve a motion to withdraw and allow the other party an opportunity to object.

Section (b) governs striking an attorney's appearance by motion and substantially follows Former Rule 125 a and c 2. Applicable when the client has no other attorney of record, the rule requires the attorney desiring to withdraw either to: (1) make a motion in open court, (2) accompany the motion with the client's written consent to withdrawal, or (3) include a certificate that notice of the attorney's intention to move for withdrawal has been filed at least five days prior to the filing of the motion. The second option is new; under the former rule an attorney could not avoid the requirement to send notice to the client and to file a certificate by obtaining the client's written consent. Section (b) also prohibits the court, unless the motion is granted in open court, from striking the appearance before the expiration of the time limit for re-

262. See Minutes, Mar. 13, 1982, at 71.

263. MD. R.P. 2-131 cross-references MD. R.P. 1-311, 1-312, and 1-313, and Rules Governing Admission to the Bar 19 and 20.

sponding to the motion for withdrawal. Rule 2-311 provides that a party must respond to a motion within fifteen days after being served. Although Rule 2-132 does not explicitly provide for service of the motion to withdraw as did Former Rule 125 b, service is required under Rule 1-321, which mandates service of every pleading and other paper filed unless a rule provides otherwise. Section (b) also retains the present grounds for the court's discretionary denial of the motion by authorizing the court to deny withdrawal if it would cause "undue delay, prejudice, or injustice."

Sections (c) and (d) follow Former Rule 125 d and e with only stylistic changes. Section (c) directs the clerk to mail notice to the client's last known address when his attorney's appearance has been stricken. The notice is to warn the client to employ new counsel to prevent dismissal, judgment by default, and assessment of court costs. The rule does not provide the form notice provided in the Committee Note to Former Rule 125. Because the requirements of the rule have not been altered, clerks may continue to use this form. Section (d) continues Former Rule 125 e's provision that an attorney's appearance is automatically terminated if no appeal has been taken and the time for appeal has expired, unless the court, prior to such automatic termination, orders otherwise.

B. Chapter 200—PARTIES

Rule 2-201—Real Party in Interest

Rule 2-201 tracks Federal Rule 17(a) and is generally consistent with Former Rule 203 a, b, and c.²⁶⁴ The rule continues the general principle of Former Rule 203 a that an action must be prosecuted in the name of the real party in interest. Also, the rule lists the exceptions set out in Former Rule 203 b except that subsections b(5) and (6), dealing with municipal corporations and chartered and unchartered counties respectively, have been deleted. The deletion resulted from the Committee's view that those sections were inapplicable because they relate to capacity to sue rather than real parties in interest.²⁶⁵ The new rule also continues the requirement of Former Rule 203 c that, if a statute provides, an action for the use or benefit of another shall be brought in the

264. See Minutes, Mar. 2-3, 1979, at 13-14.

265. See *id.* at 15 (where the Committee decided that research should be done before eliminating these sections); Minutes, May 12, 1979, at 8 ("Mr. Simmons' research had indicated that their inclusion was not necessary, and that the provisions had probably been added for clarification.").

name of the State of Maryland.²⁶⁶

Rule 2-201 is different from Former Rule 203 in two respects. First, the new rule omits the provision in Former Rule 203 d and incorporates instead a clause almost identical to that in Federal Rule 17(a). The new clause explicitly acknowledges that dismissal may result from failure to join the real party in interest, but also limits that sanction by providing that before dismissal the court must allow a reasonable time for joinder or substitution. The former rule permitted the court to order that the real party in interest be made a party plaintiff, without specifying the result of failure to do so. Second, the Committee believed that adopting the federal relation back provision where there is joinder or substitution would promote uniformity and fairness.²⁶⁷ As a result, the new rule parallels the federal rule, stating that the joinder or substitution has the same effect as if the action had been commenced in the name of the real party in interest.²⁶⁸

Rule 2-202—Capacity

Rule 2-202 combines into a single rule, with several modifications, the former Maryland rules on capacity.²⁶⁹ Section (a) provides the general rule that “[a]pplicable substantive law” governs when determining who may sue or be sued.²⁷⁰ The Committee chose this language to indicate that the whole law of the state governs, including conflict of law provisions.²⁷¹ Rule 2-202(a) deletes Former Rule 204 a and b because the Committee found that rule to be part of substantive law.²⁷² Similarly, Former Rules 206 and 207 have been omitted. Those rules indicated the code provisions governing certain particular capacity

266. See 1 J. POE, *supra* note 136, § 295 (“This was always the rule in suits for the wrongful death of the plaintiff’s decedent, but has now been modified” by Rule Q41.).

267. Proposed Rule 2-201 reporter’s note.

268. Although the relation back provision applies under FED. R. CIV. P. 17(a) whenever there is “ratification, joinder, or substitution,” MD. R.P. 2-201 refers only to “joinder or substitution.” “Ratification” was omitted from the rule because its meaning was not understood and the Committee did not feel that research into this was necessary because the prior Maryland rule did not contain this term. Minutes, Mar. 2-3, 1979, at 16.

269. See Minutes, Mar. 2-3, 1979, at 17. The former rules governing capacity were Former Md. R.P. 204 (Capacity—Individual—Own Right), 205 (Capacity—Representative), 206 (Capacity—Corporations), and 207 (Capacity—Miscellaneous Associations).

270. Compare MD. R.P. 2-202(a) (capacity to sue or be sued is determined by “[a]pplicable substantive law”), with FED. R. CIV. P. 17(b) (capacity to sue or be sued is governed by “the law of his domicile”). Originally the new rule provided that “the law of the State governs” when determining capacity. This was amended to say “applicable substantive law” because the Committee felt the former version was too narrow. Minutes, Mar. 2-3, 1979, at 17-18.

271. Minutes, Mar. 2-3, 1979, at 17.

272. *Id.*

determinations.²⁷³ Consequently, the practicing attorney will no longer be able simply to examine the rules to determine whether a special code provision exists, but will need to be familiar with the applicable case law and statutes.

Sections (b) and (c) essentially restructure Former Rule 205 c, d, and e.²⁷⁴ Section (b) permits an individual under disability to sue by a guardian or other like fiduciary, a change from the language of Former Rule 205 d, which allowed such individual to sue by guardian or committee. The change is not intended to change practice, but merely represents the Committee's desire to have the language coincide with that of the federal rule.²⁷⁵

Rule 2-202(b) makes two changes in Maryland practice governing suits by a parent on behalf of a minor. First, Former Rule 205 c, which governed who could bring suit when a minor was in the custody of one parent, applied only to tort actions, but the new rule enlarges this provision to apply generally to all suits.²⁷⁶ Second, under the new rule the custodial parent has the exclusive right to sue on behalf of a minor for

273. Former Md. R.P. 206 governed capacity of corporations and stated:

Actions by or against corporations shall be governed by the following Code provisions:

- (1) Foreign Corporations, pursuant to Code, Article 23, sections 87-93 and particularly sections 91, 92.
- (2) Domestic Corporations, pursuant to Code, Article 23, sections 94-98.
- (3) Religious Corporations, pursuant to Code, Article 23, sections 256-297 and particularly section 272.

Former Md. R.P. 207 controlled capacity of miscellaneous associations, and stated:

Actions by or against associations shall be governed by the following Code provisions:

- (1) Unincorporated Associations and Joint Stock Companies, pursuant to Code, Article 23, section 138.
- (2) Lloyd's pursuant to Code, Article 48A, sections 134-151, and particularly section 150.
- (3) Reciprocal Exchanges and Inter-Insurers, pursuant to Code, Article 48A, sections 257-270, and particularly section 262.
- (4) Cooperative Associations, pursuant to Code, Article 23, sections 349-378.
- (5) Cooperative Marketing Associations, pursuant to Code, Article 23, section 356.
- (6) Electric Cooperatives, pursuant to Code, Article 23, sections 379-411, and particularly section 382.
- (7) Fraternal Beneficial Associations, pursuant to Code, Article 48A, sections 271-308, and particularly section 289.

274. The change in language in this rule is consistent with the definitional change in MD. R.P. 1-202(k) from "person under disability" to "individual under disability."

275. See Minutes, Mar. 2-3, 1979, at 19 ("Mr. Lombardi suggested that the addition after the word 'guardian' of the words 'or other like fiduciary,' and deletion of the word 'committee,' which Mr. Brault pointed out is used in the Federal rule."). FED. R. CIV. P. 17 (c), however, uses all three of these terms, as well as the term "conservator."

276. Proposed Rule 2-202(b) reporter's note.

one year, a change from the previous six-month limitation.²⁷⁷ The Committee felt that six months was not long enough, and apparently chose the one-year time period because it is consistent with the limitations periods for libel and slander and actions under the Uniform Commercial Code.²⁷⁸ As under Former Rule 205 c, after the one-year period has expired, the suit may be filed by any person interested in the minor. The new rule eliminates the requirement that notice be mailed to the custodial parent by registered mail; apparently, notice may be by regular mail.

Section (c) simplifies Former Rule 205 e and continues its requirement that the guardian or other fiduciary defend an action against the individual under disability. The section modifies the former rule by requiring the court to appoint an attorney for an unrepresented individual under disability. Thus, the new rule is mandatory rather than permissive.²⁷⁹

Rule 2-211—Required Joinder of Parties

Rule 2-211 follows, with very few changes, Federal Rule 19²⁸⁰ and directs when a particular person must be joined in an action. No former Maryland rule addressed the standards governing the necessary joinder of parties, although Former Rule 323 a 8 provided for dismissal for "want of necessary parties."²⁸¹ The determination of who is a necessary party has so far been left to case law. The Court of Appeals of Maryland has held that all persons interested in the subject matter of a suit are necessary parties, and therefore must be made parties to it.²⁸²

277. *Id.*

278. Minutes, Mar. 2-3, 1979, at 19, 22 ("Judge Proctor's suggestion that it be extended to 18 months was countered by Judge McAuliffe's suggested compromise of 12 months, that time frame being consistent with limitations on actions for libel and slander, and under the Uniform Commercial Code, etc."). See MD. CTS. & JUD. PROC. CODE ANN. § 5-105 (1984) (stating the "[a]n action for assault, battery, libel, or slander shall be filed within one year from the date it accrues"); MD. COM. LAW CODE ANN. § 2-725 (1983) (stating that a breach of contract action must be filed within four years from the date of its accrual, but the parties may agree to reduce the period to not less than one year).

279. See also FED. R. CIV. P. 17(c), which contains a mandatory provision for appointment of a guardian ad litem for an infant or incompetent person not otherwise represented in an action.

280. Minutes, Mar. 2-3, 1979, p. 23.

281. See also Former Md. R.P. 282 (providing a remedy where a party plaintiff or defendant was omitted in an action in equity).

282. See, e.g., *Newark Trust Co. v. Talbot Bank*, 217 Md. 141, 147, 141 A.2d 516, 519 (1957); *Martin v. Carl*, 213 Md. 564, 568, 132 A.2d 601, 603 (1956); *Bachrach v. Washington United Coop.*, 181 Md. 315, 318, 29 A.2d 822, 824 (1942); *Munnikhuysen v. Magran*, 57 Md. 172, 187 (1881). Likewise, the Court of Appeals has found any person having an interest in a declaration to be a necessary party pursuant to the Declaratory Judgments Act, MD. ANN. CODE art. 31A, § 11 (1957). See *Bender v. Secretary, Md. Dep't of Personnel*, 290 Md. 345,

The Committee was uncertain about the extent of the changes effected by the new rule.²⁸³ Some members argued that introducing the concept of an involuntary plaintiff would change existing Maryland law.²⁸⁴ Others noted that the concept is equitable in nature, and thus part of Maryland common law.²⁸⁵ Despite that uncertainty, the effect on Maryland practice should be minimal because, in response to concerns of the Court of Appeals, the phrase "except as otherwise provided by law" was inserted at the beginning of the rule.²⁸⁶ The intent of this addition was to ensure that current case law would not be abrogated.²⁸⁷ The primary difference between the new rule and prior law is that Rule 2-211 provides specific requirements as to who must be joined, and describes the factors for the court to consider in determining the outcome if joinder cannot be effected.

Rule 2-211(a) defines those persons who are necessary to an action as those whose absence will prevent complete relief to the parties, may impair the absent person's ability to protect a related claimed interest, or may subject the parties to a substantial risk of multiple or inconsistent obligations. Adapted from Federal Rule 19(a), the section directs the court to order such persons to be made a party to the action. Section (b) follows Federal Rule 19(c) and requires a party to state in his pleading the name of any person meeting the above criteria who has not been joined and the reasons why.

Rule 2-211(c) is derived from Federal Rule 19(b) and permits the court to decide whether to dismiss an action when a person meeting the criteria of section (a) cannot be joined. The section lists four factors to be considered in making this decision: (1) the extent to which a judgment in the person's absence might prejudice that person or those already parties; (2) the extent to which prejudice can be lessened or avoided by protective measures; (3) whether a judgment in the person's absence would be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed. Those same factors are listed

350, 430 A.2d 66, 69 (1981) ("Any person who, as a result of a declaration, may gain or be deprived of a legal right or other benefit has an interest that might be affected by the outcome of the action and is, therefore, a necessary party."). See also *Williams v. Moore*, 215 Md. 181, 185, 137 A.2d 193, 196 (1957); *Reddick v. State*, 213 Md. 18, 29, 130 A.2d 762, 767 (1957); *United State Workers v. United Bhd. of Carpenters*, 185 Md. 32, 36, 42 A.2d 913, 914-15 (1945); *Saunders v. Roland Park Co.*, 174 Md. 188, 193, 198 A. 269, 270-71 (1938).

283. See Minutes, Mar. 2-3, 1979, at 24.

284. Comments of Mr. Brault, *id.*

285. Comments of Mr. Herrmann, *id.*

286. Letter from the Hon. John F. McAuliffe, Chairman of the Standing Committee on Rules of Practice and Procedure, to the Judges of the Court of Appeals of Maryland (Aug. 1, 1983) [hereinafter cited as McAuliffe letter (Aug. 1, 1983)].

287. *Id.*

in Federal Rule 19(b) for determining whether the person is "indispensable," but the Committee chose to omit that term in the new rule in order to reduce confusion.²⁸⁸ In making the change, however, the Committee did not intend to vary the substantive meaning from that in the federal rule.²⁸⁹ Therefore, case law interpreting the federal rule should be persuasive evidence when interpreting Rule 2-211(c). Section (d) clarifies, as does Federal Rule 19(d), that the required joinder provisions are subject to the rule governing class actions.²⁹⁰

Rule 2-212—Permissive Joinder of Parties

Rule 2-212 incorporates Federal Rule 20 almost verbatim, and therefore follows the federal concept of permissive joinder, which is more restrictive than prior Maryland practice. Under Former Rule 313 d, parties could be joined when either: (1) a substantial question of law or fact was common to another claim,²⁹¹ or (2) joinder was "convenient."²⁹² In addition to deleting the provision allowing joinder whenever it would be convenient, the new rule requires that there be a common question of law or fact and that the action be based on the same transaction or occurrence.²⁹³ The requirement that the claim or defense arise out of the same transaction or occurrence is new to Maryland practice. Consistent with Federal Rule 20, the new rule requires both of the stated requirements to be met, i.e., joinder of parties will be denied if the right to relief did not arise from the same transaction or occurrence, even if common questions of law or fact exist.²⁹⁴ Although "transaction or occurrence" is not defined in the rules, the federal requirement has been interpreted as including all logically related events entitling a person to institute legal action against another.²⁹⁵

Section (b) adopts Federal Rule 20(b) almost verbatim and authorizes the court to order separate trials or make other orders to prevent a

288. Minutes, May 11-12, 1979, at 9-10.

289. *Id.* at 10.

290. For a discussion of MD. R.P. 2-231 see *infra* notes 401-15 and accompanying text.

291. See C. BROWN, *supra* note 4, at 67 n.18 ("The Rules are unclear as to whether the common question runs through all claims or just through two or more. Rule 313 d 1 seems to require commonality with respect to all claims, but Rules 313 d 2 and 313 d 3 seem to negate that requirement.")

292. See *The Great Atlantic & Pacific Tea Co. v. Royal Crown Bottling Co.*, 243 Md. 280, 288, 220 A.2d 598, 602 (1966); *Martin v. Carl*, 213 Md. 564, 568, 132 A.2d 601, 603 (1956); C. BROWN, *supra* note 4, at 67; Minutes, May 11-12, 1979, at 9.

293. MD. R.P. 2-212 (a).

294. See, e.g., *Music Merchants, Inc. v. Capital Records, Inc.*, 20 F.R.D. 462, 465 (E.D.N.Y. 1957); 3A MOORE'S FEDERAL PRACTICE, *supra* note 38, ¶ 20.06, at 20-39 & n.6.

295. See *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974); 7 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 1653, at 270 (1972).

party from being embarrassed, delayed, or put to added expense. Thus, although Rule 2-212 does not permit parties to be joined merely because it is convenient, section (b) makes convenience an important consideration when determining whether to order separate trials or to grant other relief when two parties do not assert any claims against each other.

Rule 2-213—Misjoinder and Nonjoinder of Parties

Rule 2-213 is similar to Federal Rule 21 and governs violations of either the required or permissive joinder rules. The new rule is consistent with Former Rule 283 f, under which it was not necessary to dismiss an action in equity for misjoinder. Under the new rule, misjoinder is not a ground for dismissal of the action. Instead, the misjoined party may be dropped at any stage of the proceeding, and a misjoined claim may be severed and proceeded with separately.²⁹⁶ Furthermore, a nonjoined party may be added at any time. Although stated in neither the federal nor the Maryland rules, nonjoinder is also not a ground for dismissal unless joinder of a necessary party is not possible.²⁹⁷ Although the text of the new rule is silent as to what constitutes misjoinder and nonjoinder, misjoinder results when the parties fail to satisfy the conditions of permissive joinder, and nonjoinder arises when a necessary party, as defined in the required joinder provisions, is not joined.²⁹⁸

Rule 2-214—Intervention

Although Former Rule 208 and Federal Rule 24 are similar in content, new Rule 2-214 adopts much of the federal, rather than the state, wording.²⁹⁹ The Committee intended the new rule “firmly [to] imbed” in Maryland intervention jurisprudence the Court of Appeals’ consistent practice of interpreting the Maryland rule in light of federal case law applying Federal Rule 24.³⁰⁰ Section (a) follows the language of Federal Rule 24(a) and does not significantly alter the former rule’s requirement

296. See, e.g., *Sabolsky v. Budzanoski*, 457 F.2d 1245, 1249 (3d Cir. 1972).

297. See *Teamsters Local Union No. 116 v. Fargo-Moorhead Auto. Dealers Ass’n*, 620 F.2d 204, 205-06 (8th Cir. 1980); 3A MOORE’S FEDERAL PRACTICE, *supra* note 38, ¶ 21.04.

298. See T. COYNE, RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 253 (1982).

299. Comments of Mr. Brault, Minutes, May 11-12, 1979, at 11.

300. *Id.* at 12. See, e.g., *Maryland Radiological Soc’y v. Health Services Cost Review Comm’n*, 285 Md. 383, 388 n.5, 402 A.2d 907, 910 n.5 (1979) (“In the absence of Maryland authority, the similarity of Maryland Rule 208 and Federal Rule 24 makes the decisions of the federal courts interpreting their rule of considerable precedential value in construing our rule.”); *Montgomery County v. Ian Corp.*, 282 Md. 459, 463, 385 A.2d 80, 82 (1978) (“Maryland Rule 208 was derived from Fed. R. Civ. P. 24 as it formerly appeared. Since there are no relevant Maryland cases on the subject, we examine what has been said relative to the federal rule.”); *Citizens Coordinating Comm. on Friendship Heights, Inc. v. TKU Assocs.*,

that a party have an interest protectable solely by intervention.³⁰¹

Section (b) is almost identical to Former Rule 208 b, but adds subsection (b)(3) from Federal Rule 24 to further coordinate the Maryland rule with federal practice.³⁰² That subsection requires the court, in deciding whether to grant permissive intervention, to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Section (c) largely reflects former practice under Former Rule 208 c, but opts for much more of the federal language. The rule now specifically requires that the motion for intervention state the grounds and be accompanied by a copy of the proposed pleading. The Committee minutes note that this is presently done, even though not required by the rule.³⁰³

Rule 2-221—Interpleader

Rule 2-221 incorporates aspects of both the federal and Maryland Rules, and in addition adds several new provisions. Although Former Rule BU70 was identical to Federal Rule 22(1), the Committee felt that the rule needed to be restyled.³⁰⁴ As adopted, section (a) essentially follows the former rule, but with some additions. First, the rule now requires that a complaint for interpleader specify the nature and value of the property. Second, the Court of Appeals was concerned that the rule could be interpreted to preclude the deposit of property into court or the granting of ancillary relief before the order of interpleader is entered.³⁰⁵ In response, the Committee added a provision that permits, but does not require, the claimant to pay or tender the property into court or to request ancillary relief.³⁰⁶ Some Committee members expressed concern that the rule does not contain a definition of "interpleader" or "in the nature of interpleader."³⁰⁷ One member indicated that the Style Subcommittee was aware of this, but chose to follow the form of Federal Rule 22, which uses the terms without defining them.³⁰⁸

276 Md. 705, 712, 351 A.2d 133, 138 (1976) ("The federal cases defining Rule 24, therefore, continue to serve as a guide to our interpretation of Rule 208 a.").

301. See *Citizens Coordinating Comm.*, 276 Md. at 712, 351 A.2d at 138 (The requirement for an applicant to intervene "is that he have an interest for the protection of which intervention is essential and which is not otherwise protected.").

302. See Comments of Mr. (now Judge) Rodowsky, Minutes, May 11-12, 1979, at 12 ("Mr. Rodowsky felt that the present Maryland language would be preferable, but he would add the last sentence of Federal Rule 24(b) so as to keep out the 'kibitzer.'").

303. See Comments of Mr. Brault, *id.* at 13.

304. See Minutes, May 11-12, 1979, at 14.

305. McAuliffe letter (Aug. 1, 1983), *supra* note 286.

306. *Id.*

307. See Comments of Mr. Ryan and Dean Kelly, Minutes, Mar. 7-8, 1980, at 32.

308. See Comments of Mr. Niemeyer, *id.* One commentator defines impleader as "an equi-

Section (b) is derived from Former Rule BU72 and addresses the possibilities available to the court when a complaint for interpleader has been brought. The section clarifies the former rule's provision that defendants have "an opportunity to answer and contest" the interpleader;³⁰⁹ under the new rule the defendants must have an opportunity to answer, after which the court must schedule a hearing to determine whether interpleader is appropriate. In addition to permitting the court to issue any of the orders allowed under Former Rule BU72 b, the new rule is enlarged to allow for dismissal of the action. Because a court frequently will realign the parties in an interpleader order, the Committee sought to clarify the terminology of subsection (b)(3) by inserting the parenthetical after "original plaintiff."³¹⁰

The Committee was concerned that, because interpleader is an equity action, the right to a jury trial might disappear unless expressly provided for.³¹¹ Accordingly, section (c) follows the former rule and makes clear that interpleader does not abridge any preexisting right to a jury trial on an underlying action. As before, the demand for a jury trial must be made within fifteen days after the entry of the order of interpleader. Unlike before, the new rule allows the court to modify the time for demand and the rule deletes the provisions relating to post-demand procedure.³¹²

Section (d) changes prior practice. The former rule set a fifteen-day limit after entry of an interpleader decree within which the plaintiff was required to file an original pleading, "unless otherwise ordered by the court." The new rule simply provides that the plaintiff's complaint shall be filed "[w]ithin the time specified in the order of interpleader."³¹³ Section (d) also clarifies that the action is then to proceed as any other action.

Rule 2-231—Class Actions

Derived from Federal Rule 23, the new Maryland rule governing

table device whereby a person faced with the possibility of conflicting claims of liability or ownership asserted by two or more potential plaintiffs can secure a declaration as to his liability, or as to the rightful ownership of property held by him." J. MOORE, FEDERAL CIVIL RULES PAMPHLET 198 (1982).

309. See Former Md. R.P. BU72 a.

310. See Minutes, Mar. 7-8, 1980, at 31.

311. Comments of Mr. Sykes, Minutes, May 11-12, 1979, at 15.

312. Proposed Rule 2-221(c) reporter's note. See Former Md. R.P. BU73, stating that when a jury trial is requested, the court shall either transfer the action to a law court or order the asserted claim tried separately in a law court.

313. See Proposed Rule 2-221(d) reporter's note ("This section is derived from Rule BU74, amended to provide that timing of the complaint will always be as ordered by court, in lieu of the current 15 days unless otherwise ordered by court.").

class actions provides much more guidance in its application than the former rule. In drafting the rule, the Committee sought to: (1) retain a general class action rule that avoids "political" issues, such as attorneys' fees and notice requirements; (2) add a certification process; (3) avoid the jurisdictional issues raised by the Court of Appeals' holding in *Pollokoff v. Maryland National Bank*,³¹⁴ and (4) retain the distinction between "of right" and "discretionary" class actions.³¹⁵ The resulting rule follows Federal Rule 23 almost entirely, and therefore to a large extent will follow federal case law.

Former Rule 209 was structurally simple, and in section (a) stated that a class action could be maintained only if the action met four requirements: (1) there was a common question of law or fact; (2) the group was so numerous as to make joinder impracticable; (3) one or more claims or defenses of the class leaders were representative of the group; and (4) the class leaders were able fairly and adequately to protect the interests of all of the members of the group. Those four requirements are continued in Rule 2-231(a), which is derived from Federal Rule 23(a). But although those were the only requirements for allowing a class action under Former Rule 209, under the new rule those are necessary, but not sufficient, conditions for certification. Section (a), therefore, follows the federal rule by referring to them as "Prerequisites to a Class Action."

The additional factors for determining when a class action can be maintained are prescribed in Rule 2-231(b), which is derived from Federal Rule 23(b). For an action to be maintained as a class action, the prerequisites of section (a) must be met and the action must fall into one of three categories. A class action is maintainable: (1) when prosecution of separate actions would create a risk of inconsistent, varying, or prejudicial adjudications; (2) where injunctive or declaratory relief is appropriate with respect to the class as a whole; or (3) where common questions of law or fact predominate over individual questions and a class action is superior to other methods of adjudication.

As initially drafted, the first two categories of section (b) were labeled class actions "of right" and the third as "permissive" class actions.³¹⁶ This resulted from the Committee's attempt to retain the

314. 288 Md. 485, 418 A.2d 1201 (1980). In *Pollokoff*, the Court of Appeals of Maryland refused to allow class action plaintiffs to aggregate their claims to meet the \$2500 jurisdictional amount necessary to bring an action in circuit court. For a complete discussion of the case, see Recent Decision, *Pollokoff v. Maryland National Bank—Multiple Plaintiffs May Not Aggregate Their Claims to Meet the Jurisdictional Amount*, 41 MD. L. REV. 464 (1982).

315. Comments of the Reporter, Minutes, Jan. 9, 1981, at 12-13.

316. See Minutes, Jan. 9, 1981, at 11, 13.

distinction in Former Rule 209 b between “of right” and “discretionary” class actions.³¹⁷ But the Committee decided to drop those headings because federal case law does not agree with the distinction. Therefore, the Committee reasoned, their inclusion would cause confusion in interpretation of the new rule.³¹⁸ Furthermore, the language of the rule contains sufficient latitude so that even those class actions maintainable as of right would allow the judge a certain amount of discretion.³¹⁹ By omitting the distinction, the new rule will give courts the benefit of the extensive case law that has developed regarding the federal rule.

Rule 2-231(c) is derived from Federal Rule 23(c)(1) and provides that “the court shall determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action.” Like the federal rule, the new rule allows for flexibility—an order “may be conditional”³²⁰ and “may be altered or amended before the decision on the merits.”³²¹ Section (c) is the only section in which the Committee added to the federal requirements. First, the section provides that certification may be initiated either by the court or by any party.³²² More significantly, the section differs from the federal rule by providing for a hearing if requested by any party, apparently for the purpose of arguing whether the action should be maintained as a class

317. *Id.* at 13; *see also* Former Md. R.P. 209 b (providing that a court could not refuse to permit a class action “where a class action is maintained of right.”). In reality, this exception removes very little from the court’s discretion. It is the court that has the duty to determine whether a class action may be maintained as of right. For example, Former Md. R.P. 209 cross-referenced the MD. REAL PROP. CODE ANN. § 14-110 (1981) (resale or mortgage of property subject to remainder vested in infants or unborn persons) and Former Md. R.P. W73 b (providing that foreclosure of a power of sale or assent to a decree shall not be permitted except with the concurrence of the record holders of not less than 25% of the mortgage debt) as instances where a class action may be maintained of right. Neither the statute nor the rule, however, provided for a class action to be so maintained. While most parties seeking class action status will therefore begin their cases by arguing that the action is of right, courts have the discretion to decide to the contrary. *See, e.g.*, *Johnson v. Chrysler Credit Corp.*, 26 Md. App. 122, 125-26, 337 A.2d 210, 212-13 (1975) (no right to maintain class action).

318. *See* Minutes, Jan. 9, 1981, at 14-15.

319. Comments of the Reporter, *id.* at 15.

320. *See, e.g.*, *Phillips v. Joint Legislative Comm. on Performance and Expenditure Review of the State of Miss.*, 637 F.2d 1014, 1023 n.14 (5th Cir. 1981) (court can make certification contingent on replacement of counsel); *Cullen v. New York State Civil Serv. Comm’n*, 435 F. Supp. 546, 564 (E.D.N.Y. 1977) (conditioning certification on the appointment of additional counsel).

321. *See, e.g.*, *Johnson v. Shreveport Garment Co.*, 422 F. Supp. 526, 530 (W.D. La. 1976), *aff’d*, 577 F.2d 1132 (5th Cir. 1978) (stating that FED. R. CIV. P. 23(c)(1) empowers a court to alter certification prior to a decision on the merits); *Walsh v. City of Detroit*, 412 F.2d 226, 227 (6th Cir. 1969) (“Even without this Rule, the District Court had the power and authority to reconsider any of its orders entered during pendency of the case, which orders had not become final.”); *see also* 3B MOORE’S FEDERAL PRACTICE, *supra* note 38, ¶ 23.04, at 23-113.

322. *See* Comments of Mr. Sykes, Minutes, Jan. 9, 1981, at 16-17.

action.³²³ Finally, the rule borrows from the Uniform Class Actions Act by requiring the court, in its order determining whether to certify the action as a class action, to include its findings and the reasons for its decision.³²⁴ The provisions for a hearing and explanation should help to further clarify and define the class action proceeding, and to provide a more complete record from which to appeal the determination. As long as the parties do not use these provisions in a dilatory manner or in some other way designed to obstruct the proceedings, they are welcome additions to the class action rule.

Sections (d) and (e) are based on the federal rule. Section (d) adopts Federal Rule 23(c)(4)³²⁵ and permits the court to allow a class action with respect to a particular issue or to divide a class into subclasses. Section (e) is derived from Federal Rule 23(c)(2) and provides for notice to the members of a class. In addition to granting the court discretionary power to order notice in any class action, the rule provides a mandatory provision for notice in (b)(3) class actions. The notice is to inform members that they have an absolute right to opt out of the class action if they so desire; that the judgment, whether favorable to the class or not, will bind all members who have not opted out; and that members who remain in the class may still enter an appearance through counsel. The provision is consistent with the federal rule and recognizes that (b)(3) class actions must balance the economy of a class action against the desire of individuals to pursue their own claims.³²⁶

Section (e) differs from the federal rule by omitting the federal provision that "the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."³²⁷ The change resulted from the Committee's decision to avoid "political" issues such as notice.³²⁸ The rule leaves the type of notice to the judge's discretion and assumes that his order will comport with constitutional requisites.³²⁹

Section (f) adopts Federal Rule 23(d) and provides the court with

323. *Id.* at 17. Compare the provision in MD. R.P. 2-231(c) with UNIF. CLASS ACTIONS ACT § 2(a), 12 U.L.A. 23 (Supp. 1984) (requiring the court to hold a hearing to determine whether or not an action is to be maintained as a class action).

324. See Comments of Mr. Nilson, Minutes, Jan. 9, 1981, at 18. Compare the requirement in MD. R.P. 2-231(c) with UNIF. CLASS ACTIONS ACT § 4(b), 12 U.L.A. 25 (Supp. 1984) (requiring a court certifying or refusing to certify a class action to state its reasons and its finding on the facts).

325. See also UNIF. CLASS ACTIONS ACT § 2(c), 12 U.L.A. 23 (Supp. 1984).

326. See FED. R. CIV. P. 23(b)(3), (c)(2) advisory committee note.

327. See FED. R. CIV. P. 23(c)(2).

328. Comments of the Reporter, Minutes, Jan. 9, 1981, at 22.

329. Comments of the Chairman, *id.*

broad powers to fashion appropriate orders in the conduct of class actions. The section is the analog to Former Rule 209 c, but while the former rule specifically described only one type of order that the court could issue, i.e., an order requiring notice to protect the members of a class, the new rule describes a total of five. The court may make orders: "(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence;" (2) providing for notice to class members for their protection, advising them of the course of the proceedings or explaining how they might participate in the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters.

Section (g) contains provisions not found in either the federal or former Maryland rule, and is derived from the Uniform Class Actions Act.³³⁰ As originally drafted, this provision limited discovery solely to representative parties.³³¹ But the Committee unanimously amended the draft to give a court the discretion to permit, upon motion, discovery by or against other members of the class.³³² The amendment corresponds with federal practice, in which courts have denied discovery on absent class members without a demonstration of necessity.³³³

In section (h) the Committee adopted the full language of Federal Rule 23(e), despite their desire to avoid notice issues.³³⁴ As under Former Rule 209 d, the new rule prohibits dismissal or compromise of a

330. Comments of the Reporter, *id.* at 24.

331. See Minutes, Jan. 9, 1981, at 12, for an earlier draft of this provision. This earlier draft is identical to the first sentence of the UNIF. CLASS ACTIONS ACT § 10(a), 12 U.L.A. 28 (Supp. 1984), which reads: "Discovery under [applicable discovery rules] may be used only on order of the court against a member of the class who is not a representative party or who has not appeared." The Committee decided to reword this provision because they felt that it was unclear. Minutes, Jan. 9, 1981, at 24.

332. Minutes, Jan. 9, 1981, at 24.

333. See, e.g., *Clark v. Universal Builders*, 501 F.2d 324, 341 (7th Cir. 1974) (party seeking deposition of absent class member must show necessity and absence of motive to take advantage); *Enterprise Wall Paper Mfg. Co. v. Bodman*, 85 F.R.D. 325, 327 (S.D.N.Y. 1980) (discovery denied for absent class members); *In re Folding Carton Antitrust Litigation*, 83 F.R.D. 260, 264 (D. Ill. 1979) (named plaintiffs are always parties to discovery while absent class members are not subject to discovery except under special circumstances); *United States v. Trucking Employers Inc.*, 72 F.R.D. 101, 104-05 (D.D.C. 1976) (interrogation of absent class members are permitted, but the party must demonstrate a need for discovery and no purpose or effect of harassment); *Wainwright v. Kraftco Corp.*, 54 F.R.D. 532, 534 (N.D. Ga. 1972) (absent class members are not parties for discovery purposes under FED. R. CIV. P. 33 and 34).

334. See *supra* note 328.

class action without court approval. The new rule goes further, however, by following the federal rule's requirement of notice of the dismissal or compromise "to all members of the class in the manner the court directs."³³⁵

Section (i) incorporates Federal Rule 23(c)(3), and essentially requires the court to specify the scope of the judgment rendered in a class action proceeding. For (b)(1) and (b)(2) class actions, the judgment—whether favorable or not—"shall include and describe those whom the court finds to be members of the class." The requirement for a (b)(3) action is the same, except that the court must also specify those to whom the notice of subsection (e)(1) was directed and who have not requested exclusion, and whom the court finds to be class members.

Rule 2-241—Substitution of Parties

Rule 2-241 is based on Former Rules 220 and 222 as well as Federal Rule 25 (Substitution of Parties). The former Maryland rules governing substitution of parties were a combination of substantive law and procedural rules.³³⁶ The Committee noted that there have been many procedural problems with the rules as formerly written.³³⁷ The new rule is consistent with the former rules, but eliminates all references to substantive law and adds several provisions from the federal rule.³³⁸

Section (a) outlines the coverage of the rule. The section sets forth five situations, derived from Former Rules 220 and 222 and Federal Rule 25, in which substitution may occur. Substitution is permitted for a party who: "(1) dies, if the action survives,³³⁹ (2) becomes incompetent;³⁴⁰ (3) either voluntarily or involuntarily transfers an interest in the action;³⁴¹ or (4) if a corporation, dissolves, forfeits its charter, merges or consolidates;³⁴² or (5) if a public officer ceases to hold office."³⁴³

Section (b) incorporates the procedural requirements for substitution formerly located in Former Rule 220 c, d, and e. The section lists

335. See 3B MOORE'S FEDERAL PRACTICE, *supra* note 38, ¶ 23.80, at 23-513 ("The manner of giving notice is committed to the sound discretion of the court. The function of the notice is to describe the settlement.")

336. See Former Md. R.P. 220, 222 & 225.

337. See Minutes, May 11-12, 1979, at 15.

338. *Id.* at 15-16.

339. See Former Md. R.P. 220; FED. R. CIV. P. 25(a).

340. See FED. R. CIV. P. 25(b).

341. See FED. R. CIV. P. 25(c). The phrase "whether voluntarily or involuntarily" was added "to clarify that an appropriate trustee, receiver, or assignee may be substituted when a party's interest in the action is transferred by operation of law." McAuliffe letter (Aug. 3, 1983), *supra* note 286.

342. See Former Md. R.P. 222.

343. See FED. R. CIV. P. 25(d).

the persons who may institute a substitution proceeding and applies section (b) to substitution under any of the situations of section (a), unlike Former Rule 220 which applied only when there was the death of a party. Under the former rule, a successor in interest was afforded the first opportunity to file a motion to substitute.³⁴⁴ If he failed to do so, the opposing party could file,³⁴⁵ and only when both of those persons failed to file could another person affected or the court file.³⁴⁶ The new rule eliminates the filing preferences and allows any of them to file for substitution.³⁴⁷ The Committee noted that the former rule was intended to allow only the personal representative to be the substitute party where death required substitution, and that they intended that practice to continue under the new rule.³⁴⁸

The section also replaces the former requirement of a motion with a notice requirement. The rule provides for the contents and service of the notice. With respect to service, the Committee addressed two concerns. First, notice of the substitution must be served on all parties, thereby giving them an opportunity to object.³⁴⁹ Second, to satisfy due process, the new rule continues to subject the substituted party to service on original process, unless the substituted party has already submitted to the court's jurisdiction.³⁵⁰

Section (c) is new and provides that a motion to strike the substitution may be filed within fifteen days after service of the notice.³⁵¹ When substitution is not made, the court, pursuant to section (d), may dismiss the action, continue the trial or hearing, or take any other action as justice requires. The time factor was the biggest issue faced by the Committee when considering this rule.³⁵² Former Rule 220 f provided for dismissal if no substitution was made within one year from service of the order for substitution. Federal Rule 25 requires dismissal unless a motion for substitution is filed within ninety days after the death of the party is suggested on the record. Even the loose structuring of the time requirement under Federal Rule 25, however, has been criticized as

344. See Former Md. R.P. 220 c.

345. See *id.* d.

346. See *id.* e.

347. See Proposed Rule 2-241(b) reporter's note ("This section is derived from Rule 220 c, d and e relative to persons who may institute a substitution procedure, amended by deletion of the first-right-to-file preference currently afforded.")

348. See Comments of the Chairman and Judge Proctor, Minutes, May 11-12, 1979, at 16.

349. See Comments of the Chairman and Mr. Niemeyer, *id.* at 17.

350. See Comments of Judge McAuliffe, *id.*

351. See Minutes, June 23, 1979, at 26. This section was taken from the prior amendment procedure. *Id.*

352. Comments of Mr. Brault, *id.* at 23.

being "subject to an over technical interpretation."³⁵³ The Committee wisely decided to omit any time requirement and allowed dismissals to be within the total discretion of the court.

C. Chapter 300—PLEADINGS AND MOTIONS

Rule 2-301—Form of Action

Derived from Federal Rule 2,³⁵⁴ Rule 2-301 abolishes the distinctions between pleading a case at law or in equity.³⁵⁵ In place of technical forms of action, the new rule creates "one uniform method of pleading, with an emphasis on fact pleading,³⁵⁶ applicable in all civil actions."³⁵⁷ As in the Federal Rules, Rule 2-301 encourages "the resolution in one proceeding of as many claims as a party may have";³⁵⁸ thus, a litigant should "seek in one action all appropriate relief, both legal and equitable, to which he is entitled."³⁵⁹

In drafting Rule 2-301, the Committee was careful to note that the substantive and procedural differences between law and equity remain unchanged;³⁶⁰ the only changes are in pleading. For instance, the rule

353. See 3B MOORE'S FEDERAL PRACTICE, *supra* note 38, ¶ 25.06[3].

354. MD. R.P. 2-301 source note. FED. R. CIV. P. 2 provides: "There shall be one form of action to be known as a civil action." MD. R.P. 2-301 is virtually a verbatim incorporation of the federal rule. As in the federal rules, it should be noted that "[w]hat was intended was the removal of the distinctions in pleading" only. Minutes, Mar. 7-8, 1980, at 33.

355. Comments of Mr. Brault, Minutes, May 11-12, 1979, at 18; *cf.* Bradley v. United States, 214 F.2d 5, 7 (5th Cir. 1954).

The federal rules of civil procedure abolished all distinctions as to form between actions at law and suits in equity, but they did not abolish the difference in substance between legal and equitable remedies. There is no longer a law side and an equity side of the federal court, but said rules did not limit or extend the jurisdiction of the United States. They still have and exercise jurisdiction in actions at law and suits in equity. The substantial difference between law and equity, and between legal and equitable remedies, still exists.

Id. See generally C. WRIGHT, THE LAW OF FEDERAL COURTS § 68 (4th ed. 1983) (describing the successful experience of the creation of the single form of action in the federal courts).

356. The Committee noted that MD. R.P. 2-301 is derived from FED. R. CIV. P. 2. See MD. R.P. 2-301 source note. But in the sense that the rule places an "emphasis on fact pleading," it also resembles pleading under the code system. See *infra* note 368.

357. McAuliffe letter (Aug. 1, 1983), *supra* note 286 (providing comments and explanations to the proposed revision). It is important to note that, in creating a single form of action, MD. R.P. 2-301 abolishes all special pleadings. For instance, there will no longer be an *assumpsit* action, as provided for in Former Md. R.P. 340, for a cause of action arising *ex contractu*.

358. Herndon & Higginbotham, *Pleading and Motion Practice in Federal Court*, in 1 ALI-ABA COURSE OF STUDY: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS 223 (1983).

359. *Id.*

360. Minutes, Mar. 7-8, 1980, at 33. The Committee rejected the Style Subcommittee's proposal which read: "[a]ll procedural distinctions between Law and Equity are abolished" because it would be unclear which distinctions were merely "procedural." *Id.* at 32-33. See

neither expands nor contracts the right to a jury trial for the resolution of legal claims,³⁶¹ and equitable relief remains available when there is no adequate remedy at law. As such, the new "civil action" eliminates forms of action, reduces the importance of the term "cause of action," and allows a party to seek both legal and equitable relief. Presumably, the federal practice of trying a legal claim before a jury prior to a judge's disposition of an equitable claim³⁶² (unless, of course, the right to a jury trial has been waived) will be followed in Maryland courts.

Rule 2-302—Pleadings Allowed

As in Federal Rule 7(a), Rule 2-302 places all allowable pleadings in a single rule. Basic pleading is limited to a complaint and an answer. If applicable, a counterclaim,³⁶³ cross-claim, or third-party claim is permitted; answers to such claims are mandatory. In addition, a reply to an answer may be made, but only upon court order.

The rule eliminates all other pleadings left over from the old, common law pleading practices.³⁶⁴ For instance, a party will no longer be allowed to file a dilatory plea.³⁶⁵ Moreover, the rule follows Federal Rule 7(c) in abolishing demurrers, pleas, and replications. Thus, these changes establish but a single manner in which to pursue or respond to a civil action.³⁶⁶

generally Brown, *The Law/Equity Dichotomy in Maryland*, 39 MD. L. REV. 427 (1980) (describing the existing bounds of law and equity jurisdiction, examining principles peculiar to this dual system, and indicating several trends that undermine the constitutional right to a jury trial).

361. Minutes, Mar. 7-8, 1980, at 33. *But see* Brown, *supra* note 360, at 454. The Brown article posed a serious question that, absent the Committee's careful use of the word "pleading," the rule could have been the source of considerable dispute: "Even after the adoption of a single form of action, a perplexing question remains: When does the right to a jury trial—constitutionally protected for all actions traditionally brought at law—exist?" *Id.*

The Committee, realizing that there were several areas of possible controversy, "agreed that the intent was not to disturb . . . the distinction between law and equity" except with respect to pleadings. Minutes, Mar. 7-8, 1980, at 33.

362. *See* *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). In *Beacon Theatres*, the Court held that while "the same court may try both legal and equitable causes in the same action . . . only under the most imperative circumstances . . . can the right to a jury trial be lost through prior determination of equitable claims." 359 U.S. at 508-11. As MD. R.P. 2-301 is derived from FED. R. CIV. P. 2, the holding in *Beacon Theatres* should be very persuasive authority.

