COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100B of the People's Resource Center, 100 Community Place, Crownsville, Maryland on November 19, 1999.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H.H. Kaplan
Richard M. Karceski, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Melvin Hirshman, Esq., Bar Counsel
Martin B. Lessans, Esq.
David D. Downes, Esq., Chair, Attorney Grievance Committee
Alvin I. Frederick, Esq.
Buz Winchester, Director of Legislative Relations, M.S.B.A.
James Thompson, Esq., President, Maryland State Bar Association, Inc.
Robert Haffron, Esq.
Master Bernard A. Raum
Julie Doyle Bernhardt, Esq., Office of the Public Defender
Barry J. Dalnekoff, Esq., M.S.B.A. Family Law Counsel
Erin D. Gable, Esq.
Richard B. Jacobs, Esq.
Gina Higginbotham, Department of Human Resources
Patsy Chappell, Department of Human Resources
Teresa Kaiser, Department of Human Resources
Wendy A. Weeks, Esq., Anne Arundel County Domestic Relations

Department
Marty McGuire, Esq., Baltimore City State’s Attorney Office
Pam Ortiz, Esq., Administrative Office of the Courts
Hon. James C. Cawood, Jr.

The Chair convened the meeting. He stated that the minutes of the October 15, 1999 Rules Committee meeting were not yet completed. He asked if there were any additions or corrections to the minutes of the September 10, 1999 Rules Committee meeting. There being none, Mr. Bowen moved that the minutes be approved as presented. The motion was seconded, and it passed unanimously.

The Chair said that the Court of Appeals Conference on the 145th Report, which contained the Rules on the Judicial Disabilities Commission, went well. Mr. Howell and Judge McAuliffe were present at the conference. The Court adopted the Judicial Disabilities Rules with a few minor changes. The Committee's proposals were accepted almost unanimously. The definition of "sanctionable conduct," the applicability of Title 2 discovery rules, and the applicability of the Title 5 Rules of Evidence were all adopted. The right to reject a warning, which was suggested by Judge McAuliffe, was acceptable to the Court. One change in the Rules was the addition of a right to except to a reprimand. Rule 1.10, Imputed Disqualification: General Rule, which provides standards for attorneys changing law firms, was adopted. Mr. Howell questioned as to what the effective date is for the new Rules. The Reporter replied that no date has been set yet. Mr. Howell commented that most of the Rules in the 145th Report

were adopted unanimously, but several of the Rules were adopted on a 4 to 3 vote. The Chair added that some of the issues adopted by this vote were the applicability of Title 2 discovery rules and Title 5 evidence rules.

Judge Kaplan inquired as to what happens if the judge takes exceptions to a reprimand, and the court denies the exceptions. Can the Court impose a more severe penalty? The Chair responded that he thought that the Court could impose a more severe penalty. The Vice Chair added that the Court could do this even without exceptions being filed. The Chair noted that the theory is that sanctions could be increased only after exceptions to a reprimand have been filed. In the case of In re: Formal Inquiry Concerning Diener and Broccolino, 268 Md. 659 (1973), cert. denied, 415 U.S. 989 (1974), the Judicial Disabilities Commission recommended a sanction that was less severe than the one the Court imposed. The Reporter said that the Court remanded Rule 16-810.1, Immunity, and the Preamble to the Maryland Code of Judicial Conduct to the Rules Committee.

Agenda Item 1. Consideration of a revision to Title 16, Chapter 700 (Disciplinary and Inactive Status of Attorneys) to provide for a “one-tier” system of attorney disciplinary proceedings. (See Appendix 1).

The Chair stated that the Attorney Disciplinary Rules had been remanded to the Committee by the Court of Appeals. Mr. Howell, Mr. Brault, and the Reporter had worked on an alternative version of the Rules. The Court of Appeals had expressed its desire to do away with a two-tiered system of discipline. A statisticial analysis of attorney discipline cases was distributed at today's meeting, and it shows where some of the delays in the system occur. James Thompson, Esq., President of the Maryland State Bar Association (MSBA) as well as other members of the Association assisted with the development of the new package.

Mr. Brault explained that the background of the new Rules is that the Court of Appeals, without prejudice, rejected the package of Rules presented to it recently. Some of the people involved with the Rules were surprised; some saw it coming. The MSBA was surprised. They had been concerned that their appointive power to the Review Board had been eliminated. The American Bar Association (ABA) had criticized attorney discipline rules where there is too much involvement of the state bar association. The MSBA had been prepared to debate this issue when the Attorney Disciplinary Rules were presented to the Court of Appeals in the 144th Report. At the Court Conference, several members of the Court of Appeals expressed a concern that attorneys are the only professionals who have a

two-tiered disciplinary system. By a vote of 5 to 2, the Court decided to defer consideration of the Rules and remanded them for redesign of the structure. The Honorable Robert M. Bell, Chief Judge of the Court of Appeals, wrote a letter to the Chair in which Chief Judge Bell requested that the revised package of rules be completed before the end of the year. This is the last meeting before the end of the year, and the only time to accomplish the task. The Attorneys Subcommittee met last week to work on the Rules. Mr. Brault said that he and the Reporter met with Mr. Thompson, Albert L. (Buz) Winchester, Director of Legislative Relations for the MSBA, and other MSBA representatives to discuss the structure of the revised Rules. The idea was to change the functions of the various boards that exist under the current structure. A one-tiered system has been used in other states, such as Vermont and Rhode Island. There is some form of a grand jury-like screening. The screening body reviews the case and can then send it on to a hearing.

Mr. Brault said that the revision changes the function of the Review Board by putting it up front to become the Screening Board. The current Rules already provide for the number of Review Board members, so this does not have to be changed. The function of the Screening Board is to determine whether or not to charge someone based on the documentation

before the Board. A debate had ensued at the Subcommittee meeting as to whether the respondent attorney should have the right to argue before the Screening Board. Consultants from the Attorney Grievance Commission explained that the Screening Board would have to meet once a month, looking at approximately 20 cases each time. It would be impractical to allow the respondent attorneys to be present to argue each of their cases. The decision was that there would be no oral presentation unless the Screening Board requests it. In lieu of argument, Bar Counsel and the respondent attorney may submit briefs of law and fact and written arguments. Mr. Brault noted that another issue for determination was the type of hearing and who is to conduct it. The represent-atives from the MSBA said that most attorneys prefer to have the case heard by an Inquiry Panel, rather than a judge. Also, crowded circuit court dockets would provide a delay factor in the system. To speed up the system, the Subcommittee recommends that the one hearing be conducted by a Hearing Panel, consisting of members of the Inquiry Committee. The Rules would change the functions of the Hearing Panel, the burden of proof, and the rules of evidence. The Hearing Panel would make findings of fact, and the Title 5 Rules of Evidence would apply. The burden of proof would be clear and convincing evidence. If the Hearing Panel determines that there has been

misconduct warranting discipline, the case would go to the Court of Appeals on a petition by Bar Counsel requesting discipline. The Court would decide the appropriate discipline, considering the recommendation of the Hearing Panel, which would be part of the file. The Subcommittee did not want to micro-manage the system in the Rules. Mr. Brault complimented Mr. Howell and the Reporter for their hard work on the revised Rules.

Mr. Brault pointed out that the concern of the MSBA, which would like to be part of the appointment process, is covered. Judge McAuliffe had suggested that nominations from the MSBA should be required, so that a certain number of members of the Screening Board comes from the MSBA. Members of the Montgomery County Bar Association and other organizations sent in letters expressing their concern with the one-tiered system. The Subcom-mittee is not recommending the one-tiered system, but is presenting it as an alternative because it was requested by the Court of Appeals.

The Chair asked for questions or comments from the Rules Committee. Mr. Johnson asked if the Committee position was to recommend the earlier package of Rules. Mr. Brault responded that that is the Subcommittee position, and the Rules Committee will vote on this position at today's meeting. The Chair commented that Melvin Hirshman, Esq., Bar Counsel, had

presented a chart to the Court of Appeals which indicated that at the fact-finding level, many states have a jury comprised of fellow attorneys. Mr. Hirshman said that he was not sure of this statistic without an up-to-date survey. Mr. Brault noted that many states have a fact-finding board.

Judge Vaughan said that he was uncomfortable sending such a large package of rules to the Court of Appeals without many attorneys, such as the Solo Practice section of the MSBA, having seen the package. He expressed the view that the Committee should ask the Court of Appeals for more time. Mr. Brault responded that most of the Rules in the package were already in the first package but there were some modifications, such as changing the functions of the Review Board and the Hearing Panel. The Reporter added that there were additions and deletions from the 144th Report. Judge Vaughan observed that never in the history of the Rules Committee has there been a reaction such as this one. He has received a number of calls asking what is going on with the Attorney Disciplinary Rules. The Chair commented that the Committee can decide the position it will take as to which package of Rules it recommends. The Reporter pointed out that the Rules will be published with a 30-day comment period, including publication on the Internet and including publication of the ABA recommendations.

The Chair thanked Mr. Thompson, Alvin Frederick, Esq., and the other representatives of the MSBA for their work on the Attorney Disciplinary Rules. The Vice Chair remarked that by the end of the meeting, some redrafting of the Rules may be needed. The Committee can tell the Court of Appeals that the draft of the Rules given to the Court may not be in final form. The Vice Chair agreed that the Rules are of great significance to the bar, and it is clear that not all members of the bar have been informed of the revision, because not many attorneys are in attendance at today's meeting. Mr. Titus cautioned that the Court would like the Rules at the time it has requested, or it may go forward with its own drafting.

Mr. Sykes commented that before the discussion becomes bogged down in language and details, it would be important to get the sense of the Rules Committee as to whether everyone agrees with the change in function of the Review Board and with attorneys hearing the cases, instead of judges. Mr. Johnson expressed his agreement with Mr. Sykes. He also asked why the Review Board is being changed. Mr. Brault responded that when the various alternatives were discussed, no one was interested in having an administrative law judge or a special judge hear the cases. The only alternatives were a panel of attorneys or a circuit court judge. The problem is that if

the case goes directly to the Hearing Panel, it will become public. The Screening Board provides a confidential filter so that there is no unnecessary activity at the hearing Panel level. The Screening Board also has the power to divert a respondent into alternative counseling plans. The Honorable Lawrence F. Rodowsky, Judge of the Court of Appeals, wrote a recent opinion in a reinstatement case, in which he discussed the history of the BX Rules, which had been designed to deal with diversionary programs. The Screening Board will offer alternatives. It will be the body which determines whether diversion, dismissal, or the filing of charges is appropriate.

Mr. Titus expressed his agreement with Mr. Sykes that the policy issues should be determined first. He moved that a panel composed of attorneys and non-attorneys should do the fact-finding in the attorney discipline process. The motion was seconded, and it passed with one opposed.

The Chair stated that the next issue to be determined was whether the Review Board should be moved to the front of the process. Mr. Johnson remarked that he was persuaded by the confidentiality issue and the opportunity for diversion that the Review Board should be moved to the front of the process to do the initial screening. He moved that the Review Board become the screening body, the motion was seconded, and it carried unanimously.

Mr. Brault commented that he and Mr. Sykes had been on the BX Rules Subcommittee. Even though the BX Rules were never adopted, this is similar to the BX Rules because of the diversionary aspect of it. Judge McAuliffe pointed out that another policy issue to be determined is the method of selection of those who form the Screening Board. The matter of the involvement of the MSBA in the process had been discussed earlier. Mr. Sykes said that this can be worked out at the time Rule 16-712A is considered. Mr. Titus suggested that the Committee consider only the Rules which have been changed from the version that appeared in the 144th Report.

Mr. Howell said that he echoed the sentiments of those who are not happy with a one-tiered system. He expressed the view that the Committee should advise the Court of Appeals that the revised package of Rules is not the Committee's recommendation, but it is the best the Committee could produce working with a one-tiered system. Both the Baltimore County and Prince George's County Bar Associations have sent in letters in support of the two-tiered system, and members of the MSBA have expressed similar views.

Mr. Howell presented Rule 16-711, Attorney Grievance Commission, for the Committee's consideration. (See Appendix 1). Mr. Howell pointed out that the proposed change in section (d) allows the Chair of the Attorney Grievance Commission to

specifically delegate his or her authority to the Vice-Chair. In subsection (g)(6), the name "Review Board" has been changed to "Screening Board." There being no comment, the proposed changes to Rule 16-711 were approved as presented.

