

COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 5 and 6 of the Judicial Education and Conference Center, 2011-D Commerce Park Drive, Annapolis, Maryland on November 16, 2007.

Members present:

Hon. Joseph F. Murphy, Jr., Chair
Linda M. Schuett, Esq., Co-Chair

F. Vernon Boozer, Esq.
Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
J. Brooks Leahy, Esq.
Zakia Mahasa, Esq.

Hon. Albert J. Matricciani
Robert R. Michael, Esq.
Hon. John L. Norton, III
Debbie L. Potter, Esq.
Senator Norman R. Stone, Jr.
Melvin J. Sykes, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Cheryl Lyons-Schmidt, Rules Committee Intern
Douglas Hofstedt
Robert Wallace, Esq.
Richard Montgomery, Director, Legislative Relations, MSBA
Hon. Paul E. Alpert

The Chair convened the meeting. He said that the Committee had been sent two sets of minutes of the meetings of January 5, 2007 and June 22, 2007. Mr. Klein moved that the minutes be adopted as presented, the motion was seconded, and it passed unanimously.

The Chair announced that the Court of Appeals will hear the 158th Report on December 3, 2007. Mr. Klein will speak on the

Rules pertaining to discovery of electronically stored information. Everyone is welcome to attend the Court conference. The Chair said that the Court is interested in Canon 4F of Rule 16-813, which will allow a retired judge approved for recall also to conduct alternative dispute resolution (ADR) proceedings for a fee upon disclosure. This is consistent with Canon 5 of the Florida Code of Judicial Conduct, which allows a retired judge to serve as a recalled judge and conduct ADR proceedings, provided that the judge discloses that he or she is being utilized or has been utilized as a mediator by any party, attorney, or law firm involved in the case pending before the judge. The Chair expressed optimism that the Court will approve the proposed Rule. This is the Rule that had caused so many problems with the initial information presented to the Rules Committee. A committee of retired judges had endorsed the proposition that recalled judges could not also conduct ADR proceedings. The Court of Appeals will be happy to hear comments from practitioners who use retired judges for ADR proceedings.

The Chair stated that Agenda Items 3 and 4 would be considered first, because Mr. Klein had a scheduling conflict and would have to leave the meeting early.

Agenda Item 3. Consideration of proposed new Motor Vehicle Tort Interrogatory No. 26, concerning electronic devices capable of two-way voice, text, data, or image transmission

Mr. Klein presented Form 7, Motor Vehicle Tort Interrogatories, No. 26, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

ADD new Motor Vehicle Tort Interrogatory No. 26 to Form No. 7 - Motor Vehicle Tort Interrogatories, as follows:

Form 7. Motor Vehicle Tort Interrogatories.

Interrogatories

. . .

26. If you were **in a vehicle** at the time of the **occurrence**, state whether there were any electronic devices capable of two-way voice, text, data, or image transmission **in the vehicle** and for each device:

- (a) state the type of device (e.g., cellular telephone, personal digital assistant, citizens' band radio, mobile data terminal);
- (b) **identify** the owner of the device;
- (c) **identify** the **person** who had **possession** of the device at the time of the **occurrence**;
- (d) state whether the device was in use at the time of the **occurrence**;
- (e) **identify** the service provider for the device;
- (f) state the account number with the service provider; and
- (g) if the device has a telephone number, state the number, including the area code.

(Standard Motor Vehicle Tort Interrogatory
No. 26)

Form Interrogatory No. 7 was accompanied by the following
Reporter's Note.

The Discovery Subcommittee considered a suggestion from Michael S. Greene, Esq. that a new Form Interrogatory concerning the use of cellular telephones be added to the Motor Vehicle Tort Interrogatories. The Subcommittee has expanded upon that suggestion and recommends a new form interrogatory that includes all "electronic devices capable of two-way voice, text, data, or image transmission." Proposed new Standard Motor Vehicle Tort Interrogatory No. 26, which otherwise would be subject to objection as a compound question, will count as a single interrogatory in accordance with Rule 2-421 (a). The Subcommittee believes that the interrogatory will enhance the efficient exchange of meaningful discovery information concerning the electronic devices encompassed by the interrogatory.

Mr. Klein explained that the Form Interrogatories Subcommittee met and agreed on a new Form Interrogatory. Michael S. Greene, Esq., had proposed a new interrogatory concerning the use of cellular telephones and distraction in motor vehicles. The Subcommittee expanded the original suggested interrogatory to apply to any form of electronic device capable of two-way communication. This was added to distinguish the device from other things that can distract, such as the radio. The idea was to cast the net broadly enough to get to the core issue, including cellular telephones, "Blackberries," data terminals, etc. The words and phrases in the Rule that are in bold print are terms that already have been defined in the Form

Interrogatories. The terms are being incorporated in the proposed interrogatory, so that it remains stylistically consistent. This fits in with an existing interrogatory dealing with alcohol and drug use, Interrogatory #21 in Form 7. Cell phone usage is another kind of impairment and is timely in this society. The Subcommittee recommends the addition of the interrogatory.

