COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on January 8, 1999.

Members present:

Hon. Joseph F. Murphy, Jr., Chair

Albert D. Brault, Esq.
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Anne C. Ogletree, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Melvin Hirshman, Esq., Bar Counsel
Donald Braden, Esq., Attorney Grievance Commission
Holly Currier, Rules Committee Intern

The Chair called the meeting to order. He thanked the members present for attending in the snowy weather. He said that there were three items on the agenda -- approval of the minutes of the November meeting; an amendment to Rule 4-301, Beginning of Trial in District Court; and a reconsideration of the now-complete Chapter 700 of Title 16 in light of the Report of the American Bar Association (ABA). The Chair suggested that because there was not a quorum present due to the inclement weather, he would send a memorandum to all of the Rules Committee members allowing any member the opportunity to object to specific rules, as well as specific sections and subsections of rules

which will be discussed at today's meeting. If anything decided today becomes controversial, then that rule or part of a rule will be discussed at the next Rules Committee meeting. If there is no opposition, silence will be deemed as approval. The memorandum to the Committee is included as Appendix 1. Once the package of Attorney Discipline Rules is agreed upon, it will be printed in the Maryland Register and then sent to the Court of Appeals. The Chair asked if the suggested procedure for the meeting was acceptable, and the Committee agreed by consensus that it was acceptable.

The Chair asked if there were any additions or corrections to the minutes of the November 20, 1998 meeting. There being none, Judge Kaplan moved to accept the minutes as presented, the motion was seconded, and it passed unanimously.

Agenda Item 1. Consideration of proposed amendments to Rule 4-301 (Beginning of Trial in District Court)

Judge Johnson presented Rule 4-301, Beginning of Trial in District Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-301 to specify the form and timing of a pretrial demand in the District Court for a jury trial, as follows:

Rule 4-301. BEGINNING OF TRIAL IN DISTRICT COURT

(a) Initial Procedures

Immediately before beginning a trial in District Court, the court shall (1) make certain the defendant has been furnished a copy of the charging document; (2) inform the defendant of each offense charged; (3) inform the defendant, when applicable, of the right to trial by jury; (4) comply with Rule 4-215, if necessary; and (5) thereafter, call upon the defendant to plead to each charge.

(b) Demand for Jury Trial

(1) Form and Time of Demand

Unless the parties agree or the court orders otherwise, a pretrial demand in the District Court for a jury trial shall be in writing and filed no later than 15 days before the scheduled trial date. Otherwise, the demand shall be made by the defendant in open court on the trial date.

(2) Procedure Following Demand

Upon a demand by the defendant for jury trial that deprives the District Court of jurisdiction pursuant to law, the clerk may serve a circuit court summons on the defendant requiring an appearance in the circuit court at a specified date and time. The clerk shall promptly transmit the case file to the clerk of the circuit court, who shall then file the charging document and, if the defendant was not served a circuit court summons by the clerk of the District Court, notify the defendant to appear before the circuit court. The circuit court shall proceed in accordance with Rule 4-213 (c) as if the appearance were by reason of execution of a warrant. Thereafter, except for the requirements of Code, Article 27, §591 and Rule 4-271 (a), or unless the circuit court orders otherwise, pretrial procedures shall be governed by the rules in this Title applicable

in the District Court.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R. 751.
Section (b) is new.

Rule 4-301 was accompanied by the following Reporter's Note.

At the request of the Court of Appeals, the Criminal Subcommittee considered the rules issues arising out of Seann P. King v. Clerk of the District Court of Maryland, et al., No. 79, September Term, 1998, a case that has been dismissed as moot by the Court.

In 1989, in order to allow a same day/next day jury trial procedure to be implemented in Baltimore City and several other jurisdictions, Rule 4-301 (b) was amended as follows:

(b) Demand for Jury Trial

Upon a demand by the defendant for jury trial that deprives the District Court of jurisdiction pursuant to law, the clerk may serve a circuit court summons on the defendant requiring an appearance in the circuit court at a specified date and time. The clerk shall promptly transmit the case file to the clerk of the circuit court, who shall then file the charging document and, if the defendant was not served a circuit court summons by the clerk of the District Court, notify the defendant to appear before the circuit court. The circuit court shall proceed in accordance with Rule 4-213 (c) as if the appearance were by reason of execution of a warrant. Thereafter, except for the requirements of Code, Article 27, §591 and Rule 4-271 (a), or unless the circuit court orders otherwise, pretrial procedures shall be governed by the rules in this Title applicable in the District Court.