Mr. Howell presented Rule 16-712, Bar Counsel, for the Committee's consideration. (See Appendix 1). Mr. Howell noted that in section (a) language has been added to notify the MSBA of the appointment of Bar Counsel. This recognizes the historic primacy of the MSBA in disciplinary matters. There being no comment, the proposed changes to Rule 16-712 were approved as presented.

Mr. Howell presented Rule 16-712A, Screening Board, for the Committee's consideration. (See Appendix 1). Mr. Howell explained that the decision to move the Review Board to the front of the attorney discipline process as a screening body sparked the most discussion. The Review Board had been reduced in size by the Rules Committee in earlier discussions, because its functions had been reduced. This draft reinstates the now-existing 18-member board with a circuit by circuit listing of the number of members. The Reporter noted that the numbers of the Review Board had recently been reapportioned based on the number of attorneys in each circuit. The Vice Chair pointed out that the alternate draft of Rule 16-712A provides for a nine-member board. She asked if the

Subcommittee's opinion is that the number should be 18. Mr. Howell replied that the Subcommittee's suggested number is 18, but he dissented because 18 is an unwieldy number. As the Committee looks at the Rules, Mr. Howell said that it will be evident why 18 is too large. The Rules require Bar Counsel to turn over to the Screening Board the proposed statement of charges and the investigatory file. The nature of some investigations produces a voluminous file. All 18 members of the Screening Board would need access to the file, which would build delay into the system because of the time it would take to pass the file around. The Court of Appeals is concerned about delays. The costs of duplication of the file would be very high. Mr. Howell said that his feeling is that a nine-member board, which the Rules Committee had previously approved, would be more workable. It allows for a representative from each circuit. This is a policy issue for the Rules Committee to decide.

The Chair pointed out that under the 18-member system, a quorum would be ten members, with eight necessary to make a decision. Mr. Johnson asked if the operating procedure of the Screening Board would be similar to the Review Board procedure. Mr. Howell commented that the current Review Board has a reporting member who reports to the entire Board. Would the Screening Board operate the same way? The Chair

said that it would be better to wait to answer this question to see how the Rules play out. Mr. Howell remarked that the suggestion to have panels would defeat the idea of a uniform statewide body making the decision. The Reporter observed that the number of cases is about 140 to 160 per year. Mr. Hirshman noted that the Review Board gets the transcript of the hearing, and not too much paperwork. Mr. Brault cautioned that Mr. Johnson had stated that it is better not to micro-manage the Screening Board. If there are nine members of the Screening Board, the quorum is five, with four to decide. If there are 18 members, a quorum is ten, with eight to decide. This is similar to the issue of 12-member or six-member juries.

Turning to section (b), Mr. Howell pointed out that the MSBA is named as an organization to be notified similar to the addition in Rule 16-712 (a). There was some debate concerning the second sentence. The idea is that the MSBA would submit a list with at least two nominees for each vacancy. The Commission may appoint any person who meets the necessary requirements. Of the 15 attorney-member positions, at least six would be filled from lists submitted by the MSBA. The thought is that the MSBA has undertaken measures to assure that people with the appropriate background and training are suggested to fill the positions, and MSBA contributions should

be recognized. Not all the positions come from the MSBA list, which is the compromise. Mr. Howell stated that he does not fully support the compromise. It was difficult to find a consensus on this issue. The Vice Chair expressed the opinion that the MSBA should check the candidates to make sure that they likely will do a good job. If the bar has its own bar association members hearing evidence and deciding discipline cases, the public perception may be that the system is rigged, even though this is not true. She said that she thought that the Commission would give serious consideration to candidates from the MSBA. Mandating six candidates from the MSBA is not a good idea. The Commission should have the final say.

Mr. Brault commented that other professions have hearing panels composed of members of the profession. The Board of Quality Assurance for Physicians has panels composed of all physicians appointed by the Governor. The Vice Chair remarked that the Governor is not mandated as to whom to choose. Mr. Brault said that the list the Governor has does not have to be from a given association. Other professions are similar to this.

The Chair stated that the question is whether the Commission has to put some people on the Screening Board from the MSBA or whether the Commission can make its own decision. Mr. Titus commented that the MSBA is not out to protect bad

attorneys. Its goal is to assure that the list contains a broad spectrum of eligible attorneys. This is not putting the bar in charge of sweeping bad attorneys under the rug. The Vice Chair said that she agreed with Mr. Titus, but she expressed the concern that the public will not be aware of this. Mr. Titus suggested that both alternatives of Rule 16-712A could be presented to the Court of Appeals. Mr. Sykes commented that the Attorney Grievance Commission is composed of 12 members, eight of whom are attorneys. His preference would be that the names for the slots on the Screening Board come from the broad MSBA roster rather than from the Commission which may be too busy to handle this. Mr. Thompson said that the MSBA has criteria set out as to the rating and diversity of the people they would recommend to be on the Screening Board. Historically, the MSBA has appointed the Review Board, which worked well. Eliminating the contribution of the bar association would be a great disservice.

The Chair commented that the Subcommittee's two versions of Rule 16-712A can be discussed later after the decision is made as to the number of people to be on the Screening Board. The Vice Chair stated that the minutes of today's meeting will reflect her concerns about the public's perspective.

Mr. Howell drew the Committee's attention to section (g).

He pointed out that this is the section providing for a ten-member quorum and an eight-member decision. The way the provision is worded could mean that with all 18 members present, if two leave, eight members could take action. It should read that at least a majority of members must be present. Ms. Ogletree added that it would be a majority of 18. The Vice Chair questioned the result of ten members attending, and the decision is a five to five split. Mr. Brault responded that it would be a hung jury and not a decision to dismiss. The Chair said that if 18 members are present, and ten stay, there is compliance with the quorum. The Vice Chair remarked that if only ten show up, the decision could be five to five. The Chair responded that a grand jury needs 12 to indict whether 13 or 23 people are there. David Downes, Esq., Chairman of the Attorney Grievance Commission, observed that there are some close votes in the Review Board.

Turning to section (h), Mr. Howell noted that the current members of the Review Board would become the members of the Screening Board. Mr. Brault added that this would provide a standing Screening Board right away. The Vice Chair suggested that this provision might be better in the Court of Appeals order, rather than in the Rules. Mr. Brault suggested that this be flagged.

Mr. Howell presented Rule 16-713, Inquiry Committee, for the Committee's consideration. (See Appendix 1). Mr. Howell explained that the Inquiry Committee is an umbrella committee composed of members statewide. It breaks down into committees from each appellate judicial circuit. There is no definite number of members, except as determined by the Chair. The number of members from each circuit may be expanded and contracted to fill the need. There are three changes to the Rule. Section (b) has been amended to clarify that the members of the Inquiry Committee serve on hearing panels. Section (c) provides for notice to the MSBA, parallel to the changes in Rules 16-712 and 16-712A.. Section (f) provides for a delegation of authority by the Chair to the Circuit Vice-Chair, similar to the change in Rule 16-711. The group of persons conducting the hearings are being renamed as "Hearing Panels." Mr. Howell proposed that the name of the Inquiry Committee be changed to "Hearing Board." The Committee agreed by consensus to this change. Mr. Brault remarked that he ABA and other states use this term. Rule 16-713 was approved as presented.

Mr. Howell presented Rule 16-714, Hearing Panel, for the Committee's consideration. (See Appendix 1). Mr. Howell noted that single-member panels are not governed by the quorum requirement. He said that the word "respondent" was added in

before the word “attorney” to make it clear that the attorney to which the provision applies is the one facing charges. The Vice Chair remarked that she had noticed that throughout the package of rules, at times the word “respondent” has been added, and at times it has not. Mr. Howell responded that it is not necessary to repeat the word “respondent” modifying the word “attorney” throughout the Rules. There being no other comment, the Rule was approved as presented.

Mr. Howell presented Rule 16-723, Confidentiality and Disclosure of Information, for the Committee’s consideration. (See Appendix 1). Mr. Howell explained that adjustments have been made to the Rule to accommodate the change to a single hearing. Under the existing Rules, once charges are filed, the case is no longer confidential. The judicial hearing and the Court of Appeals hearing are public. The revised Rule provides that when the Screening Board has decided there is probable cause to charge the attorney, the case becomes public. Section (a) has a provision for an alternatives to discipline program, which is not open to inspection. Mr. Hirshman questioned whether disciplinary proceedings are confidential, since this is stated in section (a.) Mr. Howell answered that this is misleading, and he suggested that the language in section (a) which reads, “disciplinary proceedings, or charges against an attorney” be deleted. The

Vice Chair asked why records are confidential if charges and the hearing are public. The Committee agreed by consensus to Mr. Howell's suggestion to remove the language in the third line of section (a).

Judge McAuliffe commented that once the confidential records get introduced into the public hearing, they take on a different character. The Reporter observed that the investigation is confidential, and many cases fall out before they become public. Mr. Sykes expressed the view that the exception should stay in. The Chair suggested that the beginning phrase of section (a) which reads "[e]xcept as otherwise expressly provided by this Rule" should stay in. Mr. Sykes added that the statement that records of the investigation are not public should stay in. The Vice Chair suggested that the following sentence should be added to section (a): "Unless introduced into evidence at a hearing panel, the records are confidential and not open to inspection." The reference to the alternatives to discipline program being confidential would remain in the Rule. Mr. Sykes suggested that the language should not be drafted today. The Committee agrees that the records and investigation are confidential and not open, except to the extent they are offered into evidence.

The Reporter inquired whether the information about the

alternatives to discipline program can be admitted later, if the attorney does not do well in the program. Mr. Howell replied that this is not admissible. The terms of a probation agreement are confidential, even though the fact that someone entered into the agreement is not confidential. The Vice Chair suggested that the language in the last sentence of section (a) which reads, “and the Court” be deleted as unnecessary. The Committee agreed by consensus with this suggestion.

Mr. Johnson commented that a situation could arise where the attorney representing the respondent attorney finds out that the complainant complained about five other attorneys, and none of the cases went to charges. The question is if the information about this is available, even though the record is confidential. Mr. Brault answered that this is no different than the present system. If an attorney has been the subject of 15 complaints, the next time there is a complaint, the other 15 are discoverable in the deposition phase. One is able to get the information from the complainant. Chapter 400 discovery is available.

Mr. Howell inquired whether section (b) is ambiguous. Because disciplinary proceedings are open to the public on the filing of a statement of charges, it is necessary to add language which preserves the confidentiality of proceedings

that involve the alleged incapacity of an attorney. The intent is to keep placement of the attorney on inactive status at all levels, including the Court of Appeals, confidential except for the final order placing the attorney on inactive status. The Vice Chair pointed out that the term "statement of charges" is defined in section (b) of Rule 16-741. It includes a brief statement informing the attorney of the facts constituting the alleged misconduct or incapacity. However, only incapacity is confidential. Section (b) of Rule 16-723 should only refer to a statement of charges alleging incapacity. Mr. Howell explained that the intent is that a statement of charges to place an incapacitated attorney on inactive status is confidential. The Chair noted that the fact that the Court places someone on inactive status is public. Section (b) has to specify that a statement of charges or a petition that alleges incapacity shall be confidential. The Vice Chair said that the Style Subcommittee can redraft this.

Mr. Howell pointed out that in section (c), the reference to the Review Board has been deleted. The Rule was approved with the amendments made at today's meeting.

Mr. Howell presented Rule 16-724, Immunity From Civil Liability, for the Committee's consideration. (See Appendix 1). Mr. Howell noted that the reference to the Review Board

has been deleted and a reference to the Screening Board has been added. In section (a), the language "prescribed by these Rules" has been added to narrow the scope of absolute immunity. This language is limiting and reflects the Court of Appeals' comments on the proposed immunity rule in the Judicial Disabilities Commission Rules. Other limiting language replaces the word "conduct" with the word "decision" and prevents the provision from giving absolute liability for any conduct. The Chair remarked that the language is a good improvement. Mr. Howell said that this Rule is taken almost verbatim from the ABA Model Rule. There being no other comment, the Rule was approved as presented.