363. Unlike FED. R. CIV. P. 13(a), which makes a counterclaim compulsory "if it arises out of the same transaction or occurrence," MD. R.P. 2-302 provides only for permissive counterclaims.

364. Comments of Mr. Brault, Minutes, May 11-12, 1979, at 19. For a discussion of the outmoded pleadings allowed under the former rules, see C. BROWN, *supra* note 4, §§ 3.90-3.93.

365. *See* Former Md. R.P. 341; *see also* C. BROWN, *supra* note 4, § 3.91, at 115 ("it makes no sense to file a dilatory plea today").

366. The Committee felt that the rule should help to "simplify practice and . . . curb

Rule 2-303—Form of Pleadings

Section (a) of Rule 2-303 requires that averments of claim or defense be separately set forth in numbered paragraphs.³⁶⁷ Each paragraph should be limited to a statement describing a single set of circumstances. Each cause of action and each separate defense should be separately set forth and numbered. Under Rule 2-303(b), pleadings are to be factual yet concise,³⁶⁸ and may not contain argument. A pleading should, however, set forth as many facts as are necessary to state entitlement to relief or grounds for defense.³⁶⁹

Rule 2-303(c) allows alternative or hypothetical statements of a single claim or defense to be set forth in the same count or defense.³⁷⁰ As under the former rules, a pleading is not made insufficient when at least one of the alternative statements sufficiently sets forth a claim or defense. Consistent with Rule 2-301's elimination of law/equity pleading distinctions, Rule 2-303(c) allows a party to set forth as many legal and equitable claims or defenses as the party may have. This practice will apply even if the alternative claims or defenses are inconsistent with one another.

Rule 2-304—Pleading Special Matters

As in Federal Rule 9(a), Rule 2-304(a) makes it unnecessary to aver

abuses of procedure intended to delay and frustrate prosecution of actions." Proposed Rule 2-302 reporter's note.

367.

This section differs somewhat from both the existing Maryland Rules and FRCP 10(b) from which it is drawn. Maryland Rule 340 c pertains only to separate numbered counts; this section contains the additional requirement that defenses, like causes of action, be separately set forth and numbered. The requirements that the averments which collectively constitute a cause of action or defense be set forth in separate numbered paragraphs is adapted from Rules 370 a 1 and 372 a 1.

Proposed Rule 2-303(a) reporter's note.

368. See *supra* note 356 and accompanying text (noting the "emphasis of fact pleading"). There was some debate as to the merits of Rule 2-303's fact pleading requirement: One member of the Committee stated "that the rule should require a pleader to do his thinking in advance" and that "he should be required to pigeon-hole his causes of action and plead the facts." Comment of Judge McAuliffe, Minutes, May 11-12, 1979, at 21. Another member responded "that to do this would return the old English practice of no writ, no relief." Comment of Mr. Niemeyer, *id.* Another member "stated that it was only fair to the defendant and the court to require the plaintiff to inform them as to what the case was about." Comment of Judge Proctor, *id.* The present language requirement was then passed by a considerable margin. Minutes, May 11-12, 1979, at 22.

369. MD. R.P. 2-303(b) is derived from Former Md. R.P. 301 b. Proposed Rule 2-303(b) reporter's note.

370. Section (c) changes former practice by allowing a party to plead alternative claims. Under Former Md. R.P. 301 d, only answers could be stated in the alternative.

a party's capacity or authority to sue or be sued.³⁷¹ Moreover, Rule 2-304(b) follows Federal Rule 9(c) by allowing a party to "aver generally that all conditions precedent have been performed or have occurred." Unlike the federal rules, however, Rule 2-304(b) does not require that "[a] denial of performance or occurrence [of a condition precedent] shall be made specifically and with particularity."³⁷²

Rule 2-304(c) parallels Former Rule 301 c's exception to the clear statement requirement.³⁷³ The Committee rejected the argument that time, because of statutes of limitations, was always material³⁷⁴ and defeated a proposal that time always be averred.³⁷⁵

As originally drafted, Rule 2-304 contained a provision which would have required that certain complex torts be pleaded with particularity instead of by general averment. Members of the Committee criticized this provision, stating that there were many complex torts, other than those listed in the draft provision, which should be set forth with particularity.³⁷⁶ Under Maryland case law,³⁷⁷ the degree of particularity required of a pleading increases as torts climb "up a scale from a simple tort, to a complex tort, to fraud."³⁷⁸ As a result, the Committee decided to leave the case law alone, it being felt that there was "little gain in attempting to codify any of this [common law] rule."³⁷⁹

371. FED. R. CIV. P. 9(a) also contains a provision allowing for a "specific negative averment" when a party desires to raise the issue of a party's legal existence or authority or capacity to sue or be sued. An earlier draft of Proposed Rule 2-304 included the same provision. This provision was deleted, however, and a similar provision, derived from Former Md. R.P. 311 a, 342 c 1 and 2, and FED. R. CIV. P. 9(a) was placed in MD. R.P. 2-323(f), which allows for a negative defense. For a further discussion of MD. R.P. 2-323, see *infra* text accompanying notes 451-90. See generally 2 J. POE, *supra* note 136, §§ 603-667A (pleas in bar).

372. Compare FED. R. CIV. P. 9(c) with Former Md. R.P. 342 c, d and MD. R.P. 2-323.

373. Former Md. R.P. 301 c provides "it shall not be necessary to state time or place in a pleading except where time or place forms a part of the cause of action or ground of defense."

374. Cf. FED. R. CIV. P. 9(f) (stating that "[f]or purposes of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter").

375. Minutes, May 11-12, 1979, at 25-26. See MD. R.P. 2-323(g)(16) (listing statute of limitations as an affirmative defense to be included within an answer).

376. Such torts as malpractice, products liability, and professional liability were not included under the provision. "Moreover, section (6) [of the draft provision] only required malice to be averred generally." Minutes, May 11-12, 1979, at 23.

377. *E.g.*, Myers v. Montgomery Ward & Co., 253 Md. 282, 252 A.2d 855 (1969). For a discussion of special pleadings, see C. BROWN, *supra* note 4, § 3.53, at 100-02.

378. Comments of Mr. Brault, Minutes, May 11-12, 1979, at 24. See Myers, 253 Md. at 292, 252 A.2d at 861; see also Kaiser, *Pleading Negligence in Maryland—Res Ipsa Loquitur As a Rule of Pleading*, 11 MD. L. REV. 102, 104 (1950) ("general averment of negligence following a simple statement of the defendant's act or omission will be regarded as an ultimate fact; while in more complex situations where the breach of duty is not readily apparent, such an averment will be regarded as a mere legal conclusion").

379. Minutes, May 11-12, 1979, at 24.

The Committee also deleted a provision following Federal Rule 9(g). That provision required plaintiffs to plead special damages.³⁸⁰ By eliminating the provision, however, the Committee did not mean that special damages should not be pleaded with specificity. The Committee simply chose not to codify this area of common law pleading.³⁸¹

Rule 2-305—Claims for Relief

Rule 2-305 requires that any claim "contain a clear statement of facts." The clear statement requirement is derived from Former Rule 301 c.³⁸² The requirement of setting forth a demand for relief is derived from Former Rules 340 a and 370 a 3.³⁸³ Consistent with Rule 2-303(c),³⁸⁴ which allows alternative and hypothetical claims and defenses, Rule 2-305 contains a provision clarifying that a demand for alternative relief is allowable. This last provision is derived from Federal Rule 8(a)(3),³⁸⁵ but unlike the federal rule, which provides the general rules of pleading for both claims and defenses, Rule 2-305 pertains only to claims. The pleading requirements for answers are set forth in Rule 2-323.

Rule 2-311—Motions

Rule 2-311 applies to all motions unless otherwise provided. The rule has two purposes: The first purpose is to consolidate, into a single filing, the motion (or response), the supporting grounds and authorities, and the request for a hearing.³⁸⁶ The second purpose is to allow the

380. *Id.* at 26.

381. The Chairman noted that "if the law required these damages to be plead specifically, we did not require the rule to so state." *Id.* While the Minutes did not explain exactly what the Chairman meant by this comment, 8 M.L.E. *Damages* § 151 (1960), provides an excellent explanation of the current Maryland case law:

It is well settled that where by reason of a certain wrong or from the breach of a contract, the law would impute certain damages as the natural, necessary, and logical consequence of the acts of the defendant, such damages need not be specifically set forth in a declaration, but are, on a proper averment of such breach or wrong, recoverable under a claim of damages generally; whereas, on the other hand, special damages are such as actually result from the wrong done, but which do not necessarily result therefrom, and for that reason are not implied by law, and to be recovered must be specially alleged with particularity to avoid surprise to defendant.

382. Former Md. R.P. 301 c provided: "Any pleading which contains a clear statement of the facts necessary to constitute a cause of action or ground of defense shall be sufficient"

383. Former Md. R.P. 340 a 3 pertained to declarations at law, while Former Md. R.P. 370 a pertained to a bill of complaint in an equity action.

384. *See supra* note 370 and accompanying text.

385. FED. R. CIV. P. 8(a)(3) provides in part: "Relief in the alternative or of several different types may be awarded."

386. Comments of Mr. Brault, Minutes, Nov. 16, 1979, at 16. It should be noted that

court to "dispose of motions without hearings whenever a hearing is not deemed necessary and the ruling the court determines to be appropriate is not dispositive of a claim or defense."³⁸⁷

Section (a) requires that an application for an order, unless made at a hearing or in a trial, be made by written motion setting forth the desired relief. This section does not change Maryland practice, for it is essentially the same provision found in Former Rule 321 a; as re-drafted, however, the language corresponds to that found in Federal Rule 7(b)(1).³⁸⁸

Under section (b), a response must be filed to all but the following motions: Motion to Shorten or Extend Time (Rule 1-204),³⁸⁹ Motion for Judgment Notwithstanding the Verdict (Rule 2-532),³⁹⁰ Motion for New Trial (Rule 2-533),³⁹¹ and Motion to Alter or Amend a Judgment—Court Trial (Rule 2-534).³⁹² The response must be filed no later than fifteen days after service of the motion or thirty days after service of the original complaint.³⁹³ Thus, if a party files an original complaint and a motion for summary judgment³⁹⁴ at the same time, the party against whom the motion is directed has thirty days in which to file a response to the motion. If, however, a party files a motion more than fifteen days after filing the original complaint or after the opposing counsel has filed an answer, the party against whom the motion is directed has but fifteen days to file a response to the motion. Although the rule provides no express sanctions for failure to file a response, "the non-responding party risks losing the possibility of a hearing on the

while consolidation is a primary objective, a party is free to supplement a motion with a memorandum incorporated by reference. Comments of Judge McAuliffe and Chairman Ross, *id.*

387. McAuliffe letter (Aug. 1, 1983), *supra* note 286 (clarifying the Committee's intent behind Proposed Rule 2-311).

388. FED. R. CIV. P. 7(b)(1) provides in pertinent part: "An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." Note that while MD. R.P. 2-311(a) does not mention that grounds for relief shall be stated with authority, MD. R.P. 2-311(c) *does* make this requirement. See *infra* note 396.

389. See *supra* notes 44-61 and accompanying text.

390. See *infra* notes 902-12 and accompanying text.

391. See *infra* notes 913-15 and accompanying text.

392. See *infra* notes 916-31 and accompanying text.

393. See MD. R.P. 2-321(a), *discussed at infra* note 403 and accompanying text.

394. See MD. R.P. 2-501, *discussed at infra* notes 704-17 and accompanying text. *But see* MD. R.P. 2-321, *discussed at infra* notes 401-15 and accompanying text (automatically extending the time for filing an answer to 15 days after the court's order on a motion filed pursuant to MD. R.P. 2-322).

motion.”³⁹⁵

Section (c) alters Former Rule 319 in two respects: First, it substitutes the word “grounds” for the word “points” in an attempt “to curb the practice of simply listing cases.”³⁹⁶ In furthering this attempt, section (c) follows Federal Rule 7(b)(1) in requiring that grounds in support of a motion be stated “with particularity.”³⁹⁷ Second, the phrase “shall contain or be accompanied by a statement of points” has been omitted. This omission furthers the requirement that grounds and authorities be integrated into the motion and response.³⁹⁸ The obvious purpose of these changes is to reduce the number of motions, it being the Committee’s “consensus that most motions are frivolous or dilatory in nature.”³⁹⁹

Section (d) requires motions or responses, when based upon facts not found in the record or on file in the proceeding, to be supported by an affidavit. This rule is essentially the same as the exception found in Former Rule 321 b and does not alter Maryland practice.

Whether the court will hold a hearing on a motion is governed by sections (e) and (f). Section (e) grants the judge discretion as to whether a hearing will be held on motions for judgment notwithstanding the verdict, new trial, or to amend the judgment. The court may not, however, *grant* such a motion without a hearing.⁴⁰⁰ Section (f) is derived from Former Rule 321 d, but differs from that rule in two respects: First, a request for a hearing must be contained within the motion or response. Second, a hearing is mandatory only when a hearing is requested and the ruling upon the motion would be dispositive of a claim or defense, or when a rule expressly provides for a hearing.

395. Comments of Chairman Ross, Minutes, Nov. 16, 1979, at 17; Proposed Rule 2-311 reporter’s note.

396. Proposed Rule 2-311 reporter’s note; *see* Minutes, Oct. 12-13, 1979, at 11-12.

397. For a discussion of FED. R. CIV. P. 7(b)(1), *see supra* note 388. While there are no sanctions provided for a party who merely lists points of authority, “Judge McAuliffe stated that making a hearing discretionary with the judge will certainly upgrade the statement of grounds and authorities.” Comments of Judge McAuliffe, Minutes, Oct. 12-13, 1979, at 13.

398. Proposed Rule 2-311 reporter’s note; Minutes, Oct. 12-13, 1979, at 11-12.

399. Minutes, Oct. 12-13, 1979, at 13.

400. *See* McAuliffe letter (Aug. 1, 1983), *supra* note 286; text accompanying note 286. *Cf.* MD. R.P. 2-311(f) (the court “may not render a decision on the motion that is dispositive of a claim or defense without a hearing if one was requested as provided in this section.”)

The provisions of Rule 2-311 are designed to foster careful preparation of the motions and responses that are filed for the court’s consideration and to eliminate all unnecessary hearings. The subcommittee believes these purposes will not be served if a requested hearing *must* be granted whenever a motion seeks a ruling that would be dispositive of a claim or defense; the majority of motions seek such a ruling.

McAuliffe letter (Aug. 1, 1983), *supra* note 286.

Rule 2-321—Time for Filing Answer

Consistent with the mandatory filing requirement of Rule 2-302,⁴⁰¹ Rule 2-321 sets forth the time periods within which defendants must file their answers to pleadings. Although section (b) is derived from the former rules and section (c) is derived from both the former Maryland rules and the federal rules, section (a) “is completely new and is required because of the policy decision . . . to eliminate return days.”⁴⁰²

Section (a) embodies the “general rule” that the defendant must file an answer within thirty days of being served.⁴⁰³ But to this “general rule” section (b) provides an exhaustive list of exceptions, and section (c) provides for the automatic extension of time for filing an answer. Section (b) follows the former Maryland rules in many respects and allows certain defendants to file within sixty or ninety days of being served. Defendants served outside of Maryland but within the United States have sixty days to file an answer;⁴⁰⁴ however, defendants served outside of the United States have ninety days.⁴⁰⁵ A defendant served by publication or posting⁴⁰⁶ must file an answer within the time prescribed in the notice.⁴⁰⁷ A corporation served with an original pleading by service upon a state agency authorized to receive process has sixty days in which to file an answer.⁴⁰⁸ If the United States or an officer or agency of

401. MD. R.P. 2-302 provides: “There shall be a complaint and an answer. . . . There shall be an answer to any counterclaim, cross-claim or third-party complaint.”

402. Minutes, Oct. 12-13, 1979, at 16; *see* Proposed Rule 2-321 reporter’s note; Proposed Rule 2-126 reporter’s note. Under Former Rule 102, the “return day” is the first Monday of each month. Former Rule 307 a 1 requires a defendant to file an answer to the pleadings within 15 days of the return day to which the defendant is summoned. *See* C. BROWN, *supra* note 4, § 3.56, at 105. It was the Committee’s view that the “return day” was an outmoded concept. Minutes, Nov. 17, 1978, at 8.

403. MD. R.P. 2-321(a); *cf.* FED. R. CIV. P. 12(a) (“defendant shall serve his answer within 20 days after the service of the summons and complaint”).

404. MD. R.P. 2-321(b)(1); *cf.* Former Md. R.P. 307 c 4, 107 b.

405. MD. R.P. 2-321(b)(5); *cf.* Former Md. R.P. 307 c 4, 107 b.

406. *See* MD. R.P. 2-122.

407. MD. R.P. 2-321(b)(2), *cf.* Former Md. R.P. 307 a 2.

408. MD. R.P. 2-321(b)(3), *cf.* Former Md. R.P. 307 c (6), 106 e 3, 106 f 1-7. As under the former rules, a corporation may be served with an original pleading by service upon the State Department of Assessments and Taxation, and an insurer may be served by service upon the Insurance Commissioner. Rule 2-124(h) states that the rules do not abrogate statutes authorizing a different manner of service; however, the rule provides no indication as to which statutes so apply. Former Md. R.P. 106, however, listed several statutes that authorize certain agencies to receive process on behalf of certain defendants: MD. ANN. CODE art. 48A, § 57 (1957), authorizes the Insurance Commissioner to receive process issued against an insurer; MD. CORPS. & ASS’NS CODE ANN. § 11-802(a)(1) (1975), authorizes the Securities Commissioner of the Division of Securities to receive process issued against defendants in actions under the Maryland Securities Act; MD. ANN. CODE art. 48A, § 347 (1957), authorizes the Insurance Commissioner to receive process issued against a fraternal benefit society; MD. ANN. CODE art. 48A, §§ 202-211 (1957 & Supp. 1983), authorizes the Insurance Com-

the United States is served, it has sixty days in which to file an answer.⁴⁰⁹ If any other rule or statute prescribes a different time period, the answer shall be filed as provided therein.⁴¹⁰

Section (c) is derived from Former Rule 309 a and Federal Rule 12(a).⁴¹¹ It automatically extends the time for filing an answer to fifteen days after entry of the court's order on a motion to dismiss,⁴¹² motion for more definite statement,⁴¹³ or a motion to strike.⁴¹⁴ If the court grants a motion for a more definite statement, the time for filing an answer is extended to fifteen days after the service of the more definite statement. Thus, a party may extend the time for filing an answer by *at least* fifteen days by filing a motion pursuant to Rule 2-322. Of course, any party may, under Rule 1-204, file a motion to shorten or extend the time for filing an answer for cause shown.⁴¹⁵

Rule 2-322—Preliminary Motions

Fashioned after Federal Rule 12, Rule 2-322 replaces Former Rules 301 j, 317, 323, 342, 345, 346, and 371.⁴¹⁶ By creating a variety of motions with which to attack pleadings, the rule modifies Maryland practice in several respects.

missioner to receive process issued against an unauthorized foreign or alien insurer; and MD. ANN. CODE art. 56, § 219 (1957), authorizes the Secretary of the Maryland Real Estate Commission to receive process issued against non-resident real estate brokers and salesmen.

409. MD. R.P. 2-321(b)(4); *cf.* Former Md. R.P. 108 d (60 days); FED. R. CIV. P. 12(a) (60 days). Despite the rule's similarity to both the former Maryland and federal rules, some committee members felt that the United States should be required to answer within 30 days. *See* Minutes, Oct. 12-13, 1979, at 17; *id.*, Nov. 16, 1979, at 22.

410. MD. R.P. 2-321(b)(6). This section is new and is consistent with MD. R.P. 2-124(h). The section was left vague in order to avoid the necessity of amending the rule when additional statutes are enacted. Comments of Mr. Brault, Oct. 12, 1979, at 18. *Cf.* FED. R. CIV. P. 4(e) (allowing service in the manner prescribed by statute or court order upon parties not inhabitants or not found within the forum state). "Judge McAuliffe opined that the exception for special proceedings or statutes would include such instances as the mechanics lien rules, and a U.S. statute under the supremacy clause of the constitution." Minutes, Nov. 16, 1979, at 22. *See, e.g.*, MD. R.P. BG73 a (if court determines that there is reasonable ground for a mechanics lien to attach, it shall pass a show cause order directing the defendant to file a counter-affidavit or verified answer within the time provided in the order).

411. *See* Former Md. R.P. 309 a (time for filing answer enlarged "to fifteen days after compliance with the demand or disposition by the Court of such motion, demurrer or exception"); FED. R. CIV. P. 12(a) ("if the court denies the motion or postpones its disposition until the trial . . . the responsive pleading shall be served within 10 days after notice of the court's action; . . . if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement").

412. *See* MD. R.P. 2-329(a), (b).

413. *See id.* (d).

414. *See id.* (e).

415. *See* MD. R.P. 1-204, *discussed at supra* notes 44-61.

416. *See* Minutes, Jan. 4, 1980, at 15.

Section (a) of Rule 2-322 is derived from Former Rule 323⁴¹⁷ and requires that the following defenses be raised in a preliminary motion to dismiss: lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process. As in the former rule, failure to raise such a motion results in waiving the defense.⁴¹⁸ Unlike the former rule, however, the defenses of plaintiff's lack of legal capacity, and charitable immunity may not be raised in a preliminary motion; instead, these defenses are only to be raised in the answer.⁴¹⁹

Section (b) of Rule 2-322 is also derived, in part, from Former Rule 323.⁴²⁰ Unlike the defenses listed in section (a), section (b) allows the defenses of lack of jurisdiction over the subject matter, failure to join a necessary party, and governmental immunity to be raised either in a preliminary motion to dismiss, in the answer itself, or "in any other appropriate manner after [the] answer is filed."⁴²¹

Another section (b) defense, failure to state a claim upon which relief can be granted, changes Maryland practice by replacing the demurrer of Former Rules 345 and 371.⁴²² Modeled after Federal Rule 12(b)(6),⁴²³ this motion reinforces Rule 2-305's requirement that a "pleading that sets forth a claim for relief . . . shall contain a clear statement of the facts necessary to constitute a cause of action and a demand for judgment for relief sought."⁴²⁴ As with the other section (b) defenses, the defense of failure to state a claim may be raised by preliminary motion, answer, or in any other appropriate manner. As in the federal rule, a motion to dismiss for failure to state a claim that presents matters extraneous to the pleadings will be treated as a motion for summary judgment under Rule 2-502.⁴²⁵

Section (c) of Rule 2-322 provides that motions raised under sections (a) and (b) are to be determined prior to trial except that the court

417. See Proposed Rule 2-322(a) reporter's note; Former Md. R.P. 323 a 1-4.

418. See Former Md. R.P. 323 b.

419. The issue of legal capacity is to be raised as a negative defense under MD. R.P. 2-323(f)(2), and charitable immunity is an affirmative defense to be raised under MD. R.P. 2-323(g)(21). One other defense provided in Former Md. R.P. 323 a, pendency of another action between the same parties for the same cause, was apparently dropped without comment.

420. See Former Md. R.P. 323 a 8-10.

421. MD. R.P. 2-322(b).

422. See Proposed Rule 2-322(b)(2) reporter's note.

423. See *id.* MD. R.P. 2-322(b)(2) adds a new element to Maryland practice: "the speaking demurrer." "The speaking demurrer," derived from the federal rule, allows the introduction of new facts, supported by affidavit, that do not appear on the face of the pleadings but nonetheless challenge a plaintiff's right to recover. See Minutes, Jan. 4, 1980, at 16-17. Such motions are treated as motions for summary judgment. *Id.*

424. MD. R.P. 2-305.

425. See Minutes, Jan. 4, 1980, at 16-17.

may defer the determination of a motion to dismiss for failure to state a claim until the trial. This section parallels Federal Rule 12(d) except that the federal rule provides for a preliminary hearing while the new Maryland rule does not. Because the granting of a motion under section (a) or (b) would be dispositive of a claim, if a hearing is requested, it must be granted.⁴²⁶

Derived from Federal Rule 12(e), section (d) of Rule 2-322 replaces Former Rule 346's demand for a bill of particulars with a motion for more definite statement. Because the proposed rule replaces the demand with a motion, court action will now be required;⁴²⁷ however, as it is unlikely that a ruling on such a motion will be dispositive of a claim, a hearing on the motion will not likely be granted.⁴²⁸ If the court grants such a motion, the pleadings must be corrected within fifteen days unless the court fixes a greater time. Failure to do so may result in the pleading being stricken.

The motion for more definite statement should only be used if a pleading "is so vague or ambiguous that a party cannot reasonably frame an answer."⁴²⁹ It is not intended that the motion be used as a substitute for discovery,⁴³⁰ and the motion should be considered in conjunction with the fact that Rule 2-303(b) simply requires a pleading to "contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or ground of defense."⁴³¹ However, if the motion points out specifically that the pleading "(1) fails to identify the statute or ordinance allegedly violated . . . , (2) consists of mere conclusions of law . . . , or (3) fails to specify exactly which parties are being referred to in various parts of a pleading where several plaintiffs or defendants are parties,"⁴³² such a motion should be deemed proper.

Rule 2-322(e) is modeled after Federal Rule 12(f) and is derived in

426. See *supra* note 400 and accompanying text.

427. "It was observed that the [Former] Maryland rule avoids any court action, and that was better than the [new] rule." Minutes, Jan. 4, 1980, at 17. It was noted, however, that in federal practice the motion for a more definite statement is rarely used. *Id.*

428. See *supra* note 400 and accompanying text. Motions are to be disposed of "without hearings whenever a hearing is not deemed necessary and the ruling the court determines to be appropriate is not dispositive of a claim or defense."

429. Herndon & Higginbotham, *supra* note 358, at 317 (discussing FED. R. CIV. P. 12(e)).

430. See *id.* ("A Rule 12(e) motion is simply not a substitute for pre-trial discovery."); Graham, *Highlights of Rules of Federal Procedure*, in PRACTICE IN THE FEDERAL COURTS: CIVIL 106 (Md. Inst. for Continuing Professional Educ. of Lawyers, Inc. 1980): "The purpose of the motion is not to aid parties in preparation for trial, but in the preparation of the responsive pleading, so it is said that the motion should only be granted when a pleading is so vague and indefinite that a response cannot be made." *Accord* Minutes, Jan. 4, 1980, at 18 (noting "that the rule was easily confused by practitioners with a discovery request").

431. MD. R.P. 2-303(b).

432. Herndon & Higginbotham, *supra* note 358, at 317; see also Graham, *supra* note 430, at

part from Former Rules 301 j and 322.⁴³³ The new rule provides that, upon motion to strike⁴³⁴ or upon the court's own initiative at any time, "any insufficient defense or any improper, immaterial, impertinent, or scandalous material [may be] stricken from any pleading . . . [and] any pleading that is late or otherwise not in compliance with these rules [may be] stricken in its entirety."⁴³⁵ In effect, this new rule creates a motion to strike that may be applied to three distinct situations: (1) it may strike insufficient defenses from the pleadings; (2) it may strike unnecessary or improper material from the pleadings; and (3) it may strike an entire pleading because it is either filed late or is not in compliance with the rules. In this respect, Rule 2-322(e) may be seen as embodying three analytically distinct motions to strike, each of which merits some discussion.

The first motion to strike, new to Maryland practice, permits an attack on defenses insufficient in substance. This motion is the plaintiff's equivalent of the Rule 2-322(b)(2) motion to dismiss for failure to state a claim upon which relief can be granted⁴³⁶ and, thus, replaces the plaintiff's demurrer to an insufficient plea or answer.⁴³⁷ Although there was some conflict under the former rules as to whether a motion *ne recipiatur* or to strike should perform the office of a demurrer,⁴³⁸ the

106 ("[I]t may be that a motion for a more definite statement is often more appropriate than a motion for dismissal for failure to state a claim.").

433. Proposed Rule 2-322(e) reporter's note.

434. A motion to strike must be made prior to responding to the pleading or, if no responsive pleading is required, within 15 days after service of the pleading. MD. R.P. 2-322(e). For example, if defendant seeks to strike improper material from plaintiff's complaint, the motion to strike must be filed prior to answering. Under MD. R.P. 2-321(c), the time for answering will automatically be extended to 15 days after the court's order on the motion to strike. If, however, a plaintiff seeks to strike improper material from the defendant's answer, the motion to strike must be filed within 15 days after service of the answer because plaintiffs may not otherwise respond to the answer. See MD. R.P. 2-302 ("replications are abolished").

435. MD. R.P. 2-322(e).

436. Such is the view of those commenting on the similarity of FED. R. CIV. P. 12(f) to FED. R. CIV. P. 12(b)(6). See 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1381, at 791 (1969) ("a motion to dismiss the answer on the grounds that it states an insufficient defense no longer is the proper procedure for eliminating a particular defense, although there seems to be no harm in treating an application under Rule 12(b)(6) as a motion to strike"); Note, *The Motion to Strike an Insufficient Defense—Rule 12(f) of the Federal Rules of Civil Procedure*, 11 RUT.-CAM. L.J. 441, 442 *passim* (1980) (noting that the motion to strike an insufficient defense is analytically and functionally similar to the FED. R. CIV. P. 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted).

437. See Former Md. R.P. 345, 373. Under the former rules, "any question as to the sufficiency of substance of any pleading [could] be raised by demurrer . . . and thus the proper method of determining the sufficiency of a plea [was] by demurrer. In equity the method of determining the sufficiency of an answer [was] by demurrer." 18 M.L.E. *Pleading* § 84, at 120 (1961); see 2 J. POE, *supra* note 136, §§ 596-598, 669.

438. See 2 J. POE, *supra* note 136, § 668, at 385 ("Query: Since under [Former] Rule 322 the

new rules put an end to this quarrel by specifically abolishing the demurrer⁴³⁹ and expanding the motion to strike to question the legal sufficiency of a defense.

The second motion is not new to Maryland practice and is essentially the same as the motion to strike unnecessary and improper material as set forth in Former Rule 301.⁴⁴⁰ Under the new rules, this motion serves to reinforce the requirement that pleadings be kept "simple, concise, and direct"⁴⁴¹ and "not include . . . any immaterial, impertinent, or scandalous matter."⁴⁴²

The third motion is the same as the motion *ne recipiatur* or to strike of Former Rule 322.⁴⁴³ This motion should be used to strike a pleading, in its entirety, when it is filed late or otherwise fails to conform to the rules. Thus, if defendant files an answer after the time prescribed in Rule 2-321 has lapsed, plaintiff should file a motion to strike the answer "on the ground that, being without proper sanction or not in due time, it is . . . no [answer] at all, and is, therefore, no obstacle in the way of a judgment."⁴⁴⁴ In addition, a complaint that fails to set forth each cause of action in a separately numbered paragraph could conceivably be stricken for failure to conform to the requirements of Rule 2-303(a).⁴⁴⁵

It is yet to be seen whether Maryland courts will favor motions to

motion [*ne recipiatur* or to strike] may be filed because a pleading is too late, improperly verified 'or for any other reason,' may such a motion be filed to raise the legal sufficiency of a pleading as 'any other reason?'). *But see* McCormick v. St. Francis DeSales Church, 219 Md. 422, 428, 149 A.2d 768, 772 (1959) ("The fact that the Rule states that the motions *ne recipiatur* and to strike may be used, individually, in the alternative, or in combination 'for any purpose,' if intended to extend their former scope at all, would not seem to reach so far as to permit them to serve the office of a demurrer . . ."); *see also* 18 M.L.E. Pleading § 122, at 194 (1961) ("A motion *ne recipiatur* or motion to strike cannot perform the office of a demurrer . . .").

439. *See* MD. R.P. 2-302 ("Demurrers . . . are abolished.").

440. Former Md. R.P. 301 j provided:

Unnecessary, impertinent, scandalous, irrelevant or other improper matter in any pleading may, by order of court, upon motion, or upon its own initiative, be stricken out at the cost of the party introducing the same, or the court, in its discretion, may require the filing of an amended pleading from which such unnecessary or improper matter shall be omitted.

441. MD. R.P. 2-303(b).

442. *Id.*

443. Former Md. R.P. 322 provided that

A motion that any pleading be not received either because it is filed too late or is not properly verified, or for any other reason, as well as any motion to strike out any preceding motion for any reason, may be made either by a motion *ne recipiatur* or by a motion to strike, or both.

444. 2 J. POE, *supra* note 136, § 668, at 385.

445. For a discussion of the requirement of MD. R.P. 2-303, see *supra* text accompanying notes 367-70.

strike or will grant them, even when technically appropriate and well-founded, only upon a showing of prejudice to the moving party.⁴⁴⁶ It should be noted, however, that in the federal courts “because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic, motions under Federal Rule 12(f) are viewed with disfavor and are infrequently granted.”⁴⁴⁷

Rule 2-322(f) is derived from Federal Rule 12(g) and encourages parties to join all available Rule 2-322 defenses in a single motion. If a party raises a motion pursuant to this rule and fails to join any of these defenses that are then available, the defense may be waived unless preserved by Rule 2-324(a).⁴⁴⁸ This rule is consistent with Rule 2-303(c) which allows a party to “state as many separate claims or defenses as the party has, regardless of consistency and whether based on legal or equitable grounds.”⁴⁴⁹ As with Federal Rule 12(g), “the objective of the rule is to eliminate unnecessary delay at the pleading stage . . . [by] presentation of an omnibus pre-answer motion in which defendant advances every available [Rule 2-322] defense and objection he may have that is assertable by motion.”⁴⁵⁰

Rule 2-323—Answer

Once a defendant has been served with a summons and complaint, he may either file one of the preliminary motions provided in Rule 2-322⁴⁵¹ or may file a responsive pleading on the merits. In accordance with the policy to abolish distinctive pleadings for law and equity,⁴⁵² Rule 2-323 creates a single responsive pleading on the merits to be known as the “answer.”⁴⁵³ An answer *must* be filed in response to any

446. See 5 C. WRIGHT & A. MILLER, *supra* note 436, § 1381, at 799-80.

447. *Id.* § 1380, at 783; see also discussion of MD. R.P. 2-311, *supra* notes 386-400 and accompanying text (noting the Committee’s view that most motions are frivolous and dilatory and its desire to reduce the number of motions).

448. MD. R.P. 2-324(a) preserves the following defenses:

(a) The defense of failure to state a claim upon which relief can be granted, see MD. R.P. 2-322(b)(2);

(b) The defense of failure to join a party, see MD. R.P. 2-211;

(c) An objection of failure to state a legal defense to a claim, see MD. R.P. 2-322(e); and

(d) The defense of governmental immunity, see MD. R.P. 2-322(b)(4).

449. For a discussion of MD. R.P. 2-303(a), see *supra* note 367 and accompanying text.

450. 5 C. WRIGHT & A. MILLER, *supra* note 436, § 1384, at 837.

451. See *supra* notes 416-50 and accompanying text.

452. See MD. R.P. 2-301 committee note.

453. See FED. R. CIV. P. 7. Under the former Maryland Rules, the plea in bar was the pleading on the merits filed in response to plaintiff’s declaration at law. See Former Md. R.P. 342. “A plea in bar [was] one which show[ed] some ground for barring or defeating the plaintiff’s case by giving a substantial and conclusive answer to his statement of it in the

claim for relief that has not been disposed of by preliminary motion to dismiss.⁴⁵⁴ Once the answer has been filed, the claim is at issue, and the time for pleading is ended.⁴⁵⁵

Answers must be "stated in short and plain terms."⁴⁵⁶ They are to assert *all* available defenses of law and fact⁴⁵⁷ and must contain any of the following if applicable: defenses permitted under Rule 2-322(b) that have not already been raised in a preliminary motion;⁴⁵⁸ any specific admissions or denials pursuant to Rule 2-323(c);⁴⁵⁹ any general denial to a claim for money damages for breach of contract, debt, or tort pursuant to Rule 2-323(d);⁴⁶⁰ and any of the negative or affirmative defenses enumerated in Rule 2-323(f) and (g).⁴⁶¹

As in Rule 2-322(c),⁴⁶² Rule 2-323(b) provides that the defenses of lack of subject matter jurisdiction, failure to state a claim, failure to join a necessary party, and governmental immunity shall be determined before trial upon application of either party. Also as in Rule 2-322(c), the court may defer determination of the defense of failure to state a claim until trial.

Rule 2-323(c), (d), and (e) incorporates existing Maryland practice on admissions and denials. Section (c) follows Former Rule 372 a 2 by requiring defendants specifically to admit or deny all averments in a plaintiff's complaint. Specific denials should not be based upon minor inaccuracies, and, to prevent such a practice, the Committee borrowed the following sentence from Federal Rule 8(b): "Denials shall fairly meet the substance of the averments denied."⁴⁶³ If a defendant lacks

declaration." 2 J. POE, *supra* note 136, § 603, at 294. In equity, the answer was the pleading filed in response to the plaintiff's bill of complaint. See Former Md. R.P. 371 a. "While the plea in bar at law retain[ed] the vestiges of the remote common-law system of pleading, the answer filed in equity correspond[ed] to the generally used rules of modern pleading, including those found in the federal court system." C. BROWN, *supra* note 4, § 3.55, at 103.

454. See MD. R.P. 2-322(a), (b); *supra* text accompanying notes 416-25.

455. See MD. R.P. 2-323(a); Minutes, May 11-12, 1979, at 28. See also MD. R.P. 2-302 ("There shall be a complaint and an answer. . . . No other pleading shall be allowed except that the court may order a reply to an answer. Demurrers, pleas, and replications are abolished.")

456. MD. R.P. 2-323(a).

457. *Id.*

458. *Id.* (1).

459. *Id.* (2).

460. *Id.*

461. *Id.* (3).

462. See *supra* text accompanying note 426.

463. Comments of Mr. (now Judge) Rodowsky, Minutes, May 11-12, 1979, at 27. Commentators, however, have suggested a different purpose for the same phrase in FED. R. CIV. P. 8(b): "Answers that neither admit nor deny but simply demand proof of plaintiff's allegations, or pleadings that alleged that averments in an earlier pleading are immaterial and do

sufficient information with which to appraise the plaintiff's claims, a statement to this effect will be treated as a denial.

Section (d) preserves the general issue plea of Former Rule 342 b 1, 2, and 3 in the form of a general denial in specified causes. The general denial "is of expressly limited application,"⁴⁶⁴ and is to be pleaded only in response to a claim for money damages in a court for breach of contract, debt, or tort. This section is phrased to allow a defendant to deny generally certain counts while answering other counts with specificity.⁴⁶⁵

Section (e) is derived from Federal Rule 8(b) and Former Rules 372 b 1, 2, and 312 b.⁴⁶⁶ This section notes the effect of failing to admit or deny plaintiff's averments. As a rule, averments in plaintiff's complaint that are left unanswered⁴⁶⁷ are deemed to be admitted. However, when requiring a party to admit, deny, or explain an averment compels incrimination contrary to the fifth amendment privilege, failure to deny an averment will not be treated as an admission.⁴⁶⁸

Rule 2-323(f) provides for the raising of negative defenses. The rule does not change existing practice, but, rather, incorporates several of the former rules under a single heading. Failure to raise the following negative averments with supporting particulars will result in the matters being admitted: "(1) legal existence of a party, including a partnership or a corporation,⁴⁶⁹ (2) the capacity of a party to sue or be sued,⁴⁷⁰ (3) the authority of a party to sue or be sued in a representative capacity,⁴⁷¹ (4)

not require an answer are insufficient to constitute a denial." 5 C. WRIGHT & A. MILLER, *supra* note 436, § 1264, at 277-78.

464. Proposed Rule 2-323 reporter's note.

465. Comments of Mr. (now Judge) Rodowsky, Minutes, May 11-12, 1979, at 28.

466. Proposed Rule 2-323(e) reporter's note.

467. *Cf.* Former Md. R.P. 372 b ("all averments, other than the amount of any damage averred, if not denied in the answer, shall be deemed to be admitted except as against persons under disability who are not represented . . .").

468. Although a similar provision was stated in Former Md. R.P. 372 b 1, the inclusion of this provision sparked substantial debate before passage. *See* Minutes, May 11-12, 1979, at 29-30; *id.*, June 22-23, 1979, at 27-29; *id.*, Oct. 12-13, 1979, at 7-9.

469. *Cf.* Former Md. R.P. 311 a ("Whenever the partnership of any parties, the incorporation of any alleged corporation, the execution of any written instrument, the original or a copy of which is filed in the action, or the ownership of a motor vehicle is alleged in the pleadings in any action, such fact shall be deemed to be admitted insofar as such action is concerned, unless it shall be denied by the next succeeding pleading of the opposite party to the merits."); *id.* 342 c 1(h) (denial of partnership in action *ex contractu*); *id.* (i) (denial of incorporation in action *ex contractu*); *id.* 2(c) (denial of partnership in action *ex delicto*); *id.* (d) (denial of incorporation in action *ex delicto*).

470. *Cf.* Former Md. R.P. 323 a ("Any of the following defenses constitute grounds for a motion raising preliminary objection. . . . 5. Lack of legal capacity to sue on part of plaintiff.").

471. *Cf.* FED. R. CIV. P. 9(a) ("When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be used in a representative capacity,

the averment of the execution of a written instrument,⁴⁷² [or] (5) the averment of the ownership of a motor vehicle."⁴⁷³

Rule 2-323(g) is drawn from Federal Rule 8(c) and Former Rule 342 c 1 and 2, and contains an exhaustive list of affirmative defenses that a party must plead, if applicable, while making general or specific admissions and denials: (1) accord and satisfaction, (2) merger of a claim by arbitration into an award, (3) assumption of risk, (4) discharge in bankruptcy or insolvency from the plaintiff's claim, (5) collateral estoppel as a defense to a claim, (6) contributory negligence, (7) duress, (8) estoppel, (9) fraud, (10) illegality, (11) laches, (12) payment, (13) release, (14) res judicata, (15) statute of frauds, (16) statute of limitations,⁴⁷⁴ (17) ultra vires, (18) usury, (19) waiver, (20) privilege, and (21) total or partial charitable immunity.⁴⁷⁵ In addition, a catch-all provision permits a party to "include by separate defense any other matter constituting an avoidance or affirmative defense on legal or equitable grounds."⁴⁷⁶ Moreover, if a defense is improperly designated as a counterclaim, the court shall treat it as proper if justice requires.

Although the Committee added several affirmative defenses not found in the former rules, it also deleted from the list several outmoded and rarely raised defenses: Alien Enemy;⁴⁷⁷ Tender;⁴⁷⁸ Plea *Puis Darein Continuance*;⁴⁷⁹ Denial of Consideration;⁴⁸⁰ Justification, Excuse, Dis-

he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly made within the pleader's knowledge.").

472. Cf. Former Md. R.P. 311 a; *id.* 342 c 1(j); *id.* 2(e).

473. Cf. Former Md. R.P. 311 a; *id.* 342 c 1(m) (denial of ownership of motor vehicle in action *ex contractu*); *id.* 2(f) (denial of ownership of motor vehicle in action *ex delicto*).

474. One local scholar has commented that the statute of limitations defense "has traditionally been disfavored in Maryland." See C. BROWN, *supra* note 4, § 3.53, at 101, 102 (citing *Lichtenberg v. Joyce*, 183 Md. 689, 699, 39 A.2d 789, 794 (1944)). See generally Note, *Legal Sufficiency of Replication to Plea of Limitations*, Piper v. Jenkins, 15 MD. L. REV. 277 (1955).

475. Under Former Md. R.P. 323 a 7, total or partial charitable immunity was grounds for a motion raising a preliminary objection to be filed before any other pleading was filed.

476. MD. R.P. 2-323(g); cf. FED. R. CIV. P. 8(c) (allowing a party to set forth "any other matter constituting an avoidance or affirmative defense").

477. See Former Md. R.P. 342 c 1(a). Mr. Sykes questioned the uncertain constitutionality of this defense in light of recent Supreme Court decisions on the legal status of aliens. He then suggested that the defense was actually a matter of capacity. Minutes, Sept. 14, 1979, at 8. The Supreme Court has stated that, "The ancient rule against suits by resident alien enemies has survived only so far as to prevent use of the courts to accomplish a purpose which might hamper our own war efforts or to give aid to the enemy." *Ex parte Kawato*, 317 U.S. 69, 75 (1942). See also *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950) (closing courts to nonresident alien enemy). Compare *Kawato* and *Johnson*, with *Dorsey v. Kyle*, 30 Md. 512, 519 (1869) (stating the former Maryland rule).

478. See Minutes, Sept. 14, 1979, at 9. The Committee deleted tender by a 10 to 6 vote despite Mr. Sykes' recommendation that the list include tender and other "exotic" defenses which the plaintiff would not anticipate. *Id.*

479. See *id.* at 10. Under Former Md. R. P. 342 c 1(e), and 2(b), a plea *puis darein continu-*

charge—Trespass;⁴⁸¹ Truth—Libel—Slander;⁴⁸² and Property in Defendant or Third Person.⁴⁸³ The Committee also decided against including the following defenses available under Federal Rule 8(c): failure of consideration,⁴⁸⁴ injury by fellow servant,⁴⁸⁵ and license.⁴⁸⁶ Collateral estoppel “as a defense to a claim” has been listed separately from *res judicata* in order to distinguish the two.⁴⁸⁷ The Committee retained the defenses of discharge in bankruptcy or insolvency despite the concern that federal law would preclude holding a bankrupt liable for his debts because he failed to plead his bankruptcy.⁴⁸⁸ The Committee also

ance could raise any defense that arose after the suit had been brought. This plea was made unnecessary by the liberal amendment practice under Former Md. R.P. 320.