Additionally, to make the same day/next day procedure work, the Chief Judge of the District Court made administrative regulations that require the defendant in a same day/next day jurisdiction who wishes to demand a jury trial to do so in person on the trial date, in open court, with counsel present. Administrative Regulations XXI, XXII, XXIII, XXIV, and XXV, applicable to Baltimore City, Montgomery County, Baltimore County, Harford County, and Anne Arundel County, respectively, are identical except for the name of the jurisdiction. Each reads as follows:

A defendant in any criminal case in the District Court for [*name of jurisdiction*] who is entitled to trial by jury under the provisions of Courts Article, §4-302 of the Maryland Code and who is desirous of praying a trial by jury must enter such prayer in person in the District Court at the time and place in which the case is scheduled for trial. Said defendant must be accompanied by counsel of record when entering the prayer for jury trial so that the cause may be transferred forthwith to the Circuit Court for [*name of jurisdiction*] for trial by jury.

The County Administrative Judges of the circuit courts for Anne Arundel County, Baltimore City, and Baltimore County have advised the Subcommittee that they believe that the same date/next day jury trial procedure has been successful in their jurisdictions and strongly support the adoption of rules that will allow the system to continue. The Honorable Joseph H. H. Kaplan, Administrative Judge, Circuit Court for Baltimore City, also has requested that the rules be drafted to accommodate written jury trial prayers in advance of the District Court trial date, so that incarcerated defendants may obtain a prompt transmittal of their cases to the circuit court.

The Subcommittee recommends amendments to Rule 4-301 (b) to establish a uniform, state-

wide procedure for jury trial prayers in criminal cases in the District Court.

The proposed amendments reserve to defendants who have a constitutional right to a jury trial the right to make a jury trial demand in the District Court as late as the scheduled trial date. See Code, Courts Article, §4-302 (e)(1). Under the amended Rule, a jury trial demand on the District Court trial date must be made by the defendant in open court. The demand triggers the same subsequent events that are triggered under the current rule, which may include a same day/next day jury trial in the circuit court.

Under the proposed amendments, a defendant who wishes to make a pretrial demand in the District Court for a jury trial must do so in writing, no later than 15 days before the scheduled trial date, unless the parties agree or the Court orders otherwise. This amendment allows the defendant to expedite the prompt transmittal of the case to the circuit court for a jury trial by making a written demand early in the proceedings. The "15-day" provision in the amendment is intended to discourage written jury trial demands filed shortly before the scheduled trial date for purposes of delay and circumvention of the same day/next day jury trial procedure. The "15-day" provision also allows time for notification of witnesses and for administrative procedures pertaining to the transfer of the case and scheduling of a jury trial. It is the Subcommittee's understanding that in jurisdictions without same day/next day jury trials, very few jury trial prayers are filed within 15 days before the scheduled trial date. In all jurisdictions, under the proposed amendment, the 15-day requirement may be waived by order of court or stipulation of the parties.

Judge Johnson said that the Honorable William O. Carr, of the Circuit Court of Harford County, had sent a letter about same-day

jury trials, a copy of which letter was distributed at today's meeting. (See Appendix 2). Judge Johnson told the Committee that a problem had arisen with defendants in District Court being able to demand a jury trial. Many defendants had been getting continuance after continuance for a variety of reasons, and if the District Court judge refused to grant another continuance, the defendant would pray a jury trial. The witnesses would have come to court repeatedly only to find out that the case was continued. Once the case finally got to circuit court, the witnesses would no longer come to court, and the defendant would be able to walk away, without the case ever having been tried. There have been many attempts to correct this situation, none of which have worked well. Finally the idea was suggested that if the defendant comes in and asks for a jury trial, the case would be tried the same day in circuit court. This has solved some of the problems.

Judge Johnson explained that there are District Court administrative rules of which he was initially unaware, which forbid a defendant in the District Court in certain jurisdictions from praying a jury trial in writing. In one case, a defendant in Montgomery County tried to pray a jury trial in writing. This was refused, and the defendant sought a writ of mandamus in the circuit court. The writ was denied and the case went to the Court of Appeals. The State dismissed the underlying criminal case, making the appellate case moot. The Honorable Robert M. Bell, Chief Judge

of the Court of Appeals, sent the issue of same-day jury trials to the Rules Committee for its recommendations. The Criminal Subcommittee met on this, and the Honorable Martha F. Rasin, Chief Judge of the District Court, was present at the meeting. The proposed rule change is before the Committee today. The amendment to Rule 4-301 permits jury trial prayers within 15 days of trial, a time period suggested by the Rules Committee Chair to be consistent with other time periods in the Rules of Procedure.