The Reporter noted that Ms. Potter had made a very helpful comment at the Subcommittee meeting. It is important to be able to ascertain the service provider in order to obtain subsequent discovery as to timing and other information that the service provider's records would show. It is also important that the new interrogatory, which otherwise would be subject to the objection that it consists of multiple questions, counts as a single interrogatory. Mr. Klein added that one of the overarching purposes of the Form Interrogatories is that they are a "safe harbor" from the counting rule.

By consensus, the Committee approved Form Interrogatory No. 26 of Form 7 as presented.

Agenda Item 4. Consideration of a Report of the Discovery Subcommittee concerning interpreters for depositions (See Appendix 1)

Mr. Klein said that this issue was in the meeting materials to provide information to the Committee. (See Appendix 1). The question is whether a rule is needed that would govern the qualifications and/or appointment of interpreters at depositions as distinguished from court hearings, which already have rules

pertaining to interpreters. Two representatives of the Administrative Office of the Courts (AOC), who deal with finding and qualifying certified interpreters for use in court proceedings, attended the recent meeting of the Discovery Subcommittee. Even before they spoke, the Subcommittee was not sure that any rule on the subject was necessary. The Subcommittee's sense was that lawyers in civil cases work out the issue of interpreters at depositions. The AOC representatives told the Subcommittee that they have to handle the matter of certifying, maintaining the registry of, and qualifying interpreters for courtroom proceedings, and that adding a rule pertaining to interpreters at depositions would greatly drain their resources. One of their concerns is that they have tests for only 13 languages. The language needs are far broader than that. The money in the private sector is a great lure away from people working in the courthouse. The concern is that if certified interpreters are lured away to the more lucrative civil deposition work, it would deprive the courts of the interpreters needed for court, especially in criminal, Child in Need of Assistance, and domestic cases.

Mr. Klein told the Committee that the Subcommittee's opinion was that no rule pertaining to interpreters at depositions is necessary, but that the issue should be presented to the full Committee to see if it has a different view. Mr. Brault remarked that he had heard a radio interview of Douglas Gansler, Esq., Attorney General for Maryland, who harshly criticized the judiciary in Montgomery County. Mr. Gansler said that in a

highly publicized case that was dismissed because the defendant spoke an unusual African dialect for which no interpreter was available, the State was going to proceed with an appeal, even though the defendant had been deported. The defendant had been charged with a significant sexual crime against a young girl. He was from such a remote place in Africa that only a few people spoke his language. After several delays, the judge dismissed the case, because the State could not produce an interpreter. The Chair added that the case was dismissed, even though the defendant had graduated from a Montgomery County high school and received an associate of arts degree from Montgomery County Community College, for which he had to speak English. Mr. Brault said that he looks forward to reading the appellate opinion.

The Chair commented that the recommendation by the Subcommittee is a sound one. By consensus, the Committee concurred with the Subcommittee's recommendation.

Agenda Item 2. Consideration of "housekeeping" amendments to: Rule 2-501 (Motion for Summary Judgment), Rule 2-613 (Default Judgment), Rule 14-204 (Commencement of Action and Process), Rule 4-349 (Release After Conviction), and Rule 5-804 (Hearsay Exceptions; Declarant Unavailable)

The Reporter presented Rules 2-501, Motion for Summary Judgment; 2-613, Default Judgment; and 14-204, Commencement of Action and Process, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-501 to correct a reference

to federal law, as follows:

Rule 2-501. MOTION FOR SUMMARY JUDGMENT

. . .

(f) Entry of Judgment

. . .

Cross reference: ~~Section 200 of the Soldiers' and Sailors' Relief Act of 1940~~
Section 521 of the Servicemembers Civil Relief Act, 50 U.S.C. Appendix, § 521, app. §§501 et seq., imposes specific requirements that must be fulfilled before a default judgment may be entered.

. . .

Rule 2-501 was accompanied by the following Reporter's Note.

Cross references in Rules 2-501, 2-613, and 14-204 and the text of Rule 14-204 (a)(4) are proposed to be amended to replace references to the Soldiers' and Sailors' Civil Relief Act with references to the Servicemembers Civil Relief Act, which replaced the former law.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 2-613 to correct a reference to federal law, as follows:

Rule 2-613. DEFAULT JUDGMENT

. . .

(g) Finality

. . .

Cross reference: ~~Section 200 of the Soldiers' and Sailors' Relief Act of 1940,~~ Section 521 of the Servicemembers Civil Relief Act, 50 U.S.C. Appendix, §521, app. §§501 et seq., imposes specific requirements that must be fulfilled before a default judgment may be entered.

. . .

Rule 2-613 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-501.

MARYLAND RULES OF PROCEDURE

TITLE 14 - SALES OF PROPERTY

CHAPTER 200 - FORECLOSURE OF LIEN INSTRUMENTS

AMEND Rule 14-204 to correct two references to federal law, as follows:

Rule 14-204. COMMENCEMENT OF ACTION AND
PROCESS

(a) Methods of Commencing Action

. . .