480. *See* Minutes, Sept. 14, 1979, at 12. Denial of consideration suggests non-performance of a condition and is difficult to allege early in a case. *See* Comments of Mr. (now Judge) Rodowsky, *id.*

481. *See id.* at 13. Mr. Rodowsky contended that the burden of a defendant in having to plead justification, excuse, and discharge before fully working out a defense outweighed the benefit in having these items pleaded. *Id.*

482. *See id.* For several years, Maryland law has not required truth to be pleaded as an affirmative defense. *See* *Jacron Sales Co. v. Sindorf*, 176 Md. 580, 597, 350 A.2d 688, 698 (1976) (holding that “the burden of proving falsity [in a libel or slander suit] rests upon the plaintiff”). For an earlier view on the effect of the plea of justification in a libel suit, see Note, *The Effect of Plea Justification in a Libel Suit—Dolmchick v. Greenbelt Consumer Services*, 13 MD. L. REV. 357 (1953).

483. *See* Minutes, Sept. 14, 1979, at 13. Despite the applicability of this defense in detinue and replevin actions, a general denial under MD. R.P. 2-323(d) will be as effective as a specific defense. *Id.*

484. *See id.* at 15; *supra* note 383 (noting the elimination of the affirmative defense of denial of consideration).

485. *See* Minutes, Sept. 14, 1979, at 15. Several Committee members observed that the defense is no longer needed due to the provisions of the Workmen’s Compensation Article. *Id.*; *see* MD. ANN. CODE art. 101, § 15 (1979).

486. *See* Minutes, Sept. 14, 1979, at 16. The Committee apparently relied upon Mr. Sykes’ remark that license is an affirmative defense to trespass. *Id.* Although license does not appear to have been the subject of any reported case under the federal rules, *see* 5 C. WRIGHT & A. MILLER, *supra* note 436, § 1270, at 298 n.98, some states have held that a defendant may be required to plead license in actions other than trespass, *see, e.g.*, *Ramme v. Long Island R.R. Co.*, 266 N.Y. 327, 331, 123 N.E. 747, 748 (1919) (A permit case in which the New York Court of Appeals held that “[a] license to do something that cannot be lawfully done without such license is new matter constituting a defense which [under the language of the New York Code of Civil Procedure] must be alleged in the answer.”).

487. *See* Minutes, Sept. 14, 1979, at 16.

488. *See id.* at 9-10. The Committee was apparently persuaded by the existence of “discharge in bankruptcy” in FED. R. CIV. P. 8(c). Prior to the new Bankruptcy Act, a discharge in bankruptcy did not extinguish a debt but merely constituted “a personal defense, a bar to enforcement. [Thus, if] that bar must be specially set forth as an affirmative defense, . . . [f]ailure to do so before a . . . judgment is entered constitutes waiver of the defense.” *In re Carwell*, 323 F. Supp. 590, 592 (E.D. La. 1971); *see* *Ellis v. Rudy*, 171 Md. 280, 189 A. 281 (1937). Under the new Act, however, a discharge voids any debt of the debtor and operates as an injunction against the commencement or continuation of an action. *See* Bankruptcy Act, 11 U.S.C. § 524 (1978).

It should be noted that the General Assembly has repealed most of article 47’s

retained usury despite a belief held by some members that the term "illegality" was broad enough to cover the defense of usury.⁴⁸⁹ Section (g) does not expressly provide any sanction for failing to plead the listed affirmative defenses. The Committee apparently considered it implicit in the rule that an affirmative defense may not be raised unless it is pleaded in the answer or in an amended pleading.⁴⁹⁰

Rule 2-324—Preservation of Certain Defenses

Rule 2-324 is drawn directly from Federal Rule 12(h)(2) and (3) and is consistent with Former Rule 323 b.⁴⁹¹ As Rule 2-322(f) clearly states, defenses enumerated in Rule 2-322 must be asserted in a motion raising preliminary objection unless preserved by Rule 2-324.⁴⁹² Under section (a) of this rule, the following defenses and objections will not be waived although not included in a motion raising preliminary objection: a defense of failure to state a claim upon which relief can be granted;⁴⁹³ a defense of failure to join a party under Rule 2-211; an objection of failure to state a legal defense to a claim;⁴⁹⁴ and a defense of governmental immunity.⁴⁹⁵ These defenses and objections may be raised in any pleading, in a motion for summary judgment, or at trial. Section (b) provides that the court may dismiss an action on its own motion if it deems that the court lacks subject matter jurisdiction.

Rule 2-325—Jury Trial

Article 23 of the Maryland Declaration of Rights guarantees that: "The right of trial by Jury of all issues of fact in civil proceedings in the several Courts of Law of this State, where the amount in controversy

insolvency proceedings. *See* 1975 Md. Laws ch. 49, § 1. The laws regulating assignments for the benefit of creditors, however, have been retained. *See* MD. COM. LAW CODE ANN. §§ 15-101 to -103 (1975 & Supp. 1982); *see also* MD. R.P. Subtitle BP (Receivers and Assignees or Trustees for Creditors).

489. *See* Minutes, Sept. 14, 1979, at 10. Mr. Rodowsky stated that usurious contracts are not "illegal," but merely enable a debtor to avoid the usurious interest. *Id.*; *see* *Brown v. Real Estate Inv. Co.*, 134 Md. 493, 495, 107 A. 196, 196 (1919) (usurious loan not void or invalid). Federal legislation, however, may render some usurious contracts void. *See, e.g.*, Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (1976) ("loan shark" statute rendering some loans "unlawful debts").

490. *See* Comments of Mr. Brault, Minutes, Sept. 14, 1979, at 17. Two members, however, urged that sanctions be included in the rule. *See* Comments of Judge McAuliffe and Mr. Ryan, *id.* The Committee's failure to include sanctions, however, should not preclude the courts from finding that a defendant waives the defenses if not properly asserted.

491. Proposed Rule 2-324 reporter's note.

492. *See supra* note 442 and accompanying text.

493. *See* MD. R.P. 2-322(b)(2).

494. *See id.* (c).

495. *See id.* (b)(4).

exceeds the sum of five hundred dollars, shall be inviolably preserved."⁴⁹⁶ In order to exercise this right to a jury trial, the action must be one at law rather than in equity.⁴⁹⁷ The fact that law and equity have been merged *for purposes of pleading* does not alter the substantial differences between law and equity,⁴⁹⁸ and, as such, the scope of the right to trial by jury has not been altered.⁴⁹⁹

The demand for a jury trial under section (a) of Rule 2-325 is essentially the same as in Former Rule 343 a. The rule used the words "demand" and "election" interchangeably. The demand must be in writing and may be either a separate paper or a separately titled conclusion of a pleading. The Committee rejected a proposal that the election be made only at the end of a pleading instead of on a separate piece of paper.⁵⁰⁰ It should be noted that although the demand for a jury trial must be in writing, an effective withdrawal of a demand for jury trial under section (f) need not be in writing, provided that all parties not in default consent. Such is the practice under Federal Rule 38(d).

Section (b) also adopts the approach of Federal Rule 38(d) by couching the time requirement in terms of waiver. Under the section, a plaintiff may wait until defendant's answer is filed before demanding a jury trial.⁵⁰¹ This section remains consistent with the mandatory language of sections b and c of Former Rule 343 and the case law that has

496. MD. DECLARATION OF RIGHTS art. 23. It should be noted that although the District Court has exclusive jurisdiction over tort and contract actions in which the amount in controversy is \$2500 or less, MD. CTS. & JUD. PROC. CODE ANN. §§ 4-401(1), -402(d)(1) (1984), a jury trial may be demanded in any case where the amount in controversy exceeds \$500. If such a demand is timely filed, the action will be transferred automatically to the circuit court. MD. R.P. 2-325(c).

497. *See, e.g.*, *Bringe v. Collins*, 274 Md. 338, 346, 335 A.2d 670, 676 (1975); *Pennsylvania v. Warren*, 204 Md. 467, 474, 105 A.2d 488, 491 (1954); *Capron v. Devries*, 83 Md. 220, 224, 34 A. 251, 252 (1896); *see also Brown, supra* note 360, at 457-74; C. BROWN, *supra* note 4, § 5.15, at 148 ("The equity courts had no jury system of their own. Consequently, it is generally assumed that there is no constitutionally protected right to a jury trial . . ." for equitable claims.).

498. Such is the experience in the federal courts. *See, e.g.*, *Bradley v. United States*, 214 F.2d 5, 7 (5th Cir. 1954) (noting that although "[t]here is no longer a law side and an equity side of the federal court . . . [t]he substantial difference between law and equity, and between legal and equitable remedies, still exists.").

499. For a more detailed discussion of the new "civil action" and its effect on trial by jury, see *supra* notes 361-62 and accompanying text. *See also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 508-11 (1959) (Although a federal court "may try both legal and equitable causes in the same action . . . only under the most imperative circumstances . . . can the right to a jury trial be lost through prior determination of equitable claims.").

500. *See Minutes*, Jan. 4, 1980, at 20-21. One member opposed allowing election by a separate piece of paper because on one occasion a demand for jury trial had been slipped into a file after the time for making an election had passed. *Id.* at 20.

501. *Id.*

developed relative under that rule.⁵⁰² Failure to comply with this section amounts to a waiver of the right to a jury trial,⁵⁰³ and there is no relief even for good cause if a timely election was not made.⁵⁰⁴

Section (d) is similar to Former Rule 343 d in providing for a jury trial demand following certain administrative hearings where there is a statutory right to an appeal in the form of a trial de novo. Section (d) extends the time for filing the demand from "within fifteen (15) days after the appeal has been filed"⁵⁰⁵ to "within 15 days after the time for answering the petition of appeal"⁵⁰⁶

Rule 2-326—Transfers From District Court on Demand for Jury Trial

Rule 2-326, new to Maryland practice, sets forth the procedural rules that are to be followed once an action has been transferred from the District Court to circuit court. The general rule for actions within the exclusive original jurisdiction of the District Court is that subsequent pleadings and discovery in the circuit court is to be governed by District Court rules unless the court orders otherwise.⁵⁰⁷ There are two exceptions to this rule: Counterclaims, cross-claims, and amended pleadings exceeding the exclusive original jurisdiction of the District Court are governed by circuit court rules.⁵⁰⁸ In addition, although District Court procedure is otherwise applied, a circuit court may order discovery in a landlord-tenant or grantee action.⁵⁰⁹

When the action transferred is one over which the District Court and circuit court share concurrent jurisdiction, a complaint complying with Rules 2-303 through 2-305 must be filed within thirty days after filing the demand for a jury trial.⁵¹⁰ Upon receiving the new complaint filed in compliance with those rules, the defendant must respond by an-

502. See, e.g., *Impala Platinum, Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 389 A.2d 887 (1978).

503. See, e.g., *Bringe v. Collins*, 274 Md. 338, 335 A.2d 670 (1975); *Connor v. Celanese Fibers Co.*, 40 Md. App. 452, 392 A.2d 116 (1978); *Maryland Coal & Realty Co. v. Eckhart*, 25 Md. App. 605, 337 A.2d 116 (1975).

504. See Minutes, Jan. 4, 1980, at 21.

505. Former Md. R.P. 343 d.

506. MD. R.P. 2-325(d).

507. MD. R.P. 2-326(b).

508. *Id.*

509. *Id.* "The Committee decided as a policy matter that a general allowance of discovery in landlord tenant actions would not be consistent with the legislative intent, evidenced by pertinent code provisions, that the trial of such actions and an appeal should be handled in an expeditious manner." Letter from Hon. John F. McAuliffe, Chairman of the Standing Committee on Rules of Practice and Procedure, to the Court of Appeals of Maryland (Jan. 26, 1984).

510. MD. R.P. 2-326(c).

swer or motion raising preliminary objection within thirty days.⁵¹¹ Thereafter, the action will follow the circuit court rules of procedure as if it originally had been filed in circuit court.⁵¹²

Rule 2-327—Transfer of Action

Section (a) of Rule 2-327 is derived from Former Rule 515 a but no longer requires an automatic transfer when an action, falling within the exclusive jurisdiction of the District Court, is improperly filed in circuit court. Rather, the circuit court may dismiss the action if it determines that transferring the action would not serve the interests of justice.⁵¹³ Similarly, under section (b), if a court sustains a defense of improper venue, it *may* transfer the action to a more appropriate circuit court in a county in which the action could have been brought. As in Former Rule 317, the court has the discretion to transfer or dismiss the action for lack of venue depending upon "the interest of justice."⁵¹⁴

Section (c) is derived from 28 U.S.C. § 1404(a) and makes the doctrine of forum non conveniens a rule of procedure. Although Maryland already has a forum non conveniens statute,⁵¹⁵ it provides little relief to the party bringing a lawsuit in a proper, albeit inconvenient, forum because it provides only for the case to be stayed or dismissed.⁵¹⁶ The new rule, thus, follows the federal practice of permitting transfer, upon motion of any party, to any other circuit court where the action might have been brought, provided that the transfer is for the convenience of the parties and witnesses and serves the interests of justice.

It should be noted that an action transferred pursuant to this rule may be consolidated, under Rule 2-501, with another action in that county provided that the actions involve a common question of law or fact or a common subject matter.⁵¹⁷

511. *Id.*

512. *Id.*

513. Compare Former Md. R.P. 515 a ("the plaintiff *shall not* on that account be nonsuited or the action dismissed; but the action *shall* be transferred") (emphasis added), with MD. R.P. 2-327(a) (if "the court determines that in the interest of justice the action should not be dismissed, the court *may* transfer the action") (emphasis added).

514. See Former Md. R.P. 317.

515. MD. CTS. & JUD. PROC. CODE ANN. § 6-104(a) (1984).

516. See *id.*, see also C. BROWN, *supra* note 4, § 1.26, at 20 ("The harsh aspect of this statutory provision is its remedy: the case in the inconvenient forum may only be stayed or dismissed. The lack of a transfer remedy, therefore, requires the filing of a new suit when this provision is invoked; if the statute of limitations had run, this could leave a party without a claim.")

517. See Explanatory Note, Minutes, May 23, 1981, at 59. For a more detailed discussion of MD. R.P. 2-501, see *infra* notes 704-17 and accompanying text.

Rule 2-331—Counterclaim and Cross-claim

Rule 2-331 is a virtually verbatim adoption of Former Rule 314. The only important Committee discussion in this area was on whether to adopt the federal compulsory counterclaim rule. After extensive debate, the Committee declined to adopt the federal practice⁵¹⁸ because it believed that the introduction of compulsory counterclaims could encourage unnecessary litigation,⁵¹⁹ hamper litigation strategy,⁵²⁰ and produce uncertainty.⁵²¹ In addition, committee members noted that many permissive counterclaims are, in fact, "mandatory because the doctrine of *res judicata* may compel a counterclaim"⁵²² and "parties often avail themselves of the practice."⁵²³ Apparently, the Committee concluded that these concerns outweighed the policy of foreclosing multiple filings by requiring that all relevant matters be raised in a single action before the court.⁵²⁴

Maryland counterclaims are still permissive. They need not arise out of the same transaction or occurrence that is the subject of the opposing party's claim; and they may assert a claim for relief in excess of

518. Compare FED. R. CIV. P. 13(a) ("A pleading *shall* state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.") (emphasis added) and FED. R. CIV. P. 13(b) ("A pleading *may* state as a counterclaim any claim against an opposing party *not arising out of the transaction or occurrence* that is the subject matter of the opposing party's claim.") (emphasis added), with MD. R.P. 2-331(a) ("A party *may* assert as a counterclaim any claim that party has against any opposing party, *whether or not arising out of the transaction or occurrence* that is the subject matter of the opposing party's claim.") (emphasis added) and Former Md. R.P. 314 a 1 ("*In any action* any party, against whom a claim, counterclaim, cross-claim or third-party claim has been asserted, *may* plead as a counterclaim any claim he has against any opposing party.") (emphasis added). A motion to adopt the federal rule on compulsory counterclaims failed to carry by a vote of five in favor to 12 opposed. Minutes, Nov. 16, 1979, at 26.

519. Comments of Mr. (now Judge) Rodowsky, Minutes, Nov. 16, 1979, at 25.

520. Comments of Mr. Brault, *id.* Mr. Brault gave an example of a doctor who counterclaims for a fee of \$1500 in a medical malpractice action brought against the doctor. *Id.* He also pointed out that insurance counsel do not wish to represent a defendant in a counterclaim. Because of potential conflict of interests, they often refer counterclaims to other counsel. *Id.*

521. Comments of Mr. (now Judge) Rodowsky, *id.* Mr. Rodowsky questioned the meaning of the phrase "scope of transaction or occurrence" and opined that a compulsory counterclaim rule requires an attorney "to rummage about," and requires the client to assert any other claims or waive them. *Id.*

522. Comments of Mr. Brault, *id.* at 24-25.

523. Comments of Dean Kelly, *id.* at 26.

524. Comments of Dean Kelly and Professor Bowie, *id.* at 24. For a discussion of the policy of encouraging the resolution of all claims in a single proceeding, see *supra* notes 506 and accompanying text.

the amount or different in kind from that sought by the opposing party.⁵²⁵ Similarly, the rules pertaining to cross-claims are basically unchanged: Cross-claims are still permissive.⁵²⁶ Unlike counterclaims, they *must* arise out of the same transaction or occurrence that is the subject of either the original action or a counterclaim, or be related to property that is the subject of the original action; and a cross-claim may be used in a manner similar to impleader to require a co-party to make good on damages the cross-claimant owes to the plaintiff. There are, however, some minor changes in the counterclaim and cross-claim rules.

Section (c) of the rule requires that a person not previously a party who is added as a party to a counterclaim or cross-claim must be served with a copy of all pleadings previously filed in the action. Also, the time for filing a counterclaim or cross-claim has been changed from fifteen days after the time for filing the responsive pleading⁵²⁷ to thirty days after the time for filing an answer.⁵²⁸ Failure to file within this time period is grounds for a motion to strike, which must be filed within fifteen days of service of the late counterclaim or cross-claim.⁵²⁹ Unless there is a showing that the delay caused by the late filing *did not* "prejudice" the other parties, the court will grant the motion to strike.⁵³⁰ Although the rule does not define the word "prejudice," one member suggested that a court, in deciding such a motion to strike, should balance the validity of the excuse for delay against the resulting inconvenience caused to the parties.⁵³¹

Rule 2-331 does not expressly require that a counterclaim or cross-claim be made in a separate pleading.⁵³² Several members expressed concern that the absence of such a requirement could produce confusion in distinguishing the counterclaim or cross-claim from the responsive pleading.⁵³³ Other members, however, expressed the belief that the language of the former rule is implied in the new rule, and that pleaders

525. *See* Former Md. R.P. 314 a 2.

526. Permissive cross-claims are also the rule in federal courts. *See* FED. R. CIV. P. 13(g) ("A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or a counterclaim therein or relating to any property that is the subject matter of the original action.").

527. *See* Former Md. R.P. 314 d 2.

528. MD. R.P. 2-331(d).

529. *Id.*

530. *Id.*

531. Comments of the Chairman, Minutes, Jan. 4, 1980, at 10.

532. *But cf.* Former Md. R.P. 314 d 1 ("[A] counterclaim or cross-claim, if it brings in a new party, shall be filed as a separate and distinct pleading, appropriately captioned, and shall not be combined with the responsive pleading.").

533. Comments of the Chairman and Mr. Brault, Minutes, Jan. 4, 1980, at 3.

must file counterclaims or cross-claims in separate pleadings when a new party is added.⁵³⁴

Rule 2-332—Third Party Practice

This rule closely follows Former Rule 315 with only minor changes. Under section (a), as in Former Rule 315 a, a defendant (third-party plaintiff) may assert a claim against another person (third-party defendant) who may be liable for contribution to the defendant for a part of defendant's liability to the plaintiff. As in the former rule, the defendant may bring in the third party or the defendant may elect to bring a separate action.⁵³⁵ Also as in the former rule, a plaintiff's claim against a third-party defendant is mandatory. Once a third party has been brought into the litigation, section (c) requires the plaintiff to "assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. . . ."⁵³⁶ Failure to assert such a claim will result in the claim being waived.

Section (e) modifies current practice by allowing a late filing without leave of court. As in Rule 2-331(d), the time for filing is thirty days. If a party does not timely file, it is the opposing party's burden to file a motion to strike within fifteen days after receiving the late pleading. Once the motion to strike is filed, the burden shifts to the late-filing party to show that the delay has caused no prejudice. If the party fails to meet this burden, the court will grant the motion to strike. Obviously, the time limits will thus be more important to plaintiffs than defendants: If a plaintiff fails to file a claim against a third-party defendant within the allotted time and prejudice results, the plaintiff's claim will be forever barred. If the defendant fails to bring in a third party, the claim may be asserted later, in a separate action.

Rule 2-341—Amendment of Pleadings

The Committee patterned Rule 2-341 after Former Rule 320. Although the new rule follows the former rule's liberal amendment policy by allowing any amendment to a pleading at any time prior to fif-

534. *See id.*

535. *See, e.g.,* Maloney Concrete Co. v. D.C. Transit Sys., 241 Md. 420, 422, 216 A.2d 895, 896 (1965).

536. MD. R.P. 2-322(c); *see* Former Md. R.P. 315 d 3 ("The plaintiff may not assert against the third party in a separate action, instituted after the third party is impleaded, any claim which arises out of the transaction or occurrence that is the subject matter of his claim against the defendant in the pending action."); *see also* State Farm Mut. Auto Ins. v. Briscoe, 245 Md. 147, 150, 225 A.2d 270, 272 (1967).

teen days of trial,⁵³⁷ amendments sought within fifteen days of trial or after the trial has commenced must have either the written consent of the party opponent or leave of court.⁵³⁸ A further limitation not contained in the former rule is that amendments introducing new facts or varying the case will not be allowed if filed within fifteen days of trial or thereafter.⁵³⁹ As in the former rule, the court will not grant a continuance or mistrial due to an amendment "unless the ends of justice so require."⁵⁴⁰

The scope and purpose of the amendment rule has not changed. A party may amend to "(1) change the nature of the action or defense,⁵⁴¹ (2) set forth a better statement of facts concerning any matter already raised in a pleading,⁵⁴² (3) set forth transactions or events that have occurred since the filing of the pleading sought to be amended,⁵⁴³ (4) correct misnomer of a party,⁵⁴⁴ (5) correct misjoinder or nonjoinder of a party so long as one of the original plaintiffs and one of the original defendants remain as parties to the action,⁵⁴⁵ (6) add a party or parties,⁵⁴⁶ [or] (7) make any other appropriate change."

The Committee rejected a draft addressing the relation back of amendments. The draft section, drawn from Federal Rule 15(c), would have avoided some statute of limitations problems.⁵⁴⁷ But the Committee expressed concern that a provision which deals with questions regarding statutes of limitations is more substantive than procedural.⁵⁴⁸ As such, existing Maryland case law will control the relation back ques-

537. MD. R.P. 2-341(a).

538. *Id.* (b).

539. *Id.*

540. *Id.*; *see* Former Md. R.P. 320 e.

541. MD. R.P. 2-341(c)(1); *cf.* Former Md. R.P. 320 a 2 ("An action may be amended from one form to another.").

542. MD. R.P. 2-341(c)(2); *cf.* Former Md. R.P. 320 a 3 ("[A] further or better statement of particulars of any matter in any pleading may be made at any time.").

543. MD. R.P. 2-341(c)(3); *cf.* Former Md. R.P. 379 ("Prior to the entry of a final decree, any party may file a supplemental pleading, alleging material facts which occurred after the previous pleading was filed . . .").

544. MD. R.P. 2-341(c)(4); *cf.* Former Md. R.P. 320 b 1 ("A writ or action shall not abate by reason of misnomer of a party In every case . . . a party makes such amendments in his pleadings as justice may require in order to effect a fair trial.").

545. MD. R.P. 2-341(c)(5); *cf.* Former Md. R.P. 320 b 1 ("A writ or action shall not abate by reason of . . . nonjoinder or misjoinder of a party or by the omission of an heir or devisee When an amendment is made to correct nonjoinder or misjoinder, someone of the original plaintiffs and someone of the original defendants must remain as parties to the action.").

546. MD. R.P. 2-341(c)(6); *see, e.g.*, *Glens Falls Ins. Co. v. Baltimore County*, 230 Md. 524, 528, 187 A.2d 875, 876 (1963); *Abromatis v. Amos*, 127 Md. 394, 404, 96 A. 554, 557 (1916).

547. Minutes, Nov. 6, 1980, at 11.

548. *Id.*, Nov. 9, 1981, at 4.

tion. Under the case law, if an amendment sets forth a new cause of action, then the statute of limitations runs from the time of the accrual of the cause until the date the amended complaint is filed—in other words, the amendment does not relate back to the original filing. However, if the amendment does not state a new cause of action, then limitations are determined as of the date of the original filing.⁵⁴⁹

Rule 2-342—Amendment of Other Papers

This rule is new and allows for the amendment of any motion or other paper with leave of court. Thus, if for example a party files a motion to dismiss for insufficient process, Rule 2-342 would allow the party to amend the motion, upon leave of court, to include insufficiency of service of process, improper venue, or lack of jurisdiction over the person, defenses which if not included in the preliminary motion are waived.

D. Chapter 400—DISCOVERY

This chapter incorporates many provisions from the federal rules and expands Maryland discovery practice in order to replace much of the information gathering that formerly was accomplished by the pleadings. Expanded discovery is not, however, new to Maryland practice. In 1941, the former discovery rules were adopted⁵⁵⁰ with the purpose of effecting “a broad and complete exchange of information prior to trial so that cases will be settled or tried not based upon confusion, happenstance, or surprise but upon a full understanding of each party’s factual posture, ‘thereby advancing the sound and expeditious administration of justice.’”⁵⁵¹ The former discovery rules “were patterned after most of the Federal Civil Rules dealing with the subject at that time.”⁵⁵² The new discovery rules incorporate the most recent federal changes in the discovery area and take into account the general streamlining of pleading practice.

549. See, e.g., *Myers v. Aragona*, 21 Md. App. 45, 318 A.2d 263 (1974); see also C. BROWN, *supra* note 4, § 3.70, at 108 (quoting *Cline v. Fountain Rock Lime & Brick Co.*, 214 Md. 251, 258, 134 A.2d 304, 309 (1957), for the proposition that, “No new cause of action will be raised if the amendment ‘refers to the same general aggregate of operative facts upon which the original complaint was based.’”).

550. See Foreman, *Depositions and Discovery—Digest of Maryland Decisions*, 18 MD. L. REV. 1 (1958); Pike and Willis, *The New Maryland Deposition and Discovery Procedure*, 6 MD. L. REV. 4 (1941).

551. C. BROWN, *supra* note 4, § 4.10, at 1117-18 (quoting *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8, 13, 174 A.2d 768, 777 (1961)). The purposes for discovery under the federal rules is explained in the leading case of *Hickman v. Taylor*, 329 U.S. 495 (1947).

552. Former Md. R.P. ch. 400 editor’s note.

Rule 2-401—General Provisions Governing Discovery

Section (a) of this rule adopts virtually all but the last sentence of Federal Rule 26(a) and sets forth the following methods for obtaining discovery: “(1) depositions upon oral examination or written questions, (2) written interrogatories, (3) production or inspection of documents or other tangible things or permission to enter upon land or other property, (4) mental or physical examinations, and (5) requests for admission of facts and genuineness of documents.” The last sentence of Federal Rule 26(a) allows for unlimited frequency of use, unless restricted by the court. The Discovery Subcommittee did not add that sentence for the obvious reason that it would be inconsistent with Rule 2-421(a)’s restriction on interrogatories to one set of thirty and with Rule 2-411(b)’s requirement that leave of court be obtained to re-depose a person, and because it would encourage multiple use of discovery methods.⁵⁵³

Modeled after Federal Rule 26(d), section (b) applies its sequence and timing provisions to all methods of discovery and eliminates the priority rule of Former Rules 405 c (depositions) and 417 e (interrogatories with deposition). As with the federal rule, “[t]he principle effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery, and second, to make clear and explicit the court’s power to establish priority by an order issued in a particular case.”⁵⁵⁴ As under Former Rule 400 a, section (b) also permits the court to order completion of discovery by a specified date.⁵⁵⁵

Derived from Former Rule 417 a 3, section (c) requires parties to promptly supplement their responses to all discovery devices with the exception of depositions.⁵⁵⁶ Thus, answers to interrogatories are deemed continuing in nature, and a party is required to supply any additional information acquired between the time answers are filed and the time of trial. The Committee was evenly divided on whether depositions should be excepted from the rule, and the issue was only decided when the Chairman voted and broke the tie. Comment in favor of the exception noted that supplementing depositions would be a substantial departure from current practice, would impose an additional burden on the supplementing party, and would produce unnecessary confusion both at the

553. Comments of Mr. Nilson, Minutes, May 16-17, 1980, at 27-28.

554. ADVISORY COMMITTEE COMMENTS ON SUBSTANTIVE ALTERATIONS IN FEDERAL RULE 26 (1970). For cases explaining the federal rule, see *George C. Frey Ready Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551 (2d Cir. 1977); *Burns v. Thicket Chemical Corp.*, 438 F.2d 300 (5th Cir. 1973); *Rogers v. Tri-State Materials Corp.*, 51 F.R.D. 234, 241 (D.W. Va. 1970).

555. See Comments of Mr. Nilson, Minutes, May 16-17, 1980, at 28.

556. See, e.g., *Klein v. Weiss*, 284 Md. 36, 395 A.2d 126 (1978); *Broadwater v. Arch*, 267 Md. 329, 297 A.2d 671 (1972); *Pare v. Rodrigues*, 256 Md. 204, 260 A.2d 313 (1969).

pretrial stage and at trial.⁵⁵⁷ Opposition to the exception noted the important utility of depositions in the discovery process.⁵⁵⁸

It is important to note that one is only required to supplement a response if further "material" information is discovered. The materiality standard is intended to be more limited than the general discovery standard based on relevancy.⁵⁵⁹ Moreover, section (c)'s promptness requirement is intended to be construed to allow flexibility and consideration of individual circumstances.⁵⁶⁰ Finally, it should be pointed out that section (c) pertains to parties only. Non-parties are under no duty to supplement their responses.⁵⁶¹

The last two sections of Rule 2-401 also expand Maryland discovery practice. In providing for the substitution of a party, section (d) expands Former Rule 413 a 5 (depositions) to cover discovery generally and states that substitution has no effect upon discovery. Section (e) expands Former Rule 404 (depositions) to cover discovery stipulations generally and brings Maryland practice into conformance with federal practice under Federal Rule 29 by allowing the parties to agree to modify discovery practice. This section was not intended to affect the law of evidence.⁵⁶²

Rule 2-402—Scope of Discovery

Rule 2-402 is derived from Former Rule 400 and Federal Rules 26 and 33. Unchanged is Maryland's liberal philosophy allowing extensive discovery on all matters that are relevant and nonprivileged.⁵⁶³ Professor Brown has noted that,

The definition of "relevancy" for discovery purposes is much broader than its use in terms of admissibility of evidence at trial. Information need not just have a tendency to establish a material fact at issue in a case, the usual test of admissibility at trial. Instead, information is relevant for discovery purposes if it is reasonably calculated to lead to the discovery of admissi-

557. Comments of Judge McAuliffe and Mr. Lombardi, Minutes, June 20-21, 1980, at 30.

558. Comments of Professor Bowie, *id.*

559. *See* Comments of Mr. Nilson, *id.* at 28-29.

560. Comment of Mr. Brault, *id.* at 29. This comment was received with the general consensus of the Committee.

561. Comment of Mr. Nilson, *id.*

562. *See id.* at 31. Stipulations concerning discovery procedures other than depositions are a common practice and have been given effect by the federal courts. *See, e.g.,* United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977).

563. *See* Former Md. R.P. 400 c (noting that the "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"); *cf.* FED. R. CIV. P. 26(b)(1) (same).

ble evidence Thus, an answer sought in an interrogatory is discoverable even if it may not later be admissible on its own. It need only lead to potentially admissible evidence to be discoverable.⁵⁶⁴

The rule retains the basic scope of Maryland discovery practice while expanding it in several respects.

Section (a) extends the scope of interrogatory or deposition questions under Former Rule 400 c by allowing discovery of opinions and contentions that relate to fact or the application of law to fact. In drafting section (a), the Committee specifically modified the language of the parallel federal provision⁵⁶⁵ by substituting the word "response" for the word "answer."⁵⁶⁶ Although the Committee did not explain this change, the use of the word "response" implies something broader than a literal direct answer to a question. In the course of their debate about the scope of the changes to be effected by section (a), the Committee considered in some detail how broad a change was desirable in regard to opinion evidence. A motion to preclude depositions based on opinions was defeated.⁵⁶⁷ At the same time, the Committee rejected a more expansive discovery rule that would have allowed opinion evidence to be discovered via requests for admission,⁵⁶⁸ or would have made the rule applicable to all forms of discovery.⁵⁶⁹ Section (a) also omits the provision in the federal rule that permits the court to allow an answer to be withheld until after the designated discovery has ended.⁵⁷⁰ It was the Committee's view that a protective order could serve the same purpose.⁵⁷¹

Section (b) changes Maryland practice by allowing the discovery of insurance agreements. This section is identical to Federal Rule 26(b)(2) and was intended to be interpreted as such.⁵⁷² The purpose behind disclosure of insurance agreements is to "enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and

564. C. BROWN, *supra* note 4, § 4.11, at 119.

565. See FED. R. CIV. P. 33(b) ("An interrogatory otherwise proper is not necessarily objectionable because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact").

566. See Motion and Vote of Committee, Minutes, May 16-17, 1980, at 30.

567. See Comments of Mr. Brault, *id.* at 29.

568. See Comments of Mr. Niemeyer, *id.* at 29-30.

569. Motion and Vote of Committee, *id.*

570. See FED. R. CIV. P. 33(b) ("[T]he court may order that such an interrogatory not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.").

571. See Comments of Mr. Nilson, Minutes, May 16-17, 1980, at 30; see also MD. R.P. 2-401(b) (sequence and timing of discovery).

572. See Minutes, May 16-17, 1980, at 30.

litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have the opposite effect.⁵⁷³ Section (b) is limited to insurance agreements. It does not cover other facts regarding a defendant's financial status for several reasons: "(1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy."⁵⁷⁴ It should be stressed that the fact that insurance agreements are discoverable does not necessarily make them admissible in evidence at trial.⁵⁷⁵

Section (c) covers trial materials protected by the work-product doctrine.⁵⁷⁶ The section follows Former Rule 400 d in basic concept, but employs a few stylistic changes to bring it into close conformity with Federal Rule 26(b)(3).⁵⁷⁷ In drafting this section, the Committee evaluated the troublesome phrase "prepared in anticipation of litigation or for trial"⁵⁷⁸ which was thought to be the source of excessive litigation.⁵⁷⁹ In retaining the phrase, the Discovery Subcommittee felt that the large and well-defined body of federal and state case law construing the term could not be displaced without devising a superior alternative phrase.⁵⁸⁰ As interpreted under existing Maryland case law, the party in possession of the sought-after material has the burden of establishing that it was "prepared in anticipation of litigation or for trial." If the party resisting discovery meets this burden, the party seeking discovery must establish that there is a substantial need for the material and that undue hardship prevents discovery of similar materials by other means.⁵⁸¹

573. ADVISORY COMMITTEE COMMENTS ON SUBSTANTIVE ALTERATIONS IN FEDERAL RULE 26 (1970).

574. *Id.*

575. MD. R.P. 2-402(b).

576. *See generally* Hickman v. Taylor, 329 U.S. 495 (1947).

577. *Cf.* Kelch v. Mass Transit Admin., 42 Md. App. 291, 400 A.2d 440 (1979) (noting that while the Maryland and federal rules were substantially similar, the practice under the Maryland rule is less liberal).

578. MD. R.P. 2-402(c); *cf.* Former Md. R.P. 400 d (same); FED. R. CIV. P. 26(b)(3)(same).

579. *See* Minutes, May 16-17, 1980, at 30-31; *see also* Comments of Mr. Nilson, Minutes, Oct. 10, 1980, at 4.

580. The Discovery Subcommittee considered and rejected as unworkable an alternative approach of listing documents and tangible things "which would be automatically deemed as having been prepared in anticipation of litigation." Minutes, Oct. 10, 1980, at 5. The Subcommittee was unable to produce an acceptable alternative, and the Committee accepted the Subcommittee's recommendation to retain the present language of Former Md. R.P. 400 d.

581. *See* Kelch v. Mass Transit Admin., 287 Md. 223, 229, 411 A.2d 499, 453 (1980), *cited in* C. BROWN, *supra* note 4, § 4.14, at 121-22.

Section (d) concerns a party's or witness' statement on the action or its subject matter. The section retains the substantive scope of Former Rule 400 e, but expands the application to all methods of discovery.⁵⁸² The Committee debated a number of issues including the need for a definition of witness, whether a party should be able to obtain expenses, and the extent to which a non-party could obtain his own statement.⁵⁸³ However, in the end, the Committee decided that no substantive changes should be made to the former rule.⁵⁸⁴

Although the heading of section (d) refers to "Witness' Own Statement," the section's body refers to "[a] person who is not a party" without expressly requiring witness status. Nevertheless, the advisory committee notes on the similarly worded paragraph in Federal Rule 26(b)(3) specifically refer to a non-party witness,⁵⁸⁵ and, presumably, that is what the new Maryland rule means as well. Finally, it should be noted that, despite section (d)'s failure to incorporate the provisions of section (a), the relevancy standard still governs the permissible scope of discovery. That standard is implied where section (d) provides for discovery of "a statement concerning the action or its subject matter"

Subsection (e)(1) concerns expert witnesses who are expected to be called at trial and expands Maryland discovery practice. While retaining the discovery of written reports found in Former Rule 400 f, this subsection incorporates the federal practice permitting discovery of basic facts and opinions by interrogatory.⁵⁸⁶ Subsection (e)(1)(B) allows a party to use any method of discovery to obtain the findings and opinions, written or not, of experts expected to testify at trial. Although subsection (e)(1)(B) responds to the growing practice of frustrating discovery by not having the expert prepare a written report, the Discovery Subcommittee declined to adopt the practice of some states of permitting motions to compel the preparation of a written report.⁵⁸⁷

While continuing the general policy of denying discovery of materials and information from experts not expected to be called at trial, sub-

582. The Committee deleted as unnecessarily restrictive the language of Former Md. R.P. 400 e limiting the method of discovery statements concerning the action or subject matter to interrogatory or deposition. The new language conforms with that of FED. R. CIV. P. 26(b)(3).

583. See Minutes, May 16-17, 1980, at 31.

584. See Minutes, Oct. 17-18, 1980, at 5.

585. ADVISORY COMMITTEE COMMENTS ON SUBSTANTIVE ALTERATIONS IN FEDERAL RULE 26 (1970).

586. Proposed Rule 2-402(e)(1) reporter's note; see FED. R. CIV. P. 26(b)(4)(A).

587. See Comments of Mr. Nilson, Minutes, Sept. 12, 1980, at 2 (responding to Comments of Mr. Brault, Minutes, June 20-21, 1980, at 27).

section (e)(2) incorporates federal practice,⁵⁸⁸ qualified by the exception from Former Rule U12 b for condemnation cases.⁵⁸⁹ The identity of an expert who will not testify may be discovered only if the discovering party can meet the same burden necessary to discover materials prepared in anticipation of trial—that there is a substantial need for the materials and they cannot be obtained through any other means without undue hardship. The original Discovery Subcommittee draft of subsection (e)(2) did not contain the condemnation exception; however, a memorandum on the history of Former Rule U12 b, submitted by Assistant Attorney General Nolan H. Rogers, persuaded the Subcommittee to recommend and the Committee to approve the exception.⁵⁹⁰ The policy behind this exception is to deter condemning authorities from suppressing unfavorable expert reports or opinions.⁵⁹¹ In a related consideration, the Discovery Subcommittee chose not to recommend a rule change addressing the holding of *City of Baltimore v. Zell*⁵⁹² which allows an appraiser, ultimately called to testify on behalf of a property owner, to disclose his initial employment by the governmental unit.⁵⁹³

Rule 2-403—Protective Orders

Rule 2-403 furthers the integration of Maryland and federal practice already found in Former Rule 406. Section (a) substantially retains Former Rule 406 a, which was derived from Federal Rule 26(c), and grants the court wide discretion to limit discovery in order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Following the word “court” in the first sentence, section (a) omits “in which the action is pending,” language that is found in both Former Rule 406 a and Federal Rule 26(c). In a statement that is, perhaps, related to this omission, one member questioned whether a court had authority to issue orders regarding depositions taken in other states.⁵⁹⁴ Although set aside for further subcommittee study, the matter did not reappear before the Committee, and practical jurisdictional problems remain for judicial interpretation.⁵⁹⁵

Subsection (a)(2) is derived from Federal Rule 33(b) and reiterates

588. See FED. R. CIV. P. 36(b)(4)(B).

589. Proposed Rule 2-402(e)(2) reporter's note.

590. See Reference to Rogers' Memorandum and Committee Vote, Minutes, October 17-18, 1980, at 5-7.

591. See Comments of Mr. Nilson, *id.*

592. 279 Md. 23, 367 A.2d 14 (1977).

593. See Reference to Rogers' Memorandum and Comments of Mr. Nilson, Minutes, October 17-18, 1980, at 7-8.

594. Comments of Judge Ross, Minutes, June 20-21, 1980, at 32.

595. See Comments of Mr. Nilson, *id.* at 32-33.

the power of the court to direct the sequence and timing of all discovery.⁵⁹⁶ The new rule eliminates as redundant Former Rule 406 b which limited protective orders to the prevention of "genuine oppression or abuse," but the Committee intended no change in the existing standards for issuance of protective orders.⁵⁹⁷ Rather, the Committee incorporated the current provision in the language added from Federal Rule 26(c) concerning the prevention of "annoyance, embarrassment, oppression, or undue burden or expense."⁵⁹⁸

Overall, the modifications are designed to reduce abuses of discovery. Although concern was expressed about the expense of discovery, particularly for non-parties, the general reply was that protective orders would alleviate cost problems.⁵⁹⁹ The order provision in section (b) is derived from the second paragraph of Federal Rule 26(c).⁶⁰⁰ Under the new provision, the court may order compliance with discovery when denying a protective order.⁶⁰¹ Because the provision in Former Rule 406 c for the payment of the opposing party's expenses has been omitted, arguably expenses may no longer be available to parties successfully opposing a motion for a protective order.

*Rule 2-404—Perpetuation of Evidence*⁶⁰²

This rule substantially expands and seeks to clarify current Maryland practice. Section (a) applies broadly and allows all persons "who may have an interest in an action" to perpetuate testimony or other evidence. The Committee unanimously retained the scope of Former Rule 402 rather than adopting the more restrictive federal approach, which applies only to anticipated parties to an action,⁶⁰³ because it felt that the new rule would better serve the need to preserve testimony.⁶⁰⁴

Although Former Rule 402 only allowed the use of depositions,

596. See MD. R.P. 2-401(b), discussed at *supra* notes 553-62 and accompanying text.

597. See Minutes, June 20-21, 1980, at 33. The granting of a protective order is within the sole discretion of the trial court and may be reversed only upon a clear showing of abuse of discretion. See *Galello v. Onasis*, 487 F.2d 986 (2d Cir. 1973).

598. FED. R. CIV. P. 26(c).

599. See, e.g., Minutes, Oct. 17-18, 1980, at 14.

600. Proposed Rule 2-403(b) reporter's note.

601. For a discussion of the federal rule, see Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLO. L. REV. 480, 492-93 (1958).

602. The Committee deleted reference to "discoverable evidence" in the rule "since the purpose of the rule is perpetuation of testimony, and not discovery." Comments of Judge Ross, Consensus of Committee, Minutes, June 20-21, 1980, at 36.

603. The original draft of the rule followed the federal approach. See *id.* at 33; FED. R. CIV. P. 27(a)(1)(1).

604. See Comments of Judge Ross, Voice Vote of Committee, Minutes, June 20-21, 1980, at 36.

subsection (a)(1) of the new rule allows perpetuation by deposition, by production of documents, and by mental or physical examination. The subsection retains the Maryland practice of not requiring, in all cases, a motion, hearing, and order of court;⁶⁰⁵ however, as under Rule 2-423, mental and physical examinations will require an order.⁶⁰⁶

In response to concern that disabled persons may be subject to the hardship of examination in advance of litigation, one member stated that protective orders should supplement the order requirement as a remedy for abuse.⁶⁰⁷ Further protection is provided by subsection (a)(2) which requires inclusion of specified details in the notice, request, or motion to avoid unfair surprise.⁶⁰⁸ Indeed, subsection (a)(2)'s notice requirement affords the potential defendant much more information than did the former rule. Under Former Rule 402 a, a party seeking to take a deposition before an action was instituted only had to notify potential defendants of "the time and place for taking the deposition, the name or descriptive title of the officer before whom the deposition [was] to be taken, and the name and address of each person to be examined"⁶⁰⁹ Under Rule 2-404(a)(2), however, a party must give the above stated information *plus*

a description of the subject matter of the expected action, a description of the person's interest in the expected action, the facts the person desires to establish through the evidence to be perpetuated, the person's reasons for desiring to perpetuate the evidence, and, in the case of a deposition, the substance of the testimony that the person expects to elicit and a statement that any person served has a right to be present.⁶¹⁰

The filing requirements of subsection (a)(3) also change Maryland practice. Under Former Rule 402 d, the person seeking to perpetuate evidence was required to designate the court in which that person proposed to file the deposition. New Rule 2-404(a)(3) designates as the proper court the circuit court in the county of residence of the expected adverse party.⁶¹¹ This subsection also accelerates the time for indexing by the clerk to the time when notice is filed, rather than the present

605. See Proposed Rule 2-402(a)(1) reporter's note. *But cf.* FED. R. CIV. P. 27(a)(1), (3) (requiring petition and order).