Mr. Howell presented Rule 16-732, Investigative Subpoena, for the Committee's consideration. (See Appendix 1). He told the Committee that the changes to Rule 16-732 were stylistic only. The Rule was approved as presented.

Mr. Howell presented Rule 16-734, Alternatives to Discipline Program, for the Committee's consideration. (See Appendix 1). Mr. Howell said that Rule 16-734 is new and is patterned on ABA Model Rule 11 G. This is the only substantive addition to the 1996 edition of the ABA Model Rules that was not in the 1993 edition. This Rule has not been presented previously. It uses the style of the ABA language.

Delegate Vallario asked about the brackets in section (a). The Chair responded that the Committee has to decide whether Bar Counsel or the Screening Board makes the determination that the attorney will benefit from participation in the alternatives to discipline program. Mr. Howell added that everyone seems to agree that Bar Counsel can make the determination. Should Bar Counsel have unfettered discretion, or can the Screening Board order Bar Counsel to offer an alternatives to discipline program? Delegate Vallario suggested that the bracketed language be stricken. Mr. Karceski commented that it would be an anomaly to have the Screening Board directing Bar Counsel. The Reporter pointed out that the Screening Board has no staff to handle this. Mr. Brault noted that Bar Counsel could overrule the Screening Board, as the Rule is drafted. Judge McAuliffe suggested that the language be reworked so that Bar Counsel may make the offer, or at the direction of the Screening Board, shall make the offer. The Committee agreed by consensus to this suggestion.

The Vice Chair pointed out that the word “course” in section (b) should be pluralized. The Committee agreed by consensus to this change. The Chair commented that section (e) is similar to a provision in the Judicial Disabilities Commission Rules, and he directed the Reporter to conform the

language of section (e) to the parallel language in the other set of Rules.

Mr. Howell presented Rule 16-735, Termination of Preliminary Investigation, for the Committee's consideration. (See Appendix 1). Mr. Howell explained that Rule 16-735 has been restructured. The Vice Chair suggested that the first sentence of section (a) would be clearer if the word "not" were added in after the word "is" and before the word "incapacitated." The Committee agreed by consensus to this change.

Mr. Howell pointed out that former section (b) has been collapsed into section (a). Revised section (b) relocates current section (d). Revised section (d) is new. It introduces procedures for the case to be sent to the Screening Board. There being no further comment, the Rule was approved as amended.

Mr. Howell presented Rule 16-736, Screening Procedure, for the Committee's consideration. (See Appendix 1). Mr. Howell said that Rule 16-736 is new and provides for a screening procedure. The Screening Board Chair prepares a notice after receiving the materials to which section (d) of Rule 16-735 refers. If the respondent attorney so requests, the Screening Board must send the attorney a copy of all the materials Bar Counsel delivered. Mr. Brault inquired if Mr.

Hirshman routinely sends the respondent attorney a copy of these materials, and Mr. Hirshman replied that this is automatically done under the current system.

The Vice Chair expressed her concern that this procedure may delay the proceedings. The Reporter commented that some of the materials are voluminous. Mr. Howell questioned whether the duty to prepare the notice should be that of Bar Counsel who has a staff, rather than the Chair of the Screening Board. Mr. Hirshman agreed, noting that the administrative guidelines could provide that someone on his staff could do this. Mr. Brault suggested that number (5) of the list in section (a) could read "if not previously provided by Bar Counsel and upon request, the Screening Board will send to the respondent attorney a copy of all materials Bar Counsel delivered to the Screening Board."

The Vice Chair pointed out there are two different items being discussed. One question is whether the materials automatically should be sent to the respondent attorney, or only sent upon request. The second question is who should be responsible for sending the materials. Mr. Howell suggested that section (d) of Rule 16-735 could be amended to provide that the copies of the materials Bar Counsel delivers to the Screening Board are to be sent to the respondent attorney. Judge McAuliffe questioned whether Bar Counsel sends all of

this now, and Mr. Hirshman responded that he does. He explained that he has an open file policy. At the Inquiry Panel hearing, all of the exhibits are numbered, and the respondent gets a copy.

Mr. Titus inquired whether this system will be acceptable to the Court of Appeals. Members of the Court have indicated that they are displeased with a system that offers "two bites at the apple." The judges do not object to a grand jury-like hearing, but the revised Rules seem to go further than the grand jury. He suggested that numbers (3) and (4) in section (a) could be merged. He also suggested that in the second sentence of section (b) the word "invite" should be changed to the word "permit."

Mr. Sykes disagreed with the comparison to the grand jury, because it only hears one side, unlike the proceedings of the Screening Board. The Vice Chair suggested that in the first sentence of section (b), the language which reads, "briefs and written arguments" should be changed to "written statements." She said that there should be a statement as to the time allowed for the review, such as 90 days, if practicable. The way the Rule is written now, it is open-ended, so the Screening Board could take a year to review the case. An appropriate time would depend on the number of people on the Screening Board. Mr. Titus said that the Board

would meet once a month, and Mr. Brault added that there would be about 20 cases at each meeting.

The Vice Chair suggested that the time for the Screening Board to review could be 90 days. The Reporter expressed the view that this is too long a time to be acceptable to the Court. Mr. Howell noted that, subject to some interpretation, the Rule could provide that the Screening Board is to meet monthly, regardless of whether the attorney submitted written communications or failed to attend the meeting. Mr. Sykes cautioned that this may be too close to micro-managing the Screening Board. The Chair pointed out that adding in the word "promptly" to describe when the Screening Board is to act will not accomplish anything. Ordinarily, the review will occur 30 days after the date the notice was issued. The Reporter observed that the chart she distributed at the meeting indicates that the Review Board has been functioning without inordinate delay. Mr. Downes said that if the reporting member of the Review Board does not attend the meeting, a 45-day time period would not work. Describing the time period as "promptly" or within a reasonable time is better.

Mr. Karceski inquired as to when the attorney has an opportunity to respond if the attorney gets the packet at the time of the hearing. Mr. Brault replied that in general, the

attorney is negotiating and talking with Bar Counsel throughout the proceedings. A diligent defense counsel would have all the materials. He or she can look at the file, and if it is not voluminous, Bar Counsel can mail it to defense counsel, often early in the proceedings. The Chair added that if a time frame is unfair, the attorney could request an extension. However, this does not have to be included in the Rule. Mr. Bowen remarked that the notice may state that the attorney has 10 days from the date of the notice to submit a written statement. The Chair said that if the attorney requests more time, the time probably will be extended. An express provision could be put into the Rule. Mr. Bowen suggested that number (4) of section (a) read as follows: "the date by which any briefs and written arguments must be submitted, not less than _____ days after....". The Vice Chair suggested that number (2) could specify a date from the time the materials were sent or could be left open. She said that she did not like the word "promptly" used as a time guide. The Reporter expressed the view that the time frame could be not less than 15 days before the date the Screening Board reviews the materials. Mr. Howell expressed the opinion that this is best left to administrative guidelines. There is no experience at this point to make these decisions. The Reporter pointed out that there is no right of appeal or

procedure to complain if someone were given only two days to submit a written statement. The Vice Chair remarked that the attorney would have to rely on the reasonableness of the Screening Board Chair.

Mr. Brault observed that in section (c), if the Screening Board decides there is no reasonable basis for finding misconduct, Bar Counsel terminates the investigation. Mr. Sykes asked whether charges are filed if the Board finds unanimously that although there may be a reasonable basis for finding misconduct, there was no misconduct. Does the Rule mean that charges are filed if there is no reasonable basis to conclude that there is no professional misconduct or incapacity?

The Reporter suggested that the Rule could be clarified by eliminating the word "otherwise." The Committee agreed by consensus to this change. The Chair said that this is not a question about the evidence, but about the legal consequences of the evidence. Delegate Vallario suggested that the second sentence of section (c) could begin: "[i]f a majority of the Screening Board concludes...". Ms. Ogletree referred to the earlier quorum rule. Mr. Karceski inquired whether the Screening Board makes a factual determination. Mr. Karceski replied that the Board assumes that the information from Bar Counsel is accurate. The Chair said that a standard is

needed. Mr. Brault responded that the Screening Board uses a probable cause standard. The Vice Chair suggested that the language "no reasonable basis" be change to "insufficient basis," and the Committee agreed by consensus to this suggestion. Mr. Brault pointed out that the Board has a diversionary option. If there is a difference among the members and the attorney has no prior misconduct charges, the Screening Board may not automatically go forward.

Mr. Howell presented Rule 16-741, Statement of Charges, for the Committee's consideration. (See Appendix 1). Mr. Howell pointed out that the only changes to Rule 16-741 were stylistic. There being no comment, the Committee approved the Rule as presented.

Mr. Howell presented Rule 16-742, Dismissal by Bar Counsel After Statement of Charges, for the Committee's consideration. (See Appendix 1). Mr. Howell told the Committee that the only changes were stylistic. There being no comment, the Committee approved the Rule as presented.

Mr. Howell presented Rule 16-744, Probation Agreement, for the Committee's consideration. (See Appendix 1). Mr. Howell said that the only changes to Rule 16-744 were stylistic. The Committee approved the Rule as presented.

Mr. Howell pointed out that Rule 16-745 has been deleted. The Committee approved the deletion.

Mr. Howell presented Rule 16-746, Prehearing Procedures, for the Committee's consideration. (See Appendix 1). Mr. Howell explained that Rule 16-746 provides the procedure when the case is assigned to a Hearing Panel. Rule 16-746 is intended to focus on anticipated problems, orderliness, disqualification, and recusal.

Mr. Bowen pointed out that the tagline of section (a) is "Transmittal to Hearing Panel," but the text of the section only provides for transmittal to the Panel Chair. The caption should be changed. The Committee agreed by consensus to changing the caption.

Turning to section (b), the Chair suggested that the language in the first sentence which reads: "with the other members" should be taken out. The Vice Chair commented that this language might be necessary to arrange a firm date if all of the Panel members are on the telephone. Mr. Johnson responded that the Chair can do whatever is the most practicable. He or she would not need the entire panel on the telephone. The names of the Panel members are sent to the respondent in the beginning, so the respondent can identify if any member might have a conflict of interest. He expressed the view that the deletion suggested by the Chair is a good idea because the retention of that language may cause the Panel Chair to have to check with all of the Panel members for

every call. The Committee agreed by consensus to delete the language: "with the other members" from the first sentence of section (b).

The Vice Chair noted that numbers (4) and (5) in section (b) refer to Rule 16-714, but the disqualification provision is referred to as subsection (h). Mr. Howell said that the provision pertaining to disqualification is subsection (g), so this will need to be corrected in section (b) of Rule 16-746. The reference to subsection (g) actually should be to subsection (f), which is the single-member panel. Mr. Brault said that it is important to know about a single-member panel. The Vice Chair remarked that it does not hurt to explore the possibility of a single-member panel.

Mr. Howell drew the Committee's attention to section (c). This establishes the goal of the hearing being held within 90 days of the conference. The Panel Chair is to confer with the Circuit Vice Chair before granting an extension. The Vice Chair asked what the point of this is. Mr. Howell answered that this is to let the Circuit Vice Chair know what is going on. The Chair cautioned not to micro-manage this issue. Judge McAuliffe added that this is another level of control. The Vice Chair questioned whether the Rules had previously referred to the "Circuit Vice Chair." Mr. Howell noted that there is a Circuit Vice Chair for every circuit.

Turning to section (d), Mr. Brault noted that Mr. Bowen had pointed out a problem with this provision. The Vice Chair commented that there may be a discovery problem at the hearing.

Mr. Bowen suggested that the word “a” in the second sentence should be changed to the word “any,” so that the sentence would read as follows: “The party against whom the motion is directed shall submit any response to the Panel Chair within 10 days after being served with the motion.” The Committee agreed by consensus to this change.

The Vice Chair questioned whether section (e) is somewhat redundant, because Bar Counsel has already been required to send the file to the respondent attorney. Mr. Howell responded that it is not redundant, because new information arises during the continuing investigation. Mr. Brault explained that this relates only to prior disciplinary sanctions. In previous discussions, the Committee referred to this as the “sealed envelope.” Mr. Howell clarified that it relates to prior discipline Bar Counsel intends to introduce.