(4) if any defendant is a natural person, an affidavit that either the person is not in the military service of the United States as defined in Section 511 of the ~~Soldiers' and Sailors' Civil Relief Act of 1940, as amended,~~ Servicemembers Civil Relief Act, 50 U.S.C. Appendix, 520, app. §§501 et seq., or that the action is authorized by the Act.

. . .

Cross reference: Sections 511 and 532 of the ~~Soldiers' and Sailors' Civil Relief Act of 1940~~ Servicemembers Civil Relief Act, 50 U.S.C. Appendix app. §§501 et seq.

. . .

Rule 14-204 was accompanied by the following Reporter's Note.

See the Reporter's note to Rule 2-501.

The Reporter explained that the proposed changes are "housekeeping" amendments. Kevin Best, Esq., a lawyer in the Vice Chair's law firm, pointed out that the Soldiers' and Sailors' Civil Relief Act had been replaced with the Servicemembers Civil Relief Act, and cross references to the former law need to be updated. A word search revealed that three Rules contained a cross reference to the law that was changed. By consensus, the Committee approved the Rules as presented.

The Reporter presented Rule 4-349, Release After Conviction, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-349 to correct a reference to a section of Rule 4-216, as follows:

Rule 4-349. RELEASE AFTER CONVICTION

. . .

(b) Factors Relevant to Conditions of Release

In determining whether a defendant should be released under this Rule, the court may consider the factors set forth in Rule 4-216 ~~(e)~~ (d) and, in addition, whether any appellate review sought appears to be frivolous or taken for delay. The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

. . .

Rule 4-349 was accompanied by the following Reporter's Note.

The proposed "housekeeping" amendment to Rule 4-349 corrects a reference to section (e) of Rule 4-216, which should be a reference to section (d) of that Rule.

The Reporter told the Committee that Robert McDonald, Esq., Chief Counsel of the Opinions, Advice and Legislation Division of the Office of the Attorney General, had pointed out the incorrect reference to "Rule 4-216 (e)" in section (b) of Rule 4-349. The correct reference is to "Rule 4-216(d)." This change was overlooked after Rule 4-216 was reconstructed. By consensus, the Committee approved the Rule as presented.

The Reporter presented Rule 5-804, Hearsay Exceptions; Declarant Unavailable, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-804 to correct a citation in a certain Committee note, as follows:

Rule 5-804. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE

. . .

Committee note: Subsection (b)(5) of this Rule does not affect the law of spoliation, "guilty knowledge," or unexplained failure to produce a witness to whom one has superior access. See *Washington v. State*, 293 Md. 465, 468 n. 1 (1982); *Breeding v. State*, 220 Md. 193, 197 (1959); *Shpak v. Schertle*, 97 Md. App. 207, 222-27 (1993); *Meyer v. McDonnell*, 40 Md. App. 524, 533, (1978), rev'd on other grounds, 301 Md. 426 (1984); *Larsen v. Romeo*, 254 Md. 220, 228 (1969); *Hoverter v. Director of Patuxent Inst.*, 231 Md. 608, 609 (1963); and *DiLeo v. Nugent*, 88 Md. App. 59, 69-72 (1991). The hearsay exception set forth in subsection (b)(5)(B) is not available in criminal causes other than those listed in Code, ~~Criminal Procedure Courts~~ Article, §10-901 (a).

. . .

Rule 5-804 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 5-804 corrects a reference to Code, Criminal

Procedure Article, to read Code, Courts
Article.

The Reporter explained that the Committee note contains an incorrect reference to the Criminal Procedure Article -- the correct reference is to the Courts Article. By consensus, the Committee approved the Rule as presented.

Agenda Item 1. Consideration of a recommendation of the MSBA
Judicial Administration Section concerning telephone testimony
-- New Rule 2-513 (Telephone Testimony) and New Rule 3-513
(Telephone Testimony)

The Chair welcomed Judge Alpert. The Chair said that Judge Alpert had been a former colleague on the Court of Special Appeals, and before that a member of the Maryland House of Delegates and on the Baltimore County District and Circuit Courts. He is now serving as a retired judge on all of the courts.

The Reporter presented new Rules 2-513 and 3-513, Telephone Testimony, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-513, as follows:

Rule 2-513. TELEPHONE TESTIMONY

(a) Definition

In this Rule, "telephone" means a telephone or other two-way electronic communication device or method.

(b) When Telephone Testimony Allowed

Subject to sections (e) and (f) of this Rule, on motion of a party to a civil action and for good cause shown, a court may allow the testimony of a witness to be taken by telephone.

(c) Time for Filing

Unless for good cause shown the court allows the motion to be filed later, a motion to take the testimony of a witness by telephone shall be filed at least 30 days before the trial or hearing at which the testimony is to be offered.

(d) Contents

The motion shall state the witness's name, address, telephone number, and substance of the witness's testimony.