606. See Proposed Rule 2-404(a)(1) reporter's note.

607. Comments of Mr. Lombardi, Mr. Brault, and Mr. Nilson, Minutes, June 20-21, 1980, at 37.

608. Proposed Rule 2-404(a)(2) reporter's note. Although not so noted, the subsection resembles the petition requirements found in FED. R. CIV. P. 27(a)(1).

609. Former Md. R.P. 405 a 2(a); see Former Md. R.P. 402 a.

610. MD. R.P. 2-404(a)(2).

611. See MD. R.P. 2-404(a)(3); *cf.* FED. R. CIV. P. 26(a)(1).

practice of indexing when the completed deposition is filed.⁶¹² A new provision that allows any party to request that the evidence to be perpetuated be filed under seal comes from the standard practice in Baltimore City.

New subsection (a)(4) governs service of the notice required by subsection (a)(2) and incorporates the Chapter 100 rules of Title 2. Through this incorporation, the subsection retains some of the coverage found in Former Rule 402 b 2 and c by requiring service "on each person against whom the testimony or other evidence is expected to be used."⁶¹³ The subsection's new language requiring service "on any other interested person" raises ambiguities about who must be served. It is unclear who falls within this category, and the minutes reflect no discussion of the question. The first portion of the subsection requires service only on anticipated parties, because only parties could have testimony used "against" them. However, because the rule comprehends preservation of evidence without regard to anticipated party status, the second half of subsection (a)(4) seems to contemplate service on *anyone* "who may have an interest in an action."⁶¹⁴ Narrowly read, the "interested person" language could be limited to anticipated co-plaintiffs or co-defendants who would not have the evidence used "against" them. Alternatively, the language could refer to standards applied in intervention.⁶¹⁵

The Committee included subsection (a)(5) to allow the subpoena of a non-party witness who refuses to appear.⁶¹⁶ A proposal for a specific provision to allow a non-party to recover expenses was not incorporated.⁶¹⁷ Also new, subsection (a)(6) allows the general use of perpetuated evidence against any person receiving notice and in any action involving the same subject matter. This provision eliminates the previous requirement that permission of the court upon a showing of good cause be obtained in order to use the perpetuated evidence in another court.⁶¹⁸

Rule 2-404 (b) provides for the perpetuation of evidence after trial

612. Compare Former Md. R.P. 402 d ("Upon the filing of the deposition, the clerk shall index the same . . ."), with MD. R.P. 2-404(a)(3) ("The clerk shall index the notice, request, or motion under the name of the person *seeking* to perpetuate evidence . . .") (emphasis added).

613. See Proposed Rule 2-404(a)(3) reporter's note. See Former Md. R.P. 402 b 2 (allowing service upon an attorney, guardian, or committee of a person under a disability); *id.* c (prescribing rule of service upon a nonresident).

614. See MD. R.P. 2-404(a)(1). Cf. Former Md. R.P. 402 a (requiring notice only to "each person against whom such deposition is expected to be used").

615. See MD. R.P. 2-214; Former Md. R.P. 208.

616. See Minutes, Sept. 12, 1980, at 41.

617. See Comments of Mr. Ryan, *id.*

618. See Former Md. R.P. 402 e; Proposed Rule 2-404(a)(6) reporter's note.

and during appeal for use in the event of further proceedings at the trial level. To prevent abuse, one seeking to perpetuate evidence pending appeal is required to file a motion for leave to perpetuate evidence and obtain an order of court. The court in issuing the order is empowered to protect persons against annoyance, embarrassment, oppression, or undue burden or expense.⁶¹⁹

Rule 2-411—Deposition—Right to Take

Rule 2-411 is derived from Former Rule 401 and slightly changes Maryland practice by adding a third circumstance in which leave of court is required prior to taking a deposition. As a general rule, leave of court is not required. Under the former rules, leave was required to take a deposition prior to the time when a defendant's initial pleading was due, and to depose a prisoner. The new rule retains those requirements but adds a third: Leave of court is now required before deposing "an individual who has previously been deposed in the same action"⁶²⁰

Rule 2-412—Deposition—Notice

In general, this rule consolidates and modifies various deposition notice provisions found in a number of the former rules. Section (a) expands to ten days the time for filing notice before oral deposition. The Committee suggested that the five-day notice provision of Former Rule 405 a 1 was too short and created hardship when judges could not rule on protective orders within that time period.⁶²¹ By requiring that notice and subpoena be served at least thirty days in advance of deposition when production of documents is required, section (c) eliminates the inconsistency between Former Rule 419, which generally afforded a party thirty days for production, and Former Rule 405 which required production within five days when sought for a deposition.⁶²²

Because Rule 2-412 covers both oral and written depositions, section (d) expands the methods available for discovery from a corporation, partnership, association, or governmental agency. Practice under Former Rule 405 a 2(b) allowed only oral deposition. In considering discovery from organizations, the Committee addressed how the organization should identify the individual who is designated to testify

619. See MD. R.P. 2-404(b); Proposed Rule 2-404(b) reporter's note.

620. MD. R. P. 2-411(b).

621. See Comments of Judge McAuliffe and Mr. Ryan, Motion of Judge McAuliffe, and Unanimous Vote of Committee, Minutes, Oct. 17-18, 1980, at 45; see also discussion of MD. R.P. 2-432(a), *infra* notes 696-98.

622. See Proposed Rule 2-424(c) reporter's note; Minutes, Sept. 12, 1980, at 25.

on its behalf. A suggestion to require advance written designation of the person to testify was withdrawn as too restrictive and unfair.⁶²³ One member moved to require designation on the record, at the beginning of the deposition of the subject matter about which each person appearing for an organization will testify. Another member argued that this would eliminate the incentive for earlier informal notification. The motion was defeated.⁶²⁴ Thus, the rule does not specify in what manner a subpoenaed organization should designate the testifying individual. The Committee notes indicate, however, that a telephone call or other reasonable notice should be sufficient. Finally, although one member noted current judicial uncertainty over the meaning of "managing agent,"⁶²⁵ other members noted that the term is useful to suggest that senior corporate personnel generally should be designated.⁶²⁶

Rule 2-413—Deposition—Place

Rule 2-413 essentially preserves Former Rule 408 in its entirety with only minor stylistic changes. As under Former Rule 408 a 1(b), the nonresident forty-mile requirement in subsection (a)(1) does not contemplate service outside of Maryland.⁶²⁷

Rule 2-414—Deposition—Officer Before Whom Taken

This rule represents a blend of current Maryland and federal practice. Section (a) expands the category of persons before whom in-state depositions may be taken. A general definition of "any person authorized to administer an oath" replaces the specific officers listed in Former Rule 403 a.⁶²⁸ Sections (b) and (e) retain Former Rule 403 b with stylistic changes only. Section (b) allows depositions in other states to be taken before any person authorized to administer an oath, or before any person appointed by the court where the action is pending. Section (e) continues the requirement that objections to the qualification of the officer be made before beginning the deposition or as soon as discovered.

Derived from Federal Rule 28(b),⁶²⁹ section (c) changes Maryland practice on taking depositions in foreign countries in three respects: First, section (c) expressly eliminates Former Rule 403 c's requirement

623. Motion of Mr. Ryan, Comments of Mr. Jones and Mr. Franch, Minutes, Sept. 12, 1980, at 13.

624. Motion of Mr. Bowen, Comments of Mr. Nilson, *id.*

625. Comments of Judge Ross, *id.*

626. Comments of Mr. Nilson, Mr. Niemeyer, *id.*

627. Comments of Mr. Ryan, *id.* at 15.

628. *See id.* at 14-15; Comments of Reporter, Mr. Bowie, Minutes, Oct. 17-18, 1980, at 11-12.

629. Proposed Rule 2-414(c) reporter's note.

that “[a] commission or letters rogatory shall be issued only when necessary and convenient.” New section (c) allows the court to issue commissions or letters rogatory “on motion and notice and on terms that are just and appropriate.”⁶³⁰ Second, the section incorporates the general definition of any person authorized to administer an oath from section (a) rather than the specific officers listed in Former Rule 403 c. Finally, the last sentence of section (c) expressly grants the court the discretion to admit irregular responses to letters rogatory.⁶³¹

Section (d), covering disqualification for interest, eliminates reference to the option under Former Rule 403 d that the parties may agree to take a deposition before an interested person. This change will not affect Maryland practice, however, because Rule 2-401(e) allows parties to stipulate, unless otherwise ordered by the courts, before whom a deposition will be taken.⁶³²

Rule 2-415—Deposition—Procedure

This rule consolidates various procedural provisions found in a number of the former discovery rules and effects several changes. The only changes to sections (a), (b), (c), (f), and (g) are stylistic.⁶³³ The Committee considered whether “cross-examination” in section (b) was an inappropriate term because “cross-examination” at deposition frequently comes from counsel for the witness,⁶³⁴ but it later noted that the terms are currently employed in federal and Maryland practice without confusion.⁶³⁵

Section (d), providing for correction and signature, does not materially alter Maryland practice. One minor change is that corrections are now to be made by the deponent on a separate sheet and attached as part of the deposition transcript. Although this was the procedure customarily followed in the past, Former Rule 411 a 2 provided that corrections were to be noted in the transcript itself. In addition the language allowing the officer to sign the transcript if the deponent fails to sign is slightly changed to cover expressly all possible reasons for the deponent’s failure to sign, including simple inadvertence.⁶³⁶ Under Former Rule

630. Md. R.P. 2-414(c).

631. Judge Ross and other members expressed concern, but the provision was not amended. *See* Minutes, Sept. 12, 1980, at 15.

632. *See* Md. R.P. 2-401(e); *cf.* Former Md. R.P. 403 d (providing that depositions shall not be taken before an interested party “unless the parties agree thereto”).

633. *See* Proposed Rule 2-415 reporter’s note.

634. *See* Minutes, Sept. 12, 1980, at 26.

635. Comments of Reporter, Minutes, Oct. 17-18, 1980, at 12.

636. *See* Proposed Rule 2-415(d) reporter’s note; Comments of Mr. Weiner, Minutes, Sept. 12, 1980, at 16.

411 a 4, the officer was to sign for the deponent only under certain enumerated, albeit fairly inclusive, circumstances. Finally, as under the former rule, the new rule requires that both the deponent and the parties waive signing. One member suggested that only the deponent should be required to waive signature. Another member replied that the parties have legitimate interests in the matter, since the deposition is part of their litigation and they will be bound by it.⁶³⁷

Section (e), governing certification, filing, and notice, substantially changes one aspect of Maryland practice: Under the new rule, the transcript will be filed only upon request of a party. Former Rule 411 b 2 required the officer to file the transcript unless the parties agreed otherwise.⁶³⁸ The new rule retains the former requirements that the officer give notice of filing to the party taking the deposition and that that party, who may, or may not be the party requesting the filing, notify all other parties.⁶³⁹ Motions to shift all notice burdens to the officer and to limit notice to parties who attend the deposition both failed.⁶⁴⁰ With respect to the latter proposal, the Committee noted that parties who were not in attendance have a strong interest because they must rely on the transcript and may not have a chance to depose the witness themselves.⁶⁴¹ Notice was retained on the consensus of the Committee that filing was an exception under the former rules and that its occurrence deserved notice.⁶⁴²

Sections (h) and (i) slightly modify prior practice. In the event of a refusal to answer a question, section (h) now requires that the deposition be completed before filing a motion to compel. This procedure was optional under former practice.⁶⁴³ Former practice for objections to corrections is relaxed by section (i). The new rule requires "a motion to suppress all or part of the corrections [to be] filed within sufficient time before trial to allow for ruling by the court . . ."⁶⁴⁴ Under Former Rule 412 e, such a motion was required to be made "with reasonable promptness after the corrections have been filed with the transcript."⁶⁴⁵

637. Comments of Mr. Weiner, Minutes, Sept. 12, 1980, at 15-16.

638. *See* Proposed Rule 2-415(e) reporter's note; Minutes, Sept. 12, 1980, at 16. Depositions will not become part of a public record until filed. Comments of Dean Kelly and Mr. Ryan, *id.*

639. *See* Minutes, Sept. 12, 1980, at 16-17.

640. *See id.*

641. *See id.*

642. *See id.*

643. *See* Former Md. R.P. 422 a 2; Proposed Rule 2-415(h) reporter's note; Comments of Chairman, Minutes, Oct. 17-18, 1980, at 44.

644. MD. R.P. 2-415(i).

645. Former Md. R.P. 412 e. *See* Proposed Rule 2-415(i) reporter's note.

Rule 2-416—Deposition—Videotape and Audiotape

This rule retains the provisions recently adopted by the Court of Appeals under Former Rules 409 and 410.⁶⁴⁶ The only change is that the new rule allows "any deposition" to be recorded by videotape or audiotape whereas the prior rule restricted the rule's coverage to "[a]ny deposition to be taken upon oral examination." This change should have no effect on the depositions that may be recorded by either of these methods.⁶⁴⁷

Rule 2-417—Deposition—Written Questions

This rule expands Maryland practice. Section (a) is derived from Former Rule 405 b and enlarges the period for filing redirect and recross questions from ten to fifteen days.⁶⁴⁸ Although the Committee minutes do not reflect any comment on this specific change, it parallels the enlargement of the time period for filing notice of oral depositions from five to ten days effected by Rule 2-412(a).

When read with Rule 2-415(e), which requires a request by a party before the officer files the transcript, Rule 2-417(b) changes former Maryland practice, which required the officer to automatically file the transcript unless the parties agreed otherwise.⁶⁴⁹ Now, the official need only file the transcript if one of the parties requests. Derived from Former Rule 412 c 3, section (c) enlarges the time for filing an objection to recross questions from three days to seven days.⁶⁵⁰ The requirement of a statement of grounds is new.⁶⁵¹

Rule 2-418—Deposition—By Telephone

This rule is new to Maryland practice and allows for discovery by phone upon stipulation by the parties or court order. The new rule adopts Federal Rule 30(b)(7).⁶⁵²

646. Adopted Oct. 1, 1980, effective January 1, 1981. Discussion by the Committee prior to adoption of the former rules focused on general concerns about allowing videotape and audiotape deposition as a matter of course, cost considerations, the added expense of requiring typed transcripts, procedural and technical safeguards, utility of such depositions with expert testimony, who should be present, and notice and correction provisions. *See Minutes*, March 8, 1980, at 4-22; *id.*, May 16-17, 1980, at 4-23.

647. Proposed Rule 2-416 reporter's note.

648. Proposed Rule 2-417(a) reporter's note.

649. *See* Former Md. R.P. 411; *id.* b 2.

650. Proposed Rule 2-417(c) reporter's note.

651. *Id.*

652. Proposed Rule 1-418 reporter's note.

Rule 2-419—Deposition—Use

Rule 2-419 retains much of Former Rule 413 with stylistic changes and some reorganization. The new rule eliminates the introductory language of Former Rule 413, which limited use to specified proceedings. Thus, it seems that depositions now may be used in any evidentiary proceeding. The Committee considered replacing the language “or upon hearing of a motion or an interlocutory proceeding” of Former Rule 413 with “or any proceeding at which evidence is to be taken.”⁶⁵³ Instead, all introductory language was eliminated. Given the Committee’s intent to broaden deposition use, the alternate language appeared unnecessary. The Committee also eliminated part of Former Rule 413 a 5, which provided for the substitution of parties, because that provision was enlarged, under Rule 2-401(d), to cover all discovery. The express requirement of dismissal of another action before use of depositions taken therein is similarly eliminated.⁶⁵⁴

The Committee disagreed over how to assess the costs of a deposition. Originally, the Committee discussed including a provision on costs patterned after Former Rule 415.⁶⁵⁵ Consistent with practice under Former Rule 415, a draft provision required that costs of depositions admitted into evidence be assessed as costs of the case, and allowed the court discretion in assessing the costs of other depositions.⁶⁵⁶ After discussion and a variety of motions,⁶⁵⁷ the Committee narrowly voted to delete the mandatory provisions and make the provision entirely discretionary.⁶⁵⁸ That provision, however, did not emerge as part of the proposed discovery rules. Instead, the Committee later reconsidered assessing deposition costs as part of the general provision on costs in Rule 2-603(c). After debating whether such costs were reasonably necessary for trial or solely for discovery, and whether the standard under Former Rule 415 was artificial, the Committee voted to eliminate any express reference to the court’s power to assess deposition costs.⁶⁵⁹ On motion of a party and after hearing, Rule 2-603(c) now allows the court to “assess as costs any reasonable and necessary expenses, to the extent permitted by rule or law.”⁶⁶⁰ The new rules contain no general provision on deposition costs, either mandatory or discretionary.⁶⁶¹ Rule

653. Minutes, Sept. 12, 1980, at 30.

654. Compare MD. R.P. 2-419(c) with Former Md. R.P. 413 a 5.

655. Minutes, Sept. 12, 1980, at 29-30.

656. *Id.*; see Former Md. R.P. 415.

657. Minutes, Sept. 12, 1980, at 31.

658. *Id.*

659. Minutes, Nov. 20-21, 1981, at 32.

660. See Comments of Mr. Nilson, Mr. Niemeyer, Mr. Brault, and Mr. Bowen, *id.*

661. MD. R.P. 2-603(b); cf. Former Md. R.P. 415.

2-415(a), however, allows the court discretion to assess transcription costs and Rule 2-433(c) provides for expenses incurred in compelling discovery.

Rule 2-421—Interrogatories to Parties

With a few changes, Rule 2-421 retains the former Maryland practice with respect to interrogatories. Section (a) combines Former Rule 417 a 1 and 2 governing availability and number. The limit of one set of thirty questions is retained.⁶⁶² Although some Committee members expressed dissatisfaction over retaining the thirty question limit, one member explained that even though arbitrary, the rule has proven workable in practice. The limit seems consistent with the general policy of countering discovery abuse which the Committee expressed in discussion of other rules. The requirement derived from Former Rule 417 a 1 that all parties be furnished copies of interrogatories does not appear in the language of this rule, but it survives under Rule 1-321(a).⁶⁶³

With several changes, section (b) retains the practice under Former Rule 417 b 1 and b 2.⁶⁶⁴ Objections no longer need to be stated under oath.⁶⁶⁵ Response time is expanded to the later of thirty days after service of the interrogatories or fifteen days after the time for filing the initial pleading.⁶⁶⁶ And the rule adopts the local Maryland federal practice of restating each interrogatory before answering it.⁶⁶⁷

Section (c) retains the option contained in Former Rule 417 f that in response to interrogatories, a party may specify that the answer may be found in certain business records and may allow the party serving the interrogatories to inspect those records. In addition to the conditions found in the former rule, section (c) adds a specificity requirement from Federal Rule 33(c) to curb discovery abuse.⁶⁶⁸ The section requires that the party answering the interrogatory specify the records from which the answer may be obtained with sufficient detail to allow the "interrogating party to locate and to identify [the records], as readily as can the

662. Comments of Judge Ross, Minutes, Sept. 12, 1980, at 34.

663. Proposed Rule 2-421(a) reporter's note. See MD. R.P. 1-321(a) (requiring that "every pleading and every other paper filed subsequent to the original pleading shall be served upon each of the parties").

664. See Minutes, Sept. 12, 1980, at 34.

665. *Id.*

666. Compare Former Md. R.P. 417 b 1 (answer within 30 days "or by the day on which defendant's initial pleading is required"), with MD. R.P. 2-421(b) (answer within 30 days "or within 15 days after the date on which that party's initial pleading or motion is required").

667. D. MD. LOCAL R. 6(c).

668. Proposed Rule 2-421(c) reporter's note.

party served.”⁶⁶⁹

Rule 2-422—Discovery of Documents and Property

In substance, this rule retains the practice under Former Rule 419 but adopts language from Federal Rule 34.⁶⁷⁰ Additional language in section (a) specifies that multiple requests may be made and that the respondent may be required to translate data into “reasonably usable form.”⁶⁷¹ Section (d) has been borrowed from the federal rule “to avoid obfuscation in document production,”⁶⁷² and requires the producing party to produce the records as they are kept in the ordinary course of business or organize and label them in accordance with the request.

Rule 2-423—Mental or Physical Examination of Persons

Rule 2-423 substantively follows Former Rule 420 with changes in style and organization. Former Rule 420 required that the mental or physical condition be “material to any matter involved in any action”⁶⁷³ This language has been changed to parallel the federal requirement that the condition be “in controversy.”⁶⁷⁴ In addition to the separate availability of a protective order, the requirement of an order before examination protects against successive examinations and examinations by a physician to whom the party or person to be examined objects.⁶⁷⁵

Rule 2-424—Admission of Facts and Genuineness of Documents

This rule incorporates aspects of both Former Rule 421 and federal practice to create a new provision. Under section (a), when a party requests an admission of the genuineness of a document, copies of the original document need not be filed. Such copies must, however, be served with the request for an admission unless they have been provided other-

669. MD. R.P. 2-421(c).

670. Proposed Rule 2-422 reporter's note.

671. See MD. R.P. 1-422(a); cf. FED. R. CIV. P. 34(a).

672. Proposed Rule 2-422 reporter's note. This provision in FED. R. CIV. P. 34(b) became effective on August 1, 1980, and was “designed to avoid the practice of some litigants deliberately to mix critical documents with many others in the hope of obscuring significance.” FED. R. CIV. P. 34(b) advisory committee note.

673. Former Md. R.P. 420.

674. Cf. FED. R. CIV. P. 35(a). While the committee materials reflect no discussion of this change, the federal rule imports a more specific and particular requirement. See *Schlagenhauf v. Holder*, 379 U.S. 104, 121-22 (1964); *Winters v. Travia*, 495 F.2d 839, 841 (2d Cir. 1974).

675. Comments of Judge Ross, Mr. Nilson, and Professor Bowie, Minutes, Oct. 17-18, 1980, at 15.

wise.⁶⁷⁶ Section (a) also adds a provision borrowed from Federal Rule 36(a) which requires that each matter requested for admission be separately stated. Unlike the federal rule, however, this section retains the Maryland practice of limiting admissions to facts.

Section (b) combines the substance of Former Rule 421 with additional provisions from Federal Rule 36(a).⁶⁷⁷ In a minor change from the former rule, the party need only sign the response to a request for an admission rather than provide a statement under oath. More significantly, the new section adds an affirmative duty for the respondent to make "reasonable inquiry" before basing failure to admit or deny upon lack of information or knowledge. The Committee intended that the "reasonable inquiry" standard impose the minimal requirement upon a party to gather the information necessary to respond to a request for an admission. The requirement entails more than merely reviewing documents in the respondent's possession; however, if after inquiry the respondent cannot readily obtain the information, the requirement is satisfied.⁶⁷⁸ Language added from the federal rule clarifies the obligation to respond with specificity and provides that a request presenting a genuine issue for trial is not objectionable on that ground alone.

Section (c) retains the practice under Former Rule 421 d for determining the sufficiency of the response. It adds, however, new requirements for the form of the motion.⁶⁷⁹ The motion must recite the request and the answer or objection, and give reasons for challenging the answer or objection. If the court determines that an answer is insufficient, it may order that the matter is admitted or that the answer must be amended.

While abolishing as unnecessary the distinction between actual and implied admissions, section (d) continues to limit the effect of admissions to the pending action.⁶⁸⁰ The section adopts the more specific federal standard for withdrawal *or* amendment.⁶⁸¹ A two-part test now replaces the "injustice" standard of Former Rule 421 f: First, the movant/respondent must demonstrate that the admission undermines presentation of the merits. Second, the party who obtained the admission must fail to satisfy the court that withdrawal or amendment will be prej-

676. Comments of Judge Ross, Mr. Nilson, *id.* at 18.

677. *See* Proposed Rule 2-424(b) reporter's note.

678. *See* Comments of Mr. Sykes, Mr. Nilson, and Consensus of Committee, Minutes, Oct. 17-18, 1980, at 18-19.

679. *See* Proposed Rule 2-424(c) reporter's note. FED. R. CIV. P. 36(a) does not have similar requirements.

680. *See* Proposed Rule 2-424(d) reporter's note; Comments of Mr. Ryan and Mr. Nilson, Minutes, Oct. 17-18, 1980, at 20.

681. *See* FED. R. CIV. P. 36(b).

udicial. The Discovery Subcommittee felt that the two-part test states more succinctly the elements found in the former standard.⁶⁸² One member noted that the former practice placed the entire burden on the party moving to withdraw the admission, while the new rule places a burden on both the movant and the party who obtained the admission.⁶⁸³

Section (e) expands Former Rule 421 e by incorporating more specific grounds for denying a request for expenses, which are borrowed from federal practice.⁶⁸⁴ The most significant ground for not awarding expenses under the new rule is if the party had a "reasonable ground to expect to prevail." Under the former rule, a party must have had "good reasons" for refusing to admit.⁶⁸⁵ The addition of reasonable grounds (the "good reason" exception is retained) apparently relaxes the standard by which a party may avoid an assessment of attorneys' fees.

Rule 2-431—Certificate Requirement

The new rule expands Former Rule 442 d and eliminates the requirement that an attorney requesting the court's intervention in a discovery dispute actually consult with the opposing attorney. Instead the rule requires that the attorney file a certificate describing the "good faith attempts" to discuss the resolution of the dispute. The Committee discussed this change in light of the Standing Committee's recent promulgation, at the request of the Court of Appeals, of Former Rule 422 d.⁶⁸⁶ The Committee viewed the rule as an attempt by the court to encourage more effort by attorneys to settle discovery disputes without court involvement.⁶⁸⁷ After some discussion, the Committee agreed that the rule should make clear that no absolute requirement of personal consultation exists, provided that the party makes a good faith attempt to consult.⁶⁸⁸

The rule reduces the judicial work load by omitting the requirement of a hearing; the court, in its discretion, may rule on the dispute with or without a hearing.⁶⁸⁹ One member of the Committee expressed concern that the new rule might have the opposite effect of increasing

682. Comments of Mr. Nilson, Minutes, Oct. 17-18, 1980, at 19.

683. Comments of Judge McAuliffe, *id.* at 20.

684. See Proposed Rule 2-424(e) reporter's note; FED. R. CIV. P. 37(c).

685. Former Md. R.P. 421 e.

686. Comments of Mr. Nilson, Minutes, Oct. 17-18, 1980, at 20.

687. See Comments of Judge Ross, *id.* at 21. Judge Ross implied by example that mere writing of a letter to which no response was received would not satisfy "good faith attempts." *Id.*

688. See Comments of Mr. Sykes and Judge McAuliffe, *id.*

689. Proposed Rule 2-431 reporter's note.

the number of hearings, because the former rule imposed a certificate requirement only to obtain a hearing, and thus, allowed the court to dispose of many discovery matters without a hearing.⁶⁹⁰ But, the Committee intended that the new rule should enable the discovery judge to use discretion in denying a hearing and ruling on the record.⁶⁹¹ This intent parallels the new approach of Rule 2-311(f) on motions generally, which provides that the court may decide any motion without a hearing, unless the motion would be dispositive of a claim or defense or unless a rule expressly provides for a hearing.⁶⁹²

Although Rules 2-431 and 2-311(f) may reduce the number of hearings, the removal of the actual consultation requirement may produce a greater number of disputes over whether or not "good faith attempts" have been made.⁶⁹³ The specific facts required in the second sentence of Rule 2-431, therefore, become important objective criteria for establishing "good faith attempts."

The certification requirement serves an important function in promoting earlier resolution of discovery disputes. Reliance on sanctions alone would allow dilatory behavior on both sides until a sanction was imminent.⁶⁹⁴ Although the rule does not so state, two members of the Committee thought that the new rule contemplates filing of a motion, in accordance with Rule 2-432, in advance of filing the certification.⁶⁹⁵

Rule 2-432—Motions Upon Failure to Provide Discovery

Section (a) of this rule preserves prior practice by allowing an immediate motion for sanctions in three situations.⁶⁹⁶ Section (a) modifies Former Rule 422 c 3 so that the court may excuse failure of discovery on the basis of an objection only if "a protective order has been *obtained* under Rule 2-403."⁶⁹⁷ The prior rule allowed excuse upon *application* for

690. Comments of Judge Ross, Minutes, Oct. 17-18, 1980, at 22.

691. Minutes, Oct. 17-18, 1980, at 22-23.

692. MD. R.P. 2-311(f) departs from the practice under Former Md. R.P. 321 d where a hearing was mandatory upon request. See *Melnick v. Ammerman*, 38 Md. App. 635, 382 A.2d 337 (1978); see also discussion of MD. R.P. 2-311, *supra* notes 386-400 and accompanying text.

693. For example, parties seeking to avoid adjudication of the discovery dispute may seek to have the certification stricken under MD. R.P. 1-311(c).

694. Comments of Judge Ross, Minutes, Oct. 17-18, 1980, at 22.

695. Comments of Mr. Ryan and Mr. Sykes, *id.* at 23.

696. A party may move for sanctions without first obtaining an order compelling discovery if the person designated to appear for an organization under MD. R.P. 2-412(d) fails to appear, if a party fails to respond to interrogatories, or if a party fails to respond to a request for production or inspection under Rule 2-422. MD. R.P. 2-432 (a).

697. Proposed Rule 2-432(a) reporter's note; Minutes, Oct. 17-18, 1980, at 44-46; cf. FED. R. CIV. P. 37(d).

a protective order.⁶⁹⁸

Section (b) expands the grounds for compelling discovery by order in Former Rule 422 a 2 by adding provisions that allow a court to order discovery if a party fails to comply with a request for production of documents or fails to supplement a prior response. Provisions covering the form of the motion are adopted from Former Rule 417 c 2 (exceptions to interrogatories). To promote practicality and convenience, the new rule allows the moving party to attach the relevant transcript pages from depositions and does not require the duplication of interrogatories when no response has been made.

Rule 2-433—Sanctions

Section (a) is derived from portions of Former Rule 422 covering discovery failures and outlines some of the actions a court may take if it finds that one party has failed to comply with the discovery rules. Section (b) requires a motion by a party to impose sanctions for failure to comply. Section (c) adopts former practice and allows the prevailing party in a discovery dispute to seek to recover costs and attorneys' fees in certain circumstances. However, section (c) intentionally alters the presumptions to favor the party seeking expenses by providing that the court shall require the payment of such expenses unless it finds that the opposing party's stance was "substantially justified" or that an award of expenses would be "unjust."⁶⁹⁹ This shift seeks to deter frivolous motions and oppositions to motions.⁷⁰⁰ An opportunity for a hearing is required before award of expenses.⁷⁰¹

Rule 2-434—Expenses for Failure to Pursue Deposition

With minor stylistic changes, Rule 2-434 retains Former Rule 414.⁷⁰² Although Rule 2-433 (c) provides for a hearing prior to awarding expenses concerned with sanctions and protective orders, Rule 2-434 has no hearing requirement.⁷⁰³ Nevertheless, an award of expenses is

698. See Comments of Ms. Ogletree, Minutes, Oct. 17-18, 1980, at 44. Ms. Ogletree indicated that the current five-day notice requirement for depositions would create a hardship in her county under the obligation to obtain a protective order because judges might not be available to rule on requests on short notice. To accommodate, Judge McAuliffe moved to change the notice period to 15 days and to make excuse conditioned on obtaining a protective order. *Id.* at 44-45.

699. See Proposed Rule 2-433(c) reporter's note.

700. *Id.*

701. The Committee felt strongly that a hearing must be held before an award of expenses is granted. See Minutes, Oct. 17-18, 1980, at 32, 33.

702. See Proposed Rule 2-434 reporter's note; FED. R. CIV. P. 30(g)(1), (2).

703. See MD. R.P. 2-311(f) (providing that the court may decide any motion without hear-

discretionary with the court when a party noting a deposition fails to attend.

E. Chapter 500—TRIAL

Rule 2-501—Motion for Summary Judgment

Rule 2-501 is principally derived from and intended to clarify Former Rule 610. The new rule is also more streamlined, omitting provisions more appropriately included in rules of general application, such as those dealing with hearing requirements,⁷⁰⁴ bad-faith sanctions,⁷⁰⁵ and consequences of failure to respond to a motion.⁷⁰⁶

Unlike the former rule, the new rule expressly requires the party opposing a motion for summary judgment to file a response to the motion.⁷⁰⁷ By clearly requiring a motion and a response to it, the new rule prevents a court from entering summary judgment entirely on its own initiative.⁷⁰⁸ Cases construing the former rules suggest that a court may enter summary judgment on its own motion.⁷⁰⁹

The new rule also eliminates present confusion regarding when op-

ing, unless the motion is dispositive of a claim or defense, or unless a rule expressly provides for a hearing. *But cf.* Comments of Judge McAuliffe and Consensus of Committee, Minutes, Oct. 17-18, 1980, at 33 (expenses cannot be awarded without a hearing).

704. Former Md. R.P. 610 d 1 required that "there [be] no genuine dispute as to any material fact and that [the movant] is entitled to judgment as a matter of law." Similar requirements now appear in MD. R.P. 2-501(a), applicable to all hearings in civil actions, regardless of the hearing's subject. *See* MD. R.P. 1-101 (MD. R.P. Title 2 applies to all civil matters in circuit courts).

705. *Compare* Former Md. R.P. 610 e with MD. R.P. 1-311(c), (sanctions for signing pleading or paper with intent to defeat purpose of rule).

706. Under the former rule, an opponent's failure to respond to a motion for summary judgment "constitute[d] an admission for purposes of the motion of all statements of fact in the affidavit of the moving party, but did not constitute an admission that such motion or affidavit was legally sufficient." Former Md. R.P. 610 a 3.

707. *See* MD. R.P. 2-311(b) (response required to all motions to shorten or extend time requirements, for judgment notwithstanding the verdict, for new trial, or to alter or amend judgment). Moreover, Rule 2-501(b) requires the response to "identify with particularity the material facts that are disputed." MD. R.P. 2-501(b). Thus, the rule will ensure presentation to the court of all the information necessary to rule on the motion. In some cases, the new rule's requirement of a full response may, in addition, facilitate disposition of the motion without a hearing. *See* MD. R.P. 2-311(f) (no hearing required before denying motion). Even in cases in which a hearing is required, the response should shorten the hearing by identifying in advance the precise issues to be resolved. Hence, the new rule should both improve the quality of practice on motions for summary judgment and speed the disposition of those motions.

708. Explanatory Note, Minutes, Oct. 16, 1981, at 48-49.

709. *E.g.*, *Preissman v. Harmatz*, 264 Md. 715, 720-21, 288 A.2d 180, 184 (1972); *Hunt v. Montgomery County*, 248 Md. 403, 411, 237 A.2d 35, 39 (1968). *But see* *Brown, Summary Judgment in Maryland*, 38 MD. L. REV. 188, 199-201 (1978) (cases suggesting motion is not required do so in dictum and without analysis of the question).

position to a motion for summary judgment must be supported by affidavit.⁷¹⁰

[I]f [current] rule 610 is taken at face value, an opposing party, in cases in which no affidavit is required [of the moving party], could merely rest on the more general denials of his pleadings In numerous reported cases, Maryland attorneys appear to have followed just such a procedure but have paid dearly for it, losing their cases.⁷¹¹

The new rule requires affidavit support for a response whenever the motion is supported by an affidavit, whether or not affidavits were required for the motion.⁷¹² The rule thus follows the cases that have imposed demands on parties "beyond those literally required by Rule 610."⁷¹³

Section (e) of the new rule incorporates the procedure of Rule 2-602 into the court's decision to enter a partial summary judgment for some, but not all of the parties, claims, or relief.⁷¹⁴ Under that procedure, the court may determine whether its grant of partial summary judgment is a final judgment and thus appealable.⁷¹⁵ Under Former Rule 610, the granting of a motion for summary judgment was not a final judgment.

Section (f) of the new rule, although otherwise quite similar to Former Rule 610 d 4, expressly provides for modification of an "order specifying the issues or facts not in genuine dispute"⁷¹⁶ when that is necessary "to prevent manifest injustice."⁷¹⁷

Rule 2-502—Separation of Questions for Decision by Court

Rule 2-502 is not meant to change the substance of Former Rule 502, from which it is derived, but only to limit its applicability clearly to

710. Former Md. R.P. 610 required an affidavit in support of a motion for summary judgment only when the motion was filed with an initial pleading or before the defendant filed an answer. The former rule required a supporting affidavit to accompany the response to a summary judgment motion only if the movant was required to submit a supporting affidavit.

711. Brown, *supra* note 709, at 204.

712. MD. R.P. 2-501(b).

713. Brown, *supra* note 709, at 204-05.

714. Compare MD. R.P. 1-501(e) with MD. R.P. 2-602.

715. If the court "expressly determines that there is no just reason for delay and expressly directs the entry of judgment," it may direct the entry of a final judgment as to fewer than all parties or claims. MD. R.P. 2-602 (emphasis added). Only if the court does so is a partial summary judgment final and immediately appealable under the new rules.

716. MD. R.P. 2-501(f). This section of the rule clearly indicates that, unless entered pursuant to MD. R.P. 2-602, a ruling on a motion for summary judgment has the same effect as any other pre-trial order.

717. *Id.* Such an order might be used to dispose of the issue of liability, allowing a trial on the amount of damages alone. Minutes, Oct. 16, 1981, at 50. However, the new rule's use is not limited to orders of that nature, as Former Md. R.P. 610 d 1 apparently was.

questions of law.⁷¹⁸ The former rule allowed a court, when deciding a separated question, to draw all inferences that a jury could have drawn.⁷¹⁹ The Committee feared that that language might encourage a court to act in derogation of a party's right to trial by jury.⁷²⁰ To eliminate that possibility, the rule is worded to apply *only* to questions "within the sole province of the court to decide,"⁷²¹ and the court's findings of fact or factual inferences must relate to the separated question.⁷²² The separate-question procedure thus could be used to determine, for example, whether a contract is so ambiguous that parol evidence will be admissible in the trial before a jury,⁷²³ but could not be used to impair a litigant's right to have the ultimate issues of fact determined by the jury.⁷²⁴

The Committee took the unusual step of appending a Committee Note to Rule 2-502 to distinguish its function from those of related rules.⁷²⁵ When an issue or claim arises as to which there is no genuine dispute regarding any material fact, the court should direct the parties to move for summary judgment and should proceed under Rule 2-501.⁷²⁶ When an issue is not within the sole province of the court, but ought to be tried separately for convenience or to avoid prejudice, the court should proceed under Rule 2-503(b)⁷²⁷ and may do so on its own motion.

Rule 2-503—Consolidation; Separate Trials

Rule 2-503 is neither intended nor expected to change prior Mary-

718. Explanatory Note, Minutes, Mar. 6-7, 1981, at 26. That rule stated that "[t]he court may draw all inferences of facts or law that the court *or jury* could have drawn . . ." Former Md. R.P. 502 b (emphasis added). Thus, the rule did not clearly limit the scope of the court's action to questions of law.

719. Former Md. R.P. 502 b.

720. Explanatory Note, Minutes, Mar. 6-7, 1981, at 25; Explanatory Note, Minutes, June 19-20, 1981, at 11.

721. Thus, the rule will prevent trial courts from using the separate question technique to, in effect, enter a summary judgment on its own motion. *Cf.* *Harris v. Stefanowicz Corp.*, 26 Md. App. 213, 217-18, 337 A.2d 455, 458 (1975) (trial court relied on Former Md. R.P. 502 to effectively enter summary judgment on its own motion).

722. MD. R.P. 2-502.

723. Comments of Judge McAuliffe, Minutes, Mar. 6-7, 1981, at 26.

724. Minutes, Mar. 6-7, 1981, at 27. The technique could also be used to decide at an early stage questions of law arising in a nonjury trial.

725. The Note is not intended to be any part of the rule. Indeed, the Committee generally avoided appending notes to avoid the notes becoming *de facto* rules. However, in this case, the Committee believed the need for clarification outweighed that concern. Minutes, Mar. 6-7, 1981, at 27-28; Explanatory Note, Minutes, June 19-20, 1981, at 11.

726. MD. R.P. 2-502 committee note.

727. *Id.*

land practice.⁷²⁸ Section (b) completes the triad of rules providing for expedited or separate proceedings on particular aspects of an action, by allowing separate trial of any claim or issue whenever such a proceeding would be more convenient or less prejudicial.⁷²⁹ Section (a) directs attention to Maryland Code, Courts Article, § 6-104(b), which provides for consolidation of District Court with circuit court cases. Under that statute, an action may be removed from the District Court to a circuit court for consolidation with an action instituted in the circuit court.⁷³⁰ Neither the statute nor the rule, however, expressly states whether the District Court action, once transferred, automatically would be or must be consolidated with the circuit court action.⁷³¹ While automatic consolidation might deprive some circuit court litigants of an opportunity to be heard on the appropriateness of consolidation of particular actions,⁷³² the circuit court's refusal to consolidate the actions would appear to defeat the purpose of the removal from the District Court.⁷³³

Rule 2-504—Pretrial Conference

Rule 2-504 changes practice under Former Rule 504 in three principal ways. First, the rule allows the court to direct all the parties to prepare statements of the matters to be addressed at a pretrial conference.⁷³⁴ Second, the list of matters to be considered at a pretrial conference has been expanded.⁷³⁵ Third, the rule requires a pretrial order reciting the decisions reached at the conference; the former rule left the making of such an order to the discretion of the court.⁷³⁶

Some confusion regarding the necessary content of pretrial statements may arise from the wording of the new rule. Section (a) requires each party to file "a written statement addressing the matters listed in section (b)" Section (b) indicates that the listed "matters may be considered," but presumably not all of them need be, at the pretrial conference. The intent of the rule is to require parties' pretrial state-

728. Explanatory Note, Minutes, Apr. 21, 1981, at 4.

729. *Cf.* MD. R.P. 501(a).

730. MD. CTS. & JUD. PROC. CODE ANN. § 6-104 (1984).

731. At least one member of the Committee felt that a circuit court could deny a consolidation motion after a hearing, despite the District Court's grant of the transfer motion. Automatic consolidation in contrast, might deprive circuit court litigants of an opportunity to be heard on the issue of consolidation. Minutes, Apr. 21, 1981, at 5-6.

732. The parties so deprived could be those who had not been involved in the District Court action and who consequently had not been heard on the transfer motion.

733. Under MD. CTS. & JUD. PROC. CODE ANN. § 6-104 (1984), consolidation may itself be the sole ground for a removal.

734. The former rule did not provide for such statements. *See* Former Md. R.P. 504.

735. *Compare* Former Md. R.P. 504 b *with* MD. R.P. 2-504(b).

736. Former Md. R.P. 504 c.

ments to address those matters they intend to raise at the pretrial conference and any others that the court directs them to address.⁷³⁷

Rule 2-504 itself does not expressly require parties to exchange their pretrial statements before the conference. But Rule 1-321 requires service of all papers filed after the original pleading.⁷³⁸ Thus, the requirement that parties exchange their pretrial statements is embodied in the more general rule.

The expanded list of matters that may be considered at a pretrial conference is derived substantially from subparts 1 through 10 of Rule 35(B) of the United States District Court for Maryland.⁷³⁹ The new rule, unlike Former Rule 504, expressly authorizes consideration in conference of the facts on which the parties intend to rely,⁷⁴⁰ the details of the damage claimed or other relief sought,⁷⁴¹ and the documents or records the parties will offer as primary evidence.⁷⁴² The new rule also adds "limitation" of issues to the former rule's "simplification of the issues"⁷⁴³ and provides for consideration of stipulations as well as requests for admissions.⁷⁴⁴ At the same time, the new rule deletes the former rule's express provision for considering a reference of matters to an auditor.⁷⁴⁵ Instead, the procedures for referrals to masters, examiners, and auditors are governed by the rules pertaining to those officers.⁷⁴⁶

Under Former Rule 504, the court "may make an order which recites the action taken at the conference"⁷⁴⁷ The new rule mandates issuing an order, which will control the subsequent course of the action, subject to the court's modification.⁷⁴⁸ A pretrial order requiring amendments to the pleadings would also apparently supersede Rule 2-341(a), which allows a party to amend a pleading.⁷⁴⁹ The Committee agreed that the pretrial order should, in such a case, limit the general right of amendment granted by that rule.⁷⁵⁰

737. Minutes, Apr. 21, 1981, at 13-14.

738. The pretrial statements must be filed, and proof of service is a prerequisite to all filings. MD. R.P. 1-323.

739. Minutes, Apr. 21, 1981, at 14.

740. MD. R.P. 2-504(b)(1)-(3).

741. MD. R.P. 2-504(b)(7).

742. MD. R.P. 2-504(b)(8).

743. Compare MD. R.P. 2-504(b)(5) with Former Md. R.P. 504 b 1.

744. Compare MD. R.P. 2-504(b)(6) with Former Md. R.P. 504 b 3.

745. Former Md. R.P. 504 b 5.

746. For a discussion of MD. R.P. 2-541, 2-542 and 2-543, see *infra* notes 939-67 and accompanying text.

747. Former Md. R.P. 504 c (emphasis added).

748. *Id.*

749. For a discussion of MD. R.P. 2-341(a), see *supra* notes 537-49 and accompanying text.

750. Minutes, Apr. 21, 1981, at 15-16.

Rule 2-505—Removal

Former Rule 542 provided for removal of actions at law from one court to another when necessary to obtain a fair and impartial trial.⁷⁵¹ Rule 2-505 extends the availability of removal to all actions, in accordance with the proposed merger of law and equity.⁷⁵² However, the extension may conflict with article IV, section 8 of the Maryland Constitution, which grants a right of removal “in all suits or actions *at law*”⁷⁵³ The constitutional provision, in existence in some form since 1806,⁷⁵⁴ is designed to protect litigants from possibly prejudiced juries.⁷⁵⁵ Therefore, the Court of Appeals has held the right of removal under previous constitutional language inapplicable, by its nature, to suits in equity.⁷⁵⁶ At the same time, the court has concluded that the right is applicable to nonjury actions at law.⁷⁵⁷ Thus, the question remains whether the proposed rule properly can make the right of removal available in all actions.

