COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on February 13, 1998.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Judy Barr, Rules Committee Intern
Peggy Magee-Biggs, Law Clerk
David Downes, Esq., Chair, Attorney Grievance Commission
Patricia Adams, Esq., Attorney Grievance Commission
Melvin Hirshman, Esq., Bar Counsel
Glenn M. Grossman, Esq., Deputy Bar Counsel

The Chair convened the meeting. He announced that on February 10, 1998 at a court conference, the Court of Appeals had adopted Rule 2-504.3, Computer-Generated Evidence, with very little modification. The Court added the idea that computer-generated evidence does not include a photograph just because the camera which took the photograph has a computer in it. The Standby Guardianship Rules were adopted with little change, as were the changes to some of the Probate Rules. The Court adopted the change to Rule 2-326, Transfers

from District Court on demand for jury trial. The change abolishes the requirement that a plaintiff has to refile the complaint in the circuit court after a demand for a jury trial. The Court decided that Rule 2-305, Claims for Relief, should be left in the form it was when the Court had sent it to the Rules Committee. This is to prevent a miscarriage of justice in the extraordinary circumstance when the jury returns a higher verdict than the amount in the *ad damnum* clause. This will be allowed upon agreement of the parties or by leave of court. The language proposed by the Rules Committee was not added. Mr. Brault asked if leave of court is discretionary, and the Chair replied affirmatively, explaining that it is reviewable under an abuse of discretion standard. Mr. Brault inquired if amendment of the *ad damnum* clause is allowed after the trial to conform to the evidence. The Chair answered that this is up to the court's discretion. Mr. Brault remarked that the federal rules allow amendment as long as the issue has been fairly tried. The Chair responded that the Court did not discuss this. He said that he did not think that the Rule would require a judge to amend the *ad damnum* clause. If a judge did amend it, this would be affirmed unless it was an abuse of discretion.

The Chair asked if there were any additions or corrections to the minutes of the January 9, 1998 Rules Committee meeting. There being no additions or corrections, the minutes were approved as presented.

Agenda Item 1. Continued consideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys

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Mr. Howell presented Rule 16-724, Summary Transfer to Inactive Status, for the Committee's consideration.

Rule 16-724. SUMMARY TRANSFER TO INACTIVE STATUS

(a) Grounds for Summary Transfer

Upon receipt of evidence from any source that an attorney has been judicially determined to be mentally incompetent or to require a guardian of the person for any of the grounds stated in Code, Estates and Trust Article, §13-705 (b), or has been involuntarily admitted to a facility for inpatient care treatment of a mental disorder in accordance with law, and with approval by the Commission, Bar Counsel may petition the Court of Appeals to summarily place the attorney on inactive status for an indefinite period.

(b) Procedure

(1) Petition for Summary Transfer; Confidentiality

If so directed by the Commission, Bar Counsel shall file in the Court of Appeals a petition for summary transfer of the attorney to inactive status in accordance with Rule 16-731. The petition shall be supported by a certified copy of any judicial determination or involuntary admission. The petition and all other papers filed in the Court of Appeals shall be sealed and stamped "confidential" in accordance with section (b) of Rule 16-709.

(2) Service

The petition and all other papers filed with the petition shall be served upon the attorney in accordance with section (b) of Rule 16-708 and, in addition, shall be served upon any guardian of the person of the attorney and the director of any facility to which the attorney has been admitted. Proof of service shall be made in accordance with Rule 2-126.

(c) Order of the Court of Appeals

Upon consideration of the petition filed under subsection (b)(1) of this Rule, and any answer, the Court of Appeals may enter an order, effective immediately, placing the attorney on inactive status for an indefinite period until the further order of the Court, or any other order as may be appropriate, including an order that assigns the petition to any court pursuant to Rule 16-732 for a hearing in accordance with Rule 16-735. The provisions of Rule 16-737 shall apply to an order under this section that places an attorney on inactive status. Copies of the order shall be served upon Bar Counsel and each person listed in the proof of service of the petition.

(d) Effect on Disciplinary Proceeding

If a disciplinary proceeding for alleged misconduct is pending against the attorney, the entry of an order under this section shall stay the proceeding until the further order of the Court of Appeals.

(e) Termination of Inactive Status

When an attorney who has been placed on inactive status under section (c) of this Rule is judicially determined to be competent or is judicially released after involuntary admission, the Court of Appeals shall enter an order that terminates the inactive status and that either dismisses the petition or assigns the petition to any court pursuant to Rule 16-732 for a hearing in accordance with Rule 16-735.

Source: This Rule is new.

Rule 16-724 was accompanied by the following Reporter's Note.

> This Rule is new in its entirety. It is derived from A.B.A. Model Rule 23.A and §13 (a) of Rule XI, District of Columbia Bar rules.
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> In the interest of protecting the public from unfit lawyers, the problem of incapacitated lawyers needs to be addressed, even if no misconduct has been committed. It is important that incapacity not be treated as misconduct. See, e.g., Title II of the Americans With Disabilities Act, 42 U.S.C. §12101 et seq. However, if the attorney's incapacity has been determined judicially, there is no compelling reason for delay in removing the attorney from active status until the attorney regains competence.
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> Section (a) is more specific than the A.B.A. Model Rule, which applies whenever an attorney "has been judicially declared incompetent or is involuntarily committed on the grounds of incompetency or disability * * *." Model Rule 23.A. The District of Columbia version applies when "an attorney has been judicially declared to be mentally incompetent or has been involuntarily committed to a mental hospital as an inpatient." The proposed rule would apply in three restricted circumstances: (1) a judicial determination that an attorney is mentally incompetent, including a determination that an attorney is unable to stand trial as a defendant in a criminal case; (2) a determination under Code, Estates and Trusts Art., §13-705(b) that the attorney requires a guardian of the person ("[a] guardian of the person shall be appointed if the court determines from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health

care, food, clothing, or shelter, because of any mental disability , senility, other mental weakness, disease, habitual drunkenness, or addition to drugs, and that no less restrictive form of intervention is available which is consistent with the person's welfare or safety"), and (3) an involuntary admission of an attorney to a faculty for inpatient care or treatment of a mental disorder as authorized by Code, Health, General Art., §10-617, or the law of another jurisdiction where the admission occurred. The Commission may proceed under Section (b) or authorize the filing of a petition under Rule 16-737.

Subsection (b)(1) provides that Bar Counsel, if directed to seek a summary transfer to inactive status, shall file a petition with proof of the judicial determination or involuntary admission. The entire proceeding is confidential, as required by Rule 16-709 (b)(1). Subsection (b)(2) requires service upon any guardian or hospital director, as well as the attorney.

Section (c) is patterned upon Model Rule 23.A and the District of Columbia's version. It provides two options. On one hand, the Court of Appeals may determine that the attorney should be placed on inactive status immediately, in which case its order will have the effect of a suspension and subject the attorney to the requirements and procedures of Rule 16-737. On the other hand, the Court may determine that summary action is not appropriate and assign the case for a hearing pursuant to Rules 16-732 et seq.

Section (d) is added to preserve (but defer action) on any disciplinary proceeding that was pending against the attorney at the time of the order placing the attorney on inactive status.

Section (e) is derived from A.B.A. Model Rule 23.E(7). It requires the termination of inactive status that was ordered summarily upon a judicial determination of competence or a

judicial release from a facility (Rule 15-601), but allows for further proceedings to consider any evidence that the attorney is presently incapacitated and should be again placed on inactive status.

Mr. Howell explained that this Rule is new and was added to fill in the gap existing currently which occurs when there has been a judicial determination of mental incompetency or an involuntary admission of an attorney. Upon petition of Bar Counsel with the approval of the Attorney Grievance Commission, it is within the court's discretion to place an attorney on inactive status. When the disabled status of the attorney terminates, the inactive status terminates. There being no comments, Rule 16-724 was approved as presented.

Mr. Howell presented Rule 16-725, Consent to Discipline or Inactive Status, for the Committee's consideration.

Rule 16-725. CONSENT TO DISCIPLINE OR INACTIVE STATUS

(a) General Requirement

An attorney who is the subject of a disciplinary investigation or proceeding involving allegations of professional misconduct may consent to discipline or transfer to inactive status in accordance with this Rule. If the investigation or proceeding involves allegations that the attorney is incapacitated, the attorney may consent to transfer to inactive status in accordance with this Rule.

(b) Consent to Disbarment or Other Discipline

(1) Joint Petition

An attorney may consent to disbarment or other discipline by filing in the Court of Appeals a joint petition signed by the attorney and Bar Counsel, that requests an order disbarring the attorney, suspending the attorney from the practice of law, or reprimanding the attorney. If a suspension is requested, the petition shall state whether the attorney should be suspended indefinitely or for a stated period of time and any conditions that should be imposed. If a reprimand is requested, the proposed text of the reprimand, including any conditions, shall be attached to the petition.

(2) Affidavit Required

A joint petition filed under subsection (b)(1) of this Rule shall be accompanied by an affidavit by the attorney that includes the statements required by section (d) of this Rule and, in addition, certifies (A) that the attorney consents to the disbarment or other discipline stated in the petition, (B) understands that the disbarment by consent, if ordered by the Court of Appeals, terminates permanently the attorney's privilege to practice law in this State, and (C) agrees to comply with Rule 16-737 and any conditions stated in the petition that the Court of Appeals may impose.

(3) Order of the Court of Appeals

Upon the filing of the joint petition and the affidavit, the Court of Appeals may enter an order disbarring the attorney by consent from the practice of law in the State, suspending the attorney by consent from the practice of law, or reprimanding the attorney by consent and imposing any conditions stated in the petition. The provisions of Rule 16-737 apply to an order entered under this subsection.

(c) Consent to Be Placed On Inactive Status

(1) Joint Petition

An attorney may consent to be placed on inactive status by filing a joint petition signed by the attorney and Bar Counsel that requests an order to place the attorney on inactive status, either indefinitely or until the happening of a specified event, and states any conditions that should be imposed.

(2) Affidavit Required

A joint petition filed under subsection (c)(1) of this Rule shall be accompanied by an affidavit by the attorney that includes the statements required by subsections (d)(1), (3), and (4) of this Rule and, in addition, certifies that the attorney

(A) acknowledges that the attorney is presently unable to render adequate legal services by reason of mental or physical illness or infirmity, or addiction to or dependence upon an intoxicant or drug;

(B) certifies that the attorney has disclosed to Bar Counsel the name of every physician, other health care provider, or health care facility by whom or at which the attorney has been examined, evaluated or treated;

(C) certifies that the attorney has furnished Bar Counsel with written consent to the release of such health care information and records as Bar Counsel has requested;

(D) waives any physician-patient privilege as to any such information and records;

(E) knows that, if a hearing was held, Bar Counsel would have the burden of proving by clear and convincing evidence that the attorney is so incapacitated as to require the attorney to be placed on inactive status;

(F) understands that being placed on inactive status, if ordered by the Court of

Appeals, terminates the attorney's privilege to practice law in this State until the further order of that Court;

(G) agrees to comply with Rule 16-737 and any conditions stated in the petition that the Court of Appeals may impose; and

(H) acknowledges that the attorney may not be reinstated to practice law unless the attorney is able to prove by a preponderance of the evidence that the attorney has regained the ability to render adequate legal services, that inactive status should be terminated and that the attorney should be reinstated to active practice.

(3) Physician's Certificate Required

A joint petition filed under subsection (c)(1) of this Rule shall be accompanied by the certificate of a physician licensed in this State that the physician has examined the attorney and that, in so far as the physician is able to determine, the attorney is competent to execute the affidavit required by subsection (c)(2) of this Rule, that the attorney's consent is knowingly and voluntarily given, and that the attorney is capable of understanding the statements contained in the affidavit.

(4) Order of the Court of Appeals

Upon the filing of the joint petition and affidavit, the Court of Appeals may enter an order placing the attorney on inactive status by consent until the further order of the Court and imposing any conditions stated in the petition. The provisions of Rule 16-737 apply to an order entered under this section.

(d) Statements Required in Affidavits

Except as otherwise provided in subsection (b)(2) of this Rule, every affidavit filed by an attorney pursuant to this Rule

shall certify that:

(1) the attorney's consent is freely and voluntarily given, without coercion or duress;

(2) the attorney is fully aware of the implications of submitting the consent;

(3) the attorney is aware that there is presently pending an investigation or proceeding involving allegations of that attorney's professional misconduct, the nature of which the attorney shall be specifically set forth; and

(4) the attorney knows that, if a hearing was conducted, the attorney could not successfully defend himself or herself against the allegations of misconduct.

(e) Duty of Clerk

Upon entry of an order by consent under this Rule that disbars, suspends, or places an attorney on inactive status, the Clerk of the Court of Appeals shall strike the name of the attorney from the register of attorneys in that Court and, in addition, shall certify that fact to the Trustees of the Clients' Security Trust Fund and the clerks of all courts in this State.