Mr. Hochberg inquired as to how many jurisdictions have same-day jury trials. Judge Johnson replied that five jurisdictions have them. Judge Vaughan commented that some of the five jurisdictions are not holding the same-day jury trials. The Reporter pointed out that Judge Carr's letter indicates that Harford County does not have same-day jury trials. However, Anne Arundel County is adamant that same-day jury trials should continue. Judge Johnson opined that if an incarcerated defendant cannot pray a jury trial in writing, this is unconstitutional.

Judge Kaplan remarked that Prince George's County, which is not one of the five jurisdictions providing for same-day jury trials, allows jury trial prayers in writing, but Baltimore City, which is one of the five, requires that the defendant be taken to District Court to pray the jury trial. After the trip to District Court, the defendant goes back to the institution and then goes to the circuit court. This involves problems with transportation, security, and time.

Judge Kaplan stated that he is in favor of the changes to Rule 4-301.

Mr. Brault questioned whether lockup defendants will be told of the change allowing jury trial prayers in writing. Judge Kaplan responded that it will not remain secret for very long. Mr. Brault commented that the same problem will arise for incarcerated defendants who try to pray a jury trial less than 15 days before the scheduled trial date in District Court. Judge Kaplan said that they will be taken to the courtroom on the trial date to pray the jury trial. This protects the defendants languishing in prison. Mr. Brault asked if those who pray the jury trial by 15 days before the scheduled trial date will keep the same trial date. Judge Kaplan responded that the jury trial will be scheduled very promptly. It will either be the same date or very soon after that. Judge Kaplan noted that 60 to 70% of the cases are nol prossed or stetted.

Mr. Hochberg remarked that Judge Carr had noted that the jury trial can be prayed at the arraignment or re-arraignment. Judge Johnson commented that the Rules do not specifically provide for an arraignment, but there is an initial appearance. Mr. Hochberg asked if the jury trial would take place the day of the initial appearance, and Judge Johnson replied that it would be then or the next day in the jurisdictions that have same day/next day jury trials.

Judge Kaplan moved to approve the proposed changes to Rule 4-301. The motion was seconded, and it carried unanimously. Judge Kaplan then moved that the Rule be handled as an emergency. The

motion was seconded, and it carried unanimously.

Agenda Item 2. Reconsideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys

Mr. Brault explained that Mr. Howell, who had drafted most of the revised Attorney Discipline Rules and then drafted proposed Subcommittee Comments and rules changes based on the ABA Report, Maryland Report on the Lawyer Regulation System, was not present at today's meeting. The Attorneys Subcommittee reviewed the ABA Report and Mr. Howell's proposed Subcommittee Comments and rules changes. There are also one or two changes recommended by the Style Subcommittee after its review of the Rules Committee's approved draft.

Mr. Brault said that he would clarify the statement in the Subcommittee Comments that the ABA Discipline System Assistance Team that wrote the ABA Report had not interviewed any member of the Rules Committee before the Report was completed. What had happened was that Melvin Hirshman, Esq., Bar Counsel, had arranged for the ABA Team to meet with Mr. Brault when the Team was in town working on the Report. Mr. Brault said that he arrived ten minutes before the appointed time. This was, however, just before the Team was scheduled to go to the Court of Appeals to talk about the revision. He had not been told about the Team's appointment with the Court. The Team had little time to speak with Mr. Brault before the Court of Appeals appointment. He began to tell them about the revision of the

Attorney Discipline Rules. After not more than 15 minutes, they cut him off and left for their other appointment. One issue they did raise concerned immunity. After the meeting, Mr. Brault submitted a memorandum to the Team, explaining the immunity for complainants provided for in Maryland. The Team did not respond to the memorandum. Mr. Brault expressed the view that the members of the ABA Team were not as courteous as they should have been and they should have allowed for more time with him if they had intended to have a meaningful discussion of the Rules. It also would have been appropriate for the ABA Team to hear from the Attorneys Subcommittee and the Rules Committee.