Mr. Howell drew the Committee’s attention to section (f). He said that the Panel Chair has the authority to limit discovery. The Chair inquired if this provision is necessary, since Title 2, Chapter 400 covers this. Mr. Howell replied that stating this specifically emphasizes the point. The

Reporter pointed out that the second sentence of section (f) is from Rule 2-504, not Chapter 400. The Vice Chair remarked that it is rare for the courts to do this under Title 2. The Chair commented that he is uncomfortable with the last sentence of section (f.) It appears that the Panel Chair may deny a request even if it is necessary. Mr. Howell noted that the provision uses the word "may" and is not mandatory. This is an attempt to avoid a reversal if the Panel Chair denies discovery. The Chair expressed the view that this is potentially misleading. It implies that a legitimate discovery request may be denied if delays will ensue. He suggested that the last sentence be deleted. The Committee agreed by consensus to this change.

Mr. Johnson asked if a Panel Chair can order sanctions for failure to provide discovery. The Chair replied that the Panel Chair can do so under Title 2. Mr. Johnson inquired if the Panel Chair should be able to do this. Mr. Brault answered in the affirmative. Mr. Titus inquired as to whether there can be a contempt for failure to provide discovery. Mr. Brault replied that Title 2, Chapter 400 has provisions for contempt. Mr. Howell commented that this presupposes an order. Mr. Brault pointed out that contempt is of a court. The Chair commented that the Rule should provide that full formal discovery is ensured, so that people do not have to go

to court. He noted that the Court of Appeals had approved a similar provision in the Judicial Disabilities Commission Rules, so Rule 16-746 should not be a problem. Mr. Howell remarked that this is a creature of rule, not Constitution. The Chair observed that sections (b) and (c) have been deleted, because they are subsumed under the broad discovery rules.

The Committee approved Rule 16-746 as amended.

Mr. Howell presented Rule 16-747, Panel Subpoena, for the Committee's consideration. (See Appendix 1). Mr. Howell told the Committee that the only changes to Rule 16-747 were stylistic. There being no comment, the Rule was approved as amended.

Mr. Howell presented Rule 16-748, Panel Hearing Procedures, for the Committee's consideration. (See Appendix 1). Mr. Howell explained that the significant changes occur first on page 64 in section (f). The last sentence was initially in the rule that provided for a judicial hearing, but since the judicial hearing has been eliminated, the sentence was moved to section (f) of this Rule. Mr. Karceski commented that he and Delegate Vallario had some concerns about the complainant being allowed to testify at the hearing. The purpose of the hearing is to determine if there has been misconduct. What is the point of a victim impact statement

before a finding of misconduct has been made? This will only muddy the waters at this juncture in the proceedings. If the victim has to testify, it should be after the Panel deliberates. The Reporter noted that in the 144th Report to the Court of Appeals, a copy of which was in the meeting materials, the Reporter's note to Rule 16-767, Judicial Hearing, provides: "The second sentence of section (a) adds a provision that allows the judge to permit a complainant to testify as to the effect of the alleged misconduct. This addition is in response to a recommendation of the ABA that there should be a mechanism to allow a complainant to be heard when, for tactical reasons, neither Bar Counsel nor the attorney calls the complainant as a witness." The Reporter said that this would not preclude the deletion of the sentence. Mr. Howell suggested that the last sentence of section (f) be taken out, because a victim impact statement is not germane to the finding by the Panel.

The Vice Chair noted that when the Attorney Discipline Rules were presented to the Court of Appeals, the Court seemed very interested in recommendations made by the ABA. This was why the last sentence of section (f) was added. Under the original proposal, the case went to trial, and the judge gave the complainant the right to speak. The sentence could be removed, since in the new system, there is no trial before a

judge. The argument is that it is not relevant at the Panel Hearing. Judge Vaughan suggested that the sentence be moved, so that it is applicable only after there has been a finding of misconduct. Mr. Brault cautioned about creating two hearings. The Vice Chair pointed out that the Panel Chair makes all the decisions on what is relevant under Title 5, and he or she should be able to decide about the victim testifying. Mr. Karceski expressed the view that testimony as to the "effect" of the alleged conduct is troublesome. Delegate Vallario observed that the Panel Chair can call upon the victim when the Panel Chair feels that it is necessary, so the sentence is not necessary. Mr. Sykes moved that the last sentence of section (f) be deleted, the motion was seconded, and it passed on a vote of 12 to three. Judge Dryden remarked that the complainant could be given the right to submit comments in writing before the decision as to sanctions. Mr. Howell responded that the Panel does not have the authority to impose sanctions.

In subsection (g)(1), the second sentence providing that the hearing is governed by the rules of evidence in Title 5 has been added. The Vice Chair pointed out that the last sentence of subsection (g)(1) is irrelevant. Mr. Howell suggested that this sentence be deleted, and the Committee agreed by consensus to this change. Rule 16-748 was approved

as amended.

Mr. Howell presented Rule 16-749, Panel Decision, for the Committee's consideration. (See Appendix 1). Mr. Howell noted that the changes on the first page of Rule 16-749 are stylistic. On page 68, the original subsection (c)(4) was deleted, because there is no longer a board to review the reprimand. In subsection (d)(4), the provision giving a Panel member the right to request a review of the Panel decision has been eliminated, and in its place a new provision has been added allowing the Panel member to file a minority report.

Mr. Hochberg expressed his concern about the word "brief" modifying the minority report. The Reporter suggested that the word "brief" be deleted. The Committee approved this change by consensus. The Committee approved Rule 16-749 as amended.

Mr. Howell told the Committee that Rule 16-750 has been deleted. The Committee agreed by consensus to the deletion.

Mr. Howell presented Rule 16-761, Petition for Disciplinary Action, for the Committee's consideration. (See Appendix 1). Mr. Howell pointed out that in section (c) of Rule 16-761, language has been added which provides that the petition is to be accompanied by the Hearing Panel's order. The Vice Chair said that she has concerns about Rule 16-761 and the Rules immediately following that Rule. The added language should be deleted from section (c). It is

unnecessary because the order is part of the record that is transmitted to the Court pursuant to section (d). Also, the second sentence of section (a) should be taken out because in the majority of cases, there already has been a Panel Hearing and the attorney is not surprised by the filing in the Court of Appeals. Mr. Brault expressed his agreement with these two deletions. The Committee agreed by consensus.

The Vice Chair questioned the necessity of the Rules pertaining to the designation of a trial judge to hear these cases. Mr. Howell responded that at present, this is the only way for the Court of Appeals, which would decide the matter based on the record before it, to send the case to a trial judge if the Court feels the record is bad. The Reporter pointed out that this is provided for in section (d) of Rule 16-766, Disposition, and Rule 16-767, Order Designating Judge. The Vice Chair remarked that if the Court feels that the record is bad, it could vacate the decision. Mr. Howell observed that the option to send the case to a trial judge could be eliminated from Rule 16-766 (d), and the Committee agreed by consensus. Mr. Howell stated that the trial judge is needed for other proceedings, such as reinstatement. The Vice Chair suggested that the proceedings in Rule 16-791, Reinstatement, should be conducted in the same way that disciplinary proceedings are conducted, using Hearing Panels.

The Chair stated that this is a policy question. The Reporter noted that reinstatement is a judicial function to which peer review arguably is inapplicable because the person seeking reinstatement is not an attorney. Mr. Howell added that the Court of Appeals is the gatekeeper to the practice of law. The mechanics of Rule 16-767 are needed for reinstatement proceedings. Also, a petition and a hearing before a circuit judge are use in proceedings for reciprocal discipline and disciplinary action upon conviction of a crime.

The Chair said that the petition is needed for certain things and should be kept in place. After a Hearing Panel issues a recommendation on a statement of charges, the case goes directly to the Court of Appeals, the record comes up, and the parties may file exceptions pursuant to Rule 16-765. The Vice Chair said that the Rules need to be reorganized so that first there is a series of rules dealing with exception proceedings in the Court of Appeals, and after that special proceedings rules. Mr. Howell suggested that Rule 16-765 could be renumbered. The Vice Chair asked if the Rule is necessary. Mr. Brault remarked that a petition is needed to start the proceedings and pointed out that the exception procedure is set out in Rule 16-765. His concept is that if the Hearing Panel recommends discipline, a petition is filed to discipline the attorney in accordance with the findings.

The record, exceptions, and a response are filed. The statement of charges carries the caption that is before the Hearing Panel and not the caption of the Court of Appeals case. It is preferable to initiate proceedings in the Court of Appeals by a properly-captioned petition.

The Chair suggested that Rule 16-761 be redrafted to bring in the concepts of Rule 16-765. The Committee agreed by consensus to this suggestion.

The Chair announced that the people interested in the rules pertaining to masters will be attending today's meeting in the afternoon. The rules will be considered from 1:30 to 2:00 p.m. At 2:00 the discussion of the Attorney Discipline Rules will resume.

Agenda Item 2. Continued consideration of certain rules changes
recommended by the Family/Domestic Subcommittee: proposed Revised Rule 9-207 (Referral of Matters to Masters); Amendments
to: Rule 15-206 (Constructive Civil Contempt), Rule 2-541 (Masters), and Rule 16-814 (Code of Conduct for Judicial Appointees)

After the lunch break, the Chair thanked the consultants and interested persons who were attending the meeting to discuss Agenda Item 2. Ms. Ogletree presented Rule 9-207, Referral of Matters to Masters, for the Committee's consideration.

Proposed Revised Rule 9-207, showing changes from the version in the October 15, 1999 Meeting Materials

Rule 9-207. REFERRAL OF MATTERS TO MASTERS

(a) Referral

(1) As of Course

In a court having a full or part-time standing master for domestic relations causes, unless the court directs otherwise in a specific case, the following matters arising under this Chapter shall be referred to the master as of course when a hearing has been requested or is required by law:

(A) Uncontested divorce, annulment, or alimony actions;

(B) Alimony pendente lite;

(C) Support of children pendente lite;

(D) Support of dependents;

(E) Preliminary or pendente lite possession or use of the family home or family-use personal property;

(F) Subject to Rule 9-204, pendente lite custody of or visitation with children or modification of an existing order or judgment as to custody or visitation;

(G) Modification of an existing order or judgment as to the payment of alimony or support or the possession or use of the family home or family-use personal property;

Query: Should subsection (a)(1)(H) be

deleted all together?

(H) Subject to Rule 9-204, ~~as to orders and judgments governing custody and visitation,~~ civil contempt by reason of noncompliance with an order or judgment ~~in an action under this Chapter~~ relating to custody of or visitation with children following service of a show cause order upon the person alleged to be in contempt, provided that the order filed pursuant to Rule 15-206 (b)(1) or the petition filed pursuant to Rule 15-206 (b)(2) expressly states that ~~(i) referral to a master is requested and (ii)~~ incarceration is not requested;

(I) Counsel fees and assessment of court costs in any action or proceeding referred to a master under this Rule;

(J) Stay of an earnings withholding order; and

(K) Such other matters arising under this Chapter and set forth in the court's case management plan filed pursuant to Rule 16-202 b.

Committee note: Examples of matters that a court may include in its case management plan for referral to a master under subsection (a)(1)(K) of this Rule include scheduling conferences, settlement conferences, uncontested matters in addition to the matters listed in subsection (a)(1)(A) of this Rule, and the application of methods of alternative dispute resolution. Proceedings for civil contempt in which incarceration is sought and proceedings for criminal contempt may not be heard by a master.

(2) By Order on Agreement of the Parties

On agreement of the parties, the court, by order, may refer to a master any

other matter or issue arising under this Chapter that is not triable of right before a jury.

(b) Powers

Subject to the provisions of any order of reference, a master has the power to regulate all proceedings in the hearing, including the powers to:

(1) Direct the issuance of a subpoena to compel the attendance of witnesses and the production of documents or other tangible things;

(2) Administer oaths to witnesses;

(3) Rule upon the admissibility of evidence;

(4) Examine witnesses;

(5) Convene, continue, and adjourn the hearing, as required;

(6) Recommend contempt proceedings or other sanctions to the court; and

(7) Make findings of fact and conclusions of law.