(e) Good Cause

A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:

(1) the witness is otherwise unavailable because of age, infirmity, or illness;

(2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;

(3) a personal appearance would be an undue hardship to the witness; or

(4) any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.

(f) When Telephone Testimony is Prohibited

Unless the parties otherwise stipulate, a court may not allow the testimony of a witness to be taken by telephone if:

(1) the witness is a party or an expert;

(2) the testimony is to be offered in a jury trial, unless there is good cause for taking the testimony by telephone;

(3) the demeanor and credibility of the witness are critical to the outcome of the proceeding;

(4) the issue or issues about which the witness is to testify are so determinative of the outcome of the proceeding that face-to-face cross-examination is needed;

(5) a deposition for perpetuation of evidence under these Rules is a fairer way to present the testimony;

(6) the exhibits or documents about which the witness is to testify are so voluminous that testimony by telephone is not practical;

(7) facilities for taking the testimony by telephone are not available;

(8) failure of the witness to appear in person will cause substantial prejudice to a party; or

(9) other circumstances require the personal appearance of the witness.

(g) Costs

All costs of telephone testimony shall be paid by the movant and may not be charged to any other party.

Source: This Rule is new.

Rule 2-513 was accompanied by the following Reporter's Note.

The Honorable Paul E. Alpert has suggested the addition of new Rules allowing the testimony of witnesses to be taken by telephone. Telephone testimony would be allowed if the presence of a witness is not available because of financial limitations or because of personal unavailability. To safeguard abuse of this procedure, the court must find good cause to allow it. The idea is supported by the MSBA Judicial Administration Section. The Trial Subcommittee recommends adoption of the Rules.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

ADD new Rule 3-513, as follows:

Rule 3-513. TELEPHONE TESTIMONY

(a) Definition

In this Rule, "telephone" means a telephone or other two-way electronic communication device or method.

(b) When Telephone Testimony Allowed

Subject to sections (e) and (f) of this Rule, on motion of a party to a civil action and for good cause shown, a court may allow the testimony of a witness to be taken by telephone.

(c) Time for Filing

Unless for good cause shown the court allows the motion to be filed later, a motion

to take the testimony of a witness by telephone shall be filed at least 30 days before the trial or hearing at which the testimony is to be offered.

(d) Contents

The motion shall state the witness's name, address, telephone number, and substance of the witness's testimony.

(e) Good Cause

A court may find that there is good cause to allow the testimony of a witness to be taken by telephone if:

(1) the witness is otherwise unavailable because of age, infirmity, or illness;

(2) personal appearance of the witness cannot be secured by subpoena or other reasonable means;

(3) a personal appearance would be an undue hardship to the witness; or

(4) any other circumstances that constitute good cause for allowing the testimony of the witness to be taken by telephone.

(f) When Telephone Testimony is Prohibited

Unless the parties otherwise stipulate, a court may not allow the testimony of a witness to be taken by telephone if:

(1) the witness is a party or an expert;

(2) the demeanor and credibility of the witness are critical to the outcome of the proceeding;

(3) the issue or issues about which the witness is to testify are so determinative of the outcome of the proceeding that face-to-face cross-examination is needed;

(4) a deposition for perpetuation of

evidence under these Rules is a fairer way to present the testimony;

(5) the exhibits or documents about which the witness is to testify are so voluminous that testimony by telephone is not practical;

(6) facilities for taking the testimony by telephone are not available;

(7) failure of the witness to appear in person will cause substantial prejudice to a party; or

(8) other circumstances require the personal appearance of the witness.

(g) Costs

All costs of telephone testimony shall be paid by the movant and may not be charged to any other party.

Source: This Rule is new.

Rule 3-513 was accompanied by the following Reporter's Note.

See the Reporter's note to proposed new Rule 2-513.

The Reporter said that Judge Alpert would explain the new Rules.

Judge Alpert thanked the staff of the Rules Committee for its help. He had started working on the project about a year ago. It is a project of the Judicial Administration Council of the Maryland State Bar Association. He had been designated to be a member of a three-person committee to work on the Rule, which was modeled after a statute and rule in Oregon. It is a fail-safe type of rule that is controlled by the trial judge who may allow the testimony of a witness to be taken by telephone. A

motion to take the testimony of a witness by telephone must be filed at least 30 days before the trial or hearing at which the testimony is to be offered. Section (e) lists the various reasons for the court to allow telephone testimony, including where the witness is unavailable due to age, infirmity, or illness; where the personal appearance of the witness cannot be secured by subpoena; or where a personal appearance of the witness would be an undue hardship to the witness.