Rule 2-506—Voluntary Dismissal

Rule 2-506 replaces the procedure for dismissal in Former Rules 541 a and 582 with that embodied in Federal Rule 41(a)(1). Under the former rules, any party to an action at law could dismiss the action or claim without leave of court at any time before the introduction of evidence.⁷⁵⁸ In contrast, parties to suits in equity were required to obtain leave of court to dismiss their actions or claims.⁷⁵⁹ The new rule requires a plaintiff in any action to obtain leave of court for dismissal after the adverse party files an answer or a motion for summary judgment.⁷⁶⁰ Similarly, Rule 2-506 would allow dismissal of a counterclaim, cross-claim, or third-party claim without leave only until the filing of an answer.⁷⁶¹

751. Former Md. R.P. 542 a 1.

752. MD. R.P. 2-301. *See supra* text accompanying notes 354-62.

753. MD. CONST. art. IV, § 8 (emphasis added).

754. *See Davidson v. Miller*, 276 Md. 54, 64 n.5, 344 A.2d 422, 429 n.5 (1975)(history of constitutional provision).

755. *Id.* The right, being concerned with the possible bias of juries and not with the qualifications of judges, does not include the right to a different judge.

756. *Olson v. Love*, 234 Md. 503, 504, 200 A.2d 66, 67 (1964); *Ezersky v. Ezersky*, 40 Md. App. 713, 715, 394 A.2d 1225, 1226 (1978).

757. *See Greenberg v. Dunn*, 245 Md. 651, 656-57, 227 A.2d 242, 246-47 (1967) (interpreting former section).

758. Former Md. R.P. 541 a. The same right applies to any counterclaim, cross-claim or third-party claim. *Id.*

759. Former Md. R.P. 582.

760. MD. R.P. 2-506(b).

761. The Subcommittee that proposed the rule reasoned that rights may accrue to a de-

Because the new rule extends the right of dismissal without leave to claimants in equity-type actions, it also imposes the "two dismissal" rule on those claimants.⁷⁶² Thus, a unilateral notice of dismissal filed by a party who had previously dismissed an action on the same claim would operate as an adjudication on the merits, regardless of the nature of the action.⁷⁶³ A Committee member questioned whether the parties were permitted to stipulate that a second dismissal would be without prejudice. Another member indicated that the two dismissal rule does not apply to stipulations of dismissal or to dismissals granted by order of court. Only a unilateral "notice of dismissal" operates as an adjudication on the merits.⁷⁶⁴

Rule 2-507—Dismissal for Lack of Jurisdiction or Prosecution

Rule 2-507 is not intended to change substantially prior practice under Former Rule 530 for automatic dismissal of inactive cases.⁷⁶⁵ Rule 2-507(a) does not, however, include the ambiguous reference to guardianships "of disabled persons" contained in Former Rule 530 a.⁷⁶⁶ Thus, the rule clearly exempts from its operation all continuing guardianships.⁷⁶⁷ There was considerable Committee discussion regarding the use of docket entries as the triggering mechanism in the dismissal procedure. For example, a letter from counsel to the clerk that inquires whether a docket entry has been made within the past year is itself a docket entry within the meaning of section (c). Even this amount of interest will serve to keep a case alive.⁷⁶⁸ Despite this loose construction of the rule, the rule provides a simple mechanism that counsel may use to correct problems resulting from the operation of Rule 2-507. For example, if lengthy delays in setting a trial date cause the clerk to serve a

fendant in an equity case by virtue of the filing of an answer. To protect those rights, a plaintiff should be required to obtain leave of the court or the consent of the other parties to a dismissal. Minutes, May 22-23, 1981, at 47. *See also* Byron Lasky & Assocs., Inc. v. Cameron-Brown Co., 33 Md. App. 231, 236, 364 A.2d 109, 112-13 (1976) ("The obvious reason for the requirement is to prevent unilateral dismissal of cases in which a defendant has acquired a right to affirmative relief.")

762. So long as a plaintiff may dismiss only with leave of court, there is no need for the rule, because the order of dismissal would state whether the dismissal was with prejudice. Therefore, the "two dismissal" rule applies only to situations in which dismissal is unilateral, by the filing of a notice of dismissal. MD. R.P. 2-506(c).

763. *Id.*

764. Comments of Professor Bowie and Mr. Brault, Minutes, May 22-23, 1981, at 48-49.

765. Minutes, May 22-23, 1981, at 50; Former Md. R.P. 530.

766. Former Md. R.P. 530 a provided for its application to "all actions except actions involving . . . guardianships of the person or property of disabled persons."

767. Minutes, May 22-23, 1981, at 52-53.

768. Comments of the Reporter and Judge McAuliffe, *id.* at 51.

notice of dismissal, the parties may move, under section (e) for a deferral of dismissal for good cause shown.

Rule 2-508—Continuance

Rule 2-508 retains the substance of Former Rules 526 and 527,⁷⁶⁹ but eliminates the present two term limit on continuances, requires greater specificity in supporting affidavits, and increases the trial court's discretion in certain cases.

Former Rule 527 precluded continuances beyond the second term of court after service of process upon the defendant, unless there was an agreement of the parties, a showing of good cause, or another rule providing for longer continuances.⁷⁷⁰ That restriction was intended to promote "the orderly and prompt dispatch of business."⁷⁷¹ Rule 2-508 lifts that restriction, leaving prevention of undue delay in proceedings to the exercise of the trial court's discretion to deny continuances.⁷⁷²

Rule 2-508(c) enumerates the content requirements for an affidavit supporting a continuance motion based on the absence of a necessary witness. While Former Rule 527 c 2 was, in general, satisfied by conclusory statements of belief,⁷⁷³ the new rule requires that specific facts be set forth to support a conclusion that the proceeding should be continued.⁷⁷⁴ For example, the former rule requires a statement "that the affiant believes that the action cannot be tried with justice to the party without such evidence";⁷⁷⁵ the new rule requires a statement of "*the reasons why* the matter cannot be determined with justice to the party without the evidence."⁷⁷⁶

Under Former Rule 527 c 4, the trial court must deny a motion for a continuance to obtain an absent witness' testimony if the opposing party stipulates that the witness would testify as set forth in the affidavit.⁷⁷⁷ Rule 2-508, in contrast, would give the court discretion to grant

769. Explanatory Note, *id.* at 38.

770. Former Md. R.P. 527 a 2.

771. *Marsh v. Johns*, 49 Md. 569, 570 (1878).

772. The Committee apparently did not discuss this change, however. *See Minutes*, May 22-23, 1981, at 38-41.

773. However, the rule did require the affiant to "show what facts the affiant believes the witness will prove." Former Md. R.P. 527 c 2.

774. "The affidavit shall state . . . (4) the facts that show that reasonable diligence has been employed to obtain the attendance of the witness, and (5) the facts that lead the affiant to conclude that the attendance or testimony of the witness can be obtained within a reasonable time." MD. R.P. 2-508(c)(4), (5).

775. Former Md. R.P. 527 c 2.

776. MD. R.P. 2-508(c)(3) (emphasis added).

777. The former rule *allowed* the court to grant a motion for continuance *unless* the opposing party "[would] admit that the absent witness would, if present, testify to the facts alleged

or deny the motion in such a case.⁷⁷⁸

Rule 2-509—Jury Trial—Special Costs in First, Second, and Fourth Judicial Circuits

Rule 2-509 is intended to make only stylistic changes in the wording of Former Rule 548, without affecting practice under the former rule.⁷⁷⁹ When a case is removed from the assignment shortly before a jury trial is scheduled to begin, the county may incur substantial costs, and the jurors may suffer considerable inconvenience.⁷⁸⁰ The rule is intended to deal with those problems by imposing special costs in the action on the party responsible for the removal.⁷⁸¹ At the same time, the rule has been criticized for discouraging settlements and for being counter to the goal of statewide uniformity in rules of procedure.⁷⁸²

Rule 2-510—Subpoenas

Rule 2-510 changes former practice most substantially by authorizing the issuance of blank subpoenas. Section (b) of the rule requires the clerk to provide on request a blank subpoena form to be completed and returned to the clerk for signing and sealing.⁷⁸³ The rule also would allow the clerk to issue signed and sealed but otherwise blank subpoenas upon request of an attorney or other officer of the court.⁷⁸⁴ Committee members feared that this procedure might lead to abuse of judicial process, decrease the accountability of court clerks and unnecessarily impair a clerk's ability to determine trial length by the number of witnesses to be called.⁷⁸⁵ Apparently, however, the similar federal rule⁷⁸⁶ has had no

in the affidavit." Former Md. R.P. 527 c 4. The wording of the new rule is, thus, much clearer.

778. The new rule requires the court to grant the motion unless the opposing party will stipulate that the absent witness would testify as alleged. In that case, the court may, but is not required to, deny the motion. MD. R.P. 2-508(c).

779. Explanatory Note, Minutes, June 19-20, 1981, at 20.

780. Minutes, June 19-20, 1981, at 21.

781. Thus, in case of a settlement, costs are to be assessed either against the plaintiff or as the parties agree. In all other cases, costs are to be assessed against the party initiating the dismissal. MD. R.P. 2-509(b).

782. Minutes, June 19-20, 1981, at 21. Many committee members wished to eliminate the rule, but because of its recent adoption by the Court of Appeals, they felt constrained to include it. *Id.*

783. MD. R.P. 2-510(b). Under the rule, anyone entitled to have a subpoena issued would be entitled to request a blank form.

784. *Cf.* FED. R. CIV. P. 45(a) (clerk must issue subpoena in blank on request of any party).

785. *See* Minutes, Mar. 23, 1982, at 58 (discussing poll of clerks of court in which opposition to issuance of blank signed and sealed subpoenas was unanimous); Minutes, Nov. 20-21, 1981, at 46-47.

786. FED. R. CIV. P. 45(a).

such ill effects.⁷⁸⁷

The new rule also changes Maryland practice by requiring personal service of subpoenas.⁷⁸⁸ Under Former Rule 104, a summons could be served by registered mail.⁷⁸⁹ However, the severity of the sanction for failure to obey a subpoena, which is body attachment and fine,⁷⁹⁰ makes personal service more appropriate than service by mail.⁷⁹¹

Section (g) of the rule, which is derived in part from Supreme Bench Rule 528N,⁷⁹² facilitates hospitals' compliance with subpoenas of their records. The section allows a hospital's records to be authenticated by a certificate of the records' custodian; in-court testimony is not necessarily required.⁷⁹³ At the same time, the new rule makes a custodian's certificate only prima facie evidence of the records' authenticity⁷⁹⁴ and provides for subpoena of the custodian when necessary.⁷⁹⁵ Thus, the rule would not operate to preclude appropriate inquiry into the records' authenticity.

The remaining sections of Rule 2-510 bring together and clarify the provisions of various former rules relating to summonses.⁷⁹⁶ For example, section (a) makes it clear that a subpoena may be issued to a party, as well as a non-party, to compel attendance or the production of tangible evidence.⁷⁹⁷ Under section (f), as under the federal rules,⁷⁹⁸ a person who wishes to avoid giving a deposition must seek a protective order of the court, while one who wishes to avoid producing documents at the deposition need only file a written objection to shift the burden of obtaining a court order to the party seeking production.⁷⁹⁹

Rule 2-511—Trial by Jury

Rule 2-511 is intended neither to enlarge nor to diminish the right

787. Comments of Judge McAuliffe, Minutes, Nov. 20-21, 1981, at 46.

788. MD. R.P. 2-510(d).

789. Former Md. R.P. 104 b 2.

790. MD. R.P. 2-510(h). The same was true under Former Md. R.P. 114 d.

791. Minutes, Nov. 20-21, 1981, at 49-50.

792. *Id.* at 45.

793. The rule provides that the records must 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." MD. R.P. 2-510(g).

794. *Id.*

795. *Id.*

796. Those provisions are Former Md. R.P. 104, 114, 115, 116, 405, and 407.

797. However, the phrase "may be used" implies that a subpoena is not necessary to compel a party to submit to deposition. Former Md. R.P. 407 a stated expressly that this is the case.

798. FED. R. CIV. P. 45(d)(1).

799. MD. R.P. 2-510(f); Minutes, Nov. 20-21, 1981, at 47-48.

to trial by jury granted in articles 5 and 23 of the Maryland Declaration of Rights,⁸⁰⁰ despite the merger of law and equity.⁸⁰¹ The Committee noted a potential problem related to jury trials created by the merger of law and equity. The rule does not address the method by which the jury right is to be preserved, in a merged action, on a question of fact that is common both to a claim or defense triable of right by a jury and to a claim or defense triable by the court.⁸⁰²

Law and equity claims formerly could not be consolidated in Maryland courts.⁸⁰³ Instead, a plaintiff had to bring a mixed action in equity to obtain both equitable and legal remedies,⁸⁰⁴ and no jury was available to decide questions relating to legal claims or defenses in such an action.⁸⁰⁵ In contrast, under Federal Rule 58(a), upon which Rule 2-511(a) is modeled,⁸⁰⁶ common facts must be determined first by a jury, except "under the most imperative circumstances."⁸⁰⁷ The Subcommittee decided against formally addressing the problem and the Committee was confident that the Maryland Declaration of Rights and state statutes would provide a sufficient basis to answer accurately the question.⁸⁰⁸ One commentator has suggested that the Court of Appeals of Maryland might follow the reasoning of Supreme Court decisions interpreting Federal Rule 38(a).⁸⁰⁹ If that were so, Rule 2-511(a) would allow jury determination of facts relating to legal claims or defenses that presently must be tried in equity without a jury.⁸¹⁰

In all other respects, Rule 2-511 makes only stylistic and other minor changes to prior Maryland practice. For example, section (b) differs from the former provision for juries of less than twelve⁸¹¹ by stating expressly that parties may stipulate to a smaller jury at any time.⁸¹² The explicit provision in the new rule is intended to permit such an agree-

800. Minutes, Apr. 21, 1981, at 17.

801. *See supra* notes 354-62 and accompanying text.

802. Minutes, Apr. 21, 1981, at 17.

803. Brown, *supra* note 360, at 470 n.269.

804. *Id.*

805. Village Brooks, Inc. v. State's Att'y, 263 Md. 76, 94, 282 A.2d 126, 136 (1971).

806. Minutes, Apr. 21, 1981, at 17.

807. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 511 (1959). The Court also stated that those circumstances cannot be anticipated, given the flexible procedures under the federal rules. *Id.* (citing Ring v. Spina, 166 F.2d 546, 550 (2d Cir. 1948)).

808. Explanatory Note, Minutes, Apr. 21, 1981, at 17.

809. Brown, *supra* note 360, at 471.

810. Thus, in Professor Brown's view, the merger of law and equity would curtail plaintiffs' present ability to circumvent defendants' right to a jury trial by suing in equity. *See id.* (discussing Dormay Constr. Co. v. Doric Co., 221 Md. 145, 156 A.2d 632 (1959)).

811. Former Md. R.P. 544.

812. MD. R.P. 2-522(b).

ment between the parties even after deliberations begin.⁸¹³

Rule 2-512—Jury Selection

The procedure for jury selection contemplated by Rule 2-512 should not be substantially different from practice under the analogous former rules.⁸¹⁴ The new rule incorporates some language from present criminal rules,⁸¹⁵ but that language, while clearer or more explicit than the wording of the former civil rules, generally has the same effect in practice.⁸¹⁶ In addition, the jury-selection provisions in the new rule are organized to follow the actual chronology of the steps in selecting a jury more closely than the former rule did.⁸¹⁷

The rule changes some details of prior practice. First, the jury list released to parties must include all the public information on the "juror qualification form,"⁸¹⁸ except that the election precincts of jurors' residence can be substituted for their addresses.⁸¹⁹ The former rule expressly required release of only the jurors' names.⁸²⁰

Second, the rule expressly mandates a roll call of the jurors upon the request of any party.⁸²¹ The former rule did not provide for a roll call, leaving the matter to the court's discretion in the exercise of its control of the examination.⁸²² Under the new rule, parties would have an apparently absolute right to a roll call.

Third, the rule eliminates the former requirement that the jury list consist of at least twenty persons.⁸²³ Instead, the list of jurors who have qualified after examination in an action need be only a number sufficient to provide the number of jurors needed for the action, after the exercise of the parties' preemptory challenges.⁸²⁴ The new rule thus recognizes that the parties may have agreed on a lesser number of jurors than twelve.⁸²⁵

Finally, the rule would give each party a number of preemptory

813. Explanatory Note, Minutes, Apr. 21, 1981, at 17.

814. Those rules were Former Md. R.P. 541, 543, and 544.

815. MD. R.P. 2-512 source note.

816. Explanatory Note, Minutes, Apr. 21, 1981, at 21-22.

817. *Id.* at 21. For example, the provisions concerning challenges to the array now appear at the beginning, rather than the end, of the rule.

818. MD. CTS. & JUD. PROC. CODE ANN. § 8-202(c)(1984).

819. This provision reflects the Committee's concern for possible harassment of jurors. Minutes, Feb. 12, 1981, at 13.

820. Former Md. R.P. 543 a 1.

821. MD. R.P. 2-512(d).

822. Former Md. R.P. 543 d.

823. Former Md. R.P. 543 a 1, 5.

824. MD. R.P. 2-512(g).

825. *See* MD. R.P. 2-511(b).

strikes proportional to the number of alternate jurors to be impaneled.⁸²⁶ Former Rule 543 b gave each party one additional strike if alternate jurors were to be impaneled, regardless of the number of alternates.⁸²⁷ The new rule instead gives each party one additional strike for each group of three or fewer alternate jurors.⁸²⁸

Section (h) is drafted in a somewhat confusing manner. Under this section, if the court determines that co-parties have adverse or hostile interests, it may "allow to each of them separate preemptory challenges not exceeding the number available to a single party." That passage could be construed to provide four challenges to each adverse co-party.⁸²⁹ Although the Committee voted unanimously against that interpretation of the rule,⁸³⁰ the rule's language does not foreclose it.⁸³¹

Rule 2-513—Exclusion of Witnesses

Under Former Rule 536 a trial court must exclude non-party witnesses, other than expert witnesses who will give opinions based on testimony, upon the request of a party made at any time.⁸³² Rule 2-513(a) makes exclusion mandatory only if requested before testimony begins; at any later time an exclusion order is discretionary with the court.⁸³³ Further, the new rule would clearly allow a court to exclude an expert witness during testimony that will not form the basis of the expert's opinion,⁸³⁴ in contrast to the former rule, which absolutely exempted expert witnesses from its operation.⁸³⁵ Practice under the new exclusion rule for civil actions would thus conform to practice under the analogous rule of criminal procedure.⁸³⁶

826. MD. R.P. 2-512(h).

827. Former Md. R.P. 543 b.

828. MD. R.P. 2-512(h).

829. Comments of Mr. Weiner, Minutes, Apr. 21, 1981, at 24.

830. Committee Vote, *id.*

831. The ambiguity could easily be eliminated by substituting "the total of which shall not exceed" for "not exceeding."

832. Former Md. R.P. 536. *But see* State Roads Comm'n v. Creswell, 235 Md. 220, 226, 201 A.2d 328, 330 (1964) ("Rule 546 was adopted in September 1961, as the civil counterpart of the sequestration rule for criminal causes . . ."). The purpose of the rule is to prevent witnesses from being taught or prompted by each other's testimony. However, even though the rule is now mandatory upon the trial court where the exception [for expert witness] is not applicable, violation is not per se reversible error. Even in criminal cases where an allegation of deprivation of the defendant's rights is always closely scrutinized, we have required a showing of prejudice to those rights.

Id.

833. MD. R.P. 2-513(a).

834. Explanatory Note, Minutes, Apr. 21, 1981, at 20; Minutes, Apr. 21, 1981, at 21-22.

835. "An expert witness, who is to render an opinion based on testimony given at the trial, shall be exempted from the operation of this rule." Former Md. R.P. 536.

836. Explanatory Note, Minutes, Apr. 21, 1981, at 25.

The provisions of Rule 2-513 also change former practice by eliminating the requirement of court approval before a party that is not a natural person may designate a representative to remain in the courtroom.⁸³⁷ Thus, the rule leaves to the party the determination of who is an appropriate representative for a party such as a corporation.⁸³⁸ The rule additionally broadens the right to designate such a representative by extending it to any "party that is not a natural person,"⁸³⁹ in contrast to the former rule's more restrictive reference to "a corporation or association."⁸⁴⁰

Sections (b) and (c) add to the exclusion rule for civil actions explicit provisions for nondisclosure orders and a sanction for disobedience that formerly appeared only in the exclusion rule for criminal trials.⁸⁴¹ Section (b) empowers, but does not require, the court to order that evidence not be disclosed to excluded witnesses.⁸⁴² By leaving the issuance of a nondisclosure order to the court's discretion, the rule has enough flexibility to allow limited disclosure of particular evidence to an excluded witness, when that is necessary. Section (c) expressly allows a court to prevent a witness from testifying, in whole or in part, when that witness has received information in violation of an exclusion or nondisclosure order.

Neither of the two new sections appears to effect any major change in current practice. The Court of Appeals has held that a trial court may impose reasonable conditions on an expert witness to maintain secrecy.⁸⁴³ The Court of Appeals also has held, at least by implication, that the trial court may prohibit a witness from testifying, as a sanction for violating an exclusion order.⁸⁴⁴

Rule 2-514—When Court May Require Production of Evidence

Rule 2-514 makes only stylistic changes from the wording of For-

837. Compare Former Md. R.P. 536 with MD. R.P. 2-513(a).

838. Minutes, Apr. 21, 1981, at 29.

839. MD. R.P. 2-513(a).

840. Former Md. R.P. 536; see Explanatory Note, Minutes, Apr. 21, 1981, at 20.

841. Compare MD. R.P. 2-513(b) with Former Md. R.P. 755 b; compare MD. R.P. 2-513(c) with Former Md. R.P. 755 d.

842. The Committee discussed the question whether such an order should be mandatory, but concluded that flexibility is necessary. Minutes, Apr. 21, 1981, at 22.

843. *Space Aero Prod. Co. v. R.E. Darling Co.*, 238 Md. 93, 121-22, 208 A.2d 74, 89 (1965).

844. "As stated in *Frazier v. Waterman S.S. Corp.*, 206 Md. 434, 446, 112 A.2d 221, 226 "The ascertainment of the truth is the great end and object of all the proceedings in a judicial trial,' we think that the complete exclusion of the testimony of witnesses for a violation of the sequestration rule is not lightly to be imposed as a penalty upon even an offending party." *Gwaltney v. Morris*, 237 Md. 173, 176, 205 A.2d 266, 268 (1964)(citation omitted).

mer Rule 521.⁸⁴⁵ It should, therefore, effect no change in practice.

Rule 2-515—View

Rule 2-515 consolidates, under one heading, all of the provisions for views of property in civil actions, which previously appeared in Former Rules 550 and U18.⁸⁴⁶ Sections (a) and (c) of the new rule differ only stylistically from Former Rule U18 and should not alter practice in eminent domain proceedings.⁸⁴⁷

In other actions the new rule alters prior practice. First, the rule allows the trial court to order a view on its own motion, as well as on the motion of a party.⁸⁴⁸ Second, the rule permits views in cases tried to the court without a jury, in contrast to Former Rule 550 which provided only for views by juries.⁸⁴⁹ Third, the new rule requires the judge to attend and supervise a jury view.⁸⁵⁰ These changes generally increase the role of the trial judge in views of property.

The third change is particularly interesting. Under Former Rule 550 b the trial judge could appoint another person to supervise the view;⁸⁵¹ moreover, both the former and new rules concerning views in condemnation proceedings permit the parties to waive the judge's attendance at the view.⁸⁵² Rule 2-515(b) does not allow such a waiver in other proceedings. The difference between the provisions for views in condemnation and other actions may be derived from the difference between provisions of specific and of general applicability. The general rule in section (b) applies to views ordered for a variety of purposes in a variety of cases. Section (a) applies only to views for the purpose of determining the value of property, a subject with which the jury may be presumed to have some familiarity. Judicial supervision of the view may be unnecessary in a substantial number of condemnation cases, but in virtually no other cases.⁸⁵³

845. Explanatory Note, Minutes, Feb. 12, 1981, at 23.

846. Explanatory Note, Minutes, Apr. 21, 1981, at 26.

847. *Id.* For a discussion of Maryland's eminent domain procedure, see Baker & Altfeld, *Maryland's New Condemnation Code*, 23 MD. L. REV. 309 (1963). See also MD. REAL PROP. CODE ANN. §§ 12-101 to -112 (1981); MD. TRANSP. CODE ANN. §§ 8-301 to -339 (1977 & Supp. 1984) (specific eminent domain statutory provisions).

848. Compare MD. R.P. 2-515(b) with Former Md. R.P. 550 a.

849. *Id.*

850. MD. R.P. 2-515(b).

851. Former Md. R.P. 550 b.

852. Under both the former and the new rules, the waiver must be in writing and signed by all the parties. Former Md. R.P. U18; MD. R.P. 2-515(a).

853. This may have been the Committee's reasoning, but it did not fully explain the authorization of waivers in eminent domain proceedings, but not for views in other actions. See Minutes, Feb. 12, 1981, at 26-27 (discussing draft of new rule).

Rule 2-516—Exhibits

By the wording of Former Rule 635 b and c, only exhibits offered in evidence were part of the record,⁸⁵⁴ and parties were not required to deposit all exhibits with the court clerk until an appeal was noted.⁸⁵⁵ Rule 2-516 includes in the record all exhibits marked for identification, whether or not they are offered in evidence, and requires that all exhibits ordinarily be kept in the clerk's custody.⁸⁵⁶ The language of the rule apparently reflects actual practice under the former rule, and thus would not effect a change in Maryland practice.⁸⁵⁷

One Subcommittee member noted that the rule covered only those exhibits marked for identification by the court clerk, not the exhibits that are pre-marked for identification by parties. Although the Committee directed the Style Subcommittee to ensure that the language of the rule reflected that intent, the Style Subcommittee made no pertinent change in the rule.⁸⁵⁸

Rule 2-517—Method of Making Objections

Rule 2-517 changes prior practice most significantly by introducing a provision for continuing objections to the admission of evidence.⁸⁵⁹ By permitting continuing objections, the rule may obviate the need to renew at trial objections that were overruled as pretrial motions,⁸⁶⁰ a requirement formerly imposed under the contemporaneous objection rule.⁸⁶¹

The rule further changes Maryland practice by expressly permitting a party to request that the court direct an opponent to state the grounds for an objection to evidence.⁸⁶² The former rule made no provision for such a request;⁸⁶³ thus, the new rule should increase the likelihood that the grounds of an objection will be clearly stated on the record for appeal.⁸⁶⁴

854. Former Md. R.P. 635 b.

855. Former Md. R.P. 635 c.

856. MD. R.P. 2-516.

857. Explanatory Note, Minutes, June 19-20, 1981, at 13.

858. Committee Discussion, *id.*

859. MD. R.P. 2-517(b).

860. *Id.*; Explanatory Note, Minutes, Apr. 21, 1981, at 31; Minutes, Feb. 12, 1981, at 26-27.

861. Minutes, Apr. 21, 1981, at 32.

862. MD. R.P. 2-517(a).

863. Explanatory Note, Minutes, Apr. 21, 1981, at 31.

864. This appears to have been the Committee's intent. *See* Minutes, Feb. 12, 1981, at 25-26.

Rule 2-519—Motion for Judgment

Rule 2-519 replaces both Former Rule 535, dealing with motions for dismissal in a nonjury trial, and Former Rule 552, dealing with motions for directed verdict in a jury trial.⁸⁶⁵ Like each of the motions under the former rules, the new "motion for judgment" allows the parties to test expeditiously the legal sufficiency of their opponents' evidence.⁸⁶⁶ Under the new rule the form of the motion will be the same whether made in an action tried with or without a jury.⁸⁶⁷

The new rule also makes a major change in the substance, as well as the form, of the motion, by changing the nature of the trial court's consideration of the evidence. Formerly, the court was required to view the evidence and all reasonable inferences from it in the light most favorable to the party against whom the motion was directed, whether the motion was to dismiss or for a directed verdict.⁸⁶⁸ The new rule empowers the court to act as the trier of fact in ruling on a motion for judgment offered at the close of the plaintiff's evidence in a nonjury trial.⁸⁶⁹ Thus, a court can weigh the evidence presented and assess the credibility of the witnesses in the same way it would do at the close of all the evidence.⁸⁷⁰ Under "any other circumstances" the court must consider the evidence in the light most favorable to the movant's opponent, as under the former rules.⁸⁷¹ The dual standard of the new rule follows the approach of the Federal Rules of Civil Procedure, under which a defendant's motion to dismiss in a nonjury trial may be granted although the plaintiff has made out a prima facie case that would have been sufficient to require denial of a motion for directed verdict in a jury

865. Minutes, Mar. 6-7, 1981, at 31.

866. Explanatory Note, *id.* at 30-31; Explanatory Note, Minutes, Apr. 21, 1981, at 36. *See* J. Whitson Rogers, Inc. v. Board of County Comm'rs, 285 Md. 653, 660, 402 A.2d 608, 612 (1979) (purpose of Former Md. R.P. 535 is to allow party to test legal sufficiency of opponent's evidence); Impala Platinum, Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 328, 389 A.2d 887, 905-06 (1978) (motion for directed verdict under Former Md R.P. 552 tests legal sufficiency of opponent's evidence).

867. Hence, the new rule should prevent the confusion that has in the past led to the making of motions for directed verdict in nonjury trials. *E.g.*, Hooten v. Kenneth B. Mumaw Plumbing & Heating Co., 271 Md. 565, 571, 318 A.2d 514, 517 (1974); Isen v. Phoenix Assurance Co., 259 Md. 564, 569, 270 A.2d 476, 479 (1970).

868. *See, e.g.*, J. Whitson Rogers, Inc. v. Board of County Comm'rs, 285 Md. 653, 660, 402 A.2d 608, 612 (1979) (Former Md. R.P. 535); Impala Platinum, Ltd. v. Impala Sales (U.S.A.), Inc., 283 Md. 296, 328, 389 A.2d 887, 905-06 (1978) (Former Md. R.P. 552).

869. MD. R.P. 2-519(b).

870. *Cf.* United States v. AT&T, 524 F. Supp. 1336, 1343 (D.D.C. 1981) (under FED. R. CIV. P. 41(b), court may weigh evidence).

871. MD. R.P. 2-519(b). The "other circumstances" referred to are jury trials and motions by the plaintiff at the close of the defendant's evidence. Minutes, Apr. 21, 1981, at 36-37.

trial.⁸⁷²

Finally, the rule clarifies Maryland practice by stating expressly that a party's introduction of evidence during the presentation of an opponent's case is not a waiver of the right to move for judgment in the action.⁸⁷³ That provision is intended to eliminate the uncertainty regarding such a waiver that existed under the former rules.⁸⁷⁴

Rule 2-520—Instructions to the Jury

Rule 2-520 differs from Former Rule 554 most obviously by expressly designating the time at which the court is to instruct the jury.⁸⁷⁵ Under the former rule, which contained no similar provision, a court could instruct the jury either before or after the parties' closing arguments; the new rule requires the court to give its instructions before the arguments.⁸⁷⁶ The Committee believed that a majority of Maryland judges instruct the jury before closing arguments.⁸⁷⁷ Moreover, the rule permits the court to supplement its instructions later.⁸⁷⁸ This aspect of the rule, therefore, should not effect a major change in Maryland practice.

The change that the rule institutes is its requirement that parties make their objections to the instructions "promptly after the court instructs the jury."⁸⁷⁹ The former rule required the parties to object "before the jury retires to consider its verdict."⁸⁸⁰ Although the language of the former rule was closer to the language of Federal Rule 51 than is the language of the new rule, the new rule's effect will resemble more closely that of the federal rule. The federal rule requires the court to instruct the jury *after* closing arguments;⁸⁸¹ consequently, objections made before the jury retires in a federal court are made promptly after the instructions. Because the former Maryland rule allowed the court to instruct the jury before the closing arguments, that rule's provision for

872. See also *Klein v. District of Columbia*, 409 F.2d 164, 167 (D.C. Cir. 1969); *Huber v. American President Lines, Ltd.*, 240 F.2d 778, 779 (2d Cir. 1957).

873. Explanatory Note, Minutes, Apr. 21, 1981, at 36.

874. *Id.* That clarification is surely an improvement. There seems little utility in a rule that would put a party into the position of choosing between conducting a fully effective cross-examination and having the action disposed of expeditiously—particularly inasmuch as the court also has an interest in expeditious disposition of litigation.

875. MD. R.P. 2-520(a). The former rule had no such provision.

876. The Committee concluded that the most logical course is to enable parties to argue on the way the facts fit, or fail to fit, the law. Minutes, Apr. 21, 1981, at 40.

877. Explanatory Note, *id.* at 39.

878. MD. R.P. 2-520(a).

879. MD. R.P. 2-520(e).

880. Former Md. R.P. 554 d.

881. FED. R. CIV. P. 51.

objection after the arguments did not effectively require prompt objection.⁸⁸²

The new rule also changes former practice by allowing parties to file requests for instructions before the close of the evidence without the court's having directed that filing.⁸⁸³ The former rule provided for filing instruction requests only at the close of the evidence, unless the court directed the parties to file earlier.⁸⁸⁴ In addition, the rule is intended to permit parties to supplement, during the course of the trial, requests filed at the beginning of the trial.⁸⁸⁵ Thus, a party could file requests for instructions at the beginning of the trial without filing any requests that would unduly reveal the party's theory of the case.⁸⁸⁶

Rule 2-521—Jury—Review of Evidence—Communications

Under Former Rule 558, the jurors could take with them into the jury room, aside from their own notes, only those items that the court deemed necessary to a proper consideration of the case, which could include the pleadings and instructions as well as exhibits in the case.⁸⁸⁷ Rule 2-521(a) makes two changes in that practice. First, the rule permits the jurors to take into the jury room all exhibits other than depositions, unless the court orders otherwise for good cause.⁸⁸⁸ Second, the rule does not permit the jurors ordinarily to have the pleadings with them during their deliberations.⁸⁸⁹ Only if the pleadings actually have been admitted into evidence as exhibits will the jurors be permitted to take them into the jury room.⁸⁹⁰ The rule is intended to prevent the jury from giving undue weight to the pleadings.⁸⁹¹

Sections (b) and (c) of the rule are new to Maryland civil procedure, having been derived from Former Rule 758 pertaining to criminal procedure.⁸⁹² Those sections establish the procedure by which a court

882. The requirement of prompt objection allows the court to correct its error, if one exists, immediately. The new rule is intended, therefore, to correct the present system.

883. Explanatory Note, Minutes, May 22-23, 1981, at 19.

884. Former Md. R.P. 554 a provided: "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file with the court written prayers that the court instruct the jury"

885. Minutes, May 22-23, 1981, at 20-21.

886. *Id.* The new rule does not contain the requirement of Former Md. R.P. 554 a that the court furnish copies of instruction requests to all adverse parties. That requirement is now covered by MD. R.P. 1-321(a). See *supra* notes 105-08 and accompanying text.

887. Former Md. R.P. 558 a, b.

888. MD. R.P. 2-521(a).

889. Explanatory Note, Minutes, May 22-23, 1981, at 22.

890. Minutes, May 22-23, 1981, at 23.

891. *Id.*

892. Explanatory Note, *id.* at 22.

responds to jury requests to review evidence and other communications. In addition to requiring that any communication between judge and jury be on the record or in writing and filed in the action,⁸⁹³ the rule also requires the court to notify the parties of the receipt of any communication from the jury before responding to it.⁸⁹⁴

Rule 2-522—Court Decision—Jury Verdict

Rule 2-522 changes prior practice by requiring the judge in an action tried to the court to state the reasons for the decision before or at the time of entering judgment.⁸⁹⁵ Former Rule 18 b allowed the judge to make such a statement as much as fifteen days after entry of the judgment.⁸⁹⁶ The rule ensures that parties know the reasons for a judgment as soon as it is entered and the time for filing post-trial motions begins to run.⁸⁹⁷ At the same time, the rule does not mandate the formal statement of the analogous federal rule, under which the court must “find the facts specially and state separately its conclusions of law,”⁸⁹⁸ but could be satisfied by a fairly brief statement of a court’s reasons. For example, if an immediate order is necessary to prevent irreparable harm to a litigant, a brief statement might be preferable, in the interest of speed, to the more definitive statement the federal rule requires.⁸⁹⁹

Section (b) of the rule incorporates into civil procedure an express provision for polling the jury, similar to that which appears in the rules of criminal procedure.⁹⁰⁰ In addition, the section states explicitly that the parties may agree at any time during the course of an action to accept a less than unanimous verdict.⁹⁰¹ Although Former Rule 544 provided for stipulations to accept majority verdicts, it did not expressly permit polling the jury or expressly state when the parties may enter into such a stipulation.

893. MD. R.P. 2-521(c).

894. *Id.* (b), (c).

895. MD. R.P. 2-522(a).

896. Former Md. R.P. 18 b.

897. The Committee believed that a party needs to and is entitled to know the reasons for a judgment before the time for post-trial motions begins to run. Explanatory Note, Minutes, June 19-20, 1981, at 15.

898. FED. R. CIV. P. 52(a).

899. Minutes, June 19-20, 1981, at 16.

900. Former Md. R.P. 759.

901. *Cf.* Former Md. R.P. 544; MD. R.P. 2-511(b). Such a stipulation, under the broad wording of the new rule, could even be entered into after the jury has found itself unable to reach a unanimous verdict.

Rule 2-532—Motion for Judgment Notwithstanding the Verdict

Under Former Rule 563, if the court denied a party's motion for a directed verdict at the close of the evidence, that party could subsequently move for a judgment notwithstanding the verdict "in accordance with his motion for a directed verdict."⁹⁰² Rule 2-532 explicitly limits the grounds for the later motion to those previously advanced in support of the motion for judgment at the close of the evidence.⁹⁰³ Thus, under the new rule a motion for judgment notwithstanding the verdict would operate as a renewal of motion for judgment, just as a motion for judgment notwithstanding the verdict under the federal rules operates as a renewal of a motion for a directed verdict.⁹⁰⁴

Rule 2-532 changes prior Maryland practice most clearly by lengthening the time during which a party may move for a judgment notwithstanding the verdict. The former rule allowed only three days from receipt of the verdict or, if the jury failed to return a verdict, from the jury's discharge.⁹⁰⁵ The new rule allows a party ten days from the entry of a judgment on the verdict or from the jury's discharge.⁹⁰⁶ The change in the time limit on the motion brings Maryland practice in line with practice under Federal Rule 50(b).⁹⁰⁷

Section (c) of the new rule continues the Maryland practice of allowing parties to join a motion for a new trial with a motion for judgment notwithstanding the verdict, but does not allow the motion for judgment notwithstanding the verdict to include a request for a new trial.⁹⁰⁸ Although not expressly mandated by the rule, the motion for new trial, made in accordance with Rule 2-533, should be a separate motion joined as alternative relief with the motion for judgment notwithstanding the verdict.⁹⁰⁹

Former Rule 563 c stated the appellate court's power to order a new trial when the court reversed an order granting or denying a judgment notwithstanding the verdict.⁹¹⁰ Section (f) of Rule 2-532 adds ex-

902. Former Md. R.P. 563 a 1.

903. MD. R.P. 2-532(a).

904. *Johnson v. Rogers*, 621 F.2d 300, 305 (8th Cir. 1980); *House of Koscot Devel. Corp. v. American Line Cosmetics*, 468 F.2d 64, 68 (5th Cir. 1973). It is not entirely clear that the new rule will effect a change in Maryland practice, however. See *NuCar Carriers, Inc. v. Everett*, 33 Md. App. 310, 312, 364 A.2d 71, 73 (1976) ("Maryland Rule 563 does not create a right of appeal greater than those granted in [the Maryland] Code . . .").

905. Former Md. R.P. 563 a 1.

906. MD. R.P. 2-532(b).

907. Explanatory Note, Minutes, May 22-23, 1981, at 27. Cf. FED. R. CIV. P. 50(b).

908. Compare Former Md. R.P. 563 a 3 with MD. R.P. 2-532(b).

909. This was the Committee's apparent intent. See Minutes, Mar. 6-7, 1981, at 41.

910. Former Md. R.P. 563 c.

PLICIT provisions, derived from Federal Rule 50(c) and (d), regarding a party's right on appeal to assert the grounds for a new trial.⁹¹¹ One member of the Committee questioned the logic of permitting the appellate court to order a new trial when it reverses the trial court's granting of a motion for judgment notwithstanding the verdict. Nevertheless, subsection (f)(2) allows the party whose motion for judgment notwithstanding the verdict was granted at trial to argue for a new trial on appeal. The new provisions appear only to incorporate and clarify the appellate courts' existing power to grant new trials when "it shall appear . . . that a new trial ought to be had,"⁹¹² without affecting Maryland practice.

Rule 2-533—Motion for New Trial

In line with the general merger of law and equity, Rule 2-533 replaces Former Rule 690, which governed petitions for rehearing in equity, as well as Former Rule 567, which governed motions for new trial in actions at law.⁹¹³ The time limit for filing the motion for a new trial under the new rule is ten days from the entry of judgment, in conformity with federal practice and with the rule concerning the motion for judgment notwithstanding the verdict.⁹¹⁴ In addition, Rule 2-533 permits a motion for a new trial within ten days after the entry of a judgment notwithstanding the verdict or an amended judgment.⁹¹⁵ The former rules did not include such a provision.

Rule 2-534—Motion to Alter or Amend a Judgment—Court Trial

Rule 2-534, which is derived from Federal Rules 52 and 59,⁹¹⁶ grants a trial court broad discretion to correct its findings or judgment in a nonjury trial without the need for a complete new trial of the action.⁹¹⁷ Federal Rule 52(b) allows the court to expand, clarify, or correct its findings of fact or conclusions of law in a nonjury action,⁹¹⁸ but does not allow the court to conduct a new hearing on the merits.⁹¹⁹ Fed-

911. Minutes, May 22-23, 1981, at 28; Explanatory Note, *id.*

912. Former Md. R.P. 874.

913. Explanatory Note, Minutes, Mar. 6-7, 1981, at 49; Minutes, Mar. 6-7, 1981, at 51; Explanatory Note, Minutes, May 22-23, 1981, at 53.

914. FED. R. CIV. P. 59; *see supra* note 906 and accompanying text.

915. *See infra* notes 988-1014 and accompanying text (discussing MD. R.P. 2-601, 2-602).

916. Minutes, Sept. 11, 1981, at 2.

917. *Id.* at 3.

918. *Matyas v. Feddish*, 4 F.R.D. 385, 386 (D. Pa. 1945).

919. FED. R. CIV. P. 52(b), permitting a party to request additional findings of fact and conclusions of law, is not intended as a vehicle for securing a rehearing on the merits. *Zeeman v. United States*, 275 F. Supp. 235, 255 (S.D.N.Y. 1967), *modified on other grounds and remanded*, 395 F.2d 861 (2d Cir. 1968). Instead, the rule is designed primarily to correct find-

eral Rule 59(a) allows the court in an action tried with or without a jury to take additional testimony and enter a new judgment,⁹²⁰ but only in a new trial.⁹²¹ On a motion to alter or amend a judgment under Federal Rule 59(e), as under Federal Rule 52(b), the court may not re-examine facts found by a jury.⁹²² The new Maryland rule, more expansively worded than the federal rules, allows the court to receive additional evidence, revise its statement of the basis for the judgment, and enter a new judgment in response to a motion to amend the judgment.⁹²³

The rule thus permits the trial court to correct expeditiously any error in its decision without conducting a new trial of the action. A party opposed to amendment or alteration of the judgment is protected against unfairness in the granting of the motion by the requirement in Rule 2-311(e) that the court hold a hearing before granting a motion to amend the judgment.⁹²⁴ Moreover, the party against whom a motion to amend the judgment has been granted may subsequently file a motion for a new trial.⁹²⁵

The motion to amend a judgment will not supplant the motion for a new trial as a means of challenging the original judgment. A party against whom the original judgment was entered may make both motions simultaneously, and the court's granting of either will operate differently from granting of the other.⁹²⁶ In granting a motion for a new trial, the court would require the parties to submit anew, for consideration as in an original trial, all the evidence on the issues to be retried.⁹²⁷ In granting a motion to amend the judgment, the court would retain the evidentiary record, adding to or reinterpreting it rather than retrying

ings of fact that are central to the ultimate decision. *David v. Mathews*, 450 F. Supp. 308, 318 (E.D. Cal. 1978).