(c) Hearing

(1) Notice

~~The court shall fix~~ A written notice of the time and place for the hearing ~~and~~ shall ~~send written notice~~ be sent to all parties.

(2) Attendance of Witnesses

A party may procure by subpoena the attendance of witnesses and the production of documents or other tangible things at the hearing.

(3) Record

All proceedings before a master shall be recorded either stenographically or by an electronic recording device, unless the making of a record is waived in writing by all parties. A waiver of the making of a record is also a waiver of the right to file any exceptions that would require review of the record for their determination.

(d) Findings and Recommendations

(1) Generally

The master shall prepare written recommendations, which shall include a brief statement of the master's findings and shall be accompanied by a proposed order. The master shall notify each party of the master's recommendations, either on the record at the conclusion of the hearing or by written notice served pursuant to Rule 1-321. In any matter referred pursuant to subsection (a)(1) of this Rule, the written notice shall be given within ~~three~~ ten days after the conclusion of the hearing. In any other matter referred by order pursuant to subsection (a)(2) of this Rule, the written notice shall be given within 30 days after the conclusion of the hearing. Promptly upon notification to the parties, the master shall file the recommendations and proposed order with the court.

(2) Supplementary Report

The master may issue a supplementary report and recommendations on the master’s own initiative before the court enters an order or judgment. A party may file exceptions to ~~a~~ new ~~recommendation~~ matters contained in the supplementary report in accordance with section (e) of this Rule.

(e) Exceptions

Within ten days after recommendations are placed on the record or ~~filed~~ served pursuant to section (d) of this Rule, a party may file exceptions with the clerk. Within that period or within ten days after ~~filing~~ service of the first exceptions, whichever is later, any other party may file exceptions. Exceptions shall be in writing and shall set forth the asserted error with particularity. Any matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise.

(f) Transcript

Unless a transcript has already been filed, a party who has filed exceptions shall cause to be prepared and transmitted to the court a transcript of so much of the testimony as is necessary to rule on the exceptions. Instead of a transcript, the parties may agree to a statement of facts or the court by order may accept an electronic recording of the proceedings as the transcript. At the time the exceptions are filed, the excepting party shall either: (1) order the transcript, make an agreement for payment to assure its preparation, and file a certificate of compliance stating that the transcript has been ordered and the agreement has been made; (2) file a certification that no transcript is necessary to rule on the exceptions; (3) file an agreed statement of facts in lieu of the transcript; or (4) file an affidavit of indigency and motion requesting that the court accept an electronic recording of the proceedings as the transcript. Within ten days after the entry of an order denying a motion under subsection (f)(4) of this section, the excepting party shall comply with subsection (f)(1). The transcript shall be filed within 30 days after compliance with subsection (f)(1) or within such longer

time, not exceeding 60 days after the exceptions are filed, as the master may allow. The court may further extend the time for the filing of the transcript for good cause shown. The excepting party shall serve a copy of the transcript on the other party. The court may dismiss the exceptions of a party who has not complied with this section.

Cross reference: For the shortening or extension of time requirements, see Rule 1-204.

(g) Entry of Orders

(1) In General

Except as provided in subsection~~s~~ (2) ~~and (3)~~ of this section,

(A) the court shall not direct the entry of an order or judgment based upon the master's recommendations until the expiration of the time for filing exceptions, and, if exceptions are timely filed, until the court rules on the exceptions; and

(B) if exceptions are not timely filed, the court may direct the entry of the order or judgment as recommended by the master.

(2) Immediate Orders

Upon a finding by a master that extraordinary circumstances exist and a recommendation by the master that an order be entered immediately, the court may direct the entry of an immediate order after reviewing the file and any exhibits, reviewing the master's findings and recommendations, and affording the parties an opportunity for oral argument. The court may accept, reject, or modify the master's recommendations. An order entered under this subsection remains subject to a later determination by the court on

exceptions.

~~(3) Contempt Orders~~

~~On the recommendation by the master that an individual be found in contempt, the court may hold a hearing and direct the entry of an order at any time.~~

(h) Hearing on Exceptions

(1) Generally

The court may decide exceptions without a hearing, unless a hearing is requested with the exceptions or by an opposing party within ten days after ~~filing~~ service of the exceptions. The exceptions shall be decided on the evidence presented to the master unless: (A) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the master, and (B) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the master to hear the additional evidence and to make appropriate findings or conclusions, or the court may hear and consider the additional evidence or conduct a de novo hearing.

(2) When Hearing to be Held

A hearing on exceptions, if timely requested, shall be held within 60 days after the filing of the exceptions unless the parties otherwise agree in writing. If a transcript cannot be completed in time for the scheduled hearing and the parties cannot agree to an extension of time or to a statement of facts, the court may use the electronic recording in lieu of the transcript at the hearing or continue the hearing until the transcript is completed.

(i) Costs

Payment of the compensation, fees, and costs of a master may be compelled by order of court. The costs of any transcript may be included in the costs of the action and assessed among the parties as the court may direct.

Committee note: Compensation of a master paid by the State or a county is not assessed as costs.

Cross reference: See, Code, Family Law Article, §10-131, prescribing certain time limits when a stay of an earnings withholding order is requested.

Source: This Rule is derived in part from Rule 2-541 and former Rule S74A and is in part new.

Rule 9-207 was accompanied by the following Reporter's Note.

Proposed revised Rule 9-207 is derived in part from Rule 2-541 and in part from current Rule 9-207 (former Rule S74A), which was adopted as a new rule in 1991. Substantial revisions have been made in light of the July 12, 1999 Memorandum of Chief Judge Robert M. Bell transmitting to circuit and county administrative judges the Interim Policy Position Relating to standing Masters; State v. Wiegmann, 350 Md. 585 (1998), and correspondence dated May 28, 1999 from the Office of the Public Defender to Chief Judge Joseph F. Murphy, Jr. concerning the right to counsel in civil contempt cases. Additionally, the Rule has been made more self-contained by eliminating references to Rule 2-541 and including the relevant provisions of that Rule in revised Rule 9-207.

In subsection (a)(1), the list of types of cases that are referred to a standing master as of course has been modified to reflect the Interim Policy and

the concerns of the Public Defender. Proceedings for civil contempt in which incarceration is sought and proceedings for criminal contempt are not to be set before a master. To facilitate the assignment of contempt cases pursuant to this Rule and to clarify the obligation of the Public Defender to provide representation to an indigent alleged contemnor, the language of Rule 15-206 is proposed to be revised to require that the order or petition by which a civil contempt proceeding is initiated expressly state whether or not incarceration is requested. Under proposed subsection (a)(1)(H) of Rule 9-207, the only type of contempt proceeding that is referred to a master as of course is civil contempt by reason of noncompliance with an order or judgment relating to custody of or visitation with children, provided that incarceration is not sought. In an additional change to Rule 9-207, the reference to all other domestic relations matters in the Seventh Judicial Circuit is deleted. In its place is "such other matters arising under this Chapter and set forth in the court's case management plan filed pursuant to Rule 16-202 b." A Committee note lists examples of some "such other matters" that conform to the Interim Policy.

In subsection (a)(2), the Committee has added the requirement that before any matter other than the matters listed in subsection (a)(1) is referred to a master, the parties must agree to the referral.

Section (b) is derived, verbatim, from Rule 2-541 (c).

Section (c) is derived from Rule 2-541 (d), except that the language that requires the master to set the time and place of the hearing has been changed to allow court personnel other than the master to do the scheduling.

Subsection (d)(1) is derived from current Rule 9-207 (c), except that the "three day" time requirement for the master's recommendation has been changed to ten days, to allow the master sufficient time in complicated cases.

Subsection (d)(2) is new. It is added to allow a master to correct obvious errors, such as mathematical mistakes, sua sponte, so that unnecessary exceptions do not have to be filed.

Section (e) is derived from current Rule 9-207 d, except that the five-day time period for the first party's exceptions is changed to ten days and that the three-day time period for the second party's exceptions also is changed to ten days.

Section (f) is derived in part from Rule 2-541 (h)(2) and is in part new. New to the Rule is the requirement that the excepting party must take one of four possible actions or sets of actions contemporaneously with the filing of the exceptions: (1) order the transcript, make an agreement for payment, and file a certificate of compliance that these two acts have been accomplished; (2) certify that no transcript is necessary; (3) file an agreed statement of facts; or (4) file an affidavit of indigency and motion that the court accept an electronic recording of the proceedings as the transcript. A cross reference to Rule 1-204 follows section (f).

Section (g) is derived from current Rule 9-207 f. Language restricting subsection (g)(2) to pendente lite orders has been eliminated. If extraordinary circumstances exist that require the entry of an immediate order in any particular case, including a post judgment modification, an immediate order should be available. Subsection (g)(3) has been deleted as unnecessary, in that most

contempt hearings will be before a judge and revised subsection (g)(2) would be applicable in the limited number of contempt proceedings that are heard by a master and in which extraordinary circumstances exist.

Subsection (h)(1) is derived, verbatim, from Rule 2-541 (i).

Subsection (h)(2) is derived from current Rule 9-207 g(2). The provision concerning written proffers of evidence if the transcript cannot be completed in time for the hearing has been eliminated. Instead, if the parties cannot agree to an extension of time or a statement of facts, the court may either use the electronic recording in lieu of the transcript or continue the hearing.

Section (i) is derived from Rule 2-541 (j). A Committee note following the section clarifies that costs do not include fees for a master who is paid by the State or a county.

Legislative Note:

The Committee suggests that the Legislature study two areas of concern: (1) the immediate entry of orders based on the master's recommendation in cases other than those where extraordinary circumstances are found to exist and (2) the power of masters to effectuate arrests. The Committee believes that action in these areas cannot be taken by rule and that the appropriate mechanism for any change in these areas would be by legislation or possibly by a Constitutional amendment.

Ms. Ogletree pointed out that several changes were made to Rule 9-207 at the October, 1999 Rules Committee meeting.

One of the changes was to subsection (a)(1)(H) to delete the requirement that the contempt petition state that referral to a master is requested. The Subcommittee suggests that subsection (a)(1)(H) could be deleted in its entirety, because subsection (a)(1)(K) will cover this. The Committee agreed with this suggestion by consensus. Master Raum commented that approval of the case management plan is up to the Court of Appeals. The last sentence of the Committee note to subsection (a)(1)(K) is inconsistent with this. The Chair responded that the sentence could be left in, and the Court of Appeals can strike it, if it so chooses.

Master Raum pointed out another problem raised by the Honorable Erica Wolfe, a master in Anne Arundel County, in her letter of November 17, 1999, a copy of which was distributed at today's meeting. (See Appendix 2). Master Wolfe states that changes to the Rules governing Masters may impact Title IV-D funding currently available from the federal government to subsidize the cost of masters hearing child support establishment and enforcement cases. Ms. Ogletree suggested that the catchall language in subsection (a)(1)(K) allows the case management plan in jurisdictions where there are masters funded under Title IV to do what they have been doing. Ms. Ogletree said that it is clear that the Title IV masters should be retained, continuing to act under the case

management plan. The Chair noted that the Court of Appeals has made its position clear in the case of State v. Wiegmann, 350 Md. 585 (1998) and its interim policy. Master Wolfe observed that the interim policy does not include child support masters. The policy statement expressly provides that the inclusiveness of child support masters will be deferred. The Chair said that the Court of Appeals has clarified that a master cannot hear a contempt case where incarceration is a possible punishment. Master Wolfe reiterated that the interim policy specifically states that it does not include child support. Her letter expresses her fear that the system which has been proposed will needlessly cause extra costs and delay in enforcement. Most petitions for contempt request incarceration. All of these would have to go before judges, and since there are not enough resources, there will be a backlog of contempt cases. The Chair stated that a bill will be introduced in the legislature to ask for additional judges this year and next year in the five largest jurisdictions. Ms. Ogletree remarked that this will not help the smaller counties. Master Wolfe added that it will not help the people getting support now. The Reporter noted that masters could handle prehearing conferences, which may result in settlement of the cases or referrals to alternative dispute resolution. Master Wolfe responded that if a prehearing conference is set,

it is another tier in the system, and creates delay. Title IV funds may not cover that proceeding, then the counties lose money. This loses sight of what the process is about -- collecting child support through civil contempt. The Chair commented that he had written the dissent to the Wiegmann case when that case was in the Court of Special Appeals.