The Reporter told the Rules Committee that on December 21, 1998, she called Mary Devlin, Regulation Counsel, ABA Center for Professional Responsibility and a member of the ABA Team that wrote the Report, to invite the ABA to attend today's meeting. Ms. Devlin declined the invitation. The Reporter sent to the ABA by priority mail on December 22, 1998 a cover letter, together with the Subcommittee Comments, the entire revised Rules package, and the comments of the Maryland State Bar Association. A copy of the Reporter's letter is included as Appendix 3. The letter asked for comments on the proposed Rules. There was no response by the January 5, 1999 deadline.

Judge Vaughan asked why the ABA Team did not attend the Rules Committee meeting. The Reporter answered that Ms. Devlin felt that

the ABA's recommendations were comprehensively set out in their Report, and therefore there was no reason for them to attend. Mr. Brault added that a few years ago, a group from the ABA did come to a Rules Committee meeting. Mr. Hirshman stated that the guests included John Barry, Esq. from Florida and Becky Stretch, Esq. from the ABA in Chicago. Mr. Brault commented that in Florida, the view was that all of the attorney discipline proceedings should be open to the public. The concept is that if the public is inundated with this type of information, the public tends to ignore it.

Mr. Brault said that the Subcommittee Comments drafted by Mr. Howell are found along with the revised Attorney Discipline Rules and the comments of the MSBA Ethics 2000 Committee in Appendix 4. The Subcommittee Comments respond to the ABA Report and suggest a few changes to the Rules. Some of the ABA comments were already addressed in the proposed Rules. Mr. Hirshman noted that the ABA Team looked at the current Attorney Discipline Rules, and they were given a copy of the proposed Rules as they appeared at that point in time. Chief Judge Bell has been concerned that the attorney discipline system is too slow. Mr. Hirshman expressed the opinion that the system will continue to be slow under the proposed Rules. It is only necessary to have one full due process hearing. The investigation should be reviewed by a three-person body, including a public member, and then the case should go to public charges. Maryland is falling behind the other states as to which parts of the

attorney discipline system are public. There is no reason that the Inquiry Panel proceedings cannot be open. In the District of Columbia, the Inquiry Panel proceedings are public, and no one attends them. The Chair commented that the Court of Appeals can decide as to whether the proposed Rules put Maryland behind or ahead.

Mr. Brault expressed the view that the argument about no one attending is disingenuous. The Subcommittee has no information that making attorney discipline proceedings public improves the nature of the proceedings. It may be only a cosmetic effect to provide that the proceedings are open to the public. The Chair expressed his agreement with Mr. Brault. Mr. Brault remarked that the ABA recommended that statewide there be a 15-member Inquiry Panel which would be assigned to all cases. The idea that an attorney would be treated so casually with respect to the filing of public charges struck fear in the Subcommittee.

The Chair pointed out that the new Rules have an express mechanism to stop an attorney's dangerous activities by obtaining an injunction. This is a quick remedy with judicial oversight. It is a substantial improvement. Mr. Brault noted that the ABA was unimpressed with the effort to eliminate the function of the Review Board to try to speed up the process. Since the Review Board process is very slow, it is hoped that the changes embodied in the revised Rules will help speed up the attorney discipline process.

The Chair drew the Committee's attention to the proposed

reorganization of the revised Attorney Discipline Rules as designed by Mr. Sykes. (See Appendix 5). He said that the proposed new organization is similar to Mr. Howell's, but it is an improvement. Mr. Hirshman also expressed the view that the reorganization is appropriate. The Reporter observed that the Rules will have to be renumbered whether or not the proposed reorganization is approved, because some of the Rules were numbered after the initial package was drafted, such as Rule 16-712A. She said that although some sections of various rules will have to be transferred to other rules and the Rules Committee staff will have to be very careful that everything appears in the correct order and that internal references and Reporter's Notes are correct, the reorganization suggested by Mr. Sykes is logical and is worth the additional time and effort that it will take to make the required changes. The Chair asked Cathy Cox, the Rules Committee Secretary, to highlight all of the references to rules within the body of the Attorney Discipline Rules.

Judge Vaughan moved to adopt Mr. Sykes' proposed reorganization, the motion was seconded, and it passed unanimously. The Chair stated that the Rules will be reorganized consistent with the reorganization drafted by Mr. Sykes.