920. FED. R. CIV. P. 59(a).

921. However, the court may order a new trial of only some of the issues, when appropriate. *Id.*

922. *Davis v. Naviera Aznar S.A.*, 37 F.R.D. 223, 255 (D. Md. 1965) (FED. R. CIV. P. 59(e) does not allow court to reexamine facts found by jury in contravention of seventh amendment); *accord Robinson v. Watts Detective Agency*, 685 F.2d 729, 742 (1st Cir. 1982).

923. MD. R.P. 2-534. However, the new rule does not contemplate a court's granting such a motion when the movant was negligent in failing to introduce the evidence at the trial. Minutes, Mar. 7, 1981, at 45. *Cf. Briggs & Stratton Corp. v. Baldrige*, 544 F. Supp. 667, 668 (D. Wis. 1982) (FED. R. CIV. P. 59 does not contemplate relief when the issue presented could have been, but was not, raised previously).

924. *See supra* notes 400 and accompanying text.

925. MD. R.P. 2-533(a). The court must hold a hearing on that motion for a new trial, under MD. R.P. 2-311(e).

926. MD. R.P. 2-534; Minutes, Mar. 6-7, 1981, at 45; Explanatory Note, Minutes, May 22-23, 1981, at 30.

927. MD. R.P. 2-533(c).

any issues.⁹²⁸

The motions to amend a judgment and for a new trial apparently will have the same effects on the enforceability and appealability of a judgment. Under Rule 2-632(b), the trial court has the discretion to stay the enforcement of a judgment pending disposition of either motion.⁹²⁹ Rule 1012 was amended to state explicitly that both a motion to amend the judgment and a motion for new trial stay the time for filing an appeal.⁹³⁰ If a party files an appeal prior to the disposition of those motions, the appeal has no effect and must be refiled after disposition.⁹³¹

Rule 2-535—Revisory Power

Under Rule 2-535 a court's revisory power over the judgment in a case tried without a jury encompasses any action the court could have taken in response to a motion to amend the judgment.⁹³² Rule 2-535 is not intended to change the prior practice under which a motion for revision does not stay the running of the time for filing an appeal.⁹³³ Thus, under the new rules a party who seeks an alteration of the judgment more than ten days after its entry generally must choose between filing a motion for revision and filing an appeal.⁹³⁴

Only section (d) of the rule significantly changes Maryland practice. Former Rule 681 permitted a court of equity to correct clerical and similar errors at any time, but only upon petition.⁹³⁵ The new rule, which closely parallels Federal Rule 60(a), applies to any action and allows the court to correct clerical errors on its own initiative, as well as on motion.⁹³⁶ In addition, the rule limits the trial court's power to correct mistakes after an appeal is docketed by requiring the appellate court's permission to make the correction.⁹³⁷

928. Explanatory Note, Minutes, Mar. 6-7, 1981, at 44; Explanatory Note, Minutes, May 22-23, 1981, at 30.

929. See *infra* notes 1114-23 and accompanying text.

930. MD. R.P. 1012(d).

931. *Id.*

932. MD. R.P. 2-535(a). Thus, the new rule clearly allows the court to hear additional evidence. Minutes, Sept. 11, 1981, at 6.

933. See, e.g., *Tiller v. Elfenbein*, 205 Md. 14, 19-20, 106 A.2d 42, 44-45 (1954). Under the former rules, "[i]f the losing party files an appeal that is pending when his motion for revision (Rule 625) is to be heard, the trial court has no power to hear it; the power over the case would have passed to the appellate court." C. BROWN, *supra* note 4, § 6.10.

934. C. BROWN, *supra* note 4, § 6.10.

935. "Clerical mistakes in a decree or decretal order, or errors arising from any accidental slip or omission, may at any time be corrected . . . upon petition . . ." Former Md. R.P. 681.

936. MD. R.P. 2-535(d).

937. Explanatory Note, Minutes, June 19-20, 1981, at 26.

Rule 2-536—Disability of Judge

Rule 2-536 makes only minor stylistic alterations in the wording of Former Rule 528 and does not change prior practice regarding the substitution of one judge for another.⁹³⁸

Rule 2-541—Masters

Rule 2-541 is very little different from Former Rule 596 and apparently makes no change in Maryland practice.⁹³⁹ The former rule applied only to actions in equity, while the new rule applies to all actions; however, the rule allows only those issues not triable of right before a jury to be referred to a master.⁹⁴⁰ The other additions introduced by the rule clarify certain aspects of the former rule. Section (d) adds to the list of master's powers the powers to make factual findings and legal conclusions and to recommend contempt proceedings;⁹⁴¹ those powers were previously given by implication in other provisions of the former rule.⁹⁴² Section (e) of the new rule adds to the provisions concerning the conduct of a master's hearing an express requirement that written notice of the time and place for the hearing be sent to the parties.⁹⁴³

Rule 2-542—Examiners

Rule 2-542 makes several changes from the former rule concerning examiners,⁹⁴⁴ some of which formalize the link between examiners and courts. First, the rule requires that a standing examiner be appointed by a majority of the judges of a circuit court⁹⁴⁵ and specifies that any

938. Explanatory Note, Minutes, May 22-23, 1981, at 44.

939. However, the Committee considered proposals that would have required an automatic mistrial if the judge died during a trial and would have required counsels' consent to substitution of a new judge. Minutes, May 22-23, 1981, at 44-45.

940. The Committee proposed little change because the former rule had been revised very recently. Minutes, Sept. 11, 1981, at 8.

941. MD. R.P. 2-541(d)(6), (7).

942. Under Former Md. R.P. 596 f 1, the master was required to file a report "including . . . findings of fact and conclusions of law." Thus, although the master's enumerated powers did not include those powers, the master was clearly intended to make both factual and legal conclusions. Similarly, Former Md. R.P. 596 g 2 authorized a court to hold a contempt hearing upon the recommendation of a master at any time. Thus, the additions to the rule only make explicit what was formerly implicit.

943. MD. R.P. 2-541(e).

944. While masters may rule on objections and make conclusions of law, examiners have no power to do either. *Bris Realty v. Phoenix Sav. and Loan Ass'n*, 238 Md. 84, 88, 208 A.2d 68, 69 (1964). Historically, masters have been used only in uncontested cases. Comments of Judge McAuliffe, Minutes Sept. 11, 1981, at 19. However, the new rule is not expressly so limited.

945. MD. R.P. 2-541(a)(1).

examiner serves at the pleasure of the appointing court.⁹⁴⁶ The former rule was silent on both the method of appointment and the tenure of examiners.⁹⁴⁷ Second, the rule requires that matters be referred to the examiner by court order, rather than by parties themselves as under the former rule.⁹⁴⁸ Moreover, the court's referral order may prescribe the conduct of the examination;⁹⁴⁹ thus, the rule clearly gives the appointing court full control over an examiner's taking of evidence.

The rule also clarifies certain aspects of procedure involving examiners, matters that were not explicitly addressed by the former rule.⁹⁵⁰ Thus, the rule provides expressly that failure to object to a question before the examiner is a waiver of the right to file an exception on that ground.⁹⁵¹ In addition, the rule sets forth explicitly the grounds for exceptions to the examiner's record and the requirement that exceptions be in writing.⁹⁵² Finally, the rule expressly authorizes an examiner to report to the court special matters or irregularities in the examination in any case; the former rule clearly authorizes such a report only in an action for divorce or annulment.⁹⁵³

Rule 2-543—Auditors

Designed in part to strengthen the auditor's role in the judicial process,⁹⁵⁴ Rule 2-543 allows auditors to determine the necessity for a hearing⁹⁵⁵ and to make findings of fact and conclusions of law. The Committee, over some dissent because auditors are not always attorneys,⁹⁵⁶ granted auditors the power to make legal conclusions on the ground that in analogous situations, such as in Orphan's Court and administrative agencies, non-lawyers make conclusions of law.⁹⁵⁷

The rule also implements several requirements not found in the former rules. First, it requires the court to set time limits within which the

946. *Id.* (3).

947. The former rule merely provided that the circuit courts "shall appoint experienced and competent examiners . . ." Former Md. R.P. 580 a.

948. Compare Former Md. R.P. 580 d with Md. R.P. 2-542(b).

949. Because the former rule did not provide for referral by court order, it gave the court no opportunity to prescribe the examination's conduct.

950. In addition, the new rule omits some provisions the Committee considered unnecessary, such as those permitting examination by written interrogatories and the taking of testimony *ex parte* under certain circumstances. Explanatory Note, Minutes, Sept. 11, 1981, at 18.

951. Md. R.P. 2-542(d)(3). However, under the new rule, as under the former rule, an examiner has no power to rule on the objection. *Id.*

952. *Id.* (g).

953. Former Md. R.P. 580 g 3.

954. Explanatory Note, Minutes, Sept. 11, 1981, at 26.

955. Committee discussion, Minutes, Nov. 20-21, 1981, at 38.

956. Committee discussion, Minutes, Sept. 11, 1981, at 29.

957. Comments of Judge McAuliffe and Mr. Lombardi, *id.*

auditor must file the account or report.⁹⁵⁸ The rule also requires the court to hold a hearing on exceptions to the auditor's report.⁹⁵⁹ Former Rule 595 is silent on the first requirement; and on the second, it states that when exceptions are filed the court "shall take such action as may be appropriate."

The rule underwent considerable change in language before receiving final committee approval. Much of the Committee discussion focused on whether provisions of the rule cover both parties and claimants. Provisions have been added to assure claimants adequate notice of a hearing ((d)(1)), to allow claimants to subpoena witnesses and documents ((d)(2)), and to notify claimants of the amount allowed in the account or report ((e)).⁹⁶⁰

An earlier version of the rule contained a provision that a waiver of the requirement that the proceedings be recorded constituted a waiver of the right to file exceptions.⁹⁶¹ One member commented that this provision effected a waiver of the right to file exceptions before the parties know what will occur at the proceeding. Additionally, a party may wish to file an exception to a question of law and should not be prevented from so doing because he waived the making of a record.⁹⁶² Another member noted that, when parties submit an agreed statement of facts, the court does not need a record to review exceptions.⁹⁶³ In its final form, the rule provides that only those exceptions "which would require review of the record" are waived.⁹⁶⁴

Although a previous draft of the rule permitted the court in a hearing on exceptions to accept additional evidence whenever it desired,⁹⁶⁵ the Committee deleted that language because it was too broad.⁹⁶⁶ The Committee inserted in section (g) the language from Former Rule 596 h 6 relating to masters. Thus, the excepting party must convince the court to admit the evidence and give reasons why the evidence was not

958. Committee discussion, *id.* at 30; Explanatory Note, Minutes, Nov. 20-21, 1981, at 37.

959. Explanatory Note, Minutes, Nov. 21, 1981, at 37. An earlier draft left the need for a hearing to the discretion of the court. Minutes, Sept. 11, 1981, at 26.

960. Committee discussion, Minutes, Sept. 11, 1981, at 30-31; Explanatory Note, Minutes, Nov. 20-21, 1981, at 37.

961. Committee discussion, Minutes, Sept. 11, 1981, at 25.

962. Comments of Mr. Niemeyer, *id.* at 29.

963. Comments of Mr. Herrmann, *id.*

964. Comments of Mr. Brault, *id.* at 29-30; Explanatory Note, Minutes, Nov. 20-21, 1981, at 37. Judge McAuliffe noted in committee discussion that the making of a record can be waived only if *all* parties and claimants, including ones absent from a hearing, agree. Minutes, Nov. 20-21, 1981, at 40.

965. The language of the draft precluded the submission of additional evidence "[u]nless otherwise ordered by the court." Proposed Rule 2-535(k), Minutes, Nov. 20-21, 1981, at 36.

966. Comments of Mr. Niemeyer, *id.* at 41.

offered before the auditor. The Committee did not include in the new rule the provision in Former Rule 596 that a court may hold a de novo hearing, believing that the court should not make findings which require an auditor's expertise.⁹⁶⁷

*Rule 2-551—In Banc Review*⁹⁶⁸

Rule 2-551 attempts to eliminate many of the former uncertainties surrounding Maryland's in banc review process.⁹⁶⁹ When permitted, a party may obtain either an appeal or an in banc review by three judges of the circuit,⁹⁷⁰ but not both.⁹⁷¹ To some extent, in banc review functions as a "poor man's appeal."⁹⁷² The rule attempts to provide a simplified and inexpensive procedure while generating an adequate record for an in banc court to proceed as an appellate court.⁹⁷³

Section (a) states that the constitutional standard for obtaining in banc review governs.⁹⁷⁴ The Committee discussed two situations in which invoking in banc review, although arguably justifiable, might be improper. The first situation involves an application for review from the Orphan's Court where, by statute, an appeal to the circuit court may be taken in lieu of an appeal to the Court of Special Appeals.⁹⁷⁵ The Committee concluded that no in banc review should be allowed directly from the Orphan's Court, but that in banc review would be allowed from the de novo circuit court trial of a case appealed from Orphan's Court.⁹⁷⁶ The second situation involves the rule's applicability to Baltimore City. It is generally understood that in banc review is unavailable in Baltimore City mainly because of the complexity of the city's court system.⁹⁷⁷ The Committee felt that because the Baltimore

967. Committee discussion, *id.*

968. The spelling is in conformity with MD. CONST. art. IV.

969. See Explanatory Note, Minutes, Nov. 20-21, 1981, at 4, noting that "[t]he constitutional provision requiring 'reservation' during the 'sitting' at which the ruling was made has been particularly troublesome." Thus, under the new rule, it is clear that an objection preserves the point for review.

970. *Id.* at 7. (citing *Washabaugh v. Washabaugh*, 285 Md. 393, 404 A.2d 1027 (1979)).

971. Comment of Judge McAuliffe, Minutes, Mar. 12, 1982, at 65. Exercising one's right to in banc review does not preclude a party from petitioning for certiorari to the Court of Appeals for review of the in banc decision.

972. *Id.*

973. Explanatory Note, Minutes, Nov. 20-21, 1981, at 4; Comments of Judge McAuliffe, *id.* at 8.

974. MD. CONST. art. IV, § 22; *see also* Explanatory Note, Minutes, Nov. 21, 1981, at 4 (relying upon *Washabaugh v. Washabaugh*, 285 Md. 393, 404 A.2d 1027 (1979)).

975. Committee discussion, Minutes, Mar. 12, 1982, at 66. Judge Invernizzi noted some express exceptions to this statutory provision in Harford and Montgomery Counties. *Id.*

976. Comments of the Chairman, *id.* at 67 (summarizing Committee consensus).

977. Comments of Judge McAuliffe, Minutes, Nov. 20-21, 1981, at 8-9 (citing

City court system would be consolidated soon, this question should be left to judicial resolution.⁹⁷⁸

The new rule facilitates the assertion of a party's constitutional right to in banc review.⁹⁷⁹ To preserve a point for consideration by a court in banc, a party no longer is required specifically to except to orders or to rulings of the court. According to section (a), any objection sufficient to permit review by the Court of Special Appeals apparently will satisfy the requirements of article 4, section 22 of the Maryland Constitution, the provision governing in banc review.⁹⁸⁰

Section (b) reflects the Committee's concern that in banc procedures be simple and straightforward. This section requires a party to set forth his position in a memorandum rather than in a brief.⁹⁸¹ An opposing memorandum is necessary only if the respondent disagrees with either the statement of the question or the facts as presented. Otherwise, the respondent may file a memorandum of argument.

Section (c) attempts to balance the reviewing panel's need for a complete record against the monetary burden accompanying transcript production.⁹⁸² To minimize the incidence of this burden, the rule leaves the decision to require a transcript within the discretion of a judge of the panel. The judge also may assess the costs of transcript production on either party, to discourage parties from making unnecessary demands for a transcript.⁹⁸³ Finally, the rule instructs the judge to confer with counsel, if necessary, to determine whether a transcript is required.⁹⁸⁴

Section (d) by using the word "hearing" rather than "oral argument"⁹⁸⁵ emphasizes that the in banc procedure resembles motions practice and is less formal than the normal appellate practice.⁹⁸⁶ Similarly, parties may waive the hearing requirement.

Section (g) paraphrases the passage from article 4, section 22 of the Maryland Constitution concerning the finality of the reviewing panel's

Washabaugh v. Washabaugh, 285 Md. 393, 404 A.2d 1027 (1979), for the proposition that even if in banc review does not apply to Baltimore City, there is no violation of the equal protection clause).

978. *Id.* at 9.

979. *Id.*

980. Comments of Judge McAuliffe and Mr. Sykes, *id.* (citing Washabaugh v. Washabaugh, 285 Md. 393, 404 A.2d 1027 (1979)).

981. Comments of Mr. Niemeyer, Minutes, *id.* at 11.

982. Comments of Judge McAuliffe and Mr. Sykes, *id.* at 10.

983. Comments of Mr. Brault, Judge McAuliffe, and Mr. Niemeyer, Minutes, Mar. 12, 1981, at 68.

984. Comments of Mr. Sykes, Minutes, Nov. 20-21, 1981, at 11-12. Judge McAuliffe pointed out that this conference could be held by telephone. Minutes, Mar. 12, 1981, at 68.

985. Minutes, Nov. 20-21, 1981, at 12.

986. Comments of Mr. Niemeyer, *id.* at 11.

decision and an opponent's right to appeal.⁹⁸⁷ It does not address, however, situations in which a plaintiff brings two claims, winning on the first claim and losing on the second claim. If the defendant seeks in banc review on the first claim, the rule does not address whether the plaintiff must await the in banc decision before taking his appeal.

F. Chapter 600—JUDGMENT

Rule 2-601—Entry of Judgment

Rule 2-601 preserves prior practice, while seeking to eliminate uncertainty concerning both what constitutes the entry of a judgment⁹⁸⁸ and when a judgment becomes operative.⁹⁸⁹ The question of what constitutes a judgment has occasioned confusion and difficulty, partly because not all counties follow the same procedure. Some counties maintain a minute book, in which any judgment pronounced in open court is recorded. In other counties, the clerk notes the entry of a judgment in the docket file.⁹⁹⁰ Some Committee members expressed doubt as to whether, as in the federal system, a separate form, paper, or order constitutes a judgment when the judge signs it.⁹⁹¹ Under prior equity practice, a decree is not effective until the judge signs a written order.⁹⁹²

Section (b) of the new rule specifies the permissible methods of entry of judgments, each of which is intended to further the policy that judgments should not be effective unless recorded in a manner such that interested persons may find the entry.⁹⁹³ Each court may decide whether to record the judgment in the case's file jacket, a docket that is contained in the file, or a docket book. Section (b) also makes clear that the effective date of a judgment is the actual date of entry. This is intended to codify but not alter former law.⁹⁹⁴ The date of entry of a judgment is important for determining post-trial time periods, such as the period within which motions must be filed for judgment notwithstanding the verdict,⁹⁹⁵ to amend or alter the verdict,⁹⁹⁶ for a new

987. MD. CONST. art. IV, § 22; Explanatory Note, Minutes, Nov. 20-21, 1981, at 7-8.

988. See Minutes, June 19-20, 1981, at 23; Minutes, June 18-19, 1982, at 49-50 (Committee debates regarding whether judgments must be written and how judgments should be recorded).

989. Explanatory Note, Minutes, Mar. 6-7, 1981, at 35.

990. See Minutes, Mar. 6-7, 1981, at 36.

991. See Minutes, June 19-20, 1981, at 23 (referring to FED. R. CIV. P. 58(a)).

992. *Id.* at 2.

993. See Comments of Judge McAuliffe, Minutes, June 18-19, 1982, at 50 (regarding fairness and consistency).

994. See *Eberly v. Eberly*, 253 Md. 132, 134, 251 A.2d 900, 901 (1969) (judgment not effective until made part of public records).

995. See MD. R.P. 2-532.

996. See MD. R.P. 2-534; MD. R.P. 2-535.

trial.⁹⁹⁷ The date of entry also determines the beginning of the period within which an appeal must be noted.⁹⁹⁸

The new rule displays the Committee's concern for promptness and certainty. Because of the significance of the entry date, section (a) requires the clerk to enter the judgment "forthwith" upon the rendition of a jury verdict or upon a decision by the court, or upon the court's approval of the form of the judgment. If a clerk fails to enter a judgment promptly, the clerk's bond may be needed to cover damages caused by any delay.⁹⁹⁹ Federal Rule 58, from which section (a) is derived, also specifies that entry of judgment not be delayed for taxing of costs.¹⁰⁰⁰ Although Rule 2-601 does not contain such language, the Maryland courts should uniformly follow this practice to ensure that judgments are entered promptly. Section (c) restates the indexing and filing requirements of Former Rule 619 a.

Rule 2-602—Judgment—Multiple Claims

The new rule continues the present policy of avoiding the confusion, delay, and expense caused by piecemeal appeals.¹⁰⁰¹ Former Rule 605 a generally barred an immediate appeal from an adjudication of one or more but fewer than all claims in an action. The trial court was empowered to certify a partial judgment as final and appealable, but only upon fulfillment of two conditions: (1) an express determination that there was no just reason for delay and (2) upon an express request for entry of judgment.¹⁰⁰² Rule 2-602 continues this general policy with minor additions and clarifications.

Although the title of Rule 2-602, like that of Former Rule 605 a, refers only to multiple claims, the new rule also expressly applies to situations involving multiple parties. Former Rule 605 a referred only to "multiple claims," but courts had interpreted the term to include multiple defendants.¹⁰⁰³ The addition of "multiple parties" to the language of the old rule brings Rule 2-602 more closely into line with Federal Rule 54(b),¹⁰⁰⁴ which was amended in 1961 to expressly include multi-

997. See MD. R.P. 2-533.

998. See MD. R.P. 1012; see also MD. R.P. 2-551 (in banc review).

999. Minutes, June 19-20, 1981, at 23.

1000. See *supra* note 991.

1001. See, e.g., *Harford Sands, Inc. v. Levitt & Sons*, 27 Md. App. 702, 711-12, 343 A.2d 544, 549 (1975); *Parish v. Maryland & Va. Milk Producers Ass'n*, 250 Md. 24, 98, 242 A.2d 512, 553 (1968); *Durling v. Kennedy*, 210 Md. 549, 554, 123 A.2d 878, 880 (1956).

1002. Former Md. R.P. 605 a, cited in *Parish*, 250 Md. at 97-98, 242 A.2d at 553.

1003. E.g., *Picking v. State Fin. Corp.*, 257 Md. 554, 557-58, 263 A.2d 572, 574 (1970).

1004. The language of Former Md. R.P. 605 a is in all other respects essentially the same as FED. R. CIV. P. 54(b). *Accord Parish*, 250 Md. at 97, 242 A.2d at 553.

ple parties.¹⁰⁰⁵

Rule 2-602 also expressly provides that partial summary judgments obtained pursuant to Rule 2-501(d) must be certified as final in order to be appealable. This modification of the language of Former Rule 605 a incorporates current Maryland case law.¹⁰⁰⁶ By including partial summary judgments within the scope of Rule 2-602, the Committee tacitly rejected the federal practice of considering such judgments as interlocutory and not immediately appealable.¹⁰⁰⁷

Rule 2-602 also adds to the language of Former Rule 605 a by including "consolidated actions" within the type of actions for which a partial judgment must be certified to be appealable. It is important to recognize that "consolidated actions" as used in the rule merely refers to situations involving a merger of cases dealing with common questions or subject matter into a single action.¹⁰⁰⁸ Thus, the Committee did not intend to change current practice and to apply the certification requirement to trials of separate actions that are consolidated solely for the purpose of convenience, but are not truly consolidated into one action.¹⁰⁰⁹

Considerable Committee debate centered on the interplay between Rule 2-602 and certain Chapter 500 trial motion rules.¹⁰¹⁰ As originally drafted, Rule 2-602, unlike Former Rule 605, barred entry of a partial judgment whenever the court failed to certify that just cause for an expedited appeal existed.¹⁰¹¹ The rule thus required all non-certified orders to be titled something other than a judgment. That result was apparently designed to conform with the general Chapter 600 policy of precluding judgments from being entered unless final and appealable.¹⁰¹² The problem with such strict adherence to the purist concept of

1005. See FED. R. CIV. P. 54(b) advisory committee note (1961 amendment). The addition of "multiple parties" to Federal Rule 54(b) was necessitated by a line of cases which developed in the circuits holding that the language with respect to "multiple claims" in Rule 54(b) was inapplicable to the dismissal by the trial court of one or more but fewer than all defendants joined in an action. See, e.g., *Mull v. Ackerman*, 279 F.2d 25, 26 (2d Cir. 1960).

1006. See, e.g., *Shpak v. Oletsky*, 280 Md. 355, 359-60, 373 A.2d 1234, 1237-38 (1977).

1007. Cf. Comments of Professor Bowie, Minutes, June 18-19, 1982, at 42-43; see also FED. R. CIV. P. 56(c).

1008. See Minutes, Apr. 16, 1982, at 35-36; Minutes, May 21-22, 1982, at 3.

1009. *Id.* Maryland courts have consistently noted that separate cases consolidated for purposes of trial, as a matter of convenience as permitted by Former Md. R.P. 503, are not covered by Former Md. R.P. 605 a. See, e.g., *Coppage v. Resolute Ins. Co.*, 264 Md. 261, 263-64, 285 A.2d 626, 628 (1972). Separate judgments in such cases from which an appeal may be taken were provided for by Former Md. R.P. 606. See *id.*; see also *Leach v. Citizens Bank*, 17 Md. App. 391, 302 A.2d 634 (1973).

1010. See generally Minutes, June 18-19, 1982, at 42-48.

1011. *Id.* at 33. For the original draft of the rule, see Minutes, Apr. 16, 1982, at 34-35.

1012. Minutes, June 18-19, 1982, at 41.

judgments contemplated by the new rules is that the Chapter 500 rules tie the period for filing certain motions to the date of entry of judgment. Thus, the original draft of 2-602, when read together with the Chapter 500 trial motion rules, could have postponed consideration of post-trial motions until many months after the pertinent decisions.¹⁰¹³

The Committee considered two options to rectify the problem. One suggestion was that the relevant Chapter 500 rules could be amended to allow entry of an order from which post-judgment motions periods would commence to run when multiple parties or claims are involved.¹⁰¹⁴ The Committee instead chose the second option, which was to amend the wording of 2-602 to permit entry of partial judgments, but to provide that any order or judgment entered is not final and appealable unless certified.¹⁰¹⁵ As a result, the language of 2-602, in its final form, is nearly identical to that of Former Rule 605, with the addition of the express references to multiple parties, consolidated actions, and partial summary judgments as previously discussed.

Rule 2-603—Costs

Rule 2-603 modifies current practice by expanding the court's discretion to assess costs, and at the same time narrowing the clerk's role in assessment. Section (a) restates the general standard set forth in Former Rule 604 a: The prevailing party is entitled to costs, absent a rule, statute, or order of court to the contrary. Section (a) also expressly permits the court to allocate costs among the parties. That is intended to change current law, under which costs are seldom divided.¹⁰¹⁶

1013. *Id.* at 47.

1014. *Id.*

1015. *See id.*

1016. Explanatory Note, Minutes, Nov. 20-21, 1981, at 29. Under certain unusual circumstances, however, application of the former rule resulted in allocation of costs. *See, e.g., Hoffman v. Glock*, 20 Md. App. 284, 295, 315 A.2d 551, 558 (1974), in which division of costs between the parties was held within the court's discretion. One party was awarded costs for the action, and the other for the counterclaim upon which it had prevailed. Division of costs have been used in other circumstances. For example, Former Md. R.P. 882 permitted such an allocation in appeals. Also, Former Md. R.P. 415 permitted the costs of depositions taken into evidence to be apportioned among the parties.

For examples of other new rules expressly allowing allocation costs among the parties, see MD. R.P. 2-433 (Sanctions), 2-541 (Masters), 2-542 (Examiners), and 2-543 (Auditors). By contrast MD. R.P. 2-509 contains an exception to the general inclination towards permitting allocation. This rule addresses special costs of jury trials in the First, Second, and Fourth Judicial Circuits. Rule 2-509(b) states: "If the reason for removal from the assignment is settlement of the action, the costs shall be assessed against the plaintiff or as the parties agree. Otherwise, they shall be assessed against the initiating party. . . . [The] judge may waive assessment of these costs for good cause shown." MD. R.P. 2-509(b) (emphasis added). Therefore, MD. R.P. 2-509(b) provides that costs may be assessed or denied, but not allocated. An exception arises if the parties agree to allocate the costs. Likewise MD. R.P. 2-506(d), governing

The major change incorporated in the new rule is the diminution of the clerk's role in determining costs. Under section (b) the clerk assesses only standard costs; all other costs are to be assessed by the court under section (c). Former Rule 604 provided for the clerk to determine nearly all costs. Costs recoverable comprise those expenses necessarily incurred in prosecuting or defending the action.¹⁰¹⁷ Thus, under the old rule court clerks might have been called upon to decide, at least preliminarily, contested issues between attorneys that could have required analysis of the case and of the trial.¹⁰¹⁸ The new rule alleviates the undesirable aspect of clerk determination by limiting the clerk's role to assessing standard costs and by providing for mandatory judicial review of contested assessments.

Section (c) provides for court assessment of certain costs and expenses. Upon motion, the court may assess any reasonable and necessary expenses permitted by rule or law. The Committee did not intend that parties recover virtually all expenses incurred at trial; only those costs permitted by statute, rule, or case law are allowed.¹⁰¹⁹ The court also may assess the expenses of experts or interpreters that the court appoints on its own initiative¹⁰²⁰ and the costs of court-requested transcripts. This includes interpreters for the deaf, and for other disabled persons, regardless of whether the purpose is to aid a disabled person to understand events occurring at trial or to enable the court to understand a disabled person's testimony. The court has the discretion to assess the costs against any party, including prevailing parties, or to order payment of some or all the expenses from public funds.

Section (d) rewords Former Rule 604 c and explicitly states that

voluntary dismissal, permits the parties to stipulate as to costs. See also MD. R.P. 1-341, prescribing that if unjustified proceedings are instigated, costs may be assessed against the nonprevailing party and that party's attorney.

1017. This could include, for example, bond premiums (*see* MD. R.P. 1-406), transcripts of master's, examiners, or auditor's proceedings (*see* MD. R.P. 2-541, 2-542, 2-543), witness compensation fees (*see* MD. CTS. & JUD. PROC. CODE ANN. § 9-202 (1984)), costs of videotaped depositions taken into evidence (*see* MD. R.P. 2-416), or attorneys' fees (*see* MD. R.P. 1-341, 2-433, 2-434, 2-626, 2-646). It should not include expert witnesses' fees. *See* *Freedman v. Seidler*, 233 Md. 39, 47, 194 A.2d 778, 783 (1963) (expert witnesses' fees not taxable as costs).

1018. Explanatory Note, Minutes, Nov. 20-21, 1981, at 29. An illustration of this problem is the determination of witness costs. The clerk may be called to determine, in effect, the relevance of a particular witness' testimony.

1019. *See* Minutes, Nov. 20-21, 1981, at 30.

1020. *Id.* at 31. The Committee noted that experts and interpreters may at times be considered "court-appointed" even when they are requested by a party and approved by the court. Section (c) seeks to make clear that *only* when the court acts on its own initiative is an expert to be considered "court-appointed" for purposes of assessing costs. *Cf.* FED. R. EVID. 706(b), which appears to permit complete discretion in assessing the costs of court-appointed experts.

both a person bringing an action for the use or benefit of another and the person for whose benefit the action is brought are liable for costs.

Rule 2-604—Interest

Rule 2-604 is a simplified version of Former Rule 642 and Maryland District Rule 642.¹⁰²¹ Section (a), which is consistent with present practice and case law,¹⁰²² distinguishes between pre- and post-judgment interest.¹⁰²³ Moreover, the rule does not necessarily apply the current legal rate of interest to all cases involving pre-judgment interest. In some instances, interest will be computed using the rate set forth in the document upon which suit is brought.¹⁰²⁴ Section (a) also makes clear that although pre-judgment interest is included in the judgment, it must be stated separately. Separation is necessary so that the sum constituting interest may be easily determined. The separation does not affect the computation of post-judgment interest. That is, if the judgment is not paid in a timely manner, post-judgment interest will accrue on both the principal and interest components of the judgment. Section (b) requires post-judgment interest to be computed at the rate prescribed by law. This rate is determined by reference to section 11-107 of the Maryland Code, Courts Article.¹⁰²⁵

Rule 2-611—Confessed Judgment

Although a number of modifications serve to clarify and improve existing procedures, the substance of Rule 2-611 derives from Former Rule 645 without major changes. The changes are unlikely to place the constitutionality of the confessed judgment process in jeopardy. Section (a) preserves the current requirements for entry of confessed judgment. The creditor must file a complaint, together with the written instrument authorizing confession of judgment, and an affidavit stating the amount due. Nothing in the rule changes the right to attorneys' fees for recovery on a confessed judgment note.¹⁰²⁶

Section (a) also incorporates three notable changes. First, it is in-

1021. Explanatory Note, Minutes, May 21-22, 1982, at 17.

1022. *See* I.W. Berman Properties v. Porter Brothers, 276 Md. 1, 15-21, 344 A.2d 65, 74-77 (1975) (trial court may award both pre-judgment and post-judgment interest).

1023. MD. R.P. 2-604(c).

1024. Minutes, May 21-22, 1982, at 17; *see* Kronovet v. Lipchin, 288 Md. 30, 52-56, 415 A.2d 1096, 1109-11 (1980) (pre-judgment interest assessed at contract rate).

1025. The current interest rate on a judgment is 10% per annum. MD. CTS. & JUD. PROC. CODE ANN. § 11-107(a) (1984). Exceptions exist, *e.g.*, *id.* § 11-107(b) (rent judgments).

1026. The right to attorneys' fees was confirmed in Webster v. People's Loan Bank, 160 Md. 57, 61, 152 A. 815, 817 (1931); *see also* Meyer v. Gyro Transp. Sys., Inc., 263 Md. 518, 531-32, 283 A.2d 608, 614-15 (1971).

tended to establish Rule 2-611 as the exclusive means of obtaining a confessed judgment. Former Rule 645 h permitted the court to enter a confessed judgment pursuant to procedures not described in the rule.¹⁰²⁷ Second, it establishes the plaintiff's absolute right to have confessed judgment entered if the plaintiff complies with the rule. Former Rule 645 a at least appeared to allow the clerk to exercise discretion over the entry of judgment.¹⁰²⁸ Third, the new rule abolishes the distinction between instances in which the plaintiff's affidavit furnishes the defendant's address, and those in which it states that the defendant's address is unknown. Under section (c), the clerk must enter judgment in either case. Former Rule 645 f distinguished between those two situations by allowing the court's order to be entered before judgment if the defendant's address was unknown. The Committee considered that the former rule created an incentive for plaintiffs to furnish some address, even if the likelihood of the defendant's being served at that address was remote.¹⁰²⁹

Section (b) governs notice. First, it provides that if given an address, the clerk must issue a "notice" to the defendant, instead of a "summons" as under the former rule.¹⁰³⁰ The Committee changed the language because Rule 2-611 does not require the defendant to appear before the court; the defendant may simply move to open, vacate, or modify the judgment.¹⁰³¹ Traditionally, a summons mandates the appearance of the person named in the instrument, which appearance would not be necessary, should the defendant choose not to defend, or to defend solely by filing a motion in response.¹⁰³² Moreover, Rule 2-114, governing the content of summonses, requires the inclusion of a warning to the defendant of the risk of default. Such notification would not be in accord with the procedures of Rule 2-611, which result in confessed judgment, not default judgment.¹⁰³³

Section (b) also consolidates the notice provisions of Former Rule 645 e and f, without substantial changes. Former Rule 645 e allowed the plaintiff to petition the court to permit notice by mail, publication,

1027. Explanatory Note, Minutes, Oct. 16-17, 1981, at 26. Although the court may exercise its authority to enter judgment without following the directives of the new rule, the circumstances under which it would be unclear.

1028. *Id.*

1029. *Id.*

1030. Former Md. R.P. 645 b required the clerk, upon entering the judgment, to issue a summons both to notify the defendant and to require him "to appear and show cause, if any, why the judgment should be vacated, opened or modified." The summons was served under Former Md. R.P. 104, 106, or 107 a.

1031. Md. R.P. 2-611(c).

1032. *See* Minutes, Oct. 16-17, 1981, at 28.

1033. *Id.*

or posting,¹⁰³⁴ if the summons could not be served.¹⁰³⁵ Former Rule 645 f provided for notice by publication if the defendant's address was unknown.¹⁰³⁶ Section (b) of the new rule deals with both of these situations. If the court is satisfied from the plaintiff's affidavit that either the defendant cannot be served, or that the defendant's whereabouts are unknown, it must provide for notice by mail and posting or publication pursuant to Rule 2-122.¹⁰³⁷

Section (c) is essentially the same as Former Rule 645 c. It permits the defendant to move to open, modify, or vacate the judgment within the time period prescribed by Rule 2-321(a) and (b), which governs the time for filing answers.¹⁰³⁸ The defendant's motion must set forth the "legal and factual basis for the defense to the claim."¹⁰³⁹ The language is somewhat different from that in Former Rule 645 c, which permitted motions "on the ground that the defendant has a meritorious defense to the cause of action." But, the new section appears merely to have employed terminology similar to that of Federal Rule 12(b)¹⁰⁴⁰ without working any substantive change in the law. The Court of Appeals of Maryland has held under the former rule that a showing of a meritorious defense requires only persuasive evidence of substantial and suffi-

1034. Former Md. R.P. 645 e, incorporating by reference Former Md. R.P. 105 b.

1035. The new rule substitutes a notice for the summons. *See supra* note 1030 and accompanying text.

1036. Former Md. R.P. 645 f, incorporating by reference Former Md. R.P. 105 b.

1037. MD. R.P. 2-611(b), incorporating by reference MD. R.P. 2-122. A potential ambiguity discussed in Committee meetings was the conflict between MD. R.P. 2-611(b) and 1-323. Under Rule 2-611(b), the plaintiff must file a motion, together with an affidavit, in order to request substituted service pursuant to MD. R.P. 2-122. Rule 1-323, however, bars the clerk from accepting any pleading or other paper requiring service, other than an original pleading, unless it is accompanied by an admission, waiver, or proof of service. A literal reading of the two rules, therefore, would be that the plaintiff can obtain substituted service if the original complaint states that the defendant's whereabouts are unknown. However, the plaintiff can not obtain substituted service if the plaintiff first attempts personal service and fails to effect it, because the clerk may not accept the request. *See* MD. R.P. 1-321(a) (every paper filed shall be served); *id.* 1-323; Minutes, Oct. 16-17, 1981, at 28. Despite this ambiguity, the new rules should be harmonized rather than read to conflict. There is no serious question that plaintiff's request for notice pursuant to MD. R.P. 2-122 should be accepted. *See* Minutes, Oct. 16-17, 1981, at 28.

Additionally, unlike Former Md. R.P. 105 b, MD. R.P. 2-122(a) provides for notice to be mailed to the defendant's last known address in cases where the defendant's whereabouts are unknown. Furthermore, both MD. R.P. 2-122(c) and 2-611(b) require the clerk to include in the notice the latest date for the defendant to file a motion to open, vacate, or modify the judgment. This is intended to assist the defendant, who may be uncertain as to when the 30 day period in which to respond commences. *See* Minutes, Oct. 16-17, 1981, at 28-29.

1038. *See supra* text accompanying notes 403-10.

1039. MD. R.P. 2-611(c).

1040. FED. R. CIV. P. 12(b) states that "[e]very defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted . . ."

cient grounds for an actual controversy as to the merits of the case.¹⁰⁴¹ Moreover, the court held that a meritorious defense is not limited to defenses to the merits of the underlying transaction; it is merely a defense that has merit,¹⁰⁴² and thus includes limitations¹⁰⁴³ or set off.¹⁰⁴⁴ Section (c) dispenses with the language of Former Rule 645 c and d, which states that a confessed judgment "shall stand to the same extent as a judgment absolute entered after trial." The deletion of that phrase should have no effect, as the principle is well-founded in common law and is still operative.¹⁰⁴⁵ Finally, Former Rule 645 g, providing for extensions of time in which to file motions, has been obviated by Rule 1-204.

Section (d), governing disposition of the defendant's motion, closely follows Former Rule 645 d, although the requirement of a hearing has been eliminated.¹⁰⁴⁶ The test for evaluation of the motion remains the same: whether the defendant raises "a substantial and sufficient basis for an actual controversy as to the merits of the action"¹⁰⁴⁷ If the defendant surmounts this obstacle, the court must alter the judgment and permit the defendant to file a responsive pleading in anticipation of trial.

Section (e) clarifies Former Rule 645 i by prohibiting execution sales, pursuant to Rule 2-644, and remittances by garnishees, pursuant to Rule 2-646(i), until either the defendant's time for filing a motion in opposition has passed, or the disposition of any motion so filed. The former rule contained confusing language with regard to the finality of confessed judgments. A confessed judgment is final and enforceable, despite the defendant's right to challenge it within the specified time period.¹⁰⁴⁸ By implication, the present practice of filing writs of attachment simultaneously with entry of judgment is preserved. Even though execution is delayed, attachment preserves the creditor's priority interest in the debtor's property.

1041. *Billingsley v. Lincoln Nat'l Bank*, 271 Md. 683, 689, 320 A.2d 34, 37-38 (1974). See also MD. R.P. 2-611(d) (governing disposition of motions); Former Md. R.P. 645 d (same).

1042. *Young v. Mayne Realty Co.*, 48 Md. App. 662, 666, 429 A.2d 296, 298 (1981).

1043. *E.g., id.*

1044. *E.g., Gelzer v. Scamoni*, 238 Md. 73, 74, 207 A.2d 655, 655 (1965).

1045. *S.W. Barrick & Sons, Inc. v. J.P. Council Co.*, 224 Md. 138, 140, 166 A.2d 916, 917 (1961).

1046. Although a hearing is not mandatory, either party may request a hearing pursuant to MD. R.P. 2-311(f).

1047. MD. R.P. 2-611(d). This means raising a jury question. It does not mean the defendant must surmount the preponderance of the evidence test in order for the court to alter the judgment. *Billingsley v. Lincoln Nat'l Bank*, 271 Md. 683, 689, 320 A.2d 34, 38 (1974).

1048. *S.W. Barrick & Sons, Inc. v. J.P. Council Co.*, 224 Md. 138, 140, 166 A.2d 916, 917 (1961).

It is well settled that a cognovit clause does not violate per se the due process clause of the fourteenth amendment.¹⁰⁴⁹ A debtor may waive in advance the due process rights of notice and opportunity to present a defense prior to the rendition of a civil judgment on a note.¹⁰⁵⁰ Generally the court must determine, in any given case, whether the waiver was voluntarily, knowingly, and intelligently made.¹⁰⁵¹ In making this determination the court will consider whether the contract is one of adhesion, whether there is great disparity in bargaining power, and whether the debtor received any consideration for agreeing to the cognovit provision.¹⁰⁵² Realistically, therefore, such clauses will withstand attack only if corporate parties are involved. In Maryland this will almost always be the case, because lenders in consumer credit transactions are forbidden to take judgment by confession as security.¹⁰⁵³ Moreover, the Court of Appeals has established that the defendant need only pose a jury question in order to open the judgment and proceed to trial.¹⁰⁵⁴ The defendant does not bear the burden of proof by the preponderance of the evidence at two separate stages.

Rule 2-611 does not place the constitutionality of the confessed judgment procedure in jeopardy. Indeed, section (e) clarifies that property may not be sold in execution, and garnishees may not remit wages or other debts, until the time for the defendant to file a motion in response and the disposition on that motion entered has expired. Hence the rule aids in affording the defendant procedural due process.

Rule 2-612—Consent Judgment

Rule 2-612 governs the authority of the court and of the clerk to enter judgments by consent of the parties. The rule provides general authority for the court to enter judgments by consent, and empowers the clerk to enter consent judgments with certain limitations. Former Rule 601 only pertained to the entry of consent judgments by the clerk.¹⁰⁵⁵

On its face, Rule 2-612 alters the clerk's authority to enter judgments by consent of the parties. Former Rule 601 permitted the clerk to enter a consent judgment only "in the absence of the judge," and fur-

1049. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972); *Billingsley v. Lincoln Nat'l Bank*, 271 Md. at 687, 320 A.2d at 37; *Meyer v. Gyro Transp. Sys.*, 263 Md. 518, 533, 283 A.2d 608, 616 (1971).

1050. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. at 185.

1051. *Id.*

1052. *Id.* at 188.

1053. MD. COM. LAW CODE ANN. § 12-311 (1983).

1054. *Billingsley v. Lincoln Nat'l Bank*, 271 Md. at 689, 320 A.2d at 37.