Judge Alpert said that the safeguard is section (f) that pertains to when telephone testimony is prohibited, unless otherwise agreed to by the parties, including if the witness is a party or expert, if the testimony is to be offered in a jury trial, if the demeanor and credibility of the witness are critical to the outcome of the proceeding, if the issue or issues about which the witness is to testify are so determinative of the outcome of the proceeding that face-to-face cross examination is needed, if a deposition for perpetuation of evidence is a fairer way to present the testimony, if the exhibits or documents about which the witness is to testify are so voluminous that testimony by telephone is not practical, if facilities for taking the testimony by telephone are not available, if failure of the witness to appear in person will cause substantial prejudice to a party, and if other circumstances require the personal appearance of the witness. Judge Alpert expressed the opinion that it is an idea whose time has come. It is very beneficial for lawyers in small firms and litigants who do not have a large amount of money. It is not meant to apply to the key witnesses in a case,

but rather to the subsidiary witnesses. For good cause, one can ask the court for telephone testimony, but the safeguards are there, also.

Judge Matricciani suggested that in place of the language in section (f) that reads "[u]nless the parties otherwise stipulate," the following language should be substituted "[u]nless the parties object." The reason for his suggestion is that in Baltimore City, there are many guardianship cases in which a hospital asks for permission to perform a medical procedure, but the potential patient has no family, so there is no one to stipulate to taking the physician's testimony over the telephone. Judge Alpert responded that he would approve that change.

The Vice Chair said that section (f) is confusing. Judge Alpert responded that telephone testimony is allowed, unless it is prohibited. Ms. Potter inquired if the word "may" should be changed to the word "shall" in section (f). The Chair suggested that section (f) should begin as follows: "If a party objects, a court may not allow...". Judge Alpert agreed with this suggestion. By consensus, the Committee approved the Chair's language.

Mr. Bowen pointed out a style problem -- the language "telephone testimony" sounds as if the telephone is going to testify. The preferred language is "testimony by telephone." By consensus, the Committee agreed to make this change.

Mr. Klein remarked that the phrase at the end of subsection (f) (2) that reads "unless there is good cause for taking the

testimony by telephone" makes no sense, because the Rule requires that good cause be shown before testimony by telephone is allowed. Mr. Sykes told the Committee that he was not certain that section (e) provides guidance as to what constitutes good cause. Subsection (e)(4) provides wide discretion to find other circumstances that constitute good cause. Section (f) is a flat prohibition, except if the testimony is to be offered at a jury trial. He noted that what seems to be intended is that if the testimony is to be offered in a jury trial, and a party objects, "extra good" cause would be necessary. The Vice Chair responded that the language at the end of subsection (f)(2) that reads "unless there is good cause for taking the testimony by telephone" should be deleted. The judge could allow testimony by telephone in a jury trial if no party objects in the motions process. By consensus, the Committee agreed to delete the last phrase of subsection (f)(2).

The Chair told the Committee that two guests were present to discuss this topic, Douglas Hofstedt and Robert Wallace. Mr. Hofstedt explained that the Honorable Nancy Davis-Loomis, Administrative Judge of the Circuit Court for Anne Arundel County, had asked Mr. Wallace and him to attend the meeting to speak in favor of the proposed Rule. The meeting materials contain a printout of the policies that the Circuit Court for Anne Arundel County has adopted pertaining to testimony by telephone, and these are very close to what the Rule sets out. (See Appendix 2). The Honorable Ronald A. Silkworth, another Anne Arundel County Circuit Court judge, instituted a pilot

program of testimony by telephone that was very limited in what was allowed. It was not used frequently, so categories of situations that could qualify for a blanket approval by the court were developed. No case-specific approval by the court is required, and a party does not have to notify the other parties. Anne Arundel County Circuit Court is using Courtcall as a vendor, which has been very useful. The parties pay \$50 for the service. There had been some opposition to the charge, but charging for the service is a good idea, because it makes people think about whether they should use it, and no staff time is taken away for this. All that is necessary to do is to contact Courtcall, which then connects the witness to the courtroom, and the testimony can be taken. Without using this type of service, the telephone lines in the courthouse would be tied up. Courtcall wired every courtroom free of charge, because it makes its money from the transaction fees.

Judge Norton asked how many telephones there are per courtroom. Mr. Hofstedt replied that each courtroom has a digital speaker telephone with extendable microphones. The testimony by telephone actually is louder at times than people speaking into the microphone. The staff tried out different placements for the speakers, and they are now working correctly. There is a dedicated line to the judge in the courtroom. Anne Arundel County generally requires that the testimony by telephone has to be set up at least five days before the trial or hearing. It could be set up within one day for a hardship situation. The proposed Rule requires the filing of a motion at least 30 days

before the trial of hearing, which may be a problem in that it could limit the ability to use the service. The Vice Chair inquired as to how the request to use the service is effected. Mr. Hofstedt replied that if it is a "Category 1" hearing, meaning that there is blanket approval, the party calls Courtcall directly. The court receives an e-mail from Courtcall, with notice to the postponement clerk, the assignment clerk, Mr. Hofstedt, and Mr. Wallace. The e-mail notification includes the name of the judge and the date of the hearing. The assignment office puts the case on the docket, noting the telephonic appearance.