(f) Effect of Denial

If the Court of Appeals enters an order that denies a joint petition requesting discipline or inactive status by consent, the disciplinary investigation or proceeding shall resume as if no consent had been given. No admissions made in the consent, the joint petition, or the affidavit may be admitted into evidence against any party.

Source: This Rule is in part derived from former Rules 16-712 (d) (BV12 d) and 16-713 (a) (BV13 a) and in part new.

Rule 16-725 was accompanied by the following Reporter's Note.

> Since taking effect 20 years ago, the former BV Rules contained a mechanism for the disbarment of an attorney by consent. Upon affidavit by the attorney and written recommendation by Bar Counsel, the Court of Appeals was authorized to enter an order disbarring the attorney by consent. See former Rule BV12 d.
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> The frequency with which such orders appear in the Maryland Reports attests to the utility of this expedient. For recent examples of consent to disbarment, see, e.g., AGC v. Beckman, 346 Md. 370 (1997); AGC v. Brown, 346 Md. 252 (1997); AGC v. Newell, 346 Md. 121 (1997); AGC v. Sine, 345 Md. 662 (1997); AGC v. Finney, 345 Md. 595 (1997). On occasion, disbarment by consent has been applied to out-of-state attorneys not admitted in Maryland. See, e.g., AGC v. Marshall, 346 Md. 120 (1997).
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> Indeed, over the years, and without any explicit sanction in the former BV Rules, the consent expedient has been used to impose lesser forms of discipline. The Court has granted joint petitions for indefinite suspension, with or without conditions, e.g., AGC v. Dean, 346 Md. 243 (1997); AGC v. Gordon, 346 Md. 237 (1997); AGC v. Spiridon, 344 Md. 559 (1996); AGC v. Reynolds, 343 Md. 625 (1996); AGC v. O'Neill, 343 Md. 624 (1996); AGC v. Ray, 343 Md. 254 (1996) (non-admitted attorney), as well as suspension for a definite period, e.g., AGC v. Haar, 347 Md. 124 (1997) (30 days); AGC v. Zeiger, 347 Md. 107 (1997) (60 days); AGC v. Leishman, 345 Md. 41 (1997) (90 days); AGC v. Chisholm, 345 Md. 347 (1997) (six months). Several joint petitions have consented to suspension, with the duration to be imposed by the Court of Appeals. See, e.g., AGC v. Kornblit, 345 Md. 693 (1997) (30 days); AGC v. Chang, 346 Md. 215 (1997) (six months); AGC v. Hallock, 343 Md. 621 (1996) (18 months); AGC v. Bumbalo, 343 Md. 626 (1996) (two years);

AGC v. Laskin, 344 Md. 270 (1996) (indefinite period). In addition, pursuant to joint petition, incapacitated attorneys have been placed on inactive status, e.g., AGC v. Yates, 347 Md. 89 (1997); AGC v. Mattie, 345 Md. 427 (1997); AGC v. Wright, 345 Md. 425 (1997); AGC v. Holzman, 345 Md. 348 (1997); AGC v. Buttion, 345 Md. 40 (1997). There are an increasing number of instances in which attorneys have been reprimanded by consent, e.g., AGC v. Gregory, 346 Md. 600 (1997); AGC v. Driscoll, 346 Md. 313 (1997); AGC v. Hickman, 346 Md. 244 (1997); AGC v. Paugh, 345 Md. 692 (1997); AGC v. Ingerman, 345 Md. 40 (1997); AGC v. McLaughlin, 344 Md. 372 (1996); AGC v. Bell, 343 Md. 619 (1996). In some but not all cases, the order of reprimand indicates the nature of the misconduct being sanctioned. See, e.g., AGC v. Gregory, supra; AGC v. Paugh, supra; AGC v. McLaughlin, supra.

The purpose of this Rule is to codify this consent-to-discipline practice in all respects. The Rule carries forward the disbarment by consent provisions of former Rule BV12 d and expands its coverage to all forms of discipline. It authorizes suspensions by consent, reprimands by consent, and inactive status by consent. Guidance for this expansion was provided by A.B.A. Model Rule 21 and Rule 1:20-10 of the New Jersey Rules of Court.

Section (a) is new. It declares the scope of the Rule as applicable to discipline in any form and to inactive status.

Section (b) is in part derived from former Rule BV12 d and is in part new. Subsection (b)(1) is new. It contemplates a joint petition signed by the attorney and Bar Counsel which specifies the exact form of discipline and any conditions that the parties agree upon. Subsection (b)(2) is derived from former Rule BV12 d. Unlike the former Rule which prescribed only three required statements, the new Rule requires three statements in subsection (b)(1) plus the three contained in former Rule BV12 d which are now in section

(d). Subsection (b)(3) is derived from the first sentence of former Rule BV12 d 3, but it extends the order of the Court of Appeals to cover suspensions and reprimands.

Section (c) is entirely new. The former BV Rules did not provide any specific criteria for evaluating incapacitated attorneys to determine whether inactive status was appropriate, much less declare any standards for inactive status by consent. It bears repeating that incapacity should not be treated as misconduct. The condition of an incapacitated attorney may be such as to warrant procedural safeguards against improvident or ill-informed consent.

Subsection (c)(1) contemplates a joint petition signed by the attorney and Bar Counsel tailored to individual circumstances of the incapacity. Thus, the parties agree that the attorney will be placed on inactive status either indefinitely or until the happening of a specified event, e.g., release from hospital, completion of a treatment program, etc. Subsection (c)(2) requires the attorney to execute an affidavit which includes eight required statements and four more required by subsection (d). The first statement is an acknowledgment that the attorney is incapacitated; it tracks the definition of that term in Rule 16-701 (e). The other required statements are designed to give Bar Counsel full access to otherwise privileged information and to insure that the attorney's consent is given knowingly and with understanding of the consequences. Subsection (c)(3) provides an additional safeguard by requiring a certificate by the attorney's physician. Subsection (c)(4) authorizes the Court of Appeals to place the attorney on inactive status until further order.

Section (d) is derived from former Rule BV12 d 2, which required the attorney to execute an affidavit containing three categories of statements. Subsections (d)(1) and (d)(2) are both derived from former Rule

> BV12 d 2 (i). Subsection (d)(3) is derived from former Rule BV12 d 2 (ii). Subsection (d)(4) is derived from former Rule BV12 d 2 (iii).
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> Section (e) is derived from former Rule BV13 a 1 and 3 and requires the clerk of the Court of Appeals to treat discipline by consent, when approved, as any other form of discipline and certify that discharge to the Clients' Security Trust Fund and to the clerks of all other courts in Maryland.
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> Section (f) is derived from New Jersey Rule 1:20-10(a)(3) and (b)(3). It is intended to protect the consenting parties against the possibility that the Court of Appeals might deny a joint petition and later construe the consent or statements in the petition or affidavit as admissions against either Bar Counsel or the attorney.

Mr. Howell explained that Rule 16-725 is an expansion of the existing rule which provides for disbarment by consent. Bar Counsel and the attorney may agree to forms of discipline which are less than disbarment. The Chair questioned whether the Rule changes current practice with respect to the basis for the action. Mr. Howell replied in the negative, noting that the court will get the petition stipulating the various undertakings. The proposed Rule picks up the current requirements before disbarment by consent. The Rule is applicable whenever there is a disciplinary investigation and proceeding. It can be activated before proceedings have been filed before an Inquiry Panel if both parties consent. There is no reporting requirement of the consent to discipline, other than the fact that there has been a discipline by consent.

Mr. Hirshman pointed out that the way the Rule is worded, it appears that there can be a consent to discipline or inactive status only if the attorney has a mental or physical incapacity. He said that he has used the consent for an attorney who did not want to practice law any further, but was not physically or mentally incapacitated. Mr. Howell responded that he did not know if this is prohibited under this Rule. The Vice Chair remarked that it would be prohibited.

Mr. Sykes observed a difference between disbarment by consent and ordinary disbarment. The former requires that the attorney file an affidavit that he or she understands that disbarment terminates permanently the privilege to practice law. Under ordinary disbarment, the attorney could be reinstated. Mr. Grossman suggested that the definition of "disbarment" in Rule 16-701 should conform to this distinction. Mr. Howell read the definition which is: "`Disbarment' means the unconditional termination of any privilege to practice law in this State and, when applied to an attorney not admitted by the Court of Appeals to practice law, means the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State." Mr. Sykes commented that it is not necessary to include the language of the definition in Rule 16-725.

Mr. Brault said that Rule 16-725 makes no major change as to the authority of Bar Counsel. Mr. Howell added that Bar Counsel has

unfettered discretion, and this has not been changed. Mr. Hirshman pointed out that inactive status applying to more than mental or physical incapacity of an attorney would be an expansion of the Rule. The Vice Chair noted that the problem is with the affidavit requirement. Judge Vaughan asked if the Court of Appeals has to agree to a consent. Mr. Hirshman answered that the Court of Appeals has to agree. The Court can reject the consent.

Mr. Howell said that the Rules Committee could limit the Rule to consents to inactive status only when there is a physical or mental incapacity. Subsection (c)(2)(E) provides that the attorney knows that Bar Counsel would have the burden of proving by clear and convincing evidence that the attorney is so incapacitated as to require the attorney to be placed on inactive status. This would have to be amended if the Rule goes farther than incapacity of the attorney. The Vice Chair pointed out that subsection (c)(2)(A) requires that the attorney is unable to render adequate legal service by reason of incapacity. Mr. Brault suggested that language could be added to subsection (c)(2)(A) which would allow the attorney who is not incapacitated but otherwise wishes to consent to do so.

The Vice Chair suggested that sections (b) and (c) could be collapsed to allow for consent for any reason. Mr. Johnson questioned as to why subsection (c)(2)(D) is needed, because there is a release provided for in subsection (c)(2)(C). Judge Kaplan commented that unless there is a release signed, people in the

medical field are reluctant to release records. If the Rule is silent, records will not be available. Mr. Johnson again inquired why subsection (D) is necessary. Judge Kaplan responded that the release is given to Bar Counsel and is not sent to the patient from the physician. Judge Johnson added that release to Bar Counsel is the authorization from various physicians. Mr. Klein asked if Bar Counsel speaks to the physician. Mr. Brault said that there are many problems with the patient-physician privilege. There is an undercurrent among plaintiff attorneys that a release only entitles defense attorneys to get the written records, and does not authorize defense attorneys to speak with the physician on the telephone. The function of subsection (D) is to clarify that in addition to obtaining the records, Bar Counsel may also speak with the physician. Mr. Johnson remarked that generally physicians will not talk to parties in such cases. Mr. Brault responded that the physician can be subpoenaed.

The Chair pointed out that subsection (c)(2)(D) refers to "physician-patient privilege", but there is no such privilege in Maryland. Mr. Brault said that Code, Health General, §4-305 mandates confidentiality of medical records. The Chair observed that this is not a privilege. Mr. Howell suggested that the language in subsection (D) which reads "physician-patient" should be deleted. The Committee agreed by consensus to this suggestion. The Vice Chair suggested that subsections (c)(2)(C) and (D) should be collapsed.

Subsection (C) would read "certifies that the attorney has furnished Bar Counsel with written consent to the release of such health care information and records as Bar Counsel has requested and waives any privilege as to any such information and records." Mr. Sykes suggested that a statement which would direct the health care provider to release information should be added. Mr. Brault commented that the authorization statement as to the release of medical records should be well-crafted, because mental health records cannot be released without a special release.