The Chair asked if there was a consensus concerning the last sentence of the Committee note following subsection (a)(1)(k). The Committee agreed by consensus to the deletion of this sentence and approved Rule 9-207 as amended.

Ms. Ogletree presented Rule 15-206, Constructive Civil Contempt, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 200 - CONTEMPT

AMEND Rule 15-206 to require that an express statement of whether or not incarceration is sought be included in the order or petition that initiates the proceeding, to allow a show cause order to include a directive to appear for a prehearing conference, to add a certain time requirement pertaining to the scheduling of the hearing, and to add a certain statement to the notice to the alleged contemnor, as follows:

Rule 15-206. CONSTRUCTIVE CIVIL CONTEMPT

(a) Where Filed

A proceeding for constructive civil contempt shall be included in the action in which the alleged contempt occurred.

(b) Who May Initiate

(1) The court may initiate a proceeding for constructive civil contempt by filing an order complying with the requirements of section (c) of this Rule.

(2) Any party to an action in which an alleged contempt occurred and, upon request by the court, the Attorney General, may initiate a proceeding for constructive civil contempt by filing a petition with the court against which the contempt was allegedly committed.

(3) In a support enforcement action where the alleged contempt is based on failure to pay spousal or child support, any agency authorized by law may bring the proceeding.

(c) Content of Order or Petition

(1) An order filed by the court pursuant to subsection (b)(1) of this Rule and a petition filed pursuant to subsection (b)(2) shall comply with Rule 2-303 and~~, if incarceration to compel compliance with the court's order is sought, shall so state~~ shall expressly state whether or not incarceration to compel compliance with the court's order is sought.

(2) Unless the court finds that a petition for contempt is frivolous on its face, the court shall enter an order. That order, and any order entered by the court on its own initiative, shall state:

(A) the time within which any answer by the alleged contemnor shall be filed, which, absent good cause, may not be less

than ten days after service of the order;

(B) the time and place at which the alleged contemnor shall appear in person for (i) a prehearing conference pursuant to Rule 2-504.2, or (ii) a hearing, which may not be less than 20 days after any prehearing conference, or (iii) both, allowing a reasonable time for the preparation of a defense; and

Committee note: Unless the parties agree otherwise, a hearing date that is set at the prehearing conference shall be not less than 20 days after the conference.

(C) if incarceration to compel compliance with the court's order is sought, a notice to the alleged contemnor in the following form:

TO THE PERSON ALLEGED TO BE IN CONTEMPT OF COURT:

1. It is alleged that you have disobeyed a court order, are in contempt of court, and should go to jail until you obey the court's order.

2. You have the right to have a lawyer. If you already have a lawyer, you should consult the lawyer at once. If you do not now have a lawyer, please note:

(a) A lawyer can be helpful to you by:

(1) explaining the allegations against you;

(2) helping you determine and present any defense to those allegations;

(3) explaining to you the possible outcomes; and

(4) helping you at the hearing.

(b) Even if you do not plan to contest that you are in contempt of court, a lawyer can be helpful.

(c) If you want a lawyer but do not have the money to hire one, the Public Defender may provide a lawyer for you. You must contact the Public Defender after any prehearing conference pursuant to Rule 2-504.2 **and at least 10 business days before the date of the hearing.** The court clerk will tell you how to contact the Public Defender.

(d) If you want a lawyer but you cannot get one and the Public Defender will not provide one for you, contact the court clerk as soon as possible.

(e) DO NOT WAIT UNTIL THE DATE OF YOUR HEARING TO GET A LAWYER. If you do not have a lawyer before the hearing date, the court may find that you have waived your right to a lawyer, and the hearing may be held with you unrepresented by a lawyer.

3. IF YOU DO NOT APPEAR FOR THE HEARING, YOU MAY BE SUBJECT TO ARREST.

(d) Service of Order

The order, together with a copy of any petition and other document filed in support of the allegation of contempt, shall be served on the alleged contemnor pursuant to Rule 2-121 or 3-121 or, if the alleged contemnor has appeared as a party in the action in which the contempt is charged, in the manner prescribed by the court.

(e) Waiver of Counsel if Incarceration is Sought

(1) Applicability

This section applies if incarceration to compel compliance is sought.

(2) Appearance in Court Without Counsel

(A) If the alleged contemnor appears in court pursuant to the order without counsel, the court shall make certain that the alleged contemnor has received a copy of the order containing notice of the right to counsel;

(B) If the alleged contemnor indicates a desire to waive counsel, the court shall determine, after an examination of the alleged contemnor on the record, that the waiver is knowing and voluntary;

(C) If the alleged contemnor indicates
a desire to have counsel and the court finds that the alleged contemnor received a copy of the order containing notice of the right to counsel, the court shall permit the alleged contemnor to explain the appearance without counsel. If the court finds that there is a meritorious reason for the alleged contemnor's appearance without counsel, the court shall continue the action to a later time and advise the alleged contemnor that if counsel does not enter an appearance by that time, the action will proceed with the alleged contemnor unrepresented by counsel. If the court finds that there is no meritorious reason for the alleged contemnor's appearance without counsel, the court may determine that the alleged contemnor has waived counsel by failing or refusing to obtain counsel and may proceed with the hearing.

(3) Discharge of Counsel

If an alleged contemnor requests permission to discharge an attorney whose appearance has been entered, the court shall permit the alleged contemnor to explain the reasons for the request. If the court finds that there is a meritorious

reason for the alleged contemnor's request, the court shall permit the discharge of counsel, continue the action if necessary, and advise the alleged contemnor that if new counsel does not enter an appearance by the next scheduled hearing date, the action will be heard with the alleged contemnor unrepresented by counsel. If the court finds that the alleged contemnor received a copy of the order containing notice of the right to counsel and that there is no meritorious reason for the alleged contemnor's request, the court may permit the discharge of counsel but shall first inform the alleged contemnor that the hearing will proceed as scheduled with the alleged contemnor unrepresented by counsel.

Source: This Rule is new.

Rule 15-206 was accompanied by the following Reporter's Note.

Amendments to Rule 15-206 (c) are proposed in conjunction with the proposed amendments to Rule 9-207, Masters. Provided that no case management plan that is filed and approved pursuant to Rule 16-202 b assigns to a master the hearing of contempt proceedings in which incarceration is sought, the two rules changes ensure that when incarceration of the alleged contemnor is a possibility, the matter will be heard by a judge, rather than a master.

The proposed amendment to subsection (c)(1) of Rule 15-206 requires that the petition or order that initiates the proceeding contain an express statement of whether or not incarceration is sought.

In subsection (c)(2)(B), the provisions pertaining to the contents of the show cause order are proposed to be amended to provide for the optional

inclusion of a time and place at which the alleged contemnor must appear in person for a prehearing conference pursuant to Rule 2-504.2. At the conference, which may be conducted by a master, determinations can be made as to the amount of court time that should be allocated for the hearing and whether the matter is one that may be resolved by settlement or referral to alternative dispute resolution.

If the matter is not settled at the prehearing conference, the hearing on the merits is held not less than 20 days after the conference. The "20-day" requirement is added to allow the alleged contemnor sufficient time to obtain representation by the Public Defender, if eligible. The Public Defender requires that the alleged contemnor apply for representation at least "10 business days" before the hearing, which can be as many as 18 calendar days around the Christmas and New years holidays. Because the Public Defender does not provide representation in civil proceedings (including master's hearings and conferences held pursuant to Rule 2-504.2) at which an individual does not face the possibility of incarceration, the required notice to the alleged contemnor is proposed to be amended to state that the time to apply for representation by the Public Defender is <u>after</u> any prehearing conference has been held. Also, the current language of "at least 10 business days before the date of the hearing" is proposed to be in boldface. The addition to the notice gives the Public Defender's screening personnel language to which they can refer in advising an alleged contemnor to return after the prehearing conference if the matter does not settle, while the boldface type calls attention to the importance of applying at least 10 business days before the contempt hearing.

Ms. Ogletree told the Committee that the Subcommittee was

looking for a way to flag cases that may not be heard by a master and to give the Public Defender the time needed for intake. The Rule provides for an optional pre-hearing conference, and the party may not go to the Public Defender until after the conference. The Public Defender would get notice and be there for the person's civil contempt hearing. The Reporter drafted the new provision. The Vice Chair asked if this is consistent with the Committee note to subsection (c)(2)(B). The Reporter remarked that Judge Cawood did not want the date of the hearing in the initial notice, so that there would be an opportunity to schedule the hearing at the conference. If the hearing date is set at the conference, the "20-day" provisions of subsection (c)(2)(B)(ii) and the Committee note give the Public Defender enough time to be able to do the intake and representation. Ms. Ogletree continued that under subsection (c)(2), the order may include either a directive to appear for a prehearing conference or the hearing, or both. The Reporter expressed the opinion that the word "or" covers each of these three possibilities. Judge Cawood said that his original problem was the scheduling of a case for one-half hour when there are many witnesses, and the testimony actually takes two days. A prehearing conference before the hearing date is set could solve this problem. If the Rule requires that a hearing date be set initially, this

may not work. The Vice Chair suggested that the word “or” be added after the word “Rule 2-504.2" and that the substance of this provision be relocated to follow the phrase “shall enter an order” in subsection (c)(2). The Committee agreed by consensus to this change. The Committee approved Rule 15-206 as amended.

Ms. Ogletree presented Rule 2-541, Masters, for the Committee’s consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-541 in light of proposed revised Rule 9-207, as follows:

Rule 2-541. MASTERS

. . .

(b) Referral of Cases

(1) Referral of domestic relations matters to a master as of course shall be in accordance with Rule 9-207 and shall proceed in accordance with that Rule.

(2) On motion of any party or on its own initiative, the court, by order, may refer to a master any other matter or issue not triable of right before a jury.

. . .

~~(e) Further Proceedings~~

~~(1) Domestic Relations Cases~~

~~In cases referred to a master pursuant to Rule 9-207, the procedures and requirements governing the master's report, the filing of exceptions, and further judicial proceedings shall be as set forth in that Rule.~~

~~(2) Other Cases~~

~~In all other cases referred to a master, the procedures and requirements governing the master's report, the filing of exceptions, and further judicial proceedings shall be as set forth in this Rule.~~

~~(f)~~ (e) Report

. . .

~~(g)~~ (f) Entry of Order

. . .

~~(h)~~ (g) Exceptions

. . .

~~(i)~~ (h) Hearing on Exceptions

. . .

~~(j)~~ (i) Costs

. . .

Source: This Rule is derived as follows:

. . .

~~Section (e) is new.~~

Section ~~(f)~~ (e) is derived from former Rule 596 f.

Section ~~(g)~~ (f) is new.

Section ~~(h)~~ (g) is derived from former Rule 596 h 1, 2, 3 4 and 7 except that subsection 3 (b) of section h of the former Rule is replaced.

Section ~~(i)~~ (h) is derived from former Rule 596 h 5 and 6.

Section ~~(j)~~ (i) is derived from former Rule 596 h 8 and i.

Rule 2-541 was accompanied by the following Reporter's Note.

This conforming amendment to Rule 2-541 is proposed in light of the proposed amendments to Rule 9-207, which has been extensively rewritten as a self-contained rule.

Ms. Ogletree explained that all of the material pertaining to domestic relations masters has been moved to Rule 9-207. The Vice Chair pointed out that other Rules may refer to the sections of Rule 2-541 which have been deleted and may need to be corrected. The Committee approved Rule 2-541 as presented and directed that the Reporter make any necessary conforming changes to other Rules.

Ms. Ogletree presented Rule 16-814, Code of Conduct for Judicial Appointees, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 800 - MISCELLANEOUS

AMEND Rule 16-814 to clarify that a judicial appointee is allowed to apply

methods of alternative dispute resolution that are included in the official duties of the judicial appointee, as follows:

Rule 16-814. CODE OF CONDUCT FOR JUDICIAL APPOINTEES

. . .

CANON 4

Extra-Official Activities

Except as otherwise prohibited or limited by law or these canons, a judicial appointee may engage in the following activities, if doing so does not interfere with the proper performance of official duties, does not reflect adversely upon the judicial appointee's impartiality, and does not detract from the dignity of the position.