The Chair said that Mr. Howell had called the Rules Committee office earlier today regarding the Subcommittee Comments. The Assistant Reporter explained that when Mr. Howell wrote the Subcommittee Comments, he was using a prior draft of the Attorney

Discipline Rules, and the page numbers of the Rules referred to in the Subcommittee Comments are not correct. He had given the Assistant Reporter a correct list of the page numbers. The Reporter drew the Committee's attention to page 132 of the Rules package. She noted that the Style Subcommittee drafted two alternative proposals for subsection (f)(1) of Rule 16-736, Proceedings in Court of Appeals, and she asked the Committee to consider whether one or the other alternative should be chosen, or whether both alternatives should be presented to the Court of Appeals.

The Chair suggested that the Committee consider each page of the Rules package which has a change proposed by the Attorneys Subcommittee or the Style Subcommittee. The first page with a proposed change is page 16. Mr. Brault explained that the proposed change to Rule 16-702, Attorney Grievance Commission, resulted from a recommendation of the ABA that members of the Attorney Grievance Commission should be allowed to serve more than one four-year term. The ABA also recommended more public membership. The Subcommittee has changed the number of Commission members from ten to 12, the number of public members from two to four, and the number of terms the member may serve from one to two. The increase in the number of members requires a change in section (f) increasing the number of members needed for a quorum from six to seven.

Turning to Rule 16-708, Service on Attorney, Mr. Brault pointed out that in section (c), there is a cosmetic change, clarifying that

the service to which the section refers is service upon an attorney. In Rule 16-711, Preliminary Investigation, language has been added to section (f) providing that the fact that a warning has been issued may be disclosed to the complainant. This evolved from an ABA comment. Mr. Hirshman remarked that this is current procedure. Mr. Hochberg asked if this should be required rather than discretionary. Mr. Hirshman answered that complainants are often not satisfied. Sometimes, the attorney's behavior does not warrant discipline, but it is serious enough for a warning. Also, at least several times a year a complaint is dismissed, but the attorney is warned for failure to respond to Bar Counsel's request for information, as required by Rule 8.1 of the Maryland Lawyers' Rules of Professional Conduct. It is preferable to tell the complainant of the fact of the warning, rather than the substance of the warning. The language should be that the fact that a warning was issued "may" be disclosed and not "shall" be disclosed.

Judge Vaughan asked if the complainant is told not to publicize the fact of the warning. Mr. Hirshman replied that the attorney discipline rules are not binding on the public. Bar Counsel staff tells complainants that the Office of Bar Counsel is bound by confidentiality. There is one jurisdiction which apprises complainants that if they publicize the information about the warning, they will be held in contempt.

The Reporter noted that Mr. Sykes had suggested that the

definition of "warning" should be taken out of each of the places it occurs in the Rules and placed in Rule 16-701, Definitions. The Committee agreed with this suggestion by consensus.

Mr. Brault told the Committee that on page 48, language has been added to section (c) of Rule 16-712, Investigative Subpoena, which indicates that an attorney can be served with a subpoena by ordinary mail. In section (c) of Rule 16-713, Disciplinary Proceedings, language has been added to clarify that a complainant is notified of the fact that a statement of charges has been filed. In section (d) of Rule 16-713 on page 54 of the Rules, language has been added to clarify that the attorney shall file with the Commission a copy of the written response to the statement of charges. The last sentence of section (e) has been deleted in answer to the request of the MSBA Special Committee on Ethics 2000, which felt that allowing amendments to the statement of charges to conform to proof could be unfair to the respondent attorney.

Turning to Rule 16-714, Disposition without Hearing, Mr. Brault pointed out that language was added to subsection (a)(2) to clarify that notice of dismissal shall be filed with the Commission. The same change was made to subsection (a)(3) as was made to Rule 16-711 (f), providing that the fact that a warning was issued may be disclosed to the complainant. On page 64 in Rule 16-716, Probation Agreement, a grammatical change was made to section (d). In section (e), language was added to provide for the probation agreement to

include prescribing the duties of the monitor.