The Vice Chair inquired as to why the release of medical information is causing so many problems, since at the time of the joint petition, Bar Counsel has already gotten the necessary information. Mr. Brault explained that subsection (C) certifies to the Court of Appeals that the appropriate record has been established, so that the action requested of the Court is proper. It is a crime to give out medical records without the appropriate authorization. Mr. Sykes reiterated that an express direction would be helpful and not simply a release. Mr. Brault remarked that Bar Counsel can craft the release using the statute. The Chair asked if the statute should be amended, and Mr. Brault replied that he did not know. He said that Maryland is in the forefront of medical statutes, and physicians are concerned about medical powers of attorney, surrogate consents, and living wills. Mr. Brault noted that the issue of consents to inactive status for reasons other than medical

or physical incapacities has not been decided. Mr. Howell expressed the view that the Rule should not be rewritten for one isolated instance. Mr. Hirshman commented that there have been other instances, such as geriatric problems, where the attorney went on inactive status. This is different than when someone is under investigation, and the attorney is not mentally or physically incapacitated. The Chair asked Mr. Hirshman if he could recommend any language to be added to the Rule, and Mr. Hirshman suggested that the language "or for any other good reason" be added to the end of section (a). Mr. Sykes pointed out that this could lead to abuse situations. Mr. Howell disagreed with Mr. Hirshman's suggestion, noting that the categories of mental or physical infirmities are broad enough to catch all the cases which have been mentioned in the discussion today. The Chair suggested that subsection (c)(2)(A) could end with the word "services." Mr. Brault suggested that subsection (c)(2)(B) could end with the language "as Bar Counsel has requested" as subsection (C) does. The Vice Chair said that the Rule could be broadened to apply to inactive status by consent under any circumstances. The affidavit in subsection (c)(2) only applies to situations of infirmity or addiction. Mr. Howell suggested that the affidavit could provide Bar Counsel with all the information necessary to satisfy Bar Counsel. Mr. Sykes observed that subsection (B) could apply if the case is based on mental or physical illness or infirmity. Mr. Klein noted that the first four words of

subsections (c)(2)(B) and (C) could be eliminated because the lead-in paragraph to subsection (c)(2) already has those words. The Committee agreed by consensus to this suggestion. Mr. Johnson commented that an attorney may wish to go on inactive status because of an extended vacation and not due to age or mental or physical incapacity. Mr. Hirshman responded that if there is no investigation pending in his office, the attorney can file an affidavit with the Clients' Security Trust Fund (CSTF) that the attorney will not hold himself or herself out as an attorney. The attorney would no longer pay dues to the CSTF. The Chair added that the Court of Appeals would not be involved in this procedure. Mr. Grossman said that if the Court of Appeals orders the inactive status, it is more difficult to get back in to practice law than if the inactive status is accomplished through the CSTF. Mr. Johnson referred to complaints pending about the age of an attorney. Mr. Brault suggested again that the language "or other sufficient reason" be added to the end of section (a). The Vice Chair pointed out that the entire section (c) is based on incapacity. Mr. Hirshman said that an affidavit is necessary only when illness is involved.

The Vice Chair suggested that the Style Subcommittee could reorganize the Rule based on the comments made today. Language could be added to section (b) which would provide the ability to get someone placed on inactive status by consent, for reasons other than incapacity. Section (c) could be based only on special conditions.

Mr. Howell stated that he did not see the need for a new category of attorneys who do not qualify for inactive status who do not consent to discipline. The Chair reiterated that subsection (c)(2)(A) could end with the words "legal services." Subsections (B), (C), and (D) could be redrafted so as to require disclosure of health care providers, medical records, and written consents due to mental or physical illness or addictions.

The Vice Chair pointed out that subsection (c)(1) seems to apply to any reason, and the affidavit clarifies the situation. Mr. Brault said that subsection (c)(2)(B) applies if the grounds are by reason of mental or physical incapacity. If the grounds are for one of those reasons, subsection (B) could be broken down into three parts. The Chair suggested that subsections (B), (C), and (D) could be put at the end of the section. Language could be added to provide that if the inability to render adequate legal services is due to infirmity, the requirements would be put in. The Style Subcommittee can take care of this. Mr. Howell suggested that in subsection (c)(2), language could be added to provide that if the attorney is presently unable to render adequate legal services by reason of mental or physical illness or infirmity, a special affidavit would be filed. All other cases would fall under section (d). Mr. Johnson expressed the opinion that this is confusing. He asked why an affidavit is needed in a case involving an older attorney who needs inactive status due to age. The Vice Chair said that the person

would be instructed to stop practicing law. Mr. Johnson suggested that section (d) should come before subsection (c)(2). Every affidavit needs to have the items listed in section (d), but the cases involving mental or physical infirmity have only the items in subsection (c)(2). Mr. Howell suggested that section (d) go before section (c). The Committee agreed by consensus to this suggestion.

Judge Kaplan moved to approve the Rule with the changes suggested at the meeting. The motion was seconded and passed unanimously.

Mr. Howell presented Rule 16-726, Resignation of Attorney, for the Committee's consideration.

Rule 16-726. RESIGNATION OF ATTORNEY

(a) Application

An application to resign from the practice of law in this State shall be submitted in writing to the Court of Appeals. The application shall state the reasons for the resignation and certify that the attorney has no knowledge of any pending investigation, action, or proceedings in any jurisdiction involving allegations of professional misconduct by the attorney.

(b) When Attorney May Not Resign

An attorney may not resign while the attorney is the subject of a disciplinary investigation, action, or proceeding involving allegations of professional misconduct. An application to resign does not prevent or stay any disciplinary action or proceeding against

the attorney.

(c) Procedure

Upon receipt of an application to resign submitted in accordance with section (a) of this Rule, the Court of Appeals shall notify Bar Counsel, who shall investigate the application and file a response with the Clerk of the Court. The response and the record of any hearing shall be maintained as a record of the Court.

(d) Order of the Court of Appeals

A resignation by an attorney is effective only upon entry of an order of the Court of Appeals accepting the resignation.

(e) Duty of Clerk

Upon entry of an order accepting the attorney's resignation, the Clerk of the Court of Appeals shall strike the name of the attorney from the register of attorneys in that Court and, in addition, shall certify that fact to the Trustees of the Client's Security Trust Fund and the clerks of all courts in this State.

(f) Effect of Resignation

An attorney may not practice law in this State after entry of an order accepting the attorney's resignation. Bar Counsel shall give any notice required by section (e) of Rule 16-709.

(g) Motion to Vacate

On motion of Bar Counsel or the former attorney filed within 30 days after an entry of an order accepting the attorney's resignation, the Court of Appeals may vacate or modify the order. On motion filed at any time, the Court may vacate the order in case of intrinsic or extrinsic fraud, mistake, or irregularity.

Source: This Rule is in part derived from former Rules 16-712 (BV12) and 16-713 (a) (BV13 a) and in part new.

Rule 16-726 was accompanied by the following Reporter's Note.

This Rule is derived in part from former Rules BV12 and BV13 a. The subject of resignation by an attorney is not addressed in the A.B.A. Model Rules or the District of Columbia Bar rules.

Section (a) is derived in part from the first sentence of former Rule BV12 a. This section adds the new requirement that the attorney certify in writing that the attorney knows of no investigation, action, or proceeding pending in any jurisdiction involving allegations of the attorney's misconduct. This requirement is designed to prevent resignations to avoid discipline for misconduct discovered in another action or another jurisdiction but not yet reported to Bar Counsel.

The first sentence of section (b) is derived from former Rule BV12 d 1. It carries forward the concept that an attempt to resign while a disciplinary investigation or proceeding is pending will be treated as ineffectual. AGC v. Hopp, 330 Md. 177, 183-84 (1993). The second sentence of section (b) is derived from the second sentence of former Rule BV12 a.

Section (c) is derived from former Rule BV12 b. It requires Bar Counsel to file a response, which would include a report of any investigation, reasons for objecting to the application, or other recommendation. See Matter of Van Susteren, 338 Md. 339 (1995) (recommendation that resignation be accepted).

Section (d) is derived from the first sentence of former Rule BV12 c. The second

> sentence of the former rule is omitted as unnecessary because the former substance of the provisions are included in sections (e) and (f).
>
> Section (e) is derived from subsections (1) and (3) of former Rule BV13 a.
>
> Section (f) is derived from the first sentence of subsection (2) of former Rule BV13 a.
>
> Section (g) is new. It is patterned on provisions in Rule 2-535 which confer revisory power over circuit court judgments. Although section (g) permits a resigned attorney to move to vacate the order accepting resignation, it is intended primarily to provide Bar Counsel with a mechanism for rescinding a resignation obtained by alleged fraudulent nondisclosure of an investigation or proceeding in another jurisdiction that was unknown to Bar Counsel.

Mr. Howell explained that this Rule is not new, but it is a procedural amplification of the existing rule. It provides an alternative to the disciplinary process. The Vice Chair inquired whether if someone from another state wants to know if an attorney is involved in disciplinary proceedings, and the attorney resigns, the other state gets informed of this. Mr. Hirshman replied that the other state is told if the resignation is public. The states of Florida and Virginia permit attorneys to resign. Maryland gets the information of the resignation, but not the information about a final order of discipline. A rule is needed which provides that resignation is the equivalent of discipline. Bar Counsel currently has to go to the courts to get a waiver of confidentiality. These

cases have to be proven again.

The Chair asked if someone is prohibited from resigning during the pendency of an investigation. Mr. Hirshman responded that if an attorney files a letter with the Court of Appeals asking to resign, the Court asks Bar Counsel if anything is pending against the attorney. If something is pending, the attorney is not permitted to resign. The Vice Chair commented that if someone is subject to disciplinary proceedings and consents to go on inactive status, he or she can come back without taking the bar examination. Mr. Hirshman agreed that there are two different methods to go back to practicing law depending on how the person left. The Chair questioned whether an attorney who wishes to resign has to give a reason. Mr. Hirshman replied that no reason has to be given. The Chair commented that if a person is leaving an exemplary legal career, no reason for resignation should be required. The attorney could certify that there have been no disciplinary charges and still retain his or her privacy.

Mr. Brault remarked that the problem with resignations is that the attorney may have stolen one million dollars from a client, and Bar Counsel does not know about it. The attorney could be allowed to resign for a false reason. Mr. Sykes questioned as to why any attorney who has no disciplinary proceedings pending would choose to resign rather than go on inactive status. Mr. Grossman commented that many attorneys resign. The Vice Chair pointed out that if the

attorney has not been truthful, Bar Counsel can pursue disciplinary proceedings against an attorney who is on inactive status, but not against an attorney who has resigned. Mr. Sykes said that an attorney should not be allowed to get out of the practice of law before he or she is caught for an offense. Mr. Johnson commented that the applications to resign now go to Bar Counsel first before the Court of Appeals. The proposed Rule provides that the application goes to the Court of Appeals first. The Chair suggested that the Rule could require the consent of Bar Counsel. Mr. Johnson said that the application should be submitted to Bar Counsel. Mr. Brault suggested that the first sentence of the section (a) should substitute the language "to Bar Counsel" for the language "to the Court of Appeals." Mr. Howell noted that section (c) may also have to be changed. Mr. Bowen expressed the view that it is not logical to give the application to Bar Counsel. Mr. Brault asked if the application should be under oath. The Chair commented that it is important to get Bar Counsel involved, but the Court of Appeals should not have the responsibility of notifying Bar Counsel. The Rule should provide that the attorney notifies Bar Counsel, and if Bar Counsel does not object, the application can be presented to the Court of Appeals. The application should contain an agreement by Bar Counsel to the entry of an order permitting resignation. Mr. Howell said that the intention was that the Court of Appeals would notify Bar Counsel about the resignation, because the attorney may not

notify Bar Counsel. Mr. Bowen commented that if the attorney neglects to notify Bar Counsel, he or she will not get permission to resign. It is not that great a burden on the Court of Appeals to send a copy to Bar Counsel.

Judge Kaplan observed that the Rule should provide that the application should be submitted to the Court of Appeals with a copy to Bar Counsel. The Chair suggested that it be a verified application. Mr. Bowen suggested that section (c) should begin as follows: "Upon receipt of an application to resign submitted in accordance with section (a) of this Rule, Bar Counsel shall investigate and file a response with the Clerk of the Court." Mr. Brault suggested that section (a) read as follows: "A verified application to resign from the practice of law in this State shall be submitted in writing to the Court of Appeals, with a copy to Bar Counsel and shall certify the resignation is not being offered to avoid disciplinary action and that the attorney has no knowledge ... ." The Vice Chair commented that as a matter of style, the term "verified" is not used. Mr. Brault said that the Style Subcommittee could make the necessary changes. The Committee agreed to these changes by consensus.

The Vice Chair questioned whether section (g) is derived from the current rule. Mr. Howell answered that section (g) is new. It is intended to avoid the situation where an attorney successfully resigns, terminating the court's authority, but the resignation is

done fraudulently. It provides a mechanism for the court to vacate the resignation, similar to the post-judgment motion in Rule 2-535. The Vice Chair asked about the language "intrinsic or extrinsic." Mr. Howell responded that this broadens the Rule. The Vice Chair inquired if the language "newly discovered evidence" would be better.

The Chair suggested that section (g) read as follows: "On motion of Bar Counsel, the Court of Appeals may vacate or modify the order. On motion filed at any time, the Court may vacate the order in case of intrinsic or extrinsic fraud, mistake, or irregularity." Mr. Howell posited that an attorney may resign at the age of 35, and when the attorney is 60, the court vacates the order of resignation. The Chair said that the resignation is subject to revisitation at any time. Mr. Grossman commented that this is not in the present rule. The idea of resignation is that it is permanent. This new provision gives the impression that an attorney can come back in to the bar to practice law. There are other mechanisms to come back in.

The Chair asked if the words "mistake" and "irregularity" are appropriate in section (g). The Vice Chair answered that only the word "fraud" should be there. Mr. Brault agreed with Mr. Grossman and suggested that the only time the resignation can be vacated would be on motion of Bar Counsel. If the attorney has a reason to vacate, he or she can go to Bar Counsel to make the motion for Bar Counsel to consider. Mr. Howell pointed out that this takes the Court of

Appeals out of the loop; the Court could disagree with Bar Counsel. The Chair said that other avenues are available, such as equitable relief. Mr. Howell observed that an attorney could resign, and two weeks later is adjudicated to be incompetent, and then the attorney wants to come back in after he or she is no longer incompetent. Mr. Brault commented that Bar Counsel could handle that situation.