A. AVOCATIONAL ACTIVITIES.- A judicial appointee may speak, write, lecture, and teach on both legal and non-legal subjects. A judicial appointee may participate in other activities concerning the law, the legal system and the administration of justice. A judicial appointee may engage in social and recreational activities.

COMMENT

Complete separation of a judicial appointee from extra-official activities is neither possible nor wise; a judicial appointee should not become isolated from the society in which he or she may live.

B. GOVERNMENT ACTIVITIES.

(1) A judicial appointee may appear before and confer with public bodies or officials on matters concerning the judicial system or the administration of justice.

COMMENT

As suggested in the Reporter's Notes to the ABA Code of Judicial Conduct, the "administration of justice" is not limited to "matters of judicial administration" but is broad enough to include other matters relating to a judicial system.

(2) A judicial appointee may serve on governmental advisory bodies devoted to the improvement of the law, the legal system or the administration of justice and may represent his or her country, state or locality on ceremonial occasions or in connection with historical, educational and cultural activities.

COMMENT

Valuable services have been rendered in the past to the states and the nation by judicial appointees who may be appointed by the executive to undertake additional assignments. The appropriateness of conferring these assignments on judicial appointees must be reassessed, however, in light of the demands on time created by today's crowded dockets and the need to protect the judicial appointees from involvement in matters that may prove to be controversial. Judicial appointees should not be expected or permitted to accept governmental appointments that could interfere with their effectiveness and independence. Nor can a judicial appointee assume or discharge the legislative or executive powers of government or hold an "office" under the constitution or laws of the United States or State of Maryland.

(3) As a private citizen, a judicial appointee may appear before or confer with public bodies or officials on matters that directly relate to a judicial appointee's person, immediate family or

property so long as the judicial appointee does not use, and avoids the appearance of using, the prestige of the judicial appointment to influence decision-making.

C. CIVIC AND CHARITABLE ACTIVITIES.- A judicial appointee may participate and serve as a member, officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, law-related or civic organization not conducted for the economic or political advantage of its members, subject to the following provisions:

(1) A judicial appointee should not participate and serve if it is likely that the organization: (a) will be engaged in proceedings that would ordinarily come before the judicial appointee; (b) will be regularly engaged in adversary proceedings in any court; or (c) deals with people who are referred to the organization by the court on recommendation of the judicial appointee or other judicial appointees of that court exercising similar authority.

COMMENT

The changing nature of some organizations and of their relationship to the law makes it necessary for a judicial appointee regularly to reexamine the activities of each organization with which a judicial appointee is affiliated to determine if it is proper to continue a relationship with it. For example, in many jurisdictions charitable organizations are now more frequently in court than in the past or make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

As a judicial officer and person specially learned in the law, a judicial appointee is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and the improvement of criminal and juvenile justice. To the extent that time permits, a judicial appointee is encouraged to do so, either

independently or through a bar association or other organization dedicated to the improvement of the law.

(2) A judicial appointee should not solicit funds for any such organization, or use or permit the use of the prestige of his or her position for that purpose, but a judicial appointee may be listed as an officer, director, or trustee of the organization. A judicial appointee may make recommendations to public and private fund granting agencies on projects and programs of which the judicial appointee has personal knowledge and which concern the law, the legal system, or the administration of justice. A judicial appointee should not be a speaker or the guest of honor at an organization's fund raising events, but may attend such events.

D. FINANCIAL ACTIVITIES.-

(1) A judicial appointee should refrain from financial and business dealings that use the judicial appointee's position or involve the judicial appointee in frequent transactions with lawyers or persons likely to come before the judicial appointee or the appointing court in matters relating to the judicial appointee's duties and authority.

COMMENT

This section is not intended to apply to the practice of law of part-time judicial appointees, which is covered by Canon 4I (2).

(2) A judicial appointee may hold and manage investments, including real estate, and engage in other remunerative activity except that a full-time judicial appointee shall not hold any office or directorship in any public utility, bank, savings and loan association, lending

institution, insurance company, or any other business corporation or enterprise or venture which is affected with a public interest.

(3) A judicial appointee should manage investments and other financial interests to minimize the number of cases in which recusal would be required. As soon as practicable without serious financial detriment, the judicial appointee should dispose of investments and other financial interests that might require frequent recusal.

(4) Information acquired by a judicial appointee in his or her judicial capacity should not be used or disclosed by the judicial appointee in financial dealings or for any other purpose not related to the judicial appointee's official duties.

E. COMPENSATION AND EXPENSE REIMBURSEMENT.- A judicial appointee may receive compensation and reimbursement of expenses for activities permitted by this Code, subject to the following restrictions:

(1) Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judicial appointee would receive for the same activity.

(2) Expense reimbursement should be limited to the actual cost of travel, food and lodging reasonably incurred by the judicial appointee and, where appropriate to the occasion, by the judicial appointee's spouse. Any payment in excess of such an amount is compensation.

F. GIFTS.-

(1) A judicial appointee must be especially careful in accepting gifts,

favors, and loans from persons not in the judicial appointee's immediate family. However innocently intended, gifts and favors from such persons, especially gifts and favors having substantial monetary value, may create an appearance that the judicial appointee could be improperly beholden to the donor. Subject to this caveat, and except as otherwise prohibited or limited by law or these canons, a judicial appointee may accept:

(a) a gift incident to a public testimonial or books supplied by publishers on a complimentary basis for official use;

(b) ordinary social hospitality;

(c) a gift from a friend or relative by reason of some special occasion, such as a wedding, anniversary, birthday, and the like, if the gift is fairly commensurate with the nature of the occasion and the friendship or relationship;

(d) a gift, favor, or loan from a relative or close personal friend whose appearance before the judicial appointee or whose interest in a case would require a recusal under Canon 3 C;

(e) a scholarship or fellowship awarded on the same terms applied to other applicants;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judicial appointees.

(2) The standards set forth in subsection (1) of this section also apply to gifts, favors, and loans offered to members of the judicial appointee's family who reside in the judicial appointee's

household. For purposes of this Canon and absent extraordinary circumstances, gifts, favors and loans accepted by such family members shall be considered to be accepted by the judicial appointee.

Judicial appointees are often invited by lawyers or other persons to attend social, educational, or recreational functions. In most cases, such invitations would fall within the realm of ordinary social hospitality and may be accepted by the judicial appointee. If there is more than a token fee for admission to the function, however, unless the fee is waived by the organization, the judicial appointee should pay the fee and not permit a lawyer or other person to pay it on the judicial appointee's behalf.

G. FIDUCIARY ACTIVITIES.- While a judicial appointee is not absolutely disqualified from holding a fiduciary position, a judicial appointee should not accept or continue to hold such position if the holding of it would interfere or seem to interfere with the proper performance of official duties, or if the business interests of those represented require investments in enterprises that are apt to come before the judicial appointee officially or tend to be involved in questions to be determined by the judicial appointee.

H. ARBITRATION.- A full-time judicial appointee should not act as an arbitrator or mediator.

COMMENT

This does not preclude a judicial appointee from participating in settlement conferences or applying methods of alternative dispute resolution that are included in the judicial appointee’s official duties. If by reason of disclosure made during or as a result of

~~the~~ a settlement conference or an alternative dispute resolution proceeding, the judicial appointee's impartiality might reasonably be questioned, the judicial appointee should not further participate in the matter. See Canon 3 C (1).

I. PRACTICE OF LAW.-

(1) Except as provided in subsection (2), a judicial appointee should not practice law.

(2) A part-time judicial appointee may practice law to the extent permitted by the appointing authority, but the judicial appointee shall not use or appear to use the appointee's position to further that practice.

(3) Prior to assuming official duties, a full-time judicial appointee should enter into an agreement for payments relating to the judicial appointee's former law practice and should submit the agreement to the Judicial Ethics Committee so that the Committee may review it as to the reasonableness of the time provided for payments to be made under the agreement. A payment period limited to a maximum of five years or less is presumptively reasonable. A longer payment period is permitted only with the Committee's prior approval as to its reasonableness. An agreement entered into under this provision may not be amended without the prior approval of the Judicial Ethics Committee.

. . .

Rule 16-814 was accompanied by the following Reporter's Note.

The proposed amendment to the Comment following Canon 4H clarifies that a judicial appointee who applies methods of alternative dispute resolution as part of

> the judicial appointee's official duties is not in violation of Canon 4H, even though the methods may involve arbitration or mediation. This amendment is in conformity with the proposed revision of Rule 9-207 (Masters) and the Interim Policy Position Relating to standing Masters transmitted to Circuit and County Administration Judges by Memorandum dated July 12, 1999 from Chief Judge Robert M. Bell.

Ms. Ogletree pointed out that the commentary to Rule 16-814, Code of Conduct for Judicial Appointees, is proposed to be conformed to the Interim Policy of the Court of Appeals. The Committee approved the proposed amendment to Rule 16-814 as presented.

The Chair stated that the discussion would return to the topic of the Attorney Discipline Rules.

Agenda Item 1. (Continued) Consideration of a revision to Title 16, Chapter 700 (Disciplinary and Inactive Status of Attorneys) to provide for a "one-tier" system of attorney disciplinary proceedings.

The Chair redirected the Committee's attention to the matter of proceedings in the Court of Appeals following a Panel Hearing. The Vice Chair remarked that a piece of paper with a caption must be filed, and the record below must be transmitted to the Court. Mr. Howell added that there has to be a statement of what charges are sustained by the Panel.

The original statement of charges may have been broader. Judge McAuliffe stated that the charges should be the statement of charges as originally drawn. Bar Counsel has the right to file exceptions if the Panel did not find misconduct on a particular charge. The disciplinary action under the original statement of charges should go to the Court and should be not be changed by Bar Counsel after the hearing. Under the current system, occasionally Bar Counsel will file a petition that is broader than what the Review Board considered. The same statement of charges that went to the Hearing Panel should go to the Court of Appeals.

The Chair noted that in section (d) of Rule 16-749, the order of the Hearing Panel directing the filing of a petition for disciplinary action has been changed so that it is accompanied by a statement of the Panel's findings of fact and conclusions of law. This is an operative document sent to the Court of Appeals. Mr. Howell said that the definition of the word "petition" will have to be changed, if this is going to be limited to special proceedings. The Vice Chair agreed, and suggested that after a Hearing Panel has heard the case, what is filed in the Court of Appeals would not be a petition alleging misconduct or incapacity. Instead, it would be the statement of charges.

The Chair commented that after the hearing, the Panel

sends its findings of fact and conclusions of law to the Court of Appeals. Nothing happens if no exceptions are taken. There is nothing for the Court to do. Judge McAuliffe responded that the Court has to determine sanctions. Delegate Vallario asked if the Court of Appeals can disbar the attorney or increase the penalty if no exceptions are filed. The Court has not seen the witnesses, and it might be a problem if the Court can disbar the attorney despite the fact that no exceptions have been filed. Mr. Brault asked Mr. Hirshman if he ever excepts when there is a finding of no misconduct. Mr. Hirshman replied that he would file exceptions if he thinks the decision is wrong. Mr. Howell noted that under the current system, if the Review Board dismisses the case, there is no right to go to the Court of Appeals. Under the proposed system, Bar Counsel would be allowed to except to the dismissal.

Delegate Vallario expressed his concern about the possible increase in penalties. Judge McAuliffe observed that the Hearing Panel acts as a master, with the Court of Appeals making the final decision. Mr. Sykes noted that if the Court wants to increase the sanction, the attorney has no opportunity to argue. Judge McAuliffe commented that under the current Rules, the trial court is not allowed to make recommendations. The Court of Appeals had stated that it did

not want the trial court to make recommendations. Mr. Sykes said that the system could be streamlined. The Panel makes a recommendation. If there are no exceptions, the Court may agree with the recommendations. If the Court is not satisfied with the recommendations, before the final order, the parties ought to have the right to address the question of sanctions.