The Vice Chair asked if the other side knows about the testimony by telephone. Mr. Hofstedt answered that the other side does not know about it. The Vice Chair inquired about problems that have arisen. Mr. Hofstedt replied that twice, there has been a problem because the vendor did not understand Anne Arundel County procedures. He contacted the vendor, and the vendor immediately corrected the problem. The Vice Chair inquired as to when Mr. Hofstedt finds out about a problem. Mr. Hofstedt replied that he finds out prior to the trial date. The Vice Chair noted that the other side does not know about the testimony by telephone. Mr. Hofstedt responded that it does not matter if the other side knows, because under the Anne Arundel County procedures, the other side does not have a right to object. In a "Category 2" hearing, a party must obtain the prior approval of a judge in order for there to be testimony by telephone. The Vice Chair questioned as to who picks up on the

fact that the vendor has set up a telephonic appearance that is not appropriate. Mr. Hofstedt answered that usually someone from the assignment office or the postponement coordinator identifies the problem. Any of the administrative staff can contact Courtcall to tell them that the telephone proceeding may not be scheduled. Courtcall personnel call the Anne Arundel County court staff several times a day to ask if certain situations are allowable.

The Vice Chair questioned as to how the party who requests the testimony by telephone sets it up. What information does the court staff have to determine whether or not testimony by telephone is appropriate? Mr. Hofstedt responded that he does not see the documents filed by the party. The postponement coordinator and the judge see them. The judge uses the same factors listed in the Rule to determine whether testimony by telephone is appropriate. Judge Alpert expressed the view that a Rule like the one proposed would be compatible with the system in Anne Arundel County. The Rule provides guidance to the judge. The proposed Rule has been reviewed by a committee of judges and lawyers as well as by the Trial Subcommittee.

The Chair asked what kind of witness is usually giving the telephonic testimony. Mr. Hofstedt answered that one example is a case that involved the custody of a child, where the mother of the child was in New Mexico, and she was asked to verify a change in the custody of the child to the father in Maryland. There was a master's hearing and then a status hearing in the circuit court to confirm what had been filed.

The Vice Chair noted that since opposing counsel cannot object in the Anne Arundel County system, proposed Rule 2-513 is not compatible with that system. Rule 2-513 provides for a motion that requires notice and gives the parties a chance to respond. Ms. Potter noted that there are two categories in the Anne Arundel County system. Mr. Klein commented that he had looked at the procedures for Category 2 situations in Anne Arundel County, and there is nothing that provides for copies to be sent to other parties or for a right to object. This could involve a key witness in a case. Mr. Hofstedt remarked that this is not used for a key witness. It is up to the judge to allow the testimony by telephone. Mr. Klein asked how a judge would be able to ascertain this if the judge does not know anything about the case and does not hear from all parties before making a decision.

Judge Alpert told the Committee that the 30-day period provided for in section (c) had been decreased from the initial time period suggested. A lawyer may need time to prepare as to who the witnesses will be. The 30-day period had been discussed before it was chosen. The Chair commented that when one lawyer proposes to the other that a witness's testimony be taken by telephone, the lawyer who has been asked may wish to do some investigation before deciding whether to agree to this. Judge Matricciani inquired as to whether this kind of testimony would be allowed if an expert witness broke his or her ankle the night before the trial. The Vice Chair responded that it would depend on whether all the parties agreed to it. Mr. Klein added that

this is permissible under the escape clause provided for in section (c). The Chair suggested that the time period could be changed to 15 days, but he expressed the opinion that the 30-day time period is not unreasonable. The court can allow the motion to be filed later, so that solves the time problem. Judge Norton remarked that he prefers the 30-day time period, because it gives the parties a chance to respond. Mr. Klein noted that if the time period is reduced to less than 30 days, language would have to be added to the Rule concerning the time for filing an objection.

Mr. Brault inquired as to whether testimony by telephone from a foreign country would be precluded. The Chair replied that this is not precluded. Mr. Brault commented that he is counsel in a case in which one of the issues is identifying the appropriate German law. It will require participation by German lawyers. Using testimony by telephone would be very efficient and cost-saving in this kind of case. The Chair said that there was a case in the Court of Special Appeals, *Salerian v. Maryland State Board of Physicians*, 176 Md. App. 231 (2007), involving the discipline of a psychiatrist for publicizing information given to him during sessions with a man charged with espionage. The spy's testimony was given from a prison cell using a device similar to the Courtcall mechanism. This was approved by the Court of Special Appeals. This was in the administrative context, rather than the civil litigation context. The Chair added that the proposed Rule makes good sense. There may be situations in which the court would want to assess the costs differently,

particularly in a case where the court is satisfied that testimony by telephone is appropriate, and there have been many frivolous objections by the party who wants the witness to be in court. He suggested that the following language should be added to the beginning of section (g): "[u]nless the court orders otherwise, ...". By consensus, the Committee approved the addition of this language.