The Chair suggested that section (g) read as follows: "On motion of Bar Counsel, the Court may vacate or modify the order in case of intrinsic or extrinsic fraud." The Committee agreed to this change by consensus. The Rule was approved as amended.

Mr. Howell presented Rule 16-731, Petition for Disciplinary Action, for the Committee's consideration.

Rule 16-731. PETITION FOR DISCIPLINARY ACTION

(a) Commencement of Disciplinary Action.

When so directed in accordance with the provisions of this Chapter, Bar Counsel may commence a disciplinary action against an attorney by filing in the Court of Appeals a petition for disciplinary action.

(b) Parties

The petition shall be filed in the name of the Commission, which shall be called the petitioner. The attorney shall be called the respondent.

(c) Form of Petition

The petition shall be in writing and shall be sufficiently clear and specific to inform the respondent of any professional

misconduct charged and the basis of any allegation that the respondent is incapacitated and should be placed on inactive status.

(d) Service

The Court of Appeals shall direct in each case the manner of service of a copy of the petition which shall be served together with the order of the Court of Appeals designating the court in which the answer is to be filed.

(e) Actions to be Docketed

An action filed under this Rule shall be placed on the miscellaneous docket of the Court of Appeals.

Source: This Rule is derived from former Rules 16-709 (BV9) and 16-711 (b)(2) (BV11 b 2).

Rule 16-731 was accompanied by the following Reporter's Note.

Section (a) is derived, with style changes, from former Rule BV9a and the first sentence of former Rule BV9b. This section clarifies the fact that a disciplinary action against an attorney is commenced by filing a petition in the Court of Appeals. The petition is no longer to be filed by Bar Counsel "acting at the direction of the Review Board", as provided in former Rule BV9a, because Bar Counsel will no longer be acting at the direction of the Review Board. In filing a petition for disciplinary action, Bar Counsel will be acting at the direction of either an Inquiry Panel under Rule 16-719 (d) or the Commission under Rules 16-723 (Injunction; Expedited Disciplinary Action) and 16-724 (Summary Transfer to Inactive Status) or as directed by Rules 16-721 (Conviction of Crime) or 16-722 (Reciprocal Discipline).

Section (b) is derived in part from the

first sentence of former Rule BV9 b and is in part new. The designation of the Commission as the "petitioner" and the attorney as the "respondent" reflects current practice.

Section (c) is derived from former Rule BV9 c with minor style changes. The function of the petition is to give notice of the "operative facts" alleged as constituting the misconduct or incapacity. AGC v. Myers, 333 Md. 440, 445 (1994). The petition need not allege the violation of any specific provision of the Rules of Professional Responsibility but, if it does, then the disciplinary action is limited to the provisions selected. AGC v. McBurney, 282 Md. 116, 123 (1978).

Section (d) is substantially the same as former Rule BV9 d, with style changes.

Section (e) is derived from the final sentence of former Rule BV11 b 2. Because the docketing of the action occurs at the time of filing, the reference to docketing is moved forward to this Rule from its previous location among provisions for exceptions and recommendations for sanctions. The reference to the miscellaneous docket (rather than the regular appeals docket) is required because the Court of Appeals has original jurisdiction over a disciplinary action. AGC v. Garland, 345 Md. 383, 392 (1997); AGC v. Glenn, 341 Md. 448, 470 (1996); AGC v. Powell, 328 Md. 276, 287 (1992). The previous exhortation in Rule BV11 b 2 for the action to "be disposed of as soon as practicable" is deleted as unnecessary.

Mr. Howell explained that at this point in the disciplinary process, the Court of Appeals has jurisdiction. There is an entire series of rules tracking the proceedings in the Court of Appeals. These rules are taken almost verbatim from the existing rules. Mr. Brault added that the changes in the revised Rules were designed to speed up the discipline process before it goes to the court.

The Vice Chair asked if the Court of Appeals directs each petition to be served in a particular way. Mr. Grossman replied in the affirmative. Mr. Hirshman commented that if there are problems with service, the CSTF is served. Mr. Downes noted that Rule 16-708 (b) covers service on the CSTF. The Vice Chair noted that there is already a general service rule. Mr. Howell suggested that either section (b) of Rule 16-708 be moved to Rule 16-731, that a cross reference to Rule 16-708 (b) be added to Rule 16-731, or that section

(d) of Rule 16-731 should be deleted. Mr. Brault expressed the view that the Style Subcommittee could decide what to do. The Committee agreed by consensus to Mr. Brault's suggestion. The Rule was approved as amended.

Mr. Howell presented Rule 16-732, Order Assigning Petition for Hearing, for the Committee's consideration.

> Rule 16-732. ORDER ASSIGNING PETITION FOR HEARING
>
> (a) Order Assigning Petition
>
> The Court of Appeals may order the assignment of the petition to any court for hearing. The order shall designate the judge or judges who will hear the action and the clerk responsible for maintaining the record.
>
> (b) Number of Judges
>
> Ordinarily, the order shall designate a single judge. Upon motion filed by either party, or on its own motion, the Court of Appeals for good cause shown may designate two additional judges to hear the action.
>
> (c) Service of Order
>
> Upon entry of an order assigning the petition, the clerk of the Court of Appeals shall send two copies to Bar Counsel, who shall serve a copy on the respondent in accordance with section (b) of Rule 16-708.
>
> (d) Motion to Amend Order
>
> Within 15 days following service of the order on the respondent, either party may move in the Court of Appeals to reassign the hearing of the action to another court or judge or to designate two additional judges to hear the

action. Filing the motion shall not stay the time for answer to the petition. Procedure on the motion is governed by Rule 8-431.

Source: This Rule is derived from former Rules 16-709 (b) (BV9 b), 16-709 (e)(1) (BV9 e 1) and 16-710 (c) (BV10 c).

Rule 16-732 was accompanied by the following Reporter's Note.

Section (a) is derived without substantial change from the second sentence of former Rule BV9 b. It substitutes the verb "assign" for the phrase "direct that the [petition] be transmitted."

Section (b) is derived, with changes in style, from former Rule BV10 c.

Section (c) is new, although it carries forward the need to serve the attorney with a copy of the order as recognized in former Rule BV9 d, which contemplated the simultaneous service of the order and the petition. Subsection (c) assumes the possibility of delay between the filing of the petition and entry of the order. It imposes upon Bar Counsel the duty of serving the attorney with a copy of the order in accordance with Rule 16-708 (b).

Section (d) is derived from former Rule BV9 e 1, but permits the Commission as well as the respondent attorney to file a motion and thus broadens the scope of relief beyond a transfer to another court. In other words, the motion may request a different judge or the designation of two additional judges. Even without a motion, the judge initially assigned may be unable to hear the case and thus necessitate an amended order that designates a different judge. See, e.g., AGC v. Keister, 327 Md. 56, 60 n.8 (1992) (judge recused self, forcing the designation of another judge).

Mr. Grossman commented that since 1975, assignment of cases has always been to a circuit court judge. Mr. Brault noted that section (b) provides that the Court of Appeals may designate additional judges for good cause shown. He inquired as to whom the Court shows good cause. The Chair said that the language "for good cause shown" should be deleted from the Rule. The Committee agreed by consensus to this suggestion. He asked if the Court of Appeals is able to designate one additional judge. Mr. Johnson remarked that he had never heard of a three-judge panel. The Chair pointed out that the designation of one judge to hear the case is consistent with current practice, but the Court may designate additional judges. Mr. Howell suggested that the word "two" be taken out of section (d). The Committee agreed by consensus with this suggestion.

Mr. Brault inquired why service of the order is the same as service of the initial petition. Mr. Hirshman responded that the order goes with the petition. The order provides the time to answer and designates the judge who is to hear the case. Mr. Brault noted that the Rule does not provide that the order contains the time to answer. The Chair suggested that language could be added to the Rule to provide that the order contains the time to answer. Mr. Howell suggested that section (d) of Rule 16-731 could be retained, and it could provide that the petition is served with the order of the Court of Appeals explaining what the order designates. The Reporter suggested that section (d) of Rule 16-731 could be moved to Rule 16-

732.

Mr. Brault said that he thought section (a) provides that the Court of Appeals orders the assignment, and then upon entry of the order, the respondent is served with the petition. This would be a two-step process. The Chair suggested that section (a) should read as follows: "The Court of Appeals shall order the assignment of the petition to any court for hearing. The order shall designate the judge or judges who will hear the action, the date by which the respondent must answer the petition, and the clerk responsible for maintaining the record." The Vice Chair suggested that the sentence which provides that the order shall designate the judge or judges should be removed, because it is also in section (b). Alternatively, sections (a) and (b) could be collapsed. Judge Vaughan noted that section (d) also contains this language. The Chair asked about the provision stating the number of judges in section (b). Mr. Sykes expressed the opinion that it is not needed. Mr. Johnson cautioned that if the Rule does not provide how many judges there will be, someone could petition to have more than five judges. Mr. Sykes pointed out that there should be no more than three judges. Mr. Bowen stated that the number should be one or three judges, but never two. The Chair said that it would not be a good idea to run the risk of two judges hearing the case who do not agree. Mr. Bowen also agreed that there should not be five judges hearing the case. Mr. Downes noted that section (d) allows another judge.

The Chair stated that in 25 years, it has not happened that more than one judge has been assigned. The option of more than one judge should be taken out. If the Court of Appeals wants this option, it can be put it back into the Rule. The Vice Chair suggested that sections (a) and (b) should be collapsed. The Reporter questioned how the timing will be handled when, pursuant to section (c), Bar Counsel serves a copy of the order on the respondent. Mr. Howell answered that the next Rule provides that the time frame is 15 days, unless a different time is ordered. He suggested that section (a) be left in, and section (b) be deleted. Section (c) should clarify that the petition and the order are served on the respondent at the same time. The Chair said that this will be conformed from the previous Rule, and the Committee agreed by consensus. Mr. Karceski inquired about the provision in section (d) which says that the Court of Appeals can designate additional judges, and the Chair said that it should be deleted. The Committee agreed by consensus to the deletion.

Mr. Howell suggested that section (d) should be deleted from Rule 16-731 as unnecessary and that the following should be the language of the end of section (c): "who shall serve copies of the petition and the order on the respondent in accordance with section (b) of Rule 16-708." The Reporter suggested that the language should be: "serve a copy together with a copy of the petition on the respondent in accordance with section (b) of Rule 16-708 or as

otherwise ordered by the Court of Appeals." The Committee agreed by consensus to the Reporter's suggested change. The Rule was approved as amended.

Mr. Howell presented Rule 16-733, Pleading, for the Committee's consideration.

Rule 16-733. PLEADING

(a) Answer

Within 15 days after being served with the petition, unless a different time is ordered, the respondent shall file in the designated court an answer to the petition and serve a copy on the petitioner. The answer shall admit or deny the averments of the petition in accordance with section (c) of Rule 2-323. Averments of the petition are admitted unless denied in the answer. When appropriate, a respondent may claim the inability to admit, deny, or explain an averment on the ground that to do so would incriminate the respondent, and such statement shall not amount to an admission of the averment.

(b) Failure to Answer

If the time for answer has expired and the respondent has failed to file an answer in accordance with section (a) of this Rule, the court shall treat the failure as a default and apply the provisions of Rule 2-613.

Committee note: This is a new provision requiring a failure to answer the petition to be treated as a default.

(c) Defenses and Objections

Defenses and objections to the petition, including insufficiency of service, shall be stated in the answer and not by preliminary motion.

(d) Procedural Defects

It is not a defense or ground for objection to a petition that procedural defects may have occurred during disciplinary proceedings prior to filing of the petition.

(e) No Statute of Limitations

A disciplinary action is not subject to any period of limitations.

(f) Amendments to Pleadings

A party may amend a petition or an answer in accordance with the applicable provisions of Rule 2-341.

Source: This Rule is derived from former Rules 16-709 (e) (BV9 e) and 16-710 (b) (BV10 b) and is in part new.

Rule 16-733 was accompanied by the following Reporter's Note.

Section (a) is in part derived from former Rule BV9 e 2 and in part is new. Section (a) incorporates the pleading requirements of section (c) of Rule 2-323 and some portions of section (e) of that Rule. The third sentence of section (a), which provides that a failure to deny is an admission, is derived from Rule 2-323 (e), see AGC v. Willcher, 340 Md. 217, 219 (1995); AGC v. Hopp, 330 Md. 177, 186 (1993)(failure to answer constitutes admission of petition), as is the new provision in the fourth section for self-incrimination.

Section (b) is new. It recognizes that, under Rule 2-613 a failure to answer shall be treated as a default, as occurred in AGC v. Hopp, 330 Md. at 331.