On page 70, language has been added to section (e) of Rule 16-717, Prehearing Procedures, to clarify that the Panel shall dismiss the charges in accordance with section (b) of Rule 16-719, Panel Decision. Section (g) of Rule 16-722, Reciprocal Discipline or Inactive Status, has been amended to include a final adjudication of incapacity in another jurisdiction as conclusive evidence of incapacity in Maryland. This was inadvertently left out. A cross reference to Rule 16-741, Conservator of Client Matters, has been added at the end of subsection (a)(1) of Rule 16-723, Injunction; Expedited Disciplinary Action. The Assistant Reporter noted that this was a suggestion of the MSBA Ethics 2000 Committee. Mr. Brault commented that two procedures are included in the Rules to allow Bar Counsel to seek rapid court intervention to protect clients from harmful attorneys. One is an injunction, and the other is a conservatorship. Mr. Hirshman said that his office has already set up many conservatorships. Mr. Brault remarked that the conservator under the revised Rules would not be Bar Counsel, but would be an attorney approved by Bar Counsel.

Section (a) of Rule 16-731, Petition for Disciplinary Action, has been amended to include the filing of a petition to place an attorney on inactive status, because this provision was inadvertently omitted. Rule 16-735, Judicial Hearing, has two amendments. The first, in section (a), provides for a victim impact statement. In

section (c), language has been added to clarify that the hearing judge should not make recommendations as to sanctions. Although the ABA suggested that the hearing judge should be able to make recommendations, the Subcommittee rejected the idea because the Court of Appeals has made it clear that it does not want recommendations as to sanctions. Mr. Hochberg inquired if this is prohibited in the current Rules, and Mr. Hirshman answered that the Rules are silent. The Chair reiterated that the Court of Appeals has stated that it does not want the trial judge to make recommendations as to sanctions.

Mr. Brault drew the Committee's attention to page 132. In subsection (f)(1) of Rule 16-736, Proceedings in the Court of Appeals, the Style Subcommittee has suggested two alternatives for explaining how the Court of Appeals reviews the factual findings of the hearing judge. The Chair noted that the first alternative is an independent review and the second alternative is a review for sufficiency of the evidence. The Reporter said that the previous language of subsection (f)(1) is in the Reporter's note to Rule 16-736 found on page 134 of the Rules package. The Style Subcommittee had wrestled with this issue. Mr. Brault added that the Attorneys Subcommittee had looked at many cases on this subject, and each case held something different. The Reporter noted that Mr. Howell had gone through all of the pertinent cases in drafting the original provision. The Style Subcommittee had tried to improve section (f).

The issue is analogous to a judge's review of the two levels of fact-finding by a master in a domestic relations case. Mr. Brault pointed out that in the case of Wenger v. Wenger, 42 Md. App. 596 (1979), Judge Moylan explained the two levels of facts. He said that first-level facts include the amount a party earns annually as a salary, the amount of rent paid, and the amount of money in a designated bank account. On the other hand, second-level facts would be conclusory, such as a wife's ultimate financial need or a husband's ultimate ability to pay.

The Committee agreed by consensus to present both alternatives of subsection (f)(1) to the Court of Appeals, so the Court can choose whichever alternative it wishes.

Turning to page 139, Mr. Brault noted that subsection (c)(5) of Rule 16-737, Order Imposing Discipline or Inactive Status, has a minor change providing that the respondent is to notify all attorneys with whom the respondent is associated in the practice of law that the respondent has been disbarred or suspended. The Assistant Reporter observed that the ABA had suggested this change. The Chair noted that this would be helpful in huge law firms. Mr. Hirshman commented that there had been a case in which someone in the Office of the Attorney General did not know about the disbarment of another Assistant Attorney General.

Mr. Brault told the Committee that new sections (d) and (e) have been added to Rule 16-738, Reinstatement. The Assistant

Reporter added that the language came directly from the ABA report. Mr. Hirshman commented that providing this information to Bar Counsel at the time the petition for reinstatement is filed will cut down on the time needed for investigation. He remarked that the ABA had recommended that reinstatement proceedings could be initiated by a disbarred attorney after a period of eight years. Mr. Brault said that the Attorneys Subcommittee did not want a specific time period to be set. The Chair agreed, saying that a set time period turns a disbarment into a suspension.

The Reporter noted a typographical error in the first line on page 164 -- the word "institute" should be "institution." Turning to subsection (h)(5) of Rule 16-738, which provides that a criterion for reinstatement is that the petitioner has not engaged in any other professional misconduct since the imposition of discipline, Mr. Brault pointed out that this is a new provision resulting from an ABA recommendation. Language has been added to section (o) of Rule 16-738, which includes non-compliance by petitioner with any condition of reinstatement pursuant to Rule 16-737 (h) as one of the categories allowing Bar Counsel to file a motion to vacate reinstatement.