Mr. Brault asked if Judge Alpert's committee had taken into account the effect this Rule has on the use of depositions if a party is unavailable. Judge Alpert answered that they had taken into account the expense involved, and one of the factors considered was that the cost of depositions taken out of state could be prohibitive to parties. Mr. Brault commented that subsection (f)(5) seems to conflict with Rule 2-419 (a)(3). If a discovery deposition of a witness is taken, and the witness becomes no longer available to testify at trial, a discovery deposition can be used under the circumstances set forth in Rule 2-419. The Chair said that the problem can be cured by deleting the language "for perpetuation of evidence" in subsection (f)(5). Judge Alpert consented to this suggestion, and by consensus, the Committee agreed to make this change.

The Vice Chair suggested that subsection (e)(1) should read "if the witness is unavailable and was not deposed." If the witness had been deposed and is now unavailable, a party should have the right to use the deposition, unless the parties stipulate to allowing the testimony to be taken by telephone. Ms. Potter inquired as to what would happen if a discovery

deposition was taken by opposing counsel, who chose not to ask certain questions, and now the other side wishes to present the witness's testimony by telephone and ask those questions, will this be allowed? The Chair said that the language of the Rule takes care of this problem. If one side wants to present the testimony of a witness by way of the telephone, and the other side refuses because the witness's deposition has already been taken, the issue before the court is whether the deposition or the telephone is the fairer way to present the testimony. The judge will look at this and make the decision. The Vice Chair observed that if one lawyer says that the deposition testimony is fairer, and it turns out that the testimony was poor, but the lawyer wants to hold the other side to it, a judge probably would not agree that this is fair. Ms. Potter pointed out that the deposition testimony could be used to impeach the telephonic witness. The Vice Chair expressed the view that her suggested language should be added to subsection (e)(1). The Chair said that the language is not necessary. The language referring to *de bene esse* depositions will be taken out, and this takes care of the problem. The Vice Chair remarked that subsection (a)(3) of Rule 2-419, which provides that a deposition of anyone who is unavailable can be used, would not be correct. The Chair expressed the opinion that Rule 2-513 does not affect Rule 2-419. If the witness's testimony is taken by telephone, the deposition can be used to impeach the witness. The Vice Chair hypothesized a situation where the witness is on the telephone and testifies to subjects A and B, and in the deposition, a subject C was

discussed. The Vice Chair then asked if under this Rule, the deposition testimony as to subject C can be submitted to the court as the witness's testimony, or if it is necessary to ask questions directly of the witness. The Chair replied that it would be necessary to go through the witness. The Vice Chair said that this deprives a lawyer of a right that he or she would otherwise have. The Chair stated that the deposition of the adverse party can be used at any time for any purpose. The deposition of a non-party witness can be used for purposes of impeachment, but if the witness is unavailable, the testimony becomes substantively admissible.

Mr. Brault expressed his agreement with the Vice Chair. If a lawyer deposes an expert witness, and the witness gave damaging testimony to the other side in a deposition, then this is a discovery matter. Then, as happens frequently, a video is taken, so the lawyer leaves out the damaging testimony, because it is so useful. After the video is played, the lawyer offers the witness's deposition. The witness has testified in two ways -- on the video and on the transcript of the witness's discovery deposition. Mr. Brault added that he believes that he is entitled to do this under the Rule. The Vice Chair has pointed out that a lawyer can use a witness's testimony by telephone, as well as the witness's discovery transcript, not for impeachment, but as substantive evidence. Impeachment evidence is not evidence-in-chief. The Vice Chair said that she was thinking of a situation where an out-of-town witness cannot appear for a hearing. The lawyer has the right to offer the witness's

deposition testimony, but under the proposed Rule, since the witness is unavailable, the judge may decide that it is fairer to present the witness's testimony by telephone. Ms. Potter remarked that her understanding was that testimony taken by telephone would be treated as if it were taken in the courtroom. The Vice Chair explained that the Rule may be classifying any witness who is otherwise unavailable as available because of testimony by telephone.

The Chair pointed out that subsection (f)(3) provides as a factor in determining whether testimony can be taken by telephone if "the demeanor and credibility of the witness are critical to the outcome of the proceeding," so the witness would not be permitted to give the testimony by telephone in the situation referred to by the Vice Chair. The Vice Chair commented that what is clear as a bright-line test is that a witness who has been deposed becomes ill and is unavailable. The lawyer has the absolute right under the existing rules to submit the witness's deposition testimony as substantive evidence. The proposed Rule may interfere with this right. Judge Alpert asked if the Vice Chair agreed that if the witness were present, there would be no problem, and the deposition could not be used for this purpose. The Vice Chair replied affirmatively. Judge Alpert said that under the proposed Rule, functionally, the witness is there. The Vice Chair responded that the witness may be very important to the case. Judge Alpert remarked that the Rule does not apply to that kind of a witness. Mr. Leahy pointed out that the witness can be cross-examined as to his or her deposition testimony, and

if the witness on direct testifies to subjects A and B, the lawyer can elicit subject C from the witness.