Section (c) is new. Its purpose is to require defenses and objections to be asserted in the answer, rather than by a preliminary

> motion that would delay the filing of the answer. It was suggested in one case that the failure to file a preliminary motion to dismiss might constitute a waiver of the issue. AGC v. Keister, 327 Md. 56, 72-73 (1992). Section (c) is drafted to preclude any suggestion that such a motion is either required or permitted.
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> Section (d) is derived from former Rule BV10 b but limits its scope to defects occurring "during disciplinary proceedings" initiated under Rule 16-713. The limitation is necessary because pre-action defects may be challenged in other contexts, e.g., criminal conviction (Rule 16-721), involuntary admission (Rule 16-722), or action for injunctive relief (Rule 16-723).
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> Section (e) is new. It is suggested by A.B.A. Model Rule 32 and reflects Maryland case law. See e.g., Anne Arundel County Bar Ass'n v. Collins, 272 Md. 578 (1974). See also District of Columbia Rule XI, §1(c).
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> Section (f) is new. It supersedes the provision for "subsequent proceedings" in former Rule BV9 e 3 and its vague reference to "the applicable provisions of Chapter 300 of Title 2." Instead, Rule 2-341 is incorporated as governing any amendments to the petition or answer.

Mr. Howell explained that this Rule covers the answer to the petition. No motion to delay is permitted. Section (e) of the Rule is new. Mr. Brault told the Committee that the Court of Appeals currently has before it a case in which the issue of statute of limitations has been raised as a defense.

The Chair asked if the last phrase of section (a) which reads "such statement shall not amount to an admission of the averment" is currently in the existing rule. Mr. Howell replied that he thought

that it was. It is derived from the civil practice in Rule 2-323. Mr. Sykes commented that if a statement is not an admission, one can still make inferences from it. The Chair inquired if it should be retained. Mr. Howell responded that it should not be tinkered with as it may be verbatim from Rule 2-323 (e). Mr. Karceski confirmed that the phrase is verbatim from that Rule, but the words "tend to" should be added before the word "incriminate." The Committee agreed to this change by consensus.

The Chair pointed out that if someone takes the Fifth Amendment, then the trier of fact may infer that the answer would be harmful. If a non-admitted fact is found to be true, it can be kept in the case, and the evidentiary value of it can be fleshed out at the hearing. Mr. Howell suggested that the last phrase of section (a) could be taken out. Mr. Brault said that Rule 2-323 (e) is not an admission. Mr. Sykes commented that it could be taken out of both Rules. The Chair noted that there was a case in Baltimore County which involved an instruction to the jury when someone refuses to answer during testimony. The court held that the jury may not be required to and need not draw an adverse inference. The sentence should be left in section (a), since it clarifies this holding.

Mr. Sykes expressed his concern about section (e). Mr. Brault pointed out that the Code does not provide a statute of limitations in disciplinary actions against physicians. Mr. Sykes asked what happens if a physician is brought up on a disciplinary action many

years after the event, and there are no records. The Chair said that if section (e) is retained, an attorney cannot assert the defense that he or she cannot properly defend the case because it was too long ago. Mr. Sykes commented that generally the issues of venue and limitations are left to the legislature to determine. The Vice Chair added that no other rule has a similar provision. Mr. Howell said that most other states have a similar provision because the ABA has one. This does not deal with the issue of whether laches applies. One could show prejudice in the delay of filing the disciplinary action. This defense is not foreclosed by rule or by practice. Mr. Sykes remarked that laches never runs against the State. The situation may not be a matter of laches, but a bright line rule is a mistake. This should be left to case law and the common law. He suggested that section (e) be deleted, and the Committee agreed with this suggestion by consensus.

The Vice Chair referred to section (b), commenting that it is odd to use a default judgment rule in Rule 16-733. Mr. Grossman responded that the Office of Bar Counsel does do this. Mr. Howell added that using the default judgment rule was upheld in AGC v. Hopp, 330 Md. 177 (1993). The Vice Chair suggested that the Committee note to section (b) should be deleted, because it is expressing the obvious. The Committee agreed by consensus to this suggestion.

Mr. Sykes observed that when there is a default, no liability need be proven. He asked why the Rule does not provide for proof of

liability. Mr. Titus pointed out that the next issue for determination would be sanctions if the allegations of the petition are taken as true. Mr. Sykes questioned whether they should be taken as true, or whether proof of liability should be provided for. Judge Vaughan asked if an attorney would actually not respond at all. The Vice Chair remarked that this must happen. The Chair suggested that it would be better to have Bar Counsel put on proof concerning the allegations. Without testimony, how would the judge hearing the case know the appropriate sanction? Mr. Grossman said that other evidence is presented. The Chair observed that the judge can grant the petition and send the case to the Court of Appeals. The Vice Chair added that that is what often happens. Mr. Hirshman commented that when the trial court makes a decision based on a default, it makes findings of fact. Bar Counsel may make a request for admissions. Mr. Grossman remarked that the requests for admissions are usually not answered. The Vice Chair said that the attorney can always offer proof to vacate the order of default. The Chair noted that section (d) of Rule 2-613 provides that the defendant may move to vacate the order of default by stating the reasons for the failure to plead and the legal and factual basis for the defense to the claim.

The Vice Chair posited that the respondent attorney may have taken too long to get counsel to represent him or her and missed the 30-day period to vacate the default order. The Rule provides no

discretion in such a situation. Mr. Hirshman answered that the respondent attorney can always go to the Court of Appeals and explain the situation. The Court may remand the case. The Vice Chair expressed the view that section (b) does not seem proper. The Chair responded that what this is trying to accomplish is an end to the case. Mr. Brault said that the provision should be left in. It provides Rule 2-613 notice to the attorney. The attorney gets notice of the default, and has 30 more days to take action. Bar Counsel should be able to end the case. It provides a precise procedural penalty.

Agenda Item 2. Continued consideration of a proposal to amend Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant Not Required) by adding new subsection (b)(22), Judgment of Previous Conviction.

Mr. Titus presented Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Note Required, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-803 to provide that certain judgments of previous convictions are not excluded by the hearsay rule, as follows:

Rule 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Statement by Party-opponent

A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

Committee note: Where there is a disputed issue as to scope of employment, representative capacity, authorization to make a statement, the existence of a conspiracy, or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted. These rules do not address whether the court may consider the statement itself in making that determination. Compare Daugherty v. Kessler, 264 Md. 281, 291-92 (1972) (civil conspiracy); and Hlista v. Altevogt, 239 Md. 43, 51 (1965) (employment relationship) with Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 775 (1987) (trial court may consider the out-of-court statement in deciding whether foundational requirements for coconspirator exception have been met.)

(b) Other Exceptions

(1) Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded Recollection

See Rule 5-802.1(e) for recorded recollection.

(6) Records of Regularly Conducted

Business Activity

A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Committee note: Public records specifically excluded from the public records exceptions in subsection (b)(8) of this Rule may not be admitted pursuant to this exception.

Cross reference: Rule 5-902 (11).

(7) Absence of Entry in Records Kept in Accordance with Subsection (b)(6)

Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public Records and Reports

(A) Except as otherwise provided in this paragraph, a memorandum, report, record,

statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

Committee note: This section does not mandate following the interpretation of the term "factual findings" set forth in Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). See Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581 (1985).

(9) Records of Vital Statistics

Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross reference: See Code, Health General Article, §4-223 (inadmissibility of certain

information when paternity is contested) and §5-311 (admissibility of medical examiner's reports).

(10) Absence of Public Record or Entry

Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of Religious Organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in Ancient Documents

Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market Reports and Published Compilations

Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a

published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History

Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to Character

Reputation of a person's character among associates or in the community.

(22) ~~[Vacant]~~ Judgment of Previous Conviction

~~There is no subsection 22.~~ Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. In criminal cases, the State may not offer evidence of a judgment against persons other than the accused, except

for purposes of impeachment. The pendency of an appeal may be shown but does not preclude admissibility.

Committee note: This section is derived without substantive change from F.R.Ev. 803 (22). Any language differences are solely for purposes of style and clarification.

(23) Judgment as to Personal, Family, or General History, or Boundaries

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other Exceptions

Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note: The residual exceptions provided by Rule 5-803 (b)(24) and Rule 5-804 (b)(5) do not contemplate an unfettered exercise of judicial discretion, but they do

provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5-803 and 5-804 (b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Source: This Rule is derived as follows:
Section (a) is derived from F.R.Ev. 801 (d)(2).
Section (b) is derived from F.R.Ev. 803.

Rule 5-803 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 5-803 adds certain judgments of previous convictions to the list of types of hearsay that are not excluded by the hearsay rule even though the declarant is available as a witness.

When new Title 5 was transmitted to the Court of Appeals with the One Hundred Twenty-Fifth Report of the Rules Committee, Rule 5-803 contained a proposed subsection (b)(22), Judgment of Previous Conviction. When the Court adopted Rule 5-803, it declined to

> adopted subsection (b)(22). In rejecting subsection (b)(22), members of the Court expressed policy concerns about the fact that the subsection deviates from existing case law and about any effect that the subsection might have on recidivist statutes. As a result of some recent civil cases in several courts involving the "slayer's rule," the Evidence Subcommittee has concluded that it would be appropriate to request that the Court reconsider adopting subsection (b)(22), which has been redrafted with style changes. Additionally, because subsection (b)(22) addresses only the admissibility of evidence, not whether that evidence conclusively establishes the convicted individual as the decedent's killer in a "slayer's rule" action, the Subcommittee suggests that the Legislature consider a statutory change with respect to the issue of conclusiveness of the previous conviction in "slayer's rule" actions.

Mr. Titus explained that the Rules Committee did not finish its consideration of Rule 5-803 at the November meeting. He had seen an article in The Baltimore Sun about a case in which the judge had ruled that a criminal conviction of someone for first degree murder is not dispositive in a civil action brought by that person to collect insurance proceeds on the life of the individual the person murdered. In the meeting materials, there is a memorandum from Professor Lynn McLain, of the University of Baltimore, on the history of the original proposal to have a slayer's rule in the Rules of Evidence. (See Appendix 1). A version of the Rule which was similar to Federal Rule 803 (22) was included in the original package of Evidence Rules, but the Court of Appeals deleted it. The Court seemed to have some concern about recidivist statutes. The

Subcommittee recommends that it should be put back into the Rules of Evidence.

The Chair commented that this Rule has worked well in the federal courts. There have been several cases in Maryland which held that the criminal judgment cannot be introduced in a civil case as proof of the underlying facts. The Subcommittee's proposal is to change the law. Mr. Dean told the Committee that there was an upsetting case in Montgomery County where the defendant was seeking to inherit a two-million dollar estate of his handicapped child after the father had been convicted of arranging the child's murder. The Chair noted that there is a proposed statutory change filed by Delegate Vallario which provides that the fact of the conviction would be issue-preclusive on the right to inherit. The proposed rule change is broader.

Mr. Titus said that the suggestion had been made to postpone the decision on the Rule until the legislature makes its decision on the statue, but the Subcommittee felt that the proposed change to the Rule should be considered, nonetheless. Judge Vaughan asked if there should be clarification as to which judgment is referred to in the first sentence of subsection (b)(22). The Committee felt that the language was clear, and the Chair pointed out that this is the language of the federal rule. Mr. Brault moved to adopt the proposed Rule, the motion was seconded, and it passed unanimously.

Agenda Item 3. Consideration of a proposed amendment to Rule

4-343 (Sentencing -- Procedure in Capital Cases.

Judge Johnson presented Rule 4-343, Sentencing -- Procedure in Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 (f) for conformity with Clermont v. State, ___ Md. ___ (1998), as follows:

Rule 4-343. SENTENCING -- PROCEDURE IN CAPITAL CASES

. . .

(f) Allocution

Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement. Absent compelling circumstances, allocution before a jury shall precede the State's rebuttal closing argument.

. . .

Rule 4-343 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-343 adds a sentence to section (f) that expresses the holding in Clermont v. State, ___ Md. ___ (No. 115, September Term, 1996, filed January 20, 1998).

Judge Johnson explained that Rule 4-343 is proposed to be amended to conform to the decision of the Court of Appeals in the case of Clermont v. State, ____ Md. ___ (No. 115, September Term, 1996, filed January 20, 1998). The trial judge in the case with no rule to support him decided that in the sentencing phase of a criminal case, the State's Attorney has the final allocution before the jury even after the defendant has had his say. Normally, most judges allow the defendant the final allocution before the judge sentences. In a capital case, where there is a jury, the jury must make findings of fact. The defendant can argue anything, since his statements are unsworn, and the State would have no chance to rebut before the jury retires to deliberate. The Court of Appeals affirmed the trial judge, and the Honorable Lawrence F. Rodowsky, wrote a letter to the Chair asking that the Rules Committee recommend language to Rule 4-343 (f) to conform to the holding in Clermont.