The Chair thanked Mr. Brault for his presentation and the Subcommittee and Mr. Howell for doing such a magnificent job on the Attorney Discipline Rules.

Mr. Hirshman pointed out to the Committee that subsection (e)(9) of Rule 16-709, Confidentiality and Disclosure of Information,

is not logical. It provides that in the reports published by the Commission and Bar Counsel, the identity of attorneys, complainants, and witnesses may not be revealed, yet many attorney discipline proceedings are public. The Chair commented that it is not necessary to put in the report the name of attorneys who have a case pending. Mr. Brault noted that not all disciplinary proceedings are public after a petition for disciplinary action is filed. Mr. Hirshman observed that the term "disciplinary proceedings" is not defined. The Chair said that it is appropriate to place limitations on Bar Counsel. The summaries should not identify the attorneys. The danger is that someone reading the summary may see the name of an attorney who was disciplined for a very minor matter.

Judge Kaplan remarked that he receives a list of all the attorneys who are disciplined by the Court of Appeals, and the action that the Court took. Mr. Hirshman commented that everything in the disciplinary proceeding is confidential until it reaches the Court of Appeals. Mr. Brault agreed that subsection (e)(9) should be changed. He suggested that language could be added which would refer to those cases subject to confidentiality. Judge Vaughan suggested that after the word "provided" and before the words "the identity," the following language should be added: "that in those cases that have not become public." Mr. Brault suggested that subsection (e)(9) read as follows: "The Commission and Bar Counsel may publish reports and summaries of investigations, charges, and disciplinary proceedings in

order to improve the administration of justice provided that in proceedings that are not public the identity of attorneys, complainants, and witnesses is not revealed." The Committee agreed by consensus to this suggestion.

Judge Vaughan moved to approve the Rules, and the motion was seconded. The Chair pointed out that the motion should also provide that the acceptance is subject to the reorganization and includes the changes made today. Judge Vaughan accepted the amendment to his motion, as did Judge Kaplan who had seconded it, and the motion carried unanimously.

The Reporter next told the Committee about the results of the Court Conference on the 141st Report which the Court considered on January 7, 1999. Mr. Brault said that he had a report on the status of Rule 4.2 of the Maryland Lawyers' Rules of Professional Conduct. There is a major controversy nationally concerning ex parte discussions with employees and former employees of adverse parties. In the case Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996), one of the lawyers interviewed a former employee of the human resources department of Bowie State University, which had been accused of employment discrimination. The Bowie State attorneys filed a motion for sanctions. The hearing judge, the Honorable Peter Messitte, was very upset by the lawyer's actions and granted the motion, disqualifying the law firm which had interviewed the former employee. The judge adopted as the standard the draft of The Restatement of Law

Affecting Lawyers; however, former employees are not included in this. Other federal opinions have been critical of Camden. The Attorneys Subcommittee had written a draft of amendments to Rule 4.2, but the Rules Committee sent it back to the Subcommittee. Mr. Brault contacted several sources, including M. Peter Moser, Esq., who chairs the ABA Ethics Committee; representatives of the MSBA Ethics 2000 Committee; the Restatement of Law Affecting Lawyers; the Department of Justice; and the Conference of Chief Justices. The Department of Justice is trying to get the authority for United States Attorneys to be able to interview anyone connected with organizations, pre- or post-indictment. The Attorneys Subcommittee is trying to collect information about Rule 4.2. Mr. Brault wrote to the Chief Judge of the District of Columbia and the head of their Rules Committee, although he has not heard from either. Chief Judge Bell, who is a member of the Conference of Chief Justices, asked the Subcommittee to withhold action until the Conference makes a recommendation as to Rule 4.2. Mr. Brault suggested to Judge Bell that the Rules Committee would like to write a model rule in Maryland on this issue. Judge Bell thinks that this is possible.

Judge Kaplan commented that this is a constant problem. He had a case the previous week in which the plaintiff interviewed the former employee of the defendant. The defendant moved to disqualify plaintiff's counsel, but fortunately the case settled. The Chair added that it is a nationwide problem. Mr. Brault said that Judge

Messitte recognized the depth of the problem. He had hoped the case would be appealed, but it eventually settled and the issue became moot. Other cases from the Northern Division have reached different conclusions. It will be important to agree on a rule which will solve the problems.

The Chair thanked the members for their attendance in the inclement weather. The meeting was adjourned.