The Vice Chair reiterated that the proposed Rule does contradict Rule 2-419 (a)(3), which provides that once a witness is unavailable for whatever reason, the deposition of that witness may be used by any party for any purpose against any other party who was present or represented at the deposition or had due notice thereof. Mr. Klein suggested that language could be added to Rule 2-513 that would state that for purposes of Rule 2-419, the witness who testifies by telephone would be treated as though he or she were unavailable. The Vice Chair expressed the view that this would be helpful. Judge Matricciani expressed the opinion that it should not be left to the judge to determine whether a witness's testimony should be presented in the form of a deposition transcript or testimony by telephone. The Rule could provide that the court may not allow the testimony of a witness to be taken by telephone if counsel elects to submit a deposition transcript in accordance with Rule 2-419. Mr. Brault said that he preferred Mr. Klein's suggested language. Mr. Klein explained that his change would clarify that a witness who testifies by telephone would be treated as if the witness were unavailable under Rule 2-419. The Vice Chair added that this would mean that a lawyer could rely on both Rules. Mr. Brault remarked that a lawyer may depend on the deposition for substantive testimony, and then find out that the witness is going to deny it, leaving the lawyer with only using the testimony for impeachment purposes.

The Chair said that language will be added that will be drafted by the Style Subcommittee stating that a witness who testifies under Rule 2-513 is treated as if not available. Mr. Brault suggested that the wording could be: "a witness remains unavailable." The Chair continued that the new language would also provide that the term "unavailable" has the meaning stated in Rule 2-419 (a)(3). Mr. Sykes pointed out that there could be two substantive versions of the testimony. Mr. Brault remarked that if one version is not credible, then it would be inadmissible. The Chair added that it would be excluded under the theory that it is inherently unreliable. Mr. Brault commented that his point was that if the lawyer has the testimony he or she wants in a transcript, the lawyer would not do anything to upset this. Suddenly the witness becomes available because of the availability of testimony by telephone. This should not mean that the transcript cannot be put into evidence, which is the problem pointed out by the Vice Chair. The suggested language solves the problem.

The Vice Chair asked if anyone disagreed with the idea of adding in a provision that says that the parties can stipulate to this, so that there need not be a motion filed. Mr. Brault pointed out that every courtroom in Maryland will have to be fitted to accommodate testimony by telephone with telephones that act like speakers. Apparently, it is easier to hear the people on the telephone than the people in the courtroom. What will the administrative judges have to say about the necessity to rewire the courtrooms? Mr. Hofstedt noted that in Anne Arundel County,

the vendor paid for everything. Mr. Wallace commented that when the new courthouse in Anne Arundel County was built, all of the courtrooms were wired with a telephone system. The telephone in the courtroom is operational at the same time as the Courtcall telephone used to talk to witnesses. The new telephone system is relatively simple, but the sound quality is excellent. Mr. Brault inquired as to whether the Courtcall telephone can be used for other purposes. Mr. Wallace replied that the Courtcall telephones are able to call outside the courthouse.

Judge Alpert told the Committee that Judge Kaplan can speak about the experience in Baltimore City. Judge Kaplan commented that more than 10 years ago, Baltimore City tried Courtcall but could not get people to use it. Mr. Wallace remarked that when it was first installed in Anne Arundel County, there was some concern that it would not be used. Some people do not know that it is available; however, most of the members of the bar are aware of it. It has been publicized in The Barrister, the newsletter of the Anne Arundel County Bar Association. It saves time and money.

The Chair said that some language will be added to deal with the problems raised by the Vice Chair and Mr. Brault. He suggested using the following language borrowed from Rule 2-419 (a) (3), as a guideline for the Style Subcommittee who can then draft it more specifically: "The deposition of a witness whose testimony is received by telephone may be used by any party for any purpose against any other party who is present or represented at the taking of the deposition or who had due notice thereof."

This would be added to Rule 2-513 as a new section (g). What is now section (g), Costs, would be moved to section (h). This would make it clear that the deposition is substantively admissible. Mr. Brault noted that this does not apply to expert testimony. Section (a)(4) of Rule 2-419 provides that a videotape deposition of a treating or consulting physician or of any expert witness may be used for any purpose, even though the witness is available to testify. The Chair suggested that a Committee note be added that would state that section (g) is not intended to change Rule 2-419 (a)(4). By consensus, the Committee approved this addition.

The Vice Chair suggested that section (d) should also contain language that requires a statement of the reasons why the testimony by telephone should be allowed. By consensus, the Committee approved this suggestion. The Vice Chair asked whether subsection (f)(5) was changed, and the Chair answered that the language that read "for perpetuation of evidence" was deleted, so that this provision is not limited to *de bene esse* depositions.

The Chair thanked Judge Alpert for bringing this Rule to the Committee's attention. By consensus, the Committee approved the Rule, subject to restyling. The Vice Chair inquired as to application of the Rule in the District Court. The Chair responded that the parallel Rule for the District Court, Rule 3-513, is included in the materials for today's meeting. By consensus, the Committee approved Rule 3-513, subject to restyling to conform it to Rule 2-513.

The Chair wished the Committee happy holidays. The Chair

adjourned the meeting.