1055. Explanatory Note, Minutes, Oct. 16-17, 1981, at 31.

ther specified that the clerk could act only during a "term of court." The new rule dispenses with both of these limitations.¹⁰⁵⁶ Rule 2-612's restrictions as to when the clerk may enter a judgment by consent are consistent with new Rules 2-601 and 2-602. Closely following Rule 2-601, which governs the entry of judgment by a clerk after a verdict, Rule 2-612 provides that the clerk can enter judgment only if it is for a sum certain, or for costs, or if it denies all relief.¹⁰⁵⁷ Additionally, entry may not be made unless the judgment disposes of all of the claims in the action. That accords with Former Rule 605 and new Rule 2-602, which require the express direction of the court to enter a judgment on fewer than all claims in an action.¹⁰⁵⁸

Committee members suggested that the new rule changes former practice by granting the clerk some discretion to refuse to enter the judgment.¹⁰⁵⁹ The discretion apparently arises from the limitations in the new rule relating to when the clerk is allowed to enter judgment, and from the language of the rule, which provides that the clerk "may enter judgment."¹⁰⁶⁰ Presumably, the clerk may refuse to enter judgment if not satisfied that the judgment disposes of all claims in the action, or that the judgment is for sum certain, or for costs, or that it denies all relief. The language of Former Rule 601, however, also appeared to give the clerk some discretion by providing, like the new rule, that the clerk "may enter judgment." But in frequently repeated dicta Maryland courts have consistently stated that a clerk's function, upon receiving a request from the parties to enter a consent judgment, is purely ministerial, not discretionary.¹⁰⁶¹

Rule 2-613—Default Judgment

Rule 2-613 substantially revises the default judgment procedures embodied in Former Rules 310 b, 611, 648, and 675 c. While the new rule simplifies present practice, the procedure by which a default judgment is obtained remains a two-step process: entry of an order of default and its attendant notice and an opportunity to vacate, followed by the actual entry of judgment.

Under the former scheme, if a party against whom a claim is as-

1056. *Id.*

1057. *Id.*

1058. *Id.*

1059. Minutes, Oct. 16-17, 1981, at 32.

1060. MD. R.P. 2-612 (emphasis added).

1061. *See, e.g.,* *Dorsey v. Wroten*, 35 Md. App. 359, 370 A.2d 577 (1977) (citing *Corey v. Carback*, 201 Md. 389, 94 A.2d 629 (1953)). While the dicta in *Corey* to which *Dorsey* refers predates Former Md. R.P. 601, *Dorsey* clearly implies that the language is equally applicable to that rule. *See id.* at 361 n.1, 370 A.2d at 579 n.1.

served failed to comply with the time requirements for pleading, the party pressing the claim could move that a judgment by default be entered at law, or that the bill be taken *pro confesso* in an equity proceeding.¹⁰⁶² After entry of a judgment by default or of a decree *pro confesso*, notice was mailed to the defaulting party by the clerk.¹⁰⁶³ The defaulting party at law could then seek to have the judgment vacated within thirty days after entry, pursuant to the court's general revisionary power.¹⁰⁶⁴ Immediately after the judgment by default had been entered, the prevailing party at law was entitled to have the court or a jury assess the amount of damages by means of an inquisition.¹⁰⁶⁵ The initial judgment by default was then "extended" in accordance with the specific determination of the inquisition, and a final judgment by default was entered.¹⁰⁶⁶ In an equity proceeding, after a decree *pro confesso* had been entered, the defendant had thirty days in which to move to set aside the decree, after which time a final decree could have been entered.¹⁰⁶⁷

Rule 2-613 dispenses with some of the formalities of present default judgment practice. For instance, the plaintiff need not file a motion praying entry of judgment; section (a) merely requires that the plaintiff file a written request.¹⁰⁶⁸ Section (a) also eliminates the court's discretion as to whether to enter the default, by providing that, upon receipt of the plaintiff's request, the court "shall" enter an order of default.¹⁰⁶⁹

Section (b) alters prior practice regarding notice given to the defendant upon entry of an order of default. While the notice provisions of Former Rule 611 were mandatory,¹⁰⁷⁰ the clerk was not obligated to issue notice if the defendant's address was not specified in the pleadings and was otherwise unknown.¹⁰⁷¹ Rule 2-613 seeks to insure that the de-

1062. Former Md. R.P. 310 b.

1063. Former Md. R.P. 611.

1064. Former Md. R.P. 625 a. This rule was generally applicable to both law and equity. *See, e.g.,* Hughes v. Beltway Homes, Inc., 276 Md. 382, 384, 347 A.2d 837, 839 (1975). However, Former Md. R.P. 675 a addresses situations in which a defendant in an equity proceeding could move to set aside a decree *pro confesso*. *See infra* note 1077.

1065. *See* Former Md. R.P. 648. In nonjury actions, the court made an inquiry as to damages. In cases in which a jury trial was requested, a jury was empaneled and a trial or "inquisition" was conducted to assess damages. *See also* 3 J. POE, *supra* note 136, §§ 368-369.

1066. Former Md. R.P. 648. The rule did not require that notice of the inquisition be given to the defendant. *See* Kaplan v. Bach, 36 Md. App. 152, 156, 373 A.2d 71, 75 (1977); Explanatory Note, Minutes, Oct. 16-17, 1981, at 34.

1067. Former Md. R.P. 675.

1068. The request must be served on the defaulting party, *see* MD. R.P. 1-321, and it should state the defendant's last known address.

1069. Former Md. R.P. 310 b provided by implication for the exercise of discretion.

1070. *E.g.,* Calvert Fire Ins. Co. v. Reick, 39 Md. App. 620, 628, 387 A.2d 789, 793 (1978).

1071. Former Md. R.P. 611.

fendant receives adequate notice of the order of default. First, section (a) requires that the plaintiff's request include the defendant's last known address.¹⁰⁷² Second, section (b) requires the clerk to issue notice to both the defendant and to the defendant's attorney of record, if any. Finally, the rule provides that the court can require that additional notice be given to the defendant if necessary.¹⁰⁷³

To enforce the time limits for filing responsive pleadings, Rule 2-613(c) restricts a defendant's ability to have a default judgment vacated or modified. Under the former rule, in an action at law, the court had discretion to set aside or modify a default judgment during the thirty day period after entry, under its general revisory power, pursuant to Former Rule 625 a.¹⁰⁷⁴ Maryland courts interpreting that rule have consistently stated that the court's discretion should be liberally exercised.¹⁰⁷⁵ Thus, in general, a defendant was entitled to have a default judgment set aside during this period merely by showing a "reasonable indication of a meritorious defense, or other equitable circumstances that would justify striking the judgment."¹⁰⁷⁶ Likewise, in an equity proceeding, the court had discretion to set aside a decree *pro confesso*, upon a defendant's motion or on its own initiative, within thirty days after entry;¹⁰⁷⁷ and the Court of Special Appeals has held that "leave to file an answer in such cases should be freely granted when it appears that a colorable meritorious defense has been shown."¹⁰⁷⁸

Rule 2-613(c) now limits the discretionary power. First, to vacate the order of default, the defendant must file a motion within thirty days after its entry. There is no provision for the court to set aside or revise the default on its own initiative.¹⁰⁷⁹ Second, section (c) provides that the motion must specify "the reasons for the failure to plead and the legal and factual basis for the defense to the claim." For the defendant to prevail, the court must find that there is both "a substantial and suffi-

1072. This provision was the result of a late revision adopted by the Committee upon the recommendation of the court. See Letter from the Hon. John F. McAuliffe to the Judges of the Court of Appeals (Sept. 19, 1983).

1073. This would include notice by mailing and publication or posting. See MD. R.P. 2-122.

1074. The court's revisory power stems from MD. CTS. & JUD. PROC. CODE ANN. § 6-408 (1984), which mirrors Former Md. R.P. 625 a. See *Maryland Lumber Co. v. Savoy Constr. Co.*, 286 Md. 98, 101, 405 A.2d 741, 743 (1979).

1075. *Maryland Lumber*, 286 Md. at 102, 405 A.2d at 743; *Weaver v. Realty Growth Investors*, 38 Md. App. 78, 82, 379 A.2d 193, 195 (1977).

1076. *Abrams v. Gray Inv. Co.*, 253 Md. 121, 123, 251 A.2d 876, 877 (1969) (quoting *Clarke Baridon v. Union Co.*, 218 Md. 480, 483, 147 A.2d 221, 222-23 (1958)).

1077. Former Md. R.P. 625 c; see *Fritz v. Fritz*, 34 Md. App. 600, 368 A.2d 502 (1977).

1078. *Fritz*, 34 Md. App. at 608, 368 A.2d at 507. However, the defendant is not entitled as a matter of right to file an answer during the 30 day period after entry of the decree *pro confesso*. *Guerriero v. Friendly Fin. Corp.*, 230 Md. 217, 222, 186 A.2d 881, 883 (1962).

1079. See *supra* text accompanying notes 1074 & 1077.

cient basis for an actual controversy as to the merits of the action and that it is equitable to excuse the failure to plead."¹⁰⁸⁰ Thus the new rule establishes a stricter standard by requiring a "substantial and sufficient basis" as opposed to a "reasonable indication" of a meritorious defense, and by making the requirements of a meritorious defense and an equitable excuse conjunctive. Although the Committee indicated that it did not intend to override the precedent interpreting Former Rule 625 a, which allowed a judgment to be set aside solely because of "equitable circumstances,"¹⁰⁸¹ the language of Rule 2-613 clearly requires that the defendant must additionally demonstrate that there is an actual controversy as to the merits of the action.

If the defendant either fails to file a motion to vacate the order of default, or if the motion is denied, the plaintiff can request that the court enter a judgment by default pursuant to 2-613(e). Before the court can enter a final judgment, however, section (e) requires that the court be satisfied that personal jurisdiction was obtained over the defendant, and that the defendant received proper notice.¹⁰⁸²

Section (e) also dispenses with the formal requirements of an adversarial hearing or inquisition to determine the amount or character of relief,¹⁰⁸³ in favor of a more flexible, *ex parte* approach essentially derived from Federal Rule 55(b)(2). Although the court can conduct informal hearings when appropriate, the new rule provides that in certain circumstances, such as if damages are for a sum certain or a sum which can be made certain by computation, the court may rely on affidavits or on the pleadings to establish the amount of the judgment.¹⁰⁸⁴

Section (f) establishes the finality of the default judgment by denying the court its general revisory power under Rule 2-535(a) once the judgment has been properly entered. However, the section qualifies the apparent denial of authority by providing an exception allowing the court to exercise its general revisory power over the relief granted. Section (f) thus codifies present law, because the cases indicate that the

1080. Md. R.P. 2-613(d). As originally drafted, the rule required a showing of "good cause" to execute the defendant's failure to plead, instead of an "equitable" excuse. Minutes, Oct. 16-17, 1981, at 33; Minutes, Nov. 20-21, 1981, at 13.

1081. Minutes, Nov. 20-21, 1981, at 17.

1082. These requirements, which were not contained in the original draft of the rule, were apparently added by the Committee to provide further safeguards to ensure that the rights of defendants are adequately protected. *See id.* at 16.

1083. *See* Former Md. R.P. 648.

1084. The initial draft of the rule went much further and allowed the clerk to enter the judgment in such circumstances. Thus the plaintiff could obtain judgment upon written request that included an affidavit stating the amount due; however, the Committee decided that final judgment by default should not be entered without the involvement of the court. Minutes, Nov. 20-21, 1981, at 14-16.

court, pursuant to its revisory power, cannot examine the validity of the plaintiff's cause of action, due to the fact that a judgment by default is conclusive of the question of liability.¹⁰⁸⁵

The two-step process for obtaining a default judgment was the product of substantial debate by the Committee. The original draft of the rule sought to establish a one-step process in which the initial determination of default and the entry of the judgment were combined. The defendant was to be given notice only after the precise amount of the judgment had been determined. At that point the defendant could move to modify or vacate the judgment.¹⁰⁸⁶ The Committee abandoned this scheme in favor of the more traditional two-step process; nevertheless, the final version of 2-613 is significantly different from former Maryland practice, yet at the same time, only somewhat similar to Federal Rule 55. The revision of present default judgment practice contemplated by the new rule reflects the Committee's desire to encourage compliance with the time requirements for pleading, while at the same time ensuring that the rights of defendants are sufficiently protected.

Rule 2-614—Judgment of Contribution or Recovery Over

This provision restates Former Rule 605 d. The changes are stylistic,¹⁰⁸⁷ except that the former provision requiring fifteen days notice to the defendant against whom contribution is sought is deleted. Rule 2-311(b) now governs responses to all motions; it prescribes the same time period as did the former rule.

Rule 2-615—Judgment on Claim and Counterclaim

This provision restates Former Rule 605 b, with stylistic changes and allows the court to enter judgment for the amount by which a claim or counterclaim exceeds the other. The prior requirement that the court not enter a judgment for less than the jurisdictional amount is eliminated.

Rule 2-621—Lien of Judgment

The value of a judgment depends on the creditor's ability to enforce it. One of a creditor's most powerful enforcement tools, which arises automatically out of a money judgment, is a lien on the defendant's interests in real property. Rule 2-621 restates the substance of For-

1085. *See, e.g.*, *Millison v. Ades of Lexington, Inc.*, 262 Md. 319, 328, 277 A.2d 579, 584 (1971).

1086. Minutes, Oct. 16-17, 1981, at 32-35.

1087. Explanatory Note, *id.* at 54.

mer Rule 620 a, which provided that a judgment constitutes a lien on interests in land located in any county where the judgment is entered.¹⁰⁸⁸ The changes are stylistic and the new rule makes clear that liens do not arise for judgments providing relief other than a sum certain, such as injunctions or declaratory judgments.¹⁰⁸⁹

A special statutory procedure currently requires that judgments against plaintiffs for costs in equity must be entered in a special index. Under the statute, section 3-302 of the Real Property Article,¹⁰⁹⁰ the special lien cannot arise unless the plaintiff's name is entered in the index. The continued vitality of this practice is questionable after the abrogation of the law/equity distinction under the new rules.¹⁰⁹¹ This problem should be addressed by the legislature.

The cumbersome provisions of Former Rule 620 b through f, detailing the operation of liens in each court of the Maryland court system,¹⁰⁹² have been replaced by Rule 2-621(b). The new section incorporates the recording procedure of Rule 2-623 to achieve the same result as the former rule. The rules, together with Rule 2-622, provide a simple mechanism by which a judgment in one county becomes a lien on interests in land in another.

Rule 2-622—Transmittal to Another Court

The transmittal procedure outlined in Rule 2-622 fills a gap left by the former rules. Former Rules 620 and 621, which set forth procedures for obtaining liens on real estate in more than one county, stated that judgments "shall be filed" in the appropriate court, but provided no means for so doing. The lack of guidance left counsel the task of obtaining a certified copy of the judgment from the court of origin and delivering the copy to the clerk of the court of the county in which the real estate was located.¹⁰⁹³

Rule 2-622(a) specifies that the clerk of the court of rendition of

1088. MD. CTS. & JUD. PROC. CODE ANN. § 11-402(b) (1984) defines interests subject to lien as any interest except a lease from year-to-year, or for a non-renewable term of not more than five years.

1089. Explanatory Note, Minutes, Nov. 20-21, 1981, at 20. The provision reflects current practice in that liens arise only from money judgments, and not from equitable relief. Specification of judgment for a "sum certain" also avoids ambiguities such as those encountered in *Prince George's County v. Commonwealth Land Title Ins. Co.*, 47 Md. App. 380, 383, 423 A.2d 270, 273 (1980) (judgment lien on property does not arise until an amount has been specified).

1090. MD. REAL PROP. CODE ANN. § 3-302(c) (1981).

1091. See *supra* note 142 and accompanying text.

1092. Maryland District Court judgment liens are now treated separately. See *infra* note 1095 and accompanying text.

1093. Explanatory Note, Minutes, Oct. 16-17, 1981, at 55.

judgment will transmit a certified copy of the judgment upon request. Section (b) sets forth a method for updating the status of judgments recorded in other courts, thus inhibiting possible attempts to enforce liens no longer effective according to their original terms.¹⁰⁹⁴

Rule 2-623—Recording of Judgment of Another Court

Rule 2-623, in conjunction with Rules 2-621(b) and 2-622, completes the process by which interests in land outside the court of original jurisdiction are attached. The new rule is consistent with the scheme set forth in Rule 2-622, in that the clerk must notify the clerk of the court of original jurisdiction when a judgment is received from a person other than that clerk. This ensures that, when satisfaction is later recorded in the court of origin of the judgment, liens in other counties will be released.

The new rule retains most of the language of Former Rule 619 a, which listed the courts whose recorded judgments would create liens in Maryland. The rule eliminates the category of minor court judgments rendered before the establishment of the district court system. Judgment liens of district courts are not governed by Rule 2-623, but are treated separately in the Maryland District Rules.¹⁰⁹⁵

The rule does not apply to foreign judgments.¹⁰⁹⁶ Any judgment issued by a foreign court, or a state, or federal court outside of Maryland must be sued upon in a Maryland court and must be reduced to a Maryland judgment before becoming a lien. This requirement is consistent with present practice.¹⁰⁹⁷

Rule 2-624—Assignment of Judgment

Rule 2-624 covers any assignment of a judgment, including an assignment to a subrogated surety. As such it combines aspects of Former Rules 240 a and 617 a.¹⁰⁹⁸ Former Rule 240 a permitted any assignee to issue execution in his own name, and Former Rule 617 a conditionally granted the same privilege to sureties, subject to the filing of the assignment in the court of origin to the judgment.

1094. *Id.* at 56.

1095. *See* MD. DIST. R. 621. .

1096. Minutes, Oct. 16-17, 1981, at 57.

1097. Minutes, May 16-17, 1980, at 3.

1098. Although the language of Former Md. R.P. 617 a contemplated a formal suretyship relation, subrogation has traditionally been available to all persons who agree to pay the debt of another. *See* Dinsmore v. Sachs, 133 Md. 434, 437, 105 A. 524, 525 (1919). The subrogation statute codified in MD. COM. LAW CODE ANN. § 15-401 (1983), is merely declaratory of the common law. *Watkins v. Worthington*, 2 Bland 509 (1828).

The new rule does not significantly change former practice, although it requires the assignee seeking enforcement to produce a written assignment.¹⁰⁹⁹ Recording of assignments is permissive, with the burden of recording left to those benefitted by the assignment. In most instances this would be the assignee.¹¹⁰⁰ Thus, an assignee who elects not to record his assignment runs the risk that the original judgment creditor will make collections after the assignment, because only the record holder of the judgment can obtain enforcement.¹¹⁰¹ A solution lies in the transmittal scheme of Rules 2-621, 2-622 and 2-623, which together establish a channel for communicating information between all courts. Nevertheless, this was not incorporated into Rule 2-624.

The new rule likewise does not parallel Rule 2-626, governing the satisfaction of judgments. Under Rule 2-626, the creditor who receives full payment must file a notice of satisfaction. Pursuant to Rule 2-622(b), the clerk then transmits the notice to all courts in which the judgment has been recorded. But this procedure is not followed for assignments. Because Rule 2-624 is permissive, both as to the recording in the court of rendition of the judgment, and as to recording elsewhere, confusion may arise.¹¹⁰²

Rule 2-625—Expiration and Renewal of Judgment

Rule 2-625 largely eliminates the adversarial process for renewal of a judgment, which was obtained through the use of the writ of *scire facias*. Under the former rules, the writ was in the nature of a declaration; thus, service of process was required and the defendant was enti-

1099. Arguably Former Md. R.P. 240 a permitted execution to be issued on an oral assignment.

1100. See Minutes, May 21-22, 1982, at 7-8.

1101. Presumably the assignee failing to record would be estopped to enforce against the debtor who had paid the original judgment creditor in good faith and without knowledge of the assignment, although this outcome is far from certain.

The omission of a recording requirement is problematic. The Committee voted against requiring recording, but the reasons for its decision are unclear. Some concern was expressed that the requirement would create a pitfall for assignees. See *id.* at 9. This is illogical, in that recording promotes the desirable goal of furthering accuracy and consistency in the public records, while *not* recording merely saves the assignee minimal expense. Thus, the failure to require recording benefits neither debtors nor assignees.

1102. For example, a judgment may be entered in Howard County, transmitted to Carroll County, and then assigned. If the assignee obtains satisfaction, the assignee must file notice with the Howard County clerk's office or else risk the penalties provided by MD. R.P. 2-626(c). The clerk must then transmit the notice to Carroll County in accordance with MD. R.P. 2-622(b), which might result in the receipt of a notice of satisfaction for which there is no recorded judgment, unless the clerk also transmits an explanation of the assignment at the same time.

tled to plead to it.¹¹⁰³

The new rule incorporates the twelve-year limitations period of Former Rule 622 a. It also specifies that the limitations period applies only to judgments for a sum certain, and not to injunctive or declaratory relief. Finally, it requires the clerk to enter the renewal, unless more than twelve years have passed since the judgment was entered or most recently renewed. If more than twelve years have elapsed, the clerk should not renew the judgment, even if no objection to renewal is filed. This differs from prior practice in which the limitations period was only an affirmative defense which could be waived.¹¹⁰⁴ Since service of process upon the debtor is no longer required for renewal, a limit on the judgment holder's ability to renew is an appropriate quid pro quo. Despite the elimination of the *scire facias* procedure, defenses against enforcement of the judgment are not foreclosed. For example, if payment has been made, the debtor may move, under Rule 2-626, to compel the entry of an order of satisfaction; alternatively, the debtor could attack the judgment collaterally by resisting enforcement.¹¹⁰⁵

Rule 2-626—Satisfaction of Judgment

This rule drastically alters prior practice. Under Former Rule 603, the judgment creditor had the right, but not the obligation, to file an order of satisfaction after receiving payment in full from the debtor.¹¹⁰⁶ The new rule coerces the creditor into recording satisfaction by the threat of economic sanctions for failure to record.

Section (a) requires the judgment creditor to furnish both to the debtor and to the clerk a written statement of satisfaction. The clerk then must enter the judgment satisfied. Section (b) provides the debtor a mechanism for compelling the entry of satisfaction.¹¹⁰⁷ The rule requires a motion, service, and, perhaps, an adversarial proceeding.¹¹⁰⁸ If the judgment debtor prevails, and the creditor's failure to act is found to have been unjustified, the court must order the creditor to pay the debtor the costs incurred in obtaining the order of satisfaction, including

1103. See MD. R.P. Subtitle BT; 4 J. POE, *supra* note 136, § 585.

1104. O'Neill & Co. v. Schulze, 177 Md. 64, 68, 7 A.2d 263, 265 (1939); 4 J. POE, *supra* note 136, § 590.

1105. Explanatory Note, Minutes, Nov. 20-21, 1981, at 24.

1106. In practice, debtors often insist on an order of satisfaction as a condition of settlement or payment.

1107. Arguably the judgment debtor already has a right to obtain, by way of an adversarial proceeding, recordation of satisfaction. Absent a statutory provision for such a process, however, authority on point is scant. *See, e.g.,* Manowitz v. Kanov, 107 N.J.L. 523, 54 A. 326 (1931) (debtor entitled to have judgment cancelled).

1108. MD. R.P. 2-626(b).

attorneys' fees. On the other hand, if the debtor's motion is made in bad faith or without substantial justification, the court may order the debtor to pay the creditor's costs, including attorneys' fees.¹¹⁰⁹

Rule 2-631—Enforcement Procedures Available

The value of a judgment depends upon the judgment creditor's ability to enforce it; failure to execute a judgment properly will eliminate its value. Because of the overlap between statute, rule, and common law, and because of the complexity of their interplay, practitioners have in the past needed the services of specialists in the law of enforcement. New Rules 2-631 through 2-651 establish the exclusive procedures for enforcing judgments in Maryland;¹¹¹⁰ Rule 2-631 abolishes all other procedures for enforcement.¹¹¹¹ A simple and comprehensive system governing the enforcement of all judgments replaces a variety of existing procedures including *feri facias*, replevin, ejectment, and attachment on judgment. The new procedures, patterned in part after the federal rules¹¹¹² and the more effective aspects of previous practice, cover all types of property presently subject to enforcement proceedings.¹¹¹³

Rule 2-632—Stay of Enforcement

Rule 2-632 provides for two types of stays of enforcement—automatic and discretionary. Generally, the enforcement of a judgment is automatically stayed for ten days.¹¹¹⁴ During this period, the parties may file any of several post-trial motions available under the trial rules.¹¹¹⁵ The ten-day limit, which correlates with the time allowed for

1109. MD. R.P. 2-626(c).

1110. MD. R.P. 2-631.

1111. *Id.* The rule is necessitated by MD. R.P. 1-201, which states that the rules do not repeal common law or statute except as expressly provided. Committee discussions indicate the concern that the enforcement rules should be interpreted as replacing all common law methods of enforcement. Minutes, Mar. 12, 1982, at 3; Minutes, Feb. 12, 1982, at 6-7. Nevertheless, MD. R.P. 2-631 should not affect creditors' remedies outside of the enforcement of judgments. The availability of actions such as foreclosure by secured parties, or self-help under MD. COM. LAW. CODE ANN. § 9-503 (1975), remains unchanged.

1112. FED. R. CIV. P. 62, 64, 65.1, 67, 69 & 70.

1113. *See* Minutes, Feb. 12, 1982, at 8. Generally, creditors may reach all of a debtor's property, subject to certain statutory exemptions. *See* MD. CTS. & JUD. PROC. CODE ANN. § 11-504 (1984) (listing exemptions).

1114. MD. R.P. 2-632(a). Under FED. R. CIV. P. 62(a), an execution of a judgment that is obtained before the expiration of the ten-day automatic stay period may be set aside. *In re Saez*, 13 Bankr. 605, 607 (D.P.R. 1981).

1115. A party may file for judgment notwithstanding the verdict (MD. R.P. 2-532), move for a new trial (MD. R.P. 2-533), move to alter or amend a judgment (MD. R.P. 2-534), or move to revise a judgment (MD. R.P. 2-535).

filing most post-trial motions, is a compromise between the interests of both parties.¹¹¹⁶ Judgment debtors are allowed time to file permissible motions but the time is limited to prevent any "unnecessary head start" over judgment creditors.¹¹¹⁷

The automatic stay provision does not apply to all judgments. First, the court, at its discretion and to protect the security of an adverse party, may stay the enforcement of a judgment pending the disposition of motions for new trial, to alter or amend a judgment, to revise a judgment, or for judgment notwithstanding the verdict. Second, section (a) of Rule 2-632 excepts from the automatic stay provision orders granting injunctions and appointing receivers. Although the court may order a stay of enforcement, the rules do not provide guidelines for determining when such an order is appropriate. Although prior practice permitted a court to stay perpetually a judgment, the new rules do not provide any authority to enter a qualified judgment.¹¹¹⁸ Finally, some rules, such as Rule 2-611 (Confessed Judgment) contain specific stay provisions.

Rule 2-632(c), governing stays of enforcement in multiple claims suits, preserves almost verbatim Former Rule 607. The rule permits a court to stay the enforcement of a judgment pending the entry of subsequent judgments in a case involving multiple claims. Initially, the Judgments Subcommittee opposed this rule because Rule 2-602 enables a court to delay entry of a judgment that does not resolve all the parties' claims until entry of a subsequent judgment.¹¹¹⁹ But the Subcommittee ultimately recognized that justification for staying enforcement of a judgment, while not delaying the establishment of a lien, may exist in

1116. The ten-day limit is equal to the time permitted for filing motions for a judgment notwithstanding the verdict, new trial, and to alter or amend the judgment. *See supra* note 914. But under MD. R.P. 2-535, any party may file a motion to revise a judgment or for a new trial within 30 days of entry of judgment. Thus, a court may revise a judgment after a judgment creditor has begun enforcement proceedings. The exigent nature of the facts that allow a court to exercise its revisory powers justifies the longer period for filing under Rule 2-535; those factors are not applicable to the stay of enforcement of a judgment. *See supra* text accompanying notes 932-37 (discussing requirements of Rule 2-535).

1117. Explanatory Note, Minutes, May 21-22, 1982, at 12-13.

1118. Relying on MD. ANN. CODE art. 26, § 14 (1904) (repealed and re-enacted as MD. ANN. CODE art. 26, § 15 (1957), *repealed by* Acts of 1957, ch. 399, § 1), the Court of Appeals of Maryland stated that a court may grant a perpetual stay of execution "when there appears to be a good reason for a qualified judgment." *Kendrick & Roberts, Inc. v. Warren Bros. Co.*, 110 Md. 47, 73, 72 A. 461, 465 (1909). Although this statute was repealed in 1957 when Maryland recodified many statutes, the language of article 26, § 15 was reenacted as a rule of procedure by the Court of Appeals. *See* Former Md. R.P. 641. The new rules do not provide for entry of a perpetual stay. Considering the exclusive nature of the enforcement rules (*see supra* text accompanying notes 1110-11) and the intention of the Committee to simplify Maryland procedure, the court's authority to stay enforcement should be limited to that for which the rules expressly provide.

1119. Explanatory Note, Minutes, May 21-22, 1982, at 12.

some cases.¹¹²⁰ For example, if judgment is entered upon a claim and a counterclaim remains undecided, enforcement of the judgment would be premature, because disposition of the counterclaim may create a set-off. Nevertheless, the judgment debtor on the original claim should not be given an opportunity to thwart subsequent enforcement of the judgment by disposing of his property during the pendency of the counterclaim.

Rules 1016 through 1021 continue to govern any stay pending appeal except an appeal taken from an order or judgment involving injunctive relief.¹¹²¹ When a party appeals from an order or judgment involving injunctive relief, the trial court has broad discretion to protect the appellee by suspending, modifying, restoring, or granting an injunction, by requiring a bond, or otherwise.¹¹²² Similarly, section (f) of Rule 2-632 explicitly states that the rule does not limit the power of an appellate court to take protective action, while an appeal is pending, to preserve the status quo or the effectiveness of the subsequent final judgment.¹¹²³

Rule 2-633—Discovery in Aid of Enforcement

Rule 2-633 consolidates Former Rules 627 and 628.¹¹²⁴ The new rule addresses a perceived ambiguity in prior practice. The Judgment Subcommittee felt that Former Rule 627 could be interpreted to permit the use of interrogatories and requests for production of documents against non-parties despite a cross-reference prohibiting the use of those devices.¹¹²⁵ To eliminate any confusion in the new rule, the words “any

1120. Comments of Mr. Bowen, *id.* at 13.

1121. MD. R.P. 2-632(d). With the exception of six specific types of appeal (appeals from the board of liquor license commissioners, orphan's court, orders affecting building, savings and loan, and homestead associations, the insurance commissioner, tax assessments or classifications, and the sheriff's failure to turn over fees), an appellant may stay execution during appeal by filing a supersedeas bond. *See* MD. R.P. 1017 e; *see also* *Creative Dev. Corp. v. Bond*, 34 Md. App. 279, 282-84, 367 A.2d 566, 568-69 (1976) (MD. R.P. 1017 e provides that a trial court may direct the terms upon which a supersedeas bond will stay execution or prevent entirely stay by filing of supersedeas bond.).

1122. MD. R.P. 2-632(e). This authority is identical to the power of the court to limit the effect of a supersedeas bond. *See* MD. R.P. 1017 e, *discussed at supra* note 1121.

1123. The Court of Special Appeals “may increase or decrease the amount of the supersedeas bond or pass such order as to the surety on such bond as may be proper.” This action may be taken only after the trial court has ruled upon the complainant's objections to the bond. *See* MD. R.P. 1017 c, d.

1124. Explanatory Note, Minutes, Nov. 20-21, 1981, at 26.

1125. Former Md. R.P. 627 limited the use of interrogatories and requests for production of documents “as provided in the Rules relating to . . . Discovery, Rules 417 to 419, inclusive, and Rule 422.” Former Md. R.P. 417 and 419 provided that interrogatories and requests for documents could be served by “[a]ny party [upon] any other party.” Former Md. R.P. 417 a 1, 419.

person" are eliminated from Rule 2-633. But the cross-reference to the rules controlling the use of interrogatories and requests for document production also were eliminated. Nevertheless, the Committee intended that Rules 2-421(a) and 2-422(a), which prevent a party from serving interrogatories or requests upon non-parties, control Rule 2-633.¹¹²⁶

Rule 2-633 changes some practices permitted under Former Rule 628. Under prior practice, a judge could permit the examination of a judgment debtor or other person meeting the criteria of the rule, if the judgment creditor established that the debtor was evading, or was attempting to evade enforcement. Rule 2-633(b), however, prohibits the filing of examination requests for thirty days after entry of judgment, regardless of the basis for that request. Thus, the rule grants a judgment debtor an opportunity to pay the judgment, to appeal, or to file post-trial motions.

Rule 2-633 also changes prior practice by expanding the court's discretion to refuse an examination request. Former Rule 628 required the court to order an examination if one of the two conditions described above was met.¹¹²⁷ Section (b) now provides that the court "may" issue such an order. According to the Committee, this change permits the court to deny the request for examination "when, in the court's judgment, the procedure is being used to harass the judgment debtor."¹¹²⁸ The Committee also eliminated section (d) of Former Rule 628 because Rules 2-641 through 2-649 enable the court to grant relief by appointing receivers, granting injunctions, or taking other actions.¹¹²⁹

Rule 2-641—Writ of Execution—Issuance and Content

Rules 2-641, 2-642, 2-643 and 2-644 establish a new system governing the enforcement of money judgments through levy upon the judgment debtor's real or personal property. Rule 2-641 modifies the former methods regarding the issuance of writs of execution. Rule 2-642 expands Former Rule G46 by treating separately and in greater detail

1126. Explanatory Note, Minutes, Nov. 20-21, 1981, at 26. An earlier version of MD. R.P. 2-633 expressly cross-referenced to MD. R.P. 2-421(a) and 2-422(a), but apparently the Committee felt that this was unnecessary.

1127. The former rule stated that upon satisfactory proof the court "shall" order an examination. *See* Former Md. R.P. 628 a, b.

1128. Minutes, Nov. 20-21, 1981, at 27.

1129. Explanatory Note, *id.* at 26. Sections (c) and (e) of Former Md. R.P. 628 have also been eliminated. Section (c) has been replaced by a cross reference to MD. CTS. & JUD. PROC. CODE ANN. § 9-119 (1984). Section (e) empowers the court to punish those who wilfully or negligently disobey orders for discovery in aid of enforcement. As such, it is redundant, since any order of court carries with it the threat of punishment inherent in the court's contempt powers.

levies on real property, personal property, and property in the hands of third parties. Rule 2-643 substantially alters the existing scheme for release from levy. Finally, Rule 2-644 sets forth the first comprehensive guidelines for sheriffs' sales.

Under Rule 2-641(a), the judgment creditor initiates the levy by filing a written request for a writ of execution with the clerk of the court of rendition of the judgment. The rule also formalizes the requirements for instructions to the sheriff concerning the property to be levied upon and the manner of the levy. Both the written request and the specifics required for the sheriff represent a departure from prior practice, under which neither is mandatory.¹¹³⁰ Although the rule does not expressly empower the clerk to reject a request for a writ, such power is implicit in the language of section (a). Thus the clerk may refuse to issue a writ that either lacks the requisite specificity or fails to contain the minimum information set forth in the rule.¹¹³¹

Section (c) indicates that the clerk is responsible for transmitting the writ and instructions to the sheriff. This is intended to change the former practice of delivering writs to parties or counsel.¹¹³² Moreover, the new mechanism is designed to protect the rights of creditors when multiple creditors levy upon the same property. Since the clerk is required to deliver the writ and instructions immediately upon the creditor's request, a writ is deemed effective from the time the sheriff receives it, instead of from the time the sheriff serves it on the debtor. Therefore, priority conflicts among competing creditors will no longer be resolved by race to obtain service.¹¹³³

Section (c) also requires the sheriff to record the date and hour of receipt of the writ. The Committee did not intend the failure of the sheriff to record receipt properly to form the basis of a judgment debtor's attack on the validity of the levy. But a creditor injured by the

1130. Explanatory Note, Minutes, Mar. 12, 1982, at 6. Former Md. R.P. G42 d merely required the sheriff to be given instructions as to the identity and location of the property.

1131. Section (a) states that the writ "shall" contain notices of the availability of exemptions and of the right to release, and "shall" be accompanied by specific instructions to the sheriff. MD. R.P. 1-201(a) explains that the word "shall" mandates conduct, and that where the consequences of noncompliance are not prescribed, the court may determine those consequences in light of the circumstances and purpose of the rule. While the Committee did not expressly incorporate the clerk's power into the rule, such authority is consistent with the concern for clear instructions that the rule embodies. *See* Minutes, Feb. 12, 1982, at 11.

1132. Explanatory Note, Minutes, Mar. 12, 1982, at 6.

1133. This has been referred to as the rule of the "writ in the mitt" rather than the rule of the "race to the swiftest." According to the Committee, the "writ in the mitt" rule removes the incentive for creditors to bribe a sheriff to serve one writ before another. Minutes, Feb. 12, 1982, at 11-12.

sheriff's failure may have a cause of action against the sheriff.¹¹³⁴

Section (a) allows the creditor to select among three alternative instructions to the sheriff as to the method of carrying out the levy. These are to levy and leave the property where found; to exclude others from access to it; or to remove it from the premises.¹¹³⁵ The creditor in choosing should bear in mind the nature of the judgment debtor's interest in the property to be levied upon. If the interest is undivided, any of the methods would be appropriate. If the judgment debtor's interest is only partial, the creditor should so instruct the sheriff in order to protect the interests of third parties. For example, if the subject property is a vacant building wholly owned by the debtor, the judgment creditor might wish to instruct the sheriff to seal the building so as to deny others access to it. On the other hand, if the building is leased to third parties, the sheriff should be instructed to "levy and leave" the property, so as not to interfere with the tenants' possessory interests. Given this process, the burden of determining the precise nature of the judgment debtor's interest rests upon the judgment creditor. If, at the behest of the creditor, the sheriff interferes with the rightful possession of a third party, the creditor, not the sheriff, will be held liable.¹¹³⁶

In view of the choices permitted, section (c) authorizes the sheriff to require the judgment creditor to post bond if the sheriff is instructed to remove property or to exclude others from access to it. The purpose of the bond is to cover costs associated with the levy, such as moving or storage expenses.¹¹³⁷ This practice may have been informally observed in some jurisdictions, but the rule codifies it.¹¹³⁸ The creditor's bond is not intended to apply to damages caused by the sheriff's wrongful taking. The Committee rejected an earlier version of rule, which would have provided for such coverage, after extensive discussion during which members expressed concern that such bonds would become prohibitively expensive and difficult to obtain.¹¹³⁹

Section (a) also entitles the judgment creditor to file such "additional instructions as are necessary and appropriate" to supplement the

1134. *Id.*

1135. MD. R.P. 2-641(a).

1136. Minutes, Apr. 16, 1982, at 8.

1137. Minutes, Mar. 12, 1982, at 8-10. The Committee also intended that the bond be backed by security other than surety. *See id.* at 8; MD. R.P. 2-641(c). *See also* MD. R.P. 1-402(e) (authorizing bond other than surety).

1138. Minutes, Mar. 12, 1982, at 9. Former Md. R.P. G42 e did not require such bond in all cases.

1139. *See* Minutes, Mar. 12, 1982 at 4 (MD. R.P. 2-622(b) requiring payment of any damages and costs); *id.* at 9-10 (discussion regarding bond for damages). MD. CTS. & JUD. PROC. CODE ANN. § 2-105 (1984) requires the sheriff to post bond for the faithful performance of his duties.

original instructions.¹¹⁴⁰ For example, a creditor who had first instructed the sheriff to “levy and leave” certain property may later decide to have the sheriff remove the property because the judgment debtor has not satisfied the judgment. This supplemental instruction may be forwarded directly to the sheriff, without requesting the issuance of a new writ.¹¹⁴¹ The language of the rule permits the creditor to “file” the additional instructions and to “deliver a copy to the sheriff.” That differs from the requirement, expressed earlier in the rule, that the *clerk* deliver the original instruction to the sheriff.¹¹⁴² If the property has been levied upon, there is no compelling reason why the creditor’s additional instructions must be transmitted to the sheriff by the clerk. If the sheriff has made the return without completing delivery, however, the creditor should have a new writ issued and have the new instructions delivered by the clerk.¹¹⁴³

The rule also permits the creditor seeking to levy upon property in another county the option of recording the judgment in that county and then requesting a writ.¹¹⁴⁴ Alternatively, the creditor may merely request the clerk of the court of rendition of the judgment to issue a writ and instructions to the sheriff of the other county. The latter procedure is codified in section (b), which incorporates Former Rule 622 h. The writ and instructions, together with a copy of the judgment, must be transmitted to the sheriff through the clerk of the other county. The receiving clerk will file the instructions and record the judgment. The return may then be recorded in the records of both counties, thus keeping all records current. If a judgment is satisfied or reversed, the clerk of one county will then notify the clerk of the other county accordingly.¹¹⁴⁵

Rule 2-642—Writ of Execution—Levy

Rule 2-642 expands Former Rule G46 a by establishing in greater detail the procedures to be followed in levying upon real or personal

1140. MD. R.P. 2-641(a).

1141. *Id.*

1142. *See supra* note 1132 and accompanying text.

1143. Committee discussions concerning these points are unenlightening. *See* Minutes, Apr. 16, 1982, at 17-18. Arguably the language of the rule should be interpreted to mean exactly what it says: Additional instructions are to be *filed* with the clerk and *delivered* to the sheriff.

1144. The first sentence of MD. R.P. 2-641(a) implicitly incorporates the scheme established for transmittal and recording of judgments. *See supra* notes 1093-97 and accompanying text (discussing MD. R.P. 2-622 and 2-623). MD. R.P. 2-641(a) states that the writ of execution shall be issued by the clerk “where the judgment was entered *or is recorded*.” (emphasis added). A clerk who enrolls an out-of-county judgment must so notify the clerk of the court of rendition of the judgment. *See* MD. R.P. 2-623. This system preserves the integrity of judgment records.

1145. Minutes, Apr. 16, 1982, at 10.

property and dispenses with the artificial distinction between *feri facias* and attachment on judgment.¹¹⁴⁶ The rule also relaxes the traditional requirement that the sheriff actually seize personal property to effectuate the levy. Finally, sections (c) and (b) differ from the former rule by stating that the sheriff shall levy “[e]xcept as otherwise provided by law.”¹¹⁴⁷ This proviso incorporates current and future statutory exemptions.¹¹⁴⁸

A levy on personal property raises more issues than does a levy on real property. Although the sheriff must cause either type of property to be appraised,¹¹⁴⁹ thereafter the methods of levy diverge. Rule 2-642(a), covering real property, merely requires the sheriff to enter on a schedule a description of the property and post a copy of the writ and schedule in a prominent place on the property. Section (b), pertaining to personal property, is more complex. It begins by recognizing that certain property is entirely exempt from levy or must be levied upon in accordance with particular governing statutes.¹¹⁵⁰ Section (b) then authorizes the sheriff to effect the levy by obtaining a view of the property, entering a description on the schedule, and posting the writ and schedule. The sheriff may also remove the property from the premises, but levy may be perfected without removal. Thus, the rule eases the strict requirement of Former Rule G46 a, under which the sheriff had to “seize” the property either by removing it or by preventing access to it, in order to complete the levy.¹¹⁵¹ The policy change is intended to reward the creditor diligent enough to locate the judgment debtor’s property, instead of permitting the enforcement of a judgment to be hindered by the debtor’s acts or by fortuitous circumstances.¹¹⁵²

In addition to dispensing with the seizure requirement, the rule occasionally may obviate the need for the sheriff to affix labels to every

1146. For a discussion of the differences, see C. BROWN, *supra* note 4, at 198-202.

1147. MD. R.P. 2-642(a), (b).

1148. See MD. CTS. & JUD. PROC. CODE ANN. § 11-504 (1984) (containing the “homestead” exemptions). The exemptions do not apply to vendor’s purchase money liens, tax liens, mortgages, deeds of trust, or other security interests. *Id.* § 11-507. The minutes do not contain any discussion of the exemption. However, MD. R.P. 2-643(c) sets forth as one of the defenses to levy the exemption of the subject property. For a discussion of the exemption process and the role of the sheriff’s appraisal, see *infra* notes 1166-67 and accompanying text.

1149. By Acts of 1983, chs. 175, § 554, MD. CTS. & JUD. PROC. CODE ANN. § 11-504 was revised to provide for an election of exemption after levy of execution, and a court review, upon request, of the sheriff’s appraisal. The appraisal is mandatory. *Id.* § 11-504(c)(1).

1150. Various sections in the Commercial Law Article authorize specialized methods of levying upon certain types of commercial documents. See, e.g., MD. COM. LAW. CODE ANN. § 4-303 (1975) (bank deposits); *id.* § 6-111 (bulk transfers); *id.* § 7-607 (documents of title); *id.* § 8-317 (investment securities). See also 4 J. POE, *supra* note 136, § 504.