Mr. Dean said that historically the Court of Appeals has expressed the view that it is appropriate for the prosecutor to comment on the defendant's allocution, which is not made under oath, and against which there is no opportunity for cross-examination. This implicitly suggests that it is appropriate for the prosecutor to have the last word. Mr. Brault pointed out that the Court of Appeals has requested this change to the Rule.

The Chair inquired if the order being assigned in the Rule is the State's argument, the defense's rebuttal, the defense's

allocution, and the rebuttal to the allocution. Judge Johnson responded that no order is being decreed. The Chair pointed out that the argument may be made that the defendant must allocute before the State's rebuttal argument. Judge Kaplan clarified that after the defendant's allocution, the State shall have the opportunity to respond. Mr. Karceski questioned whether the defendant can choose to allocute after his counsel has spoken and after the State's rebuttal. The Chair answered in the affirmative. Mr. Karceski said that the problem is how the procedure goes. In death penalty cases, every "i" must be dotted and every "t" crossed. Judge Johnson stated that the holding is that the State's final argument follows the defendant's allocution.

Mr. Sykes asked if the Rule has to go this far. This makes the defendant allocute before he hears what the State argues on the merits. After summations of counsel, the defendant has the right to allocute, subject to the State's right to comment afterward. The Court may have gone too far. Judge Johnson noted that the Court was stating the law. Mr. Sykes suggested that it could be changed by rule, so that the defendant does not get the last word, but no procedure is being locked in. Mr. Klein remarked that the Rule should not require the defendant to allocute necessarily after the summation. Mr. Sykes observed that the defendant can do what he or she wants, but Mr. Karceski noted that the Rule as proposed to be changed does not say that.

The Chair suggested that the Rule be changed to read as follows: "Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement, and shall afford the State the opportunity to respond to that statement." Mr. Klein asked if the word "respond" should be changed to the word "rebut." The Chair said that a response is not the same as a rebuttal. A response could be that someone agrees. The Reporter suggested that language be added which would clarify that the allocution could be after the State's rebuttal closing. The Chair said that a Committee note can be added to point out that the timing of the allocution is within the discretion of the defendant. If allocution occurs after the State's rebuttal closing argument, the State may respond. The Style Subcommittee can draft the Committee note.

Judge Kaplan moved to change Rule 4-343 (f) as the Chair had just proposed. The motion was seconded, and it carried unanimously.

Agenda Item 1. Continued consideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys

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After the lunch break, Mr. Howell presented Rule 16-734, Discovery, for the Committee's consideration.

Rule 16-734. DISCOVERY

> Subject to the order of the court to which the action is assigned, the taking of depositions and discovery in a disciplinary

action is governed by Chapter 400 of Title 2.

Source: This Rule is derived from former Rule 16-710 (a) (BV10 a).

Rule 16-734 was accompanied by the following Reporter's Note.

This Rule is derived from former Rule BV10 a but qualifies its operation by making all discovery subject to orders of the court to which the action is assigned.

Mr. Howell explained that Rule 16-734 is the same as the current Rule, Rule 16-710 a., except for the first clause. Mr. Sykes commented that this subject is covered in Title 2, Chapter 400, and he asked if anything is added to the Rule by the first clause. The Chair responded that this shows the discretion of the court in a disciplinary action. Mr. Howell said that this retains the idea that the court has control. It may be redundant, but it emphasizes the point. The Chair asked if the language of the Rule should be changed to "Depositions and discovery in a disciplinary action are subject to the order of the court to which the action is assigned." Mr. Howell did not agree with this language. The Vice Chair asked if this is intended to mean that one must get an order for doing discovery, and Mr. Howell replied that that is not the meaning of the Rule. The Vice Chair expressed the view that the Rule is ambiguous. Mr. Brault suggested that the order of the language could be reversed so that the sentence would read: "The taking of depositions and

discovery in a disciplinary action is governed by Chapter 400 of Title 2, unless otherwise ordered by the court."

The Vice Chair inquired if this Rule incorporates the protective order rule, and Mr. Howell answered that it does. The Vice Chair reiterated that the beginning clause is confusing. Mr. Brault said that the phrase gives the court the authority to limit more than Chapter 400. Mr. Sykes asked what other limitations there would be beyond what is already covered in Chapter 400. The Chair suggested that the first clause be taken out, and a Committee note added which would provide "Chapter 400 of Title 2 gives the court discretion to order or limit discovery." Mr. Bowen moved that this suggestion be adopted, the motion was seconded, and it passed unanimously.

Mr. Howell presented Rule 16-735, Judicial Hearing, for the Committee's consideration.

Rule 16-735. JUDICIAL HEARING

(a) Generally

The hearing of a disciplinary action is governed by the same rules of law and procedures as are applicable to a civil action tried by the court. The hearing shall be governed by the applicable procedures of Chapter 500 of Title 2.

(b) Evidence -- Burden and Measure of Proof

The hearing shall be conducted in accordance with the rules of evidence in Title 5. The petitioner shall have the burden of

proving the averments of the petition by clear and convincing evidence. A respondent who asserts matters of defense, mitigation, or extenuation shall have the burden of establishing such matters by a preponderance of the evidence.

(c) Findings and Conclusions

The judge shall prepare and file in the record a written statement of the judge's findings of fact and conclusions of law. The clerk of the court shall send copies to the parties.

(d) Transmittal of Record

Within 15 days after the findings and conclusions are filed, unless a different time is ordered, the clerk of this court shall transmit the record to the Court of Appeals. The petitioner shall cause a transcript of all proceedings at the hearing to be prepared and included in the record.

Source: This Rule is derived from former Rules 16-710 (d) (BV10 d) and 16-711 (a) (BV11 a).

Rule 16-735 was accompanied by the following Reporter's Note.

Section (a) is derived from the first sentence of former Rule BV10 d, but omits its reference to "evidence" and incorporates the applicable trial procedures of Chapter 500 of Title 2. The court assigned to conduct the hearing functions or a master in chancery. ACC v. McBurney, 282 Md. 116, 123 (1978). Indeed, former Rule BV10 d applied the procedures applicable to trials "in equity." Because Rule 2-301 blurs the former distinction between law and equity, section (a) refers instead to "a civil action tried by the court." See Rule 2-519(b).

Section (b) is derived in part from the second sentence of former Rule BV10 d and in

> part is new. It incorporates the Maryland Rules of Evidence and reiterates the requirement that the allegations of the petition must be established by clear and convincing evidence. See, e.g., AGC v. Sachse, 345 Md. 578, 589 (1997); AGC v. Garland, 345 Md. 383, 394 (1997); AGC v. Glenn, 341 Md. 448, 470 (1996); AGC v. Kemp, 335 Md. 1, 9 (1994); AGC v. Powell, 328 Md. 276, 287 (1992). However, the respondent has the burden of proving by a preponderance of the evidence any factual matter in defense or the existence of mitigating circumstances. AGC v. Glenn, 341 Md. at 470; AGC v. Powell, 328 Md. at 288. Some cases have stated that, if disbarment is appropriate, that sanction will be imposed "unless the lawyer can demonstrate by clear and convincing evidence that compelling extenuating circumstances call for a different result." AGC v. Sparrow, 314 Md. 421, 426 (1988). However, because the burden of proof is upon Bar Counsel, section (b) treats extenuating and mitigating circumstances alike and requires their proof by a preponderance of the evidence.
>
> Section (c) is derived from former Rule BV11 a and is similar to the requirement stated in Rule 2-522 (a) for a decision in a contested court trial.
>
> The first sentence of section (d) is derived from former Rule BV11 b 1 with minor style changes. The final sentence is derived from Rule 16-808 (j)(2).

Mr. Howell explained that this Rule is derived from current Rules 16-710 d. and 16-711 a. It contains references to burden of proof, the judge's findings, and transmittal of the record. There are two burdens of proof -- the petition is by clear and convincing evidence, and the response is by preponderance of the evidence. This clarifies that the respondent does not have the same burden as Bar

Counsel.

Mr. Sykes asked about affirmative defenses which go to denial of the charges, but do not require proof. Mr. Howell explained that he did not want affirmative defenses mentioned in the Rule. The Chair commented that the affirmative defense is subsumed by the burden of proof of clear and convincing evidence. Mr. Karceski inquired about the last sentence of section (b). The Chair answered that this comes from the case of Attorney Grievance Commission v. Bakas, 332 Md. 395 (1991). The question before the court in that case was if the respondent has to prove matters of mitigation by clear and convincing evidence. The Court of Appeals held that only Bar Counsel has that burden of proof; the respondent attorney need only prove mitigating circumstances by a preponderance of the evidence.

Mr. Howell pointed out that the Court of Appeals has held that when Bar Counsel has made a case for disbarment, the sanction of disbarment will be imposed unless the attorney demonstrates by clear and convincing evidence compelling circumstances. The Chair responded that this is on the issue of the ultimate sanction. Mr. Grossman remarked that there is some inconsistency. The Chair said that the first issue was if the facts alleged against the respondent are true or false. Factual averments are proved by clear and convincing evidence. Once proved, the sanction is disbarment "unless the attorney demonstrates by clear and convincing evidence that

compelling extenuating circumstances call for a different result." Mr. Grossman commented that this language is from a case decided in 1988, Attorney Grievance Commission v. Sparrow, 314 Md. 421, 426. Then, the burden on both sides was clear and convincing evidence. The Rule refers to mitigation. There would be disbarment but for conditions, such as alcoholism, which are proved by a preponderance of the evidence. If it is proved, there is no disbarment.

Turning to section (c), the Chair noted that when there is a post conviction proceeding, the court may write a long opinion or dictate the opinion into the record. He inquired why the court cannot have the option of dictating a decision into the record, instead of filing a written opinion pursuant to section (c). He questioned why it is necessary to wait three months for a judge to file a written opinion. Mr. Howell said that the Subcommittee felt that requiring findings of fact and conclusions of law to be written represents current practice. This is used to advantage by the Court of Appeals in unreported opinions, if the Court decides to simply adopt the opinion of the trial judge. Mr. Brault pointed out that there used to be a problem with the accuracy of transcripts, but this has dissipated in recent years. There is not a big difference between (1) dictating an opinion into the record and having it transcribed and (2) preparing a written opinion. Mr. Howell remarked that allowing the dictation of the opinion would be a change to the current rule. The Vice Chair commented that dictation of decisions

into the record is permitted in many rules. Judge Kaplan added that it is also a matter of economics. To have the judge dictate and then to obtain a transcript means that someone has to pay a court reporter. A written opinion issued later is no cost to the system.

Mr. Howell suggested that a Committee note be added explaining the change if a change in the current procedure is made, but the Vice Chair said that the change can be explained in the Reporter's note. Mr. Brault remarked that it may be easier for judges to make findings of fact and conclusions of law immediately after the hearing when the issues are still fresh in the judge's mind. The Chair suggested that language similar to that in Rule 4-407, Statement and order of court, be added to the Rule. Mr. Howell asked if this would change the process of review in Rule 16-736. The Vice Chair answered that the same findings of fact and conclusions of law would be dictated into the record.

The Vice Chair suggested that the first sentence of section (c) be changed to read as follows: "The judge shall prepare and file or dictate into the record a statement of the judge's findings of fact and conclusions of law." The Chair said that language similar to that in Rule 4-407 (c) should be included. Mr. Brault suggested that the following sentence be added to the end of section (c): "If dictated into the record, the statement shall be promptly transcribed and filed with the clerk of the court." Mr. Hirshman inquired as to who pays for the respondent's copy. His office pays for the original

and one more, and if they win, they are awarded costs. The Vice Chair noted that one transcript is included in the record. The respondent pays for his or her own copy.

Mr. Brault suggested that the words "or transcribed" be added to section (d) after the word "filed" and before the word "unless." The Committee agreed by consensus to this change. The Vice Chair asked about the 15-day transmittal time. Mr. Howell questioned as to what is the trigger. The Chair answered that once the judge announces his or her decision, the announcement is transcribed. When the finding of facts is issued in a written form, this triggers the transmittal. Rule 4-407 provides that the post conviction judge makes the decision, and the statement is transcribed. The statement is included with the court's order which is filed and sent to the prisoner. The Vice Chair remarked that she was envisioning the situation where the judge makes the statement in court, but nothing is filed. Mr. Brault noted that it has to be filed. The Chair said that the court reporter will have to do the transcription, but in the post conviction case, the reporter is not paid. Mr. Brault observed that the court reporter is paid when the transcription is made. The Chair stated that it has to be clarified to judges that it is proper to dictate into the record.

Judge Kaplan commented that in Baltimore City, the judges send the videotapes of the proceedings to a transcription service which has to be paid first before the transcription is done. If no one

pays, the transcription is not completed. He said that he gets a copy of the written opinion of every disciplinary proceeding in Baltimore City, so it can be determined that the trial judge is doing what is required by the Court of Appeals. The system works well with the judges making written findings of fact and conclusions of law. He keeps track of the written opinions, and it would be more difficult to keep track of dictated opinions. The Chair remarked that if he were on the circuit court, he would prefer to dictate his decisions into the record. Some jurisdictions have problems with court reporters and sufficiency of money to pay for the transcription.