The Chair suggested that section (a) of Rule 16-749 could be titled "Dismissal" and consist of the first sentence of section (a) as it appears now. A new section could begin with the second sentence of current section (a) as follows: "If the Panel finds that the attorney has engaged in professional misconduct or is incapacitated, it shall either direct the filing of a petition for disciplinary action or, if section (c) of this Rule applies, reprimand the attorney." In section (d), the language "Authorization of" could be deleted from the tagline, and in its place, the language "Recommendation for" could be substituted. If the Panel finds that a reprimand is inappropriate, it files an order and statement of charges. Either side is able to except, and there is no need for a petition. Mr. Brault inquired if anyone is opposed to a Panel dismissal ending the case. The Chair responded that it is appropriate, since the Court of Appeals only wants to see the case if there has been a finding of misconduct. Mr. Hirshman remarked that the Panel may not have done a good job. Mr.

Howell said that this is no different than the current system. Mr. Hirshman noted that there is no appellate process at all. The Vice Chair explained that the thinking of the Court of Appeals was that there would be one evidentiary hearing. Currently, there is a right to except to a finding of no misconduct. Mr. Hirshman commented that he did not think that the Court of Appeals envisioned no right to except in a one-tiered system.

The Chair pointed out that in the new system, the Hearing Panel will do what the circuit court judges are doing in the present system. The Panel will file findings of fact and conclusions of law. Either side can except to the Court of Appeals. Mr. Howell said that it is important to clarify that proceedings in the Court of Appeals concerning petitions for disciplinary actions regarding inactive status are confidential.

The Chair stated that a policy question to be determined by the Committee is whether the Hearing Panel operates as a jury in a criminal case. If the attorney is acquitted, is there no further right of appeal? The first sentence of section (a) provides that the Panel shall dismiss the charges and terminate the proceedings unless it finds that the respondent has engaged in professional misconduct or is incapacitated. An alternative is to have the Panel present

findings of fact and conclusions of law, and either side can except to these. Judge McAuliffe noted that the Court of Appeals is not likely to adopt a system that sets up a body which handles all charges with no involvement by the Court of Appeals. Mr. Dean added that this would undermine confidence by the public in the attorney discipline process. Mr. Hirshman remarked that this would make less work for the Office of Bar Counsel, but it would be a terrible mistake to design the system this way. The Chair said that when the Screening Board finds a reasonable basis for the charges, the attorney goes before a group of attorneys and lay people in a public forum. There is no harm allowing exceptions, because a public hearing has already taken place.

Mr. Sykes noted that he had a theoretical concern. Juries are inconsistent in their verdicts, and the Court of Appeals is ultimately responsible. If the Court is not in a position to enforce unanimity, this creates problems beyond the public confidence in the system. It becomes a kind of lottery depending on whom one gets as jurors. An overall consistent body of law and a uniform policy is needed. Mr. Howell said that he had checked on the ABA model. Either side can except to the decision of the Panel, with a further right to take exceptions from the Review Board. He stated that he was persuaded that the new system provides uniformity and

even-handed justice. It is not sensible to disallow the right of Bar Counsel to take exceptions. Mr. Johnson remarked that currently Bar Counsel cannot take exceptions when the Panel dismisses a case. He observed that there is the question of confidence on the part of attorneys in the new system. The Chair added that the new system closes a loophole in the current system. Judge Vaughan said that it appears that an extra step is being built into the system. Mr. Sykes responded that an extra step is not being built in, but two hearings are being cut out. Mr. Karceski remarked that there is no reason to be before the Court of Appeals if there has been a finding of no misconduct and a dismissal of all charges by the Panel. Mr. Howell pointed out that this is an original proceeding and not appellate review. Judge McAuliffe added that the Court has inherent responsibility in this area.

Judge McAuliffe continued that under the present system, there is a petition for disciplinary action which goes to the Court of Appeals when charges are filed. Under the proposed Rules, the charges go to the Hearing Panel first, deferring the matter going to the Court of Appeals. It may be better for the matter to go to the Court of Appeals when the statement of charges is filed. The Reporter inquired if a copy of the statement of charges could be sent to the Court of Appeals at the time it is filed with the Commission. Judge

McAuliffe answered that the Court may not approve this system. The Vice Chair asked where it provides that the case is the Court's original jurisdiction. The Chair replied that this is the holding in Maryland State Bar Association v. Boone, 255 Md. 420 (1969). Mr. Zarnoch cited the case of Attorney General v. Waldron, 289 Md. 683 (1981), which holds that the judicial branch of government has the ultimate authority to regulate the legal profession and Article 8 of the Maryland Declaration of Rights, which provides for the separation of powers between the legislative, executive, and judicial branches of government in Maryland.

The Chair said that the Committee can vote on which version of Rule 16-749 it wants to send to the Court, or it can decide to send alternative versions. Mr. Brault expressed the view that the Rule should be changed. The Vice Chair suggested that when the Hearing Panel decides to dismiss the case, the record should go to the Court of Appeals. Mr. Johnson said that everything should go to the Court of Appeals, but the issue is whether Bar Counsel has a right to except to the dismissal of charges. The Chair suggested that the first sentence of section (a) could read either: "[w]hen the Hearing Panel finds no misconduct, it shall dismiss the charges and terminate the proceedings" or [w]hen the Hearing Panel finds no misconduct, it shall recommend to the Court of

Appeals that proceedings be terminated, and exceptions can be filed." The Chair asked for a vote on each, and the second one was accepted with a majority vote, with four members voting for the first alternative. Mr. Titus suggested that the name of the document be changed. The Vice Chair said that the Style Subcommittee can rename the document.

The Chair commented that the recommendation is filed with the Court of Appeals, along with the findings of fact and the order. Mr. Sykes stated that if no exceptions are filed, and the Court of Appeals departs from the recommendation, the parties should have an opportunity to address this. Mr. Howell asked if a reprimand should be reviewable if the parties have waived the right to file exceptions. Does Bar Counsel have the right to except to a reprimand? Should the authority of the Panel to give reprimands be deleted? Judge Vaughan questioned as to why the Subcommittee changed the process. Currently, the case is filed in Court of Appeals and the Court sends it to a judge. The new procedure could be that the Court gets the case before the Panel does, and then the Court designates a Panel. The Chair pointed out that the Court of Appeals had said that once it gets the case, it should not have to send it back. Mr. Brault added that the idea is to speed up the process. Mr. Sykes observed that the Court does not pick the Hearing Panel. The Vice Chair

expressed the opinion that the Panel reprimand should be retained. Mr. Brault commented that an attorney could agree to a reprimand, but the Court could refuse to issue one. Mr. Hirshman noted that the Court has only turned down one reprimand. The Chair remarked that the reprimand should remain.

Judge Dryden said that the Panel and the attorney may agree as to the reprimand, but Bar Counsel may be opposed. He pointed out that the Court of Appeals can invoke any sanction. Mr. Hirshman commented that he can enter into a consent disposition at any time. The Vice Chair commented that the reprimand is a recommendation. The Chair said that it has to be that way. The Hearing Panel makes the recommendation, and the Court of Appeals is able to review it. Either side can take exceptions. Mr. Thompson noted that if the reprimand goes to the Court of Appeals for review, the Court may impose a heavier sanction. The Chair observed that Bar Counsel and the respondent would have an opportunity to be heard before that occurred. Mr. Howell remarked that when there is proposed discipline by consent, consent orders are not usually denied. The Chair stated that if the Hearing Panel decides to reprimand the attorney, it will make the recommendation to the Court of Appeals. The Court will rule on it. If no exceptions have been filed, the Court will either follow the

Panel's recommendation or give the parties an opportunity to be heard.

Mr. Johnson asked what the document issued by the Panel is called. The Chair responded that it is findings of fact and conclusions of law. Mr. Titus pointed out that in section (i) of Rule 16-748, the language which reads: "...the Panel shall render a decision" should be changed to "the Panel shall render a report and recommendation...". The Chair said that this is a matter for the Style Subcommittee.

The Vice Chair inquired about the single-member Panel. The Reporter pointed out that subsection (c)(4) refers to Rule 16-714 (f), the provision pertaining to a single-member panel. The Vice Chair noted that the decision of the single-member Panel is final. Judge Dryden suggested that the Court of Appeals should be able to review the decision of the single-member Panel, but Mr. Howell argued that there would be no incentive to have a single-member Panel if the Court can later disbar the attorney. The Chair commented that this goes back to the idea that the Court of Appeals has the ultimate responsibility. Mr. Howell suggested that the exception in Rule 16-749 be moved to the text of Rule 16-714 (f) and be limited to the written stipulation set out in subsection (f)(1)(B) of that Rule. The Committee agreed by consensus with this suggestion.

The Reporter commented that a reprimand from a single-member Panel may be better than a dismissal from a three-member Panel, because the reprimand cannot be changed to a more severe sanction. Mr. Howell explained that there is a progression in the Rules. Early on, the attorney gets some breaks. Once the attorney has been charged, the system is more difficult to get through. There are incentives to choose a single-member Panel. Mr. Karceski remarked that in a close case, it is better to take the reprimand than to try to win the case. The Chair said that this is the structure of a one-tiered system.

The Chair said that the Committee has to decide whether it recommends the one-tiered system to the Court of Appeals or whether it is staying with its original recommendation of the two-tiered system. Judge Kaplan expressed his preference for the two-tiered system, but he added that if the system has to be one-tiered, the current package of Rules is the recommended one. The Vice Chair commented that at the hearing on the first package of Rules, Judge Wilner and some of the other judges were asking why attorneys should be entitled to a two-tiered disciplinary system when no other profession has it. No one present at the hearing adequately answered the question. Mr. Titus observed that unlike other professions, attorneys have a special role in the adversary system and are

advocates for unpopular issues. The Vice Chair inquired as to why a good, strong screening process is not good enough. Mr. Brault responded that the Screening Board does not see and hear the complaining person. When there are two tiers, it ensures that the complainant is a credible witness. The Chair remarked that in addition, the attorney disciplinary system is the creation of the Court. The other professions are controlled by the legislature. The Court of Appeals cannot decide that there should be a two-tiered system for chiropractors. A screening procedure cannot reach demeanor-based testimony. The proposed Rules being discussed today are the best system the Rules Committee can offer if the system has to be one-tiered. The MSBA has requested a two-tiered system. Mr. Howell noted that there are de novo hearings in workers' compensation cases, and District Court appeals. The Chair commented that this could be pointed out to the Court.

Mr. Thompson said that there are five core issues in the disciplinary system. They are (1) confidential screening before charges, (2) peer review, (3) lay participation, (4) a due process hearing, and (5) expedition of the proceedings. The current system better meets these than the one-tiered system.

Mr. Howell noted that an 18-member Screening Board is being proposed. He stated his preference for a smaller

number, as set out in the Alternative Draft of Rule 16-712A. If the 18-member Board operates in the same manner as the existing Review Board, the 18 members listen to one reporting member, relying on that member as to whether there should be public charges. Mr. Johnson expressed the view that the 18-member Screening Board is needed to handle the workload. Also, the larger Board allows for greater diversity and more uniformity in the Board's decisions.

The Chair called for a vote on Rule 16-712A. The Subcommittee recommendation of an 18-member Screening Board passed by a majority vote, and the Subcommittee Draft of Rule 16-712A was approved as presented.

Judge Kaplan moved that the Committee stay with its recommendation of a two-tiered system, but if the Court requests a one-tiered system, the proposed Rules are the Committee's recommendation. The motion was seconded. Judge Vaughan stated that he was abstaining from the vote, because the package of Rules had not been disseminated to the Rules Committee nor to members of the bar prior to the meeting. He stated that he is not faulting the staff, but he is not comfortable with the speed with which this package is proceeding through the rule-making process. He expressed his preference to vote on the package at the January Rules Committee meeting. Mr. Howell commented that this concern

could be conveyed to the Court. The Chair said that the Rules Committee is complying with the request of the Court of Appeals to have the package of Rules to them before the first of the year. Mr. Thompson remarked that he would be happy to state to the Court that most attorneys do not know about the current package of Rules. The Chair expressed his appreciation of the efforts of Mr. Thompson and the Ethics 2000 Committee of the MSBA. The proposed Rules are the best alternative complying with the request for a one-tiered system.

The Chair called for a vote on Judge Kaplan’s motion. The motion carried with two opposed and two abstaining. Mr. Titus said that the Rules Committee is grateful for the efforts of Mr. Howell, Mr. Brault, and the Reporter in revising the Rules.

The Chair adjourned the meeting.