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December 22, 2021

Sandra F. Haines, Esq.
Reporter, Rules Committee
Judiciary A-POD
580 Taylor Avenue
Annapolis, MD 21401

Re: Comments on 209th Report of the
Standing Committee on Rules of Practice and Procedure,
Notice of Proposed Rules Changes

Dear Ms. Haines:

As always, the Standing Committee has produced an excellent product; however, I respectfully disagree with some of the proposed changes to Rule 2-506 (voluntary dismissal).

In brief summary, two modifications are being suggested. Subsection (b)(1) modifies the notice of dismissal requirement, and it would require disclosure of the fact of a written settlement agreement; if a date is specified in the agreement, the date for satisfaction of the agreement; and, that the agreement provides that parties will keep each other informed of their current addresses until satisfaction. Subsection (b)(2) provides that a settled action may be reopened on motion of a party, upon filing of the settlement agreement and an affidavit stating the balance to be enforced.

The Standing Committee proposed the changes because: "In some jurisdictions, judges have refused to permit dismissal unless the terms of the settlement are provided. The Committee has been asked to clarify whether parties have a right to maintain confidentiality regarding the terms of a settlement."

This letter addresses only the proposed Subsection (b)(1) changes. Initially, I ask whether any such Court refusal is permissible under the Rule. A Rule 2-506(a)(2) dismissal should be operative without any action of the Circuit Court, and I question how a Court may refuse to permit dismissal when a stipulation

comporting with Subsection (a)(2) of the Rule is filed. Filing of the stipulation, not a Court dismissal order, is the operative act under the Rule.

If there is a need for amendment, I suggest that a better course would be to make clear that a Court cannot refuse to permit dismissal by requiring that any of the terms of the settlement be provided. In my opinion, nothing in the text of the current Rule imposes a disclosure requirement. If clarification is appropriate, I suggest that Rule 2-506(b)(1) could state: “If an action is settled upon written stipulated terms and dismissed a notice of voluntary dismissal pursuant to Subsection (a) need not provide any reason for the dismissal or any terms of any agreement.”

In pertinent part, Rule 2-506 currently provides:

(a) By Notice of Dismissal or Stipulation. Except as otherwise provided in these rules or by statute, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim *may dismiss* all or part of the claim *without leave of court by filing* (1) a notice of dismissal at any time before the adverse party files an answer or (2) *a stipulation of dismissal signed by all parties to the claim being dismissed.*

(b) Dismissal Upon Stipulated Terms. If an action is settled upon written stipulated terms and dismissed, the action may be reopened at any time upon request of any party to the settlement to enforce the stipulated terms through the entry of judgment or other appropriate relief.

(c) By Order of Court. *Except as provided in section (a) of this Rule, a party who has filed a complaint, counterclaim, cross-claim, or third-party claim may dismiss the claim only by order of court and upon such terms and conditions as the court deems proper.* If a counterclaim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the action shall not be dismissed over the objection of the party who filed the counterclaim unless the counterclaim can remain pending for independent adjudication by the court. If a third-party claim has been filed before the filing of a plaintiff's motion for voluntary dismissal, the court, in its discretion, may dismiss the action over the objection of the party who filed the third-party claim, but the court may not dismiss a third-party claim that is non-derivative and, if refiled, would be barred by an applicable statute of limitations. [Emphasis added].

I suggest that it is textually clear that a dismissal under Subsection (a)(2) is exempt from the “terms and conditions” provision of Subsection (c). Leave of Court is not required.

In pertinent part, Fed.R.Civ.P. 41(a) provides:

(a) Voluntary Dismissal.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff *may dismiss* an action *without a court order* by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) *a stipulation of dismissal signed by all parties who have appeared.*

(B) *Effect.* Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(2) *By Court Order; Effect.* *Except as provided in Rule 41(a)(1),* an action may be dismissed at the plaintiff's request only by court order, *on terms that the court considers proper.* If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice. [Emphasis added].

In short, the current Maryland Rule closely parallels the Federal Rule. That is a persuasive reason to reject change.

I have the following concerns with proposed Subsection (b)(1):

First, I suggest that proposed Subsection (b)(1) creates an ambiguity with current Subsection (a). Subsection (a) permits “a stipulation of dismissal signed by all parties to the claim being dismissed.” That provision authorizes dismissal of an action that has been settled by a written agreement without any disclosure. In my

experience, this course of action is generally followed in written settlements. Further, it is consistent with Subsection (c). However, proposed Subsection (b)(1) would require disclosure of the written settlement and some of its provisions. What would be required under proposed Subsection (b)(1) is not required in Subsection (a) or justified by Subsection (c). This creates ambiguity.¹

Second, while I have no empirical data, in my experience, the overwhelming majority of settlements are completed without problem, and I do not think that there is an empirically demonstrated need for additional requirements in the Rule to address what I perceive to be a small number of defaults. This seems to be the tail wagging the dog. Every settlement will be slightly more complex because some few are not consummated.

Third, with the exception of governmental settlements that are not confidential, settlement agreements are private contracts between the parties. I do not see the need for disclosure of any of the terms, absent a motion to enforce or to remedy a breach. In my experience, nongovernmental settling parties almost invariably desire confidentiality. If some disclosure is required by the proposed Rule, it will likely result in additional verbiage. For example, a defendant will insist on adding “without any admission of liability and with a full denial of liability” to the stipulation disclosing a settlement payment. And, a plaintiff will then ask for countering language that is typical in agreements. If a payment date is specified, one party may want to add that “time is of the essence” and the other may resist. If multiple payments are provided, as is often the case in commercial cases, must all, or only the final one, be provided? If only the latter, it may create an argument that the interim payment dates are no longer material.

Fourth, Rule 2-506(b) addresses a “Dismissal on Stipulated Terms.” While I do not question the Court’s inherent power to require additional information, most stipulations do not provide such information. For example, a stipulation extending the time to answer, or to enlarge the time for discovery responses, which does not conflict with a Court-imposed milestone, normally recites only the parties’ agreement and relief requested. I do not see a reason that a stipulation of dismissal is treated differently under Subsection (b). If both parties have agreed to an amicable resolution, absent minority or incapacity, the agreement should be sufficient. Indeed, it is in Subsection (c) dismissals that the Court has the power to determine whether it deems a settlement to be proper.


¹ Further, to the extent, if any, to which the proposed amendment triggers Subsection (c), it may indicate that Courts have the power to, or should, become involved in evaluating the settlement agreement, i.e., the “terms and conditions,” to determine if they are deemed “proper.”

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Settlement is favored. Maryland's public policy dictates that courts should "look with favor upon the compromise or settlement of law suits in the interest of efficient and economical administration of justice and the lessening of friction and acrimony." *Clark v. Elza*, 286 Md. 208, 219 (1979) (citation omitted). Making it more difficult to dismiss an action, as the amendment does, is contrary to that policy. Institutions that are frequently sued may be more reluctant to settle if disclosures such as this are required.

Thank you for your consideration.

Respectfully submitted,


Michael D. Berman 