1151. Former Md. R.P. G46 a.

1152. Minutes, Mar. 12, 1982, at 17.

item levied upon. When it is possible, yet impractical, for the sheriff to label each item, the levy may be completed by posting a copy of the writ and the schedule in a conspicuous place in the immediate vicinity of the property. The procedure will simplify levying upon a large quantity of similar objects located in a single place, such as thousands of similar cartons of merchandise in a warehouse.¹¹⁵³

The language of section (b) was apparently not intended to cover situations in which the sheriff can see the property but cannot affix labels to it because access to the property is barred.¹¹⁵⁴ For example, the sheriff might be able to see an automobile through the windows of a locked garage or through a fenced lot. Whether a levy upon the automobile should be considered effective if the sheriff affixes the writ and schedule to the outside of the garage is uncertain.¹¹⁵⁵ Such a practice would be consistent with the reason for allowing the sheriff to complete a levy without exercising physical domain over the property: Chance or a recalcitrant debtor should not be able to thwart the effectuation of a diligently prosecuted levy. Furthermore, the purpose of requiring that the writ or label be affixed to the property is to provide notice to all parties that the property has been levied upon; affixing the writ to a locked door in most instances will serve that function. But posting may not provide sufficient notice if there are many cars in a large garage or lot, and the car that is under levy cannot be specified adequately on the schedule. Arguably, then, if the sheriff cannot complete the levy, the creditor should take further steps to effectuate the levy, such as those ancillary enforcement measures provided in Rule 2-651.

Section (c) addresses situations in which the judgment creditor has instructed the sheriff to remove the property or exclude others from access to it but finds the property in the hands of a third party who claims possessory rights. The Committee debated whether the sheriff should have the discretion to remove the property. One alternative was to require the sheriff to follow the creditor's instructions, and to remove the property (or deny access to it) over the third party's objections.¹¹⁵⁶ Mandatory compliance would relieve the sheriff of responsibility for wrongful seizure, because the creditor would ultimately be liable for

1153. Minutes, Feb. 12, 1982, at 15.

1154. *Id.* at 15-16.

1155. Although authority on point is scant, the rule in the past has been that an officer bearing a writ of execution may forcibly enter any enclosure other than a dwelling in order to levy execution on judgment. If a garage were not part of a dwelling, presumably the creditor could instruct the sheriff to break in. *See* Annot., 57 A.L.R. 209, 210-21 (1928); *Trainer v. Saunders*, 270 Pa. 451, 113 A. 681 (1921). While forcible entry may make the sheriff liable as a trespasser, it does not invalidate the levy. 2 J. POE, *supra* note 136, at 671.

1156. Minutes, Apr. 16, 1982, at 14-15.

having supplied the defective instructions.¹¹⁵⁷ The creditor's liability was a necessary consequence of this scheme, because under Rule 2-641 the sheriff may not require a bond for damages arising out of wrongful levy.¹¹⁵⁸

This alternative was not adopted, and the sheriff is expected to exercise discretion in levying upon property in the hands of third parties. Hence section (c) states that the sheriff "may levy and leave the property where found," even if the creditor's instructions call for removal or barring of access.¹¹⁵⁹ This "levy and leave" is a perfectly valid levy which goes a long way towards satisfying the creditor's judgment. Inasmuch as the sheriff is allowed some discretion, the sheriff faces a degree of exposure for wrongful seizure. The sheriff may therefore be expected to err on the side of caution by levying and leaving the property.

Section (d), which governs notice of levy, changes the current rules by explicitly placing upon the sheriff the burden of furnishing notice to any person in possession of the property and to the judgment debtor. If the possessor and the debtor are not the same person, the sheriff must send a copy of the writ and schedule to the debtor's last known address.¹¹⁶⁰ The rule specifies no remedy if the sheriff fails to give proper notice.

Rule 2-643—Release of Property from Levy

Rule 2-643 sets forth for the first time a comprehensive system for freeing property from levy. It combines, with major changes, the substance of Former Rules G57 and G58, as well as significant new material. Some provisions strengthen the creditor's position, while others seek to balance the interests of creditors, debtors, and third parties. Sections (a) and (b) contain the provisions for mandatory release; sections (c), (d), and (e) provide for the situations in which the court may exercise discretion.

Section (a) accords with prior practice in providing that the entry of satisfaction and the payment of enforcement costs cause property to be released.¹¹⁶¹ The costs of enforcement proceedings include post-judgment costs and interest but do not include attorneys' fees, unless otherwise agreed between the parties.¹¹⁶² The judgment debtor has the

1157. *Id.* Conversely, the sheriff could not refuse to levy, since to do so would constitute a breach of duty, for which the sheriff would be liable to the judgment creditor.

1158. *See supra* notes 1137-38 and accompanying text.

1159. MD. R.P. 2-642(c).

1160. *Id.* (d).

1161. MD. R.P. 2-643(a).

1162. Minutes, Feb. 12, 1982, at 21.

option of paying the creditor directly or of making payment through the sheriff.¹¹⁶³ When the creditor receives payment, the creditor must file with the clerk a notice of satisfaction.¹¹⁶⁴

Section (b) changes the practice of Former Rule G57, under which the judgment debtor could obtain release of the property by posting bond in an amount equal to the value of the property. The new rule prescribes the filing of bond sufficient to satisfy the judgment and enforcement costs regardless of whether the property would satisfy the judgment. That eliminates the possibility of a defective appraisal resulting in the release of property on an inadequate bond. The requirement also avoids the possibility that released property will be subject to a subsequent levy if the full amount of the judgment and costs is not covered by the bond and other unreleased property.¹¹⁶⁵

Although the procedures provided for in section (c) are derived from the former rules, the section codifies a variety of new principles which allow the debtor, upon motion to the court, to obtain partial or full release from levy. In effect, the section provides the court a means of overseeing the enforcement process. Particularly noteworthy are subsections (c)(3), (5), and (6). Subsection (c)(3) allows release of the levy if the judgment creditor fails to comply with the rules of procedure or violates a court order. Subsection (c)(5) allows the debtor to substitute other property for the property levied upon, if the levy causes the debtor undue hardship. Under subsection (c)(6), property may be released if 120 days pass without sale of the property. That is intended to curtail delay by the creditor's attorney.¹¹⁶⁶ Finally, section (c) also provides for judicial review of the sheriff's appraisal, upon the request of either the debtor or the creditor.

Section (d), also entirely new, responds to the 1983 change in section 11-504 of the Maryland Code, Courts Article, which altered the statutory exemptions from execution.¹¹⁶⁷ The section allows the judgment debtor to elect to have released from execution property equal in value to the maximum allowed under statutory exemptions. The court must order the release of those items selected by the debtor to the extent the items or their cumulative value are legally exempt from execution.

Section (e), replacing Former Rules G58 and G51, deals with the

1163. Minutes, Mar. 12, 1982, at 20-21.

1164. MD. R.P. 2-626(a).

1165. Minutes, Mar. 12, 1982, at 21.

1166. *Id.* at 22.

1167. 1983 Md. Laws ch. 175, § 554 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 11-504 (1984)). These revisions reduced the bankruptcy debtor's "additional exemption," expressly permitted the judgment debtor to exempt cash from execution, and modified the appraisal procedure.

release of property upon motion of a third party. Either the creditor, the debtor, or both may respond to a motion by an interested third party. While the rule does not specify what grounds the claimant must assert in order to have the property released, earlier drafts of the rule and Committee discussions indicate that the property is to be released upon a showing that the third party's claim is valid.¹¹⁶⁸ Hence, the failure of both the creditor and the debtor to respond to the motion will *not* justify automatic release of the property.

Any three-way dispute envisioned by section (e) would have at its core the question of who has paramount title to the property. The rule does not specify whether a determination made under this section could later have collateral estoppel effect on the judgment debtor, should the debtor fail to contest the third-party claim. The rule calls for service of the third party's motion on the judgment debtor "if reasonably feasible," or the filing of an affidavit showing that efforts have been made to provide such notice.¹¹⁶⁹ Thus, it represents an attempt to provide an expedited procedure for resolving all the rights of the innocent party whose property has been seized.¹¹⁷⁰ On the other hand, the only notice of the levy that the judgment debtor is entitled to receive is the posting of the writ and schedule and a mailing to the debtor's last known address.¹¹⁷¹ Some Committee members argued that unless the debtor is actually present, resolution of the claim should settle only the issue of entitlement between creditor and third party.¹¹⁷² Nevertheless, the rule permits the court to require further efforts to contact the debtor, which lends weight to the argument that this adjudication may be treated similarly to any other default judgment. The decision should always be binding on the creditor, however, regardless of whether the creditor contests the third party claim.¹¹⁷³

Rule 2-644—Sale of Property Under Levy

By Acts of 1983, section 11-501 of the Maryland Code, Courts Article was revised to authorize the promulgation of rules for sheriffs'

1168. Minutes, Mar. 12, 1982, at 19-25.

1169. MD. R.P. 2-643(e).

1170. If a determination of rights between the innocent party and an absconding debtor must await return of service on the debtor, the innocent party might be faced with a lengthy deprivation of his property.

1171. MD. R.P. 2-642.

1172. Minutes, Mar. 12, 1982, at 23.

1173. *Id.* at 23-25. The creditor cannot seriously maintain a claim of lack of an opportunity to be heard, or that the adjudication was not on the merits. The creditor institutes the levy and the creditor's address is of record.

sales.¹¹⁷⁴ Rule 2-644 lays down comprehensive guidelines for execution sales. The rule generally follows prior practices, but it also embodies some minor modifications and a major change in execution sales of real property.

Section (a) codifies the long-standing practice that the sheriff conducts sales at the request of the judgment creditor. It further prescribes a stay of sale pending the debtor's election to exempt various items, pursuant to section 11-504 of the Maryland Code, Courts Article¹¹⁷⁵ and Rule 2-643(d). The rule also attempts to dispel the confusion over exactly what property interest the sheriff can convey title to, by defining the interest subject to sale as "all legal and equitable interests of a debtor in the property at the time the judgment became a lien on the property." This is an attempt to codify the rule that the purchaser takes subject to any title or right of possession which antedates judgment upon which execution is issued.¹¹⁷⁶ The language of the rule produces different results for real and personal property in that Rule 2-621, which creates a lien at the time judgment is entered, applies to real property only. A lien does not arise on personal property until an actual levy is made.¹¹⁷⁷ Moreover, although the Committee discussed the issue, the rule makes no provision for affording protection to lienholders junior to the judgment creditor.¹¹⁷⁸

Section (b) closely follows the Maryland Code, Courts Article section 11-502 and requires notice by publication and posting. The only change to the statutory procedure is that the rule authorizes the sheriff to dispense with the prescribed notice in undertaking a sale of perishables that have been levied upon.¹¹⁷⁹

Section (c) governs the details of the sheriff's sale by codifying the holding of *McCartney v. Frost*,¹¹⁸⁰ in which the Court of Appeals reaffirmed the long-established rule that the sheriff may refuse to accept the highest offer, if the offer is unconscionably low and operates as a sacrifice of the property.¹¹⁸¹ Section (c) also adds a new provision enabling

1174. 1983 Md. Laws ch. 224 (codified at MD. CTS. & JUD. PROC. CODE ANN. § 11-501 (1984)).

1175. MD. CTS. & JUD. PROC. CODE ANN. § 11-504 (1984).

1176. *See* Minutes, Mar. 12, 1982, at 30-31, (discussing *Deakins v. Rex*, 60 Md. 593 (1883) and cases cited in MD. CTS. & JUD. PROC. CODE ANN. § 11-509 annot. (1984)).

1177. MD. CTS. & JUD. PROC. CODE ANN. § 11-403 (1984).

1178. Minutes, Mar. 12, 1982, at 30-31. A junior lienholder may of course apply to court for distribution of any surplus to him. *Leonard v. Groome*, 47 Md. 499, 505 (1878).

1179. Currently the law is that while the need to sell perishables may obviate the requirement of notice, the sheriff should still apply for leave of court to make an immediate sale. *See Arnold v. Fowler*, 94 Md. 497, 509, 51 A. 299, 301 (1902).

1180. 282 Md. 631, 386 A.2d 784 (1978).

1181. *Id.* at 636-40, 386 A.2d at 787-89. The case illustrates that the sheriff ought not to

the debtor to direct the sheriff as to the order in which property is offered for sale. The debtor may direct the sheriff only in the event that both real and personal property have been levied upon under the same judgment.¹¹⁸²

Section (d), governing the transfer of title of real property after a sheriff's sale, represents a major departure from prior practice. Heretofore the law has been that sheriff's sales are not judicial sales. The latter are subject to ratification by the court, because the court is in essence the vendor.¹¹⁸³ The new rule changes that by incorporating Former Rule BR6 into the sheriff's sale procedure. Thus, sales of real property invoke the publication requirements of Former Rule BR6 b 2, and all sales are conditioned upon judicial approval and ratification. The change will result in increased cost, because under prior practice neither publication nor court involvement was necessary to effectuate a sheriff's sale. Moreover, purchasers will face delays in obtaining title and possession, since the sheriff may neither execute a deed nor place the purchaser in possession until after judicial ratification.¹¹⁸⁴ This is potentially serious in that a disgruntled debtor may easily file exceptions and disrupt the finality of the sale. On the other hand, the court's involvement will also benefit purchasers. The issue of the validity of the sale will, after ratification, be *res judicata*, thus foreclosing the possibility of collateral attack.¹¹⁸⁵ In contrast to section (d), section (e), which governs the conclusion of sales of personal property, does not involve judicial ratification. Hence prior practice is unchanged in that area.

Both sections (d) and (e) incorporate the statutory requirement contained in section 11-509 of the Maryland Code, Courts Article that

refuse to consummate the sale merely because the price is inadequate. The sheriff's duty is to be fair and impartial, and to protect the interests of the debtor as well as the creditor. This protection would not appear to extend to the sheriff's *second* sale, if he refused all offers at the first. *See id.* at 637, 386 A.2d at 787 (citing with approval 2 J. POE, PLEADING AND PRACTICE, § 661, at 623 (H. Tiffany 5th ed. 1925), stating that the sheriff can not justify repeated refusals to let the property go). *See also* *Buckeye Dev. Corp. v. Brown & Shilling, Inc.*, 243 Md. 224, 220 A.2d 922 (1966). MD. CTS. & JUD. PROC. CODE ANN. § 11-503 (1984) also permits the sheriff to employ a professional auctioneer and charge the costs of the sale to the debtor. 1182. MD. R.P. 2-643(c).

1183. *See McCartney*, 282 Md. at 635-36, 386 A.2d at 786-87 (construing Former Md. R.P. BR1 and *McCann v. McGinnis*, 257 Md. 499, 505, 263 A.2d 536, 539 (1970)). As explained by *McCartney*, the sheriff conducting an execution sale is merely the ministerial officer of the law. He is not an agent of the court, and the court does not direct how the sale should be made. Consequently a sheriff's sale is unconditional. *McCartney*, 282 Md. at 635-36, 386 A.2d at 787.

1184. MD. R.P. 2-644(d).

1185. *Ed Jacobsen Jr., Inc. v. Barrick*, 252 Md. 507, 511, 250 A.2d 646, 648 (1969) (applying MD. R.P. BR6 to a foreclosure proceeding, as required by MD. R.P. W74 e).

the sheriff place the purchaser in possession of the property.¹¹⁸⁶ Although the statute is not new, the rule expressly authorizes the sheriff to transfer physical possession of the property. Therefore, purchasers of real property no longer must comply with the writ of possession procedures under Former Rule 637.¹¹⁸⁷ Thus, the new rule simplifies transfer of title when a debtor who remains in possession of the property refuses to relinquish his interest.

Section (f) prescribes the order of disposition of the proceeds of sale. After reimbursement of sheriff's fees and expenses,¹¹⁸⁸ the balance is applied to satisfy the judgment and its enforcement costs. Any excess is paid to the debtor. Various Committee members expressed dissatisfaction regarding the distribution of surplus funds to the debtor, because the rule provided no protection for junior lienholders.¹¹⁸⁹ Moreover, sections 11-510 and 11-511 of the Maryland Code, Courts Article do not provide any remedies for junior lienholders; neither the court nor any third party is expressly empowered to intervene in the distribution.¹¹⁹⁰ Thus, junior lienholders must protect themselves by diligently policing the debtor and soliciting the support of prior lienholders.

Rule 2-645—Garnishment of Property—Generally

The garnishment provisions of the Former F and G rules have been restructured. Rule 2-645 governs garnishment of all property other than wages and partnership interests. It changes present practice as to what may be garnished, how garnishment is effectuated, and how the garnishee's response affects the proceeding. It further revises the sanctions available in the event the garnishee fails to answer interrogatories. By contrast, Rule 2-646, covering garnishment of wages, incorporates essentially the same procedures formerly embodied in Rule F6.

Section (a) of Rule 2-645 has been drafted to permit the maximum flexibility concerning what property may be garnished.¹¹⁹¹ Creditors typically garnish intangible property; tangible property is usually levied upon and rarely garnished.¹¹⁹² After lengthy consideration, however,

1186. MD. CTS. & JUD. PROC. CODE ANN. § 11-509 (1984).

1187. Explanatory Note, Minutes, Mar. 12, 1982, at 28.

1188. For a schedule of statutory fees, see MD. CTS. & JUD. PROC. CODE ANN. § 7-402 (1984). Moreover, § 11-503 authorizes the sheriff to employ the services of professional auctioneers at the debtor's expense.

1189. Minutes, Feb. 12, 1982, at 27; Minutes, Mar. 12, 1982, at 30-31.

1190. MD. CTS. & JUD. PROC. CODE ANN. §§ 11-510, -511 (1984). According to the Committee, the court may not intervene on its own motion. The statute merely permits the sheriff to seek the court's assistance should a problem arise. Minutes, Mar. 12, 1982, at 31.

1191. Minutes, Apr. 16, 1982, at 23.

1192. *Id.* MD. R.P. 2-641 and 2-642 contemplate the levy of the debtor's property in the

the Committee decided to make garnishment applicable to all property other than wages.¹¹⁹³

Thus section (a) was designed to broaden the extent of property subject to garnishment. The rule expressly covers contingent debts, which could not be garnished under prior practice.¹¹⁹⁴ Among the other

hands of a third party. Arguably, garnishment is unnecessary to enable the judgment creditor to *learn* what property of the judgment debtor is in the hands of third parties, since Rule 2-633 permits the creditor to obtain discovery in aid of enforcement. *See* Comments of the Reporter, Minutes, Apr. 16, 1982, at 22. However, garnishment and discovery operate differently. Service of the writ of garnishment creates an inchoate lien binding the debtor's property in the hands of the garnishee, which then remains effective until a final judgment is entered. *Northwestern Nat'l Ins. Co. v. William G. Wetherall, Inc.*, 267 Md. 378, 384, 298 A.2d 1, 6 (1972). Discovery affords no such protection to the creditor. Moreover, MD. R.P. 2-645 does not require the creditor to specify the property subject to garnishment. The onus is on the garnishee to come forward and reveal the nature of the judgment debtor's property in the garnishee's hands. By contrast, a levy under MD. R.P. 2-641 presupposes knowledge of specific property in the hands of a third party. Hence garnishment may be a practical remedy for a creditor uninformed as to the nature and extent of the debtor's property.

1193. *See* Minutes, Apr. 16, 1982, at 21-26. A partnership interest subject to a charging order may not be garnished. *See infra* notes 1244-45 and accompanying text (discussing MD. R.P. 2-649).

1194. *Safe Deposit & Trust Co. v. Independent Brewing Ass'n*, 127 Md. 463, 468, 96 A. 617, 619 (1916); *C. BROWN*, *supra* note 4, at 200; *cf. Fico, Inc. v. Ghinger*, 287 Md. 150, 163, 411 A.2d 430, 436 (1980) (debt uncertain as to amount or existence cannot be garnished). The scope of the contingency intended to be covered is hazy. First, Former Md. R.P. G45 stated that unmatured debts may be attached. MD. R.P. 2-645(a) expands this to include "unmatured" or "contingent" debts. A contingent debt is one in which the obligation is not presently fixed, but which may or may not become so in the future upon the occurrence of some uncertain event. *Belcher v. GEICO*, 282 Md. 718, 723, 387 A.2d 770, 773 (1978); *cf. Ghinger*, 287 Md. at 163, 411 A.2d at 436 (a fund the existence of which is uncertain may not be condemned in garnishment). Hence the literal meaning of contingent debt includes those which may be incapable of collection. One Committee member exemplified this by hypothesizing a judgment debtor who is also a plaintiff in a personal injury case. The judgment creditor could theoretically lay the garnishment in the hands of the *defendant's* insurance carrier. Comments of Mr. Lombardi, Minutes, Apr. 16, 1982, at 22-23. This is an extreme example in that until a judgment has been rendered in favor of the plaintiff-debtor, the garnished interest is purely speculative. *See Belcher*, 282 Md. at 724, 387 A.2d at 774 (Court of Appeals rejecting precisely this theory, which first appeared in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966)).

On the other hand, another Committee member suggested that "contingent" debts are those for which the amount is ascertainable, but the due date is not. Comments of Mr. Sykes, Minutes, Apr. 16, 1982, at 22. This is also an unorthodox construction, although an argument can be advanced in support of it. Presumably an "unmatured" debt is one which has a maturity date that has not yet arrived; therefore, to extend the coverage of the rule to encompass debts without definite due dates requires a new word. But this interpretation is problematic in that a debt is either "due" on demand or at a fixed date; otherwise, it is not due at all (because it is contingent and may never be payable). There are no other alternatives. In view of *Belcher* and the latent ambiguity of MD. R.P. 2-645(a), further clarification may be expected in the future.

For a recent Court of Appeals discussion of what "credits" may be garnished, see *Hoffman Chevrolet, Inc. v. Washington County Nat'l Sav. Bank*, 297 Md. 691, 696-702, 467 A.2d 758, 761-64 (1983) (unindorsed check payable to debtor not garnishable).

types of property intended to be included are a beneficiary's interest in a trust,¹¹⁹⁵ and tangible or intangible property already levied upon as a result of a different judgment.¹¹⁹⁶

Sections (b) and (c) incorporate, with significant modifications, Former Rules 623, G47 b, G48, and BT4, together with substantial new material. Section (b) enables the judgment creditor to obtain issuance of the writ of garnishment upon filing a sufficiently specific request,¹¹⁹⁷ which may be *ex parte*.¹¹⁹⁸ Section (c) dictates the content of the writ and requires that the writ notify the garnishee of the risk of the entry of judgment by default. This equates roughly to Former Rule G47 b, which compelled the garnishee to answer or risk a judgment of condemnation absolute, pursuant to Former Rule G55. Subsections (c)(4) and (c)(5) require the writ to contain notice to the judgment debtor of the availability of exemptions and of the right to contest. This is to enable the judgment debtor to receive expedited notice of the proceeding.¹¹⁹⁹ Committee discussions indicated that the requisite notice could be accomplished by general statements, rather than by a comprehensive listing stating each exemption or defense.¹²⁰⁰

Section (d), governing service, incorporates the substance of Former Rule 104 a 4. The writ may be served inside or outside the forum county.¹²⁰¹ Section (d) also prescribes the manner in which the judgment debtor is sent notice of the proceeding and is intended to respond to constitutional concerns arising out of federal cases from other districts

1195. Minutes, Apr. 16, 1982, at 23. Maryland case law, however, exempts various forms of trust interest from attachment proceedings. *See, e.g.,* Jackson Square Loan & Sav. Ass'n v. Bartlett, 95 Md. 661, 663-65, 53 A. 426, 427 (1902) (spendthrift trust instrument restricts the ability of beneficiary to pledge or encumber trust assets).

1196. Minutes, Apr. 16, 1982, at 24. This situation might arise when the value of the property is greater than the amount due on the first levy, so that the surplus value can be garnished to satisfy the garnishment.

1197. MD. R.P. 2-645(b).

1198. *See* MD. R.P. 1-321(c) (exempting requests to the clerk from the requirements of service).

1199. *See infra* notes 1202-03 and accompanying text.

1200. Minutes, May 21-22, 1982, at 30-31.

1201. MD. R.P. 2-645(d). This is consistent with prior practice. *See* Minutes, Apr. 16, 1982, at 24. Garnishment may be served anywhere in the state because, according to one Committee member, unlike the sheriff's levy, it poses no threat of breach of the peace. *Id.*

One issue not addressed by the rule concerns the recording of the lien of garnishment in the county in which the writ is served. The levy provisions of MD. R.P. 2-641 ensure that a judgment from another county will be recorded in the county where the levy takes place. The garnishment rules do not. This is inconsistent with permitting real or tangible property to be garnished. *See supra* notes 1191-92 and accompanying text. On the other hand, the garnisher may not *know* which items, if any, of the debtor's property are to be garnished. *See id.* Nevertheless, the failure to furnish a means of recording outside the county of rendition of the judgment creates a potential hazard for creditors other than the judgment creditor.

or circuits in which garnishment statutes that did not provide for proper notice were struck down.¹²⁰² For practical reasons, notice to the debtor is delayed until service on the garnishee has been effectuated.¹²⁰³

The Committee considered who should be responsible for notifying the judgment debtor and what method should be employed. Despite some sentiment in favor of placing the responsibility on the clerk, and despite the understanding that private process servers have little stake in the proceedings, the Committee ultimately determined that the person making service should mail notice to the debtor.¹²⁰⁴ By incorporating the proof-of-mailing requirements of Rule 2-126, section (d) balances the interests of both parties. Although Rule 2-126(a) requires the use of certified mail and a signed return receipt, Rule 2-126(g) states that failure to make proof of service does not invalidate service.¹²⁰⁵ A mailing to the debtor's last-known address will satisfy Rule 2-645(d); thus, the creditor is not burdened with the requirement of actual service on an absconding debtor.

Sections (e) and (f) attempt to protect both the interests of the judgment creditor (garnishor) and those of the garnishee. The two sections contain elements of Former Rules F2, F3, F4, G52, and G54, but the concept of condemnation *nisi* has been discarded. Section (e), covering the garnishee's answer, requires the garnishee to admit or deny the existence of a debt or the possession of property. The garnishee must describe anything subject to garnishment and specify the amount of any debt.¹²⁰⁶ The garnishee may raise any defenses to garnishment, including those of the judgment debtor. The garnishee may also disgorge the debtor's property by paying garnished indebtedness into court, or by delivering property to the sheriff.¹²⁰⁷ Disgorgement does not end the garnishee's liability, because the garnishee remains answerable, under

1202. Explanatory Note, Minutes, May 21-22, 1982, at 28. The Legal Aid Bureau brought to the Committee's attention the existence of three federal cases striking down garnishment proceedings similar to that under Former Md. R.P. F6. See *Deary v. Guardian Loan Co.* 563 F. Supp. 264 (S.D.N.Y. 1982); *Simler v. Jennings*, 50 U.S.L.W. 2470 (S.D. Ohio, January 18, 1982); *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980). Although the Committee was reluctant to reshape the garnishment rules upon the basis of these cases, and in the absence of Supreme Court precedent, see Minutes, May 21-22, 1982, at 30, several of the recommendations were adopted.

1203. Minutes, May 21-22, 1982, at 31.

1204. *Id.* at 31-33. One member noted that the creditor, who stands to lose the most should notice be challenged successfully, has the option of verifying that notice has been made.

1205. MD. R.P. 2-126.

1206. See *supra* notes 1191-96 and accompanying text.

1207. MD. R.P. 2-645(e). The property is then treated as if levied upon by the sheriff, and may be sold pursuant to MD. R.P. 2-644. See also *infra* note 1215 and accompanying text (garnishee's answer conclusive if creditor fails to contest). The levy is mandatory. See Minutes Mar. 12, 1982, at 34.

sections (f) and (g), for any of the debtor's property acquired prior to judgment.¹²⁰⁸ Moreover, the garnishee may not convert the proceeding into a species of interpleader by disgorging an excessive amount of the debtor's property. The garnishee may only pay into court an amount up to the limit of the garnishment.¹²⁰⁹

The provisions of Former Rule G51 covering motions to quash the garnishment proceeding have been discarded. Such a procedure is no longer needed, because under the new rules the garnishee may employ any pleading or motion, including a Motion to Dismiss, under Rule 2-322(a), or a Motion for Summary Judgment under Rule 2-501.¹²¹⁰

Section (f) governs the garnishee's failure to answer and modifies the current two-step process only slightly. Condemnation *nisi* under Former Rule G54 and condemnation absolute under Former Rule G55 are replaced by a general default judgment pursuant to Rule 2-613.¹²¹¹ In addition to a change in nomenclature, the new rule may lengthen the time interval between garnishment and the entry of judgment. Section (e) prescribes the time limit for the garnishee's answer by incorporating Rule 2-321. The latter allows at least thirty days for an answer.¹²¹² The failure to answer then authorizes the garnishor to invoke Rule 2-613, governing default. Under Rule 2-613(e), the garnishor may request entry of judgment by default after the running of the time period in which the garnishee may move to vacate default. That period is also thirty days.¹²¹³ Hence the shortest period in which judgment may be obtained is sixty days.

Former Rule G54 b permitted the entry of judgment of condemnation *nisi* fifteen days after the return day following service of the writ. The period so defined could be as brief as sixteen days.¹²¹⁴ Former Rule G55 b then permitted the garnishor to move at once for judgment absolute.¹²¹⁵ Hence the service of a writ of garnishment near the end of a

1208. Minutes, Apr. 16, 1982, at 22. This is consistent with case law. *See, e.g.*, *Northwestern Nat'l Ins. Co. v. William G. Wetherall, Inc.*, 267 Md. 378, 384, 298 A.2d 1, 6 (1972).

1209. Minutes, May 21-22, 1982, at 34.

1210. See MD. R.P. 2-645(g), which states that if the garnishee contests, "the matter shall proceed as if an original action . . . governed by the rules applicable to civil actions."

1211. The creditor may obtain default upon request, but the request must be served on the other parties. *See* MD. R.P. 1-321.

1212. MD. R.P. 2-321(a).

1213. MD. R.P. 2-613(c). Any motion filed under MD. R.P. 2-322 would further extend the time period.

1214. *See supra* note 1133 and accompanying text.

1215. Former Md. R.P. G55 b. The garnishor had to prove his claim pursuant to Former Md. R.P. 648. *See also* *Kaplan v. Bach*, 36 Md. App. 152, 155, 373 A.2d 71, 74 (1977) (no notice required under Former Md. R.P. 648).

month could, under the old system, result in a much shorter time interval for entry of judgment upon the garnishee's failure to answer.

Section (g) applies to uncontested proceedings in which the garnishee files a timely answer. The rule protects the garnishee, who needs to know what his responsibility is and when it ends, by terminating the creditor-garnishor's right to contest the answer thirty days after the garnishee files it.¹²¹⁶ The rule also enables the garnishee (as well as the creditor or the debtor) to obtain the entry of judgment if the creditor does not reply to the answer. The Committee added those provisions to spare the cooperating garnishee the inconvenience and expense of further proceedings. Although some members referred to the entry of judgment as automatic, the clerk is not directed to act, even if the garnishee's answer is conclusive and the result is beyond dispute.¹²¹⁷ The garnishee must still request judgment, and the court's action is discretionary. In order to hasten the process, the garnishee may file the request at the same time as the answer. In that manner the garnishee can best assure that the continuing liability for subsequently acquired assets ends.

Section (g) also governs contested cases. Committee members expressed the opinion that these are rare; in most cases the garnishee confesses and disgorges.¹²¹⁸ The rule adopts the stratagem of treating everything as part of the original proceeding unless and until the garnishee contests or the creditor disputes the garnishee's answer. Any dispute arising between those parties is to be docketed and tried as if a new case. If the creditor serves multiple garnishees and only one contests the writ, only the action between the creditor and that one garnishee need be docketed.¹²¹⁹

The Committee eliminated the provision of Former Rule G52 c, which permitted the garnishee to recover attorneys' fees upon prevailing in a contest with the judgment creditor. The Committee justified the omission by explaining that because the garnishee would not be entitled to attorneys' fees in a dispute with the debtor, the garnishee likewise ought not be entitled to attorneys' fees with respect to the creditor.¹²²⁰

Section (h) permits the judgment creditor to propound interrogatories to the garnishee, in accordance with Rule 2-421. This is similar to Former Rule G56, except that the rule changes the sanctions for failure

1216. This would be equally true whether the garnishee answered *nulla bona*, confessed and disgorged, or raised a defense. *See* Minutes, May 21-22, 1982, at 34.

1217. *Id.* at 35.

1218. Minutes, Mar. 12, 1982, at 38.

1219. *Id.* at 38-39, 48-50.

1220. This is based on the rationale that the attaching creditor is subrogated to the rights of the debtor. *See* *Messall v. Suburban Trust Co.*, 244 Md. 502, 506-07, 224 A.2d 419, 421 (1966).

to answer. Under the former rule, the court could enter judgment in the full amount of the creditor's claim—even if that amount exceeded the value of the debtor's assets in the garnishee's hands.¹²²¹ Failure to answer interrogatories does not warrant so severe a sanction. After some study, the Committee included both contempt and attorneys' fees and costs as potential sanctions.¹²²²

Section (i) incorporates by reference Rule 2-643 governing release of property from levy. This became necessary after the Committee decided to include tangible property within the scope of the garnishment procedure.

Section (j), limiting judgments against garnishees to the value of the garnished property, is consistent with prior practice. First, regardless of whether the creditor's claim is contested or uncontested, a judgment against the garnishee is in personam.¹²²³ Second, the amount of the judgment is controlled by both the statutory requirement that the garnishee's recovery not exceed the amount owed by the judgment debtor,¹²²⁴ and by the further limitation of the judgment to the specific property proven to be in the garnishee's hands.¹²²⁵ This is intended to address the problem of establishing the limit of the garnishee's liability. Hence proof of value is an element of the creditor's case, just as it was under Former Rule G55. The language of the rule protects the garnishee from "proof" of value of property which exceeds fair value.

Rule 2-646—Garnishment of Wages

Rule 2-646 closely tracks Former Rule F6 and is patterned after Rule 2-645, governing garnishment of other property. Former Rule F6 became effective in 1979 and is considered to have worked well.¹²²⁶ Consequently, modifications have been slight, and the garnishment of wages is largely unchanged.

Sections (b) and (c) formalize the requisites for issuance and content of the writ. Section (b) sets forth the information to be supplied in

1221. See Explanatory Note, Minutes, Mar. 12, 1982, at 36. See also *id.* at 37-38. This result, however, would perhaps conflict with MD. CTS. & JUD. PROC. CODE ANN. § 11-602 (1984), which limits execution against the garnishee to the amount shown "to be the value of the property and credits attached"

1222. Either sanction is available under MD. R.P. 2-433, governing compliance with discovery. Early drafts of MD. R.P. 2-645 made only contempt available. Committee members expressed concern that courts would be reluctant to impose contempt, thus leaving judgment creditors no recourse. Minutes, Apr. 16, 1982, at 29-30. Attorneys' fees were not added to section (h) until September, 1983.

1223. Minutes, Mar. 12, 1982, at 48.

1224. MD. CTS. & JUD. PROC. CODE ANN. § 11-602 (1984).

1225. MD. R.P. 2-645(j); Minutes, May 21-22, 1982, at 34.

1226. Minutes, Mar. 12, 1982, at 50.

the creditor's written request to the clerk. Former Rule F6 b's provisions for a blank answer form for the garnishee and for a warning of the risk of contempt are preserved.¹²²⁷ Section (c), similar to Rule 2-645(c), prescribes the content of the writ, with the intent of furnishing adequate notice to the debtor.¹²²⁸

Section (d), governing service, deviates from Former Rule F6 c by requiring that a copy of the writ be mailed to the judgment debtor's last known address.¹²²⁹ Rule 2-645, governing property other than wages, includes the same requirement, but Rule 2-646(d) fails to make the mailing the responsibility of the same person who has served the writ.¹²³⁰ There appears to be no reason for this curious omission, since the considerations applicable to the mailing apply equally to wage and non-wage garnishment.¹²³¹ Section (d) further parallels Rule 2-645 by expressly authorizing the service of the writ outside the forum county.¹²³²

Section (e) differs from Former Rule F6 d by incorporating Rule 2-321's time limits for the garnishee's answer. The former rule furnished a flat thirty-day period for response.¹²³³ Section (e) also incorporates Former Rule F6 k, which permitted the debtor to interpose a defense or objection.

Section (f) is virtually identical to the former rule. It departs from Rule 2-645(f), governing non-wage property, by imposing different sanctions upon the garnishee who fails to answer. Section (f) provides that the garnishee may be held in contempt, and required to pay attorneys' fees and costs. Rule 2-645(f) merely permits the creditor to request an order of default. While the minutes do not disclose the reason for this distinction, the explanation may lie in the nature of wage garnishment, which is largely self-effectuating. Both Former Rule F6 h and new Rule

1227. This contrasts with MD. R.P. 2-645, which contains no such provisions.

1228. *See supra* notes 1199-1200 and accompanying text.

1229. MD. R.P. 2-646(d).

1230. *See id.* which states "the person making service shall mail a copy of the writ to the judgment debtor's last known address."

1231. *See supra* note 1204 and accompanying text.

1232. Former Md. R.P. 622 f by implication permits garnishment under Former Md. R.P. F6 to be served outside the forum county. The concern for notice to creditors, which inheres in the transmittal of judgment procedures of MD. R.P. 2-622, 2-623 and 2-641, has little bearing on the garnishment of wages. The garnishment of nonwage property outside the forum county could raise the notice issue, *see supra* note 1201, because nonwage property may be subject to imminent disposal by the garnishee. The income stream of wages is more likely to be of continuing availability. Therefore, the notice arising from the recording of the judgment from outside the garnishee's county is less likely to be important.

1233. In some situations under MD. R.P. 2-321, the time period for response exceeds 30 days. *See* MD. R.P. 2-321, *discussed at supra* pp. 748-50.

2-646(i) provide that while the lien is in force the garnishee must withhold wages and remit to the creditor. Hence in all uncontested cases the creditor does not need to reduce the garnishment to a formal final order of court in order to receive the garnished wages. On the other hand, the garnishee's failure to respond to the writ raises the inference that the garnishee is attempting to frustrate the creditor and to defy the court's authority. Because the self-effectuating nature of the process is defeated by uncooperative garnishees, severe sanctions are appropriate to compel the garnishee's acknowledgment.

Section (g), like the former rule, requires dismissal of the lien if the creditor fails to request a hearing within fifteen days of the garnishee's answer denying employment. It differs both from the former rule and from Rule 2-645(g) by providing that the hearing be held "promptly" if the answer asserts any other defense, or if the debtor moves in opposition.¹²³⁴ Again, the minutes do not indicate the reason for the departure, but it may be due to concern for the potentially serious impact of wage garnishment upon the judgment debtor.

Section (i), governing the withholding and remitting of wages, differs significantly from Former Rule F6 h. The new rule provides that if the garnishee or the debtor opposes the garnishment, the garnishee must remit the withheld wages to the court pending resolution of the proceeding. In all other respects the section does not change prior practice and requires the garnishee to pay over wages and file periodic reports.

Section (j), governing the duties of the creditor, repeats the language of the former rule, except for minor stylistic changes. Former Rule F6 j 3 appears to have been eliminated but in fact it was not. Rule 2-626(a) imposes upon the creditor the same duty to record satisfaction as the former rule. Section (k) incorporates Former Rule F6 i almost verbatim, and section (h) incorporates by reference Rule 2-645(h), governing interrogatories.

Rule 2-647—Enforcement of Judgment Awarding Possession

Rule 2-647 has no precise counterpart in the former rules, although in substance it resembles Former Rule 637, and BQ50.¹²³⁵ Very simply,

1234. MD. R.P. 2-646(g).

1235. The Committee initially contemplated that the rule was to follow ejectment procedures for real property and replevin procedure for tangible property. *See Minutes*, Feb. 12, 1982, at 27-28. This would have been unnecessary and undesirable, since these procedures are original actions and do not provide for enforcement. Moreover, the replevin rules were repealed when in 1973 the legislature transferred all replevin actions to district court jurisdiction. *See MD. CTS. & JUD. PROC. CODE ANN.* § 4-401; MD. DIST. R. BQ40-BQ50. As presented, the new rule more nearly approximates Former Md. R.P. 637 b than anything else. *See Minutes*, May 21-22, 1982, at 19-20; *see also* MD. R.P. 2-648.

it permits the judgment creditor to obtain upon request the services of the sheriff in taking possession of real or personal property. The new rule is necessary because the levy provisions of Rules 2-641 through 2-644 only prescribe methods by which the debtor's property may be sold. In addition, Rule 2-647 incorporates the substance of the writ of *capias in withernam*, providing for a levy upon alternative property if the specified property cannot be found.¹²³⁶ In accord with prior practice, the new rule makes no reference to private repossession, leaving intact the self-help remedies prescribed by the Uniform Commercial Code.¹²³⁷ Furthermore, it has no bearing on summary ejectment, which continues to be governed by the District Rules.¹²³⁸

Rule 2-648—Enforcement of Judgment Prohibiting or Mandating Action

Rule 2-648 roughly parallels Former Rule 685, although in style it more closely resembles Federal Rule 70. The new rule is intended to grant to the court the broadest possible power in the area of enforcement. The absence of an enumeration of powers is intended to avoid an unintentional limitation through failure to itemize exhaustively.¹²³⁹ The judgment holder may obtain relief upon showing that the person alleged to be in contempt has actual knowledge of the judgment.¹²⁴⁰ The new rule specifically provides for seizure or sequestration of the property of the non-complying party, but changes the language of Former Rule 685 a ("as may be necessary to satisfy the said decree, . . .") to "the extent necessary to compel compliance"¹²⁴¹ The change accords with the scope of the respective rules. The former rule was employed to enforce monetary awards pursuant to equity decrees, while the new rule is solely concerned with injunctive relief.¹²⁴² The rule, like

1236. Under the former parlance, when the writ of replevin (or levy) was returned "eloigned," a writ of *capias in withernam* might be obtained. In other words, if the sheriff could not find the property (and the creditor possessed a judgment awarding in the alternative money or property, or both), the creditor could have had execution on the debtor's other property without resort to another levy upon specified property. See Former Md. R.P. BQ50.

1237. *E.g.*, MD. COM. LAW CODE ANN. §§ 7-502, 9-503 (1975).

1238. MD. DIST. R. 1(b). The "writ of restitution" procedure used in landlord-tenant cases is not intended to be altered. See Minutes, May 21-22, 1982, at 20-21.

1239. Minutes, May 21-22, 1982, at 22-24. This does not mean that the old common law or equity writs are still available. See MD. R.P. 2-631.

1240. Minutes, May 21-22, 1982, at 23.

1241. MD. R.P. 2-648.

1242. There is some question as to whether "sequestration" is redundant, since the new rule expressly authorizes "seizure" of property. To the extent "sequestration" governs intangibles or places in *custodia legis* property that is held by third parties, it represents a useful and intended extension of scope. For various applications of sequestration, see *Oles Envelope Corp. v. Oles*, 193 Md. 79, 86-94, 65 A.2d 899, 904-06 (1948). "Sequestration" of property in order to compel the *appearance* of a party is governed by MD. R.P. 2-115.

Federal Rule 70, also provides for the court to order an appointed person to perform, at the non-complying party's expense, acts that the non-complying party has previously been ordered to do.¹²⁴³

Rule 2-649—Charging Order

Rule 2-649 prescribes for the first time in the Maryland Rules a method of obtaining satisfaction of a monetary judgment by the mechanism of a judicial order against a debtor's partnership interest. The remedy itself is not new, having long been provided in the Maryland Code, Corporations and Associations Article and its predecessors.¹²⁴⁴ A charging order is analogous to garnishment, in that the judgment creditor may seek and obtain an order compelling the partnership to pay over to the creditor the debtor's income stream, as well as any capital distributions which would have been made to the debtor. The court may also order foreclosure of the partnership interest itself, making the creditor entitled to all the judgment debtor's economic (but not management) rights.¹²⁴⁵

Rule 2-651—Ancillary Relief in Aid of Enforcement

The purpose of Rule 2-651 is to give the court "broad authority to issue mandatory and prohibitive injunctions when necessary to aid in the enforcement of the judgment."¹²⁴⁶ The rule is a synthesis of elements of Former Rules 627, 628 d, 636, and 685. To safeguard against potential abuse, ancillary relief can not be obtained except upon motion and proof of service. Because judgment debtors may not be represented by counsel at this stage of the proceedings, the new rule requires service of process in the same manner as process to obtain personal jurisdiction, and not mere service upon counsel of record.¹²⁴⁷ The scope of relief available under the new rule is limited to "regarding property subject to the enforcement of the judgment."¹²⁴⁸ The rule thus should not be construed as authorizing the court to order the debtor to pay, and to hold the debtor in contempt for failure to comply.¹²⁴⁹

1243. MD. R.P. 2-648. Unlike FED. R. CIV. P. 70, the new rule does not state that an "act when so done has like effect as if done by the party," but that meaning is inherent in the rule.

1244. MD. CORPS. & ASS'NS CODE ANN. §§ 9-505, 10-121 (1978).

1245. *See id.* The courts have not yet determined the scope of a charging order in Maryland, because the issue has not yet been presented. *See Bank of Bethesda v. Koch*, 44 Md. App. 350, 353-56, 408 A.2d 767, 769-70 (1979).

1246. Explanatory Note, Minutes, Mar. 12, 1982, at 51. It is intended to accomplish directly what is currently accomplished by use of supplementary proceedings. *Id.* at 52.

1247. *See* MD. R.P. 2-651; Minutes, Mar. 12, 1982, at 52-53.

1248. MD. R.P. 2-651.

1249. Minutes, Apr. 16, 1982, at 34.