Mr. Brault inquired about post conviction procedure in Baltimore City. Judge Kaplan replied that post conviction decisions are dictated, but Baltimore City does not pay for the transcripts. Mr. Brault expressed the opinion that the Office of Bar Counsel should pay for the transcripts. The Chair suggested that the last sentence of section (c) read as follows: "The clerk shall send a copy of the judge's findings and conclusions to each party."

The Chair referred to Mr. Sykes' point about including affirmative defenses in section (b). Mr. Sykes suggested that the third sentence of section (b) be changed to read as follows: "A respondent who asserts any affirmative defense or matters of mitigation or extenuation shall have the burden of establishing such defense or matters by a preponderance of the evidence." Mr. Howell

observed that limitations is an affirmative defense. The Chair added that an alibi is also an affirmative defense. Mr. Sykes moved that his suggested modifications be made to section (b), the motion was seconded, and it carried unanimously.

Mr. Bowen said that he had two proposals. One was to delete the first sentence of section (b) and add the following language to the end of section (a): "and the rules of evidence in Title 5." Then he suggested that one of the sentences in section (a) be eliminated. Mr. Howell said that the first sentence should be retained. The Chair suggested that the language "rules of evidence" should be substituted in place of the language in the first sentence of section (a) which reads "rules of law." The Reporter suggested that the word "circuit" be added before the word "court" in the first sentence.

Mr. Bowen pointed out that the language "Evidence--" in the tagline to section (b) should be deleted. The Chair suggested that the tagline should read "Burdens of Proof." Mr. Brault responded that burdens and measures of proof are different. The Vice Chair commented that section (b) involves burdens of persuasion. Mr. Brault observed that a measure of proof establishes a standard. The Vice Chair said that this issue can be decided by the Style Subcommittee.

The Reporter asked again about referring to the "circuit" court in the first sentence of section (a). The Vice Chair noted that in

the first sentence, there are two important concepts--one is that the case is tried by the court, and one is that it is the circuit court. The Chair suggested that the language be: "a civil action tried by a circuit court judge." The Reporter suggested that the Style Subcommittee can decide the exact language, but that section (a) would read, "The hearing of a disciplinary action is governed by the rules of evidence and procedure as are applicable to a court trial in a civil action tried by a circuit court judge." The Vice Chair said that the language "as are applicable" is a problem. She suggested that the words "as are" be deleted, and the Committee agreed by consensus with these suggestions.

The Vice Chair inquired as to who sends the notice of transmittal. She noted that the next Rule is tied to the filing of the record. Mr. Grossman answered that the Court of Appeals sends the notice. The Vice Chair asked if there should be language in section (d) which states that the clerk mails out the notice. The time runs from when the statement of findings and conclusions is filed. Mr. Howell said that the sentence about the clerk mailing out the notice can be added to Rule 16-736. Mr. Klein questioned whether the time is measured from when the record is filed or when notice is received. Mr. Howell answered that the operative time is from when the record is filed in the Court of Appeals. The clerk notifies the parties. Mr. Klein inquired as to what happens if the clerk does not send notice for a week. Mr. Howell suggested that language could be

added to Rule 16-736 which provides that upon receipt of the record, the Clerk of the Court of Appeals notifies the parties that the record was filed.

Mr. Howell presented Rule 16-736, Proceeding in Court of Appeals, for the Committee's consideration.

Rule 16-736. PROCEEDING IN COURT OF APPEALS

(a) Exceptions and Recommendations

Within 15 days after the record is filed in the Court of Appeals, each party may file and serve exceptions to the findings and conclusions and any recommendations concerning the appropriate disciplinary sanction or other disposition of the action under section (f) of this Rule.

(b) Answer

Within 15 days after the filing of the exceptions and recommendations, the adverse party may file an answer.

(c) Form

Exceptions, recommendations, and answers shall be filed in eight legible copies and conform to the requirements of Rule 8-112. Pages shall be numbered consecutively.

(d) Oral Argument

If exceptions or recommendations are filed, the Court shall set a date for oral argument to be conducted in accordance with Rule 8-522. If no exceptions and recommendations are filed, or if the parties file a written waiver of argument, the Court may decide the matter without oral argument.

(e) Standard of Review

(1) Findings of Fact

The hearing court's findings of fact are subject to an independent review of the record to determine whether the findings are supported by clear and convincing evidence. The Court of Appeals will not set aside any finding unless clearly erroneous, and will give due regard to the opportunity of the hearing court to judge the credibility of witnesses.

(2) Conclusions of Law

The hearing court's conclusions of law will be upheld if legally correct.
Committee note: This section is a new provision based on case law.

(f) Disposition

The Court of Appeals may order (1) disbarment, (2) suspension, (3) reprimand, (4) inactive status, (5) dismissal of the disciplinary action, or (6) remand for further proceedings as specified in the order of remand.

(g) Decision

The decision of the Court of Appeals is final. The decision shall be evidenced by the order of the Court of Appeals, which shall be certified under the seal of that Court by the Clerk and may be accompanied by an opinion. Ordinarily, the order and any opinion shall be published.

Committee note: The final sentence of this provision is new and was added to indicate that all disciplinary orders are public and should be published.

(h) Record

Unless a remand is ordered, the record in the action shall be retained by the Clerk of the Court of Appeals.

(i) Further Proceedings on Remand

If a remand is ordered pursuant to subsection (f)(6) of this Rule, the provisions of this Rule shall govern proceedings in the Court of Appeals after the hearing court has complied with the order of remand and has transmitted the record to the Court of Appeals. The Court of Appeals shall review the findings and conclusions after remand in accordance with this Rule.

Source: This Rule is derived in part from former Rule 16-711 (BV11) and is in part new.

Rule 16-736 was accompanied by the following Reporter's Note.

Section (a) is derived, with style changes, from the first sentence of former Rule BV11 b 2.

Section (b) is derived, with style changes, from the second sentence of former Rule BV11 b 2.

Section (c) is derived in part from the fourth sentence of former Rule BV11 b 2. It adds the requirements that the papers be typed or printed in conformity with Rule 8-112 (Form of Court Papers) and that the pages be numbered consecutively. No page limit is prescribed.

Section (d) is derived from former Rule BV11 b 3, but is styled after the corresponding provision in Rule 16-809 (c).

Section (e) is new. Subsection (e)(1) is applicable to findings of fact and exceptions thereto. The first sentence is based upon case law. See e.g., AGC v. Garland, 345 Md. 383, 392 (1997) ("we make an independent and in-depth review of the entire record"); AGC v. Breschi, 340 Md. 590, 599 (1995) ("[w]e determine by an independent review of the record whether the hearing judge's findings of fact are based on clear and convincing evidence"); AGC v. Kemp, 335 Md. 1, 9 (1994)

("[t]o be sustained, the findings of fact of a hearing court must be supported by clear and convincing evidence"; * * * "exceptions can be sustained only if, upon an independent review of the record, we conclude that the hearing court's finding * * * was not supported by clear and convincing evidence"); Bar Ass'n v. Marshall, 269 Md. 510, 516 (1973) ("we [make] an independent, detailed review of the complete record with particular reference to the evidence relat[ed] to the disputed factual finding"). See also, AGC v. Sachse, 345 Md. 578, 589 (1997); AGC v. Glenn, 341 Md. 448, 470 (1996). The second sentence of subsection (e)(1) is derived from the language of Rule 8-131(c), which governs the review of actions tried without a jury. It also is declaratory of established case law. See e.g., AGC v. Awuah, 346 Md. 420, 434 (1997) ("in disciplinary proceedings, the factual findings of the hearing judge will not be disturbed unless they are clearly erroneous"); AGC v. Glenn, 341 Md. 448, 470 (1996) ("the findings of the trial judge are prima facie correct and will not be disturbed unless clearly erroneous" and "[w]e give due regard to the trial judge's findings on credibility, as the trial judge is in the best position to assess the witnesses' credibility"); AGC v. Drew, 341 Md. 139, 150 (1996) ("[o]ur review is not based on what finding we would make on the same evidence"); AGC v. Williams, 335 Md. 458, 473 (1994) ("court's finding should not be disturbed unless it is clearly erroneous"); AGC v. Joehl, 335 Md. 83, 92 (1994); AGC v. Powell, 328 Md. 276, 287-88 (1992) ("[t]he trial court's findings of fact are prima facie correct and will not be disturbed unless clearly erroneous, giving due regard to the trial court's opportunity to assess the credibility of the witnesses"); AGC v. Bakas, 323 Md. 395, 402 (1991). See also AGC v. Garland, 345 Md. at 392. "To this end, hearing judges may pick and choose the evidence upon which they will rely." AGC v. Sachse, 345 Md. at 589. In this regard, the trial court is free to assign weight to an expert's opinion and to reject or disbelieve an expert's opinion. See, e.g., AGC v. Williams,

335 Md. at 473; AGC v. Nothstein, 300 Md. 667, 684 (1984).

Several members of the Subcommittee questioned the "clearly erroneous" standard as unduly restrictive in the context of a disciplinary action. The Court of Appeals has original jurisdiction over disciplinary proceedings. AGC v. Garland, 345 Md. at 392; AGC v. Glenn, 341 Md. at 470; AGC v. Kent, 337 Md. at 371; AGC v. Powell, 328 Md. at 287; Bar Ass'n v. Marshall, 269 Md. at 516. The "clearly erroneous" standard is a restriction upon appellate review, Rule 8-131(c), ill-suited to the kind of "independent, detailed review" that Marshall exacts of the Court of Appeals. However, the circuit courts employ the "clearly erroneous" standard in the exercise of original jurisdiction when reviewing a master's findings of fact. See, e.g., Domingues v. Johnson, 323 Md. 486, 491-92 (1991). Moreover, the Marshall opinion likened the hearing court to a master in equity whose findings of fact from the evidence "will not be disturbed unless determined to be clearly erroneous." 269 Md. at 516. Finally, any inconsistency between the "clearly erroneous" standard and the exercise of original jurisdiction may be more apparent than real. In a disciplinary action, a finding of fact will be determined to be "clearly erroneous" if, "upon an independent review of the record, we conclude that the hearing court's finding [of fact] * * * was not supported by clear and convincing evidence." AGC v. Kemp, 335 Md. 1, 9 (1994). In short, a finding that is supported merely by "substantial evidence" -- the usual test of sufficiency -- would be "clearly erroneous" in the context of a disciplinary action.

Subsection (e)(2) employs the non-deferential "legally correct" standard of review of the hearing court's conclusions of law. AGC v. Breschi, 340 Md. 590, 599 (1995) (issue is whether the conclusions "are not erroneous"). The Court of Appeals "makes the ultimate decision as to whether a lawyer has

violated professional rules." Id. See AGC v. Garland, 345 Md. at 392; AGC v. Glenn, 341 Md. 448, 470 (1996); AGC v. Powell, 328 Md. 276, 287 (1992).

Section (f) is derived, without substantial change, from the first sentence of former Rule BV11 b 4.

Section (g) is derived, with minor style changes, from the first two sentences of former Rule BV11 b 5. However, the final sentence of section (g) is new. It reflects the Subcommittee's belief that all disciplinary orders are public and should be published in the Maryland reports. In addition, in cases in which discipline is imposed by the Court after argument, the order should be accompanied by a reported opinion setting forth the justification for imposing the sanction in that particular case. See A.B.A. Model Rule 10.D.

Section (h) is derived from the final section of former Rule BV11 b 5, modified to allow the record to be relinquished when a remand is ordered.

Section (i) is derived from the last two sentences of former Rule BV11 b 4.

The Vice Chair suggested that in section (b), the word "service" be added in place of the word "filing." The Committee agreed by consensus with this suggestion. The Reporter said that a new section (a) could be added as follows:

(a) Notice of the filing of the record

Upon receipt of the record, the clerk of the Court of Appeals shall notify the parties that the record has been filed.

What is now section (a) would become section (b) and read as follows:

(b) Exceptions and Recommendations

Within 15 days after service of the notice required by section (a) of this Rule, each party may file and serve exceptions to the findings and conclusions and any recommendations concerning the appropriate disciplinary sanction or other disposition of the action under section (g) of this Rule.

The Committee agreed by consensus with these modifications to Rule 16-736.

Mr. Hirshman commented that in existing Rule 16-711 b, no direction is given as to who notifies the parties that the record was filed. Mr. Howell responded that proposed Rule 16-736 is faithful to that Rule, but it fills in the gaps. The Vice Chair asked if Title 1 applies to the Attorney Discipline Rules. The Reporter answered that Title 1 applies. The Vice Chair pointed out that the word "serve" is not needed in new section (b), and she suggested that it be deleted. The Committee agreed by consensus to this change. The Vice Chair suggested that in new section (c), the word "answer" be changed to the word "response." The Committee agreed by consensus to this suggestion.

The Vice Chair questioned the wording of subsection (e)(1). The Chair observed that the Court may be looking for items of mitigation which are proven by a preponderance of the evidence, and he suggested that the language referring to "clear and convincing evidence" should be eliminated. The Vice Chair commented that findings of fact are really findings of misconduct. The Chair said

that there are cases which have involved the question of the deference the appellate court gives the trial court in factual findings, as opposed to mixed questions of law and fact, as opposed to pure questions of law. Mr. Howell responded that the Court will make an independent review of the record as in First Amendment cases, even if the respondent does not make a definite point. The Court undertakes a review of the findings of fact which are supported by clear and convincing evidence. The Chair noted that the Court may read a transcript and conclude that the trial judge erroneously concluded something by clear and convincing evidence on the basis of the witnesses' testimony. This gives the Court of Appeals the right to say that the trial judge was wrong. Mr. Grossman asked how the standard of review could be clearly erroneous and supported by clear and convincing evidence at the same time. The Chair replied that this is a rhetorical question. The Court may read the transcript and not believe the witness, but may not be able to touch the factual findings, unless they are clearly erroneous. Subsection (e)(1) is both. Mr. Howell observed that the Court has held this in opinions.

The Chair suggested that the first sentence of subsection (e)(1) could be deleted. Mr. Howell disagreed, explaining that the Court of Appeals has used the same language as in subsection (e)(1), which is that the Court must make an independent review of the evidence to support the findings by clear and convincing evidence, but the decision will only be disturbed if clearly erroneous. The

consultants to the Subcommittee were divided as to what the Court means. It is better to leave in both standards, which better minds can later reconcile. The Chair commented that it would be sending up an inconsistent rule based on dicta. Mr. Howell disagreed, noting that that the holdings are rubrics declared in the same paragraph. A string cite of cases, which are difficult to harmonize with each other, has been developed.

The Vice Chair expressed the view that subsection (e)(1) is confusing. She suggested that it be rewritten as follows: "The Court of Appeals shall review the record to determine whether findings of misconduct are supported by clear and convincing evidence. The Court of Appeals shall not set aside any finding of fact unless clearly erroneous, and shall give due regard to the opportunity of the hearing court to judge the credibility of witnesses." Mr. Howell stated that this would perpetuate problems for practitioners because there is no standard of review. It is better that the provision remain confusing, so the Court of Appeals can see it.

The Chair suggested a reconciliation of these two viewpoints. There is a reference to both fact-finding and ultimate sanctions. The Court determines whether there should be a sanction and what it should be. It gives due regard to the ability of the trial judge to assess the credibility of the witnesses. The fact-finding of the trial judge is only disturbed if it is clearly erroneous. The first

sentence of subsection (e)(1) refers to factual findings, and it should not do so. Mr. Sykes commented that the trial judge is similar to a special master who saw the witnesses, but the Court of Appeals has the ultimate responsibility for the case.

The Chair suggested that the first sentence of subsection (e)(1) read as follows: "The hearing court's findings of fact are subject to an independent review of the entire record." Mr. Howell commented that the standard of review of the findings of fact is whether they are supported by clear and convincing evidence, but the findings are not set aside unless clearly erroneous. The Chair said that these are in conflict. Mr. Howell noted that the Subcommittee felt that both should be set forth. The Chair observed that the Court of Appeals may be concerned about the two inconsistent statements. The Vice Chair pointed out that the two statements are not necessarily inconsistent. The first statement is not a statement of review. The Court of Appeals has original jurisdiction, and it is bound to review the evidence to determine if the trial court was clearly erroneous in making the decision as to whether the conduct was supported by clear and convincing evidence.

Mr. Howell remarked that the second sentence of subsection (e)(1) caused some debate in the Subcommittee. The clearly erroneous standard rises from appellate review. This is an original undertaking by the Court, as opposed to appellate jurisdiction. The Subcommittee had some trouble with the "clearly erroneous" concept.

In practice, a review of the master's findings is based on the standard of clearly erroneous. The Chair explained that, for example, a domestic relations master makes first-level factual findings, such as the amount of earnings. On the second level, the court makes the individual assessment of such issues as how much money the other spouse will be awarded. If the analogy is appropriate to Rule 16-736, then in place of the suggested language in subsection (e)(1) which reads, "findings of fact," the following language should be substituted: "findings of misconduct." Mr. Howell pointed out independent review is limited to determining whether a disciplinary violation is established by clear and convincing evidence. The Chair noted that it also goes to the issue of mitigation. Mr. Grossman said that the problem is whether the mitigation is causally related to the misconduct. Mr. Sykes pointed out that the mitigation need only be proved by a preponderance of the evidence.

The Vice Chair inquired if the Court of Appeals conducts an independent review with respect to the burden of proof of each party. Mr. Howell answered that the Court does not conduct an independent review, but it gives a deferential review to determine whether there is clear and convincing evidence to support a finding of misconduct. The Chair remarked that an appellate court gives an independent review, anyway. The Vice Chair commented that unlike a typical civil appeal, the Court of Appeals has to read the entire transcript. The

Chair added that it may be a mistake to use the language from the appellate opinions in the Rule.

Mr. Bowen suggested that the first sentence of subsection (e)(1) read as follows: "The Court of Appeals shall review the record to determine whether findings of a violation of the disciplinary rules are supported by clear and convincing evidence." The Vice Chair suggested that the new language could be: "The Court of Appeals shall review the record to determine if the parties met the burden of persuasion."

Mr. Sykes asked about the language in subsection (e)(1) which provides "...the Court of Appeals...will give due regard to the opportunity of the hearing court to judge the credibility of witnesses." The Chair said that this is the same language as in Rule 8-131 (c). "Due regard" is as much regard as the appellate court wishes to give it. Mr. Howell commented that subsection (e)(1) looks inconsistent, but the Court of Appeals reviews the record to determine whether a finding of a violation of the disciplinary rules is supported by clear and convincing evidence, and no finding is set aside unless clearly erroneous. If the court determines that a mere inference supports the finding, it may be clearly erroneous in the standard of clear and convincing evidence.

The Chair suggested that the words "of fact" be added into the second sentence of subsection (e)(1) after the word "finding" and before the word "unless." The Committee agreed by consensus with

this change. Mr. Sykes pointed out that in subsection (e)(1), the word "will" which appears twice should be changed to the word "shall." The Committee agreed by consensus with Mr. Sykes' suggestion.

Mr. Sykes asked what deference the Court of Appeals has to give to the ultimate finding of the trial court. Is it that the Court reviews the case, but is not convinced by clear and convincing evidence and should therefore reverse, or is it that a rational trier of fact could be convinced by clear and convincing evidence and therefore the Court should affirm? The Chair responded that the statement that a client walked into the attorney's office at January 5 at 10:00 is factual, but the finding or conclusion that the attorney committed misconduct is different. The Court of Appeals will not set aside any finding of fact. The Court may consider the finding of misconduct to be a finding of fact, or it may be a conclusion of law. The ultimate conclusion is by clear and convincing evidence. Mr. Howell said that the conclusion is legal, but findings of fact are based on clear and convincing evidence. He cited the case of Attorney Grievance Commission v. Kemp, 335 Md. 1 (1994) which held that to be sustained, the findings of fact of the hearing court must be supported by clear and convincing evidence.

Mr. Sykes remarked that it can be a mixed question of fact and law, similar to issues concerning negligence. Mr. Grossman commented that judges find certain facts, such as the client sought to

communicate with the attorney on specific dates. The Chair stated that each piece of evidence has to be proved by clear and convincing evidence. The judge may announce seven factual findings, but none are proved by clear and convincing evidence. However, looking at all of the pieces together, the judge is persuaded by clear and convincing evidence. In the case of Spector v. State, 289 Md. 407 (1981), the Court held that even if none of the findings of fact are proven beyond a reasonable doubt, if all the findings are put together, the defendant may still be found to be guilty.

Mr. Grossman questioned why this Rule is being written this way, since the existing Rules do not have standards of review. The Chair expressed the view that the Court of Appeals would want standards of review in the proposed Rules. Mr. Sykes noted that this is a policy question -- whether in making its review, the Court of Appeals determines in the first instance that the findings are proven by clear and convincing evidence, or whether the Court thinks that the trial judge could have reasonably found that the findings are supported by clear and convincing evidence. Mr. Howell pointed out that Mr. Bowen's suggestion was that the independent review be deleted from subsection (e)(1). This wording is probably the best that the Rules Committee can do. The Subcommittee struggled with the wording. The Court of Appeals can eliminate this if it chooses. The Chair agreed that it can be proposed to the Court of Appeals to see if this is what the Court wants. The Committee agreed by consensus.

Mr. Sykes noted that section (e) does not deal with the standard of review. The first sentence does not say which standard of review is to be used. The second sentence does not specify which findings the Court is limited to, and it is ambiguous. There is no standard of review listed, such as de novo or deferential. The Chair referred to a conclusion of law, stating that if the circuit court finds that the attorney's falsified income statements are not the basis for a disciplinary action, the Court of Appeals may not uphold that decision. If the trial judge says that he or she is persuaded that the attorney did not underreport income, and then the judge finds no violation, this is not a conclusion of law. The Vice Chair remarked that the conclusion of law is that there is no violation. Mr. Grossman added that this may be legally correct but based on the wrong facts. The Chair commented that it may be a legally correct statement erroneously based on incorrect factual findings. He asked if the Court of Appeals is locked in. Mr. Howell responded that this may be a mixed question of law and fact. The Court has the ultimate authority to state what the law is.

Mr. Sykes observed that this is review de novo, although a standard of review is not provided in the Rule. Conclusions of law are reviewed de novo, but findings of fact are reviewed by a standard of clearly erroneous. Case law clarifies where the standard is proof by clear and convincing evidence, the appellate court will uphold the decision of the trial court if it is rational. The Chair asked if

the language of Rule 8-131 (c) should be added to the Rule, and Mr. Howell replied in the negative. He explained that the Subcommittee tried to keep to the language of the Court of Appeals. He agreed with Mr. Sykes that the conclusions of law are made de novo. The Vice Chair suggested that subsection (e)(2) be changed to read as follows: "The Court of Appeals shall review de novo the hearing court's conclusions of law and uphold them if legally correct." She asked if de novo review has constitutional underpinnings. Mr. Howell answered that it probably does, although it has not been formulated. The Vice Chair remarked that if the court is constitutionally required to do an independent review, this is similar to the circuit court review of masters' determinations. The case law of masters could be reviewed to see if it includes standard of review language. The Chair said that fact-finding is delegated to the trial judge to decide if there has been a violation of the disciplinary rules. Mr. Sykes added that the review is not independent where one would be required to review the entire record on a deferential standard.

The Vice Chair commented that what the Chair had said was that the master makes findings of fact as to earnings and determines what the spouse will receive, and the circuit court will uphold the simple facts. If the matter borders on conclusions of law, the reviewing court will look more carefully at the record. Mr. Sykes noted that the court still has to check the record to see if the findings of fact are supported. Mr. Klein inquired why the language of Rule 8-

131 (c) could not be used. Mr. Howell referred to the Vice Chair's statement that this is the only place where the Court of Appeals exercises original jurisdiction. Rule 8-131 expresses the epitome of appellate review. The Chair asked about review by the Judicial Disabilities Commission in a matter involving a judge. Mr. Howell replied that that is not original jurisdiction. Attorney discipline is a unique area.

The Chair cited the case of Wenger v. Wenger, 42 Md. App. 596 (1979), which held that there are first-level facts as opposed to ultimate facts. In the case of Dominguez v. Johnson, 323 Md. 486 (1991), Judge McAuliffe wrote that there are first- level vs. ultimate facts. This is the best guidance available as to how to design this Rule.

The Chair drew the Committee's attention to section (f). Mr. Hirshman pointed out that when suspensions are issued, conditions may be attached. Mr. Howell added that this will be detailed in Rule 16-737.

Turning to section (g), Mr. Sykes commented that this is contrary to current practice. The Subcommittee had recommended asking the Court of Appeals to publish all opinions, making unreported dispositions few and far between. The attorney is entitled to some protection, but it is a policy decision of the court as to whether to open up all the decisions affecting attorneys. The public interest is not well served to have secret dispositions. The

Subcommittee decided not to recommend the ABA procedure which is to open up all Inquiry Panel proceedings to the public. The Chair suggested that the last part of the second sentence of section (g) could read as follows: "... and shall be accompanied by a published opinion." Mr. Howell commented that other states mandate reporting, and the ABA endorses the approach of leaving it up to the court's discretion, but ordinarily the opinions would be published. Mr. Hirshman pointed out that if this section is mandatory, the Court of Appeals may not be willing to adopt it. The bar feels that the opinions should be published, since it provides notice to them as to what conduct is not permitted. Not everyone reads The Daily Record, which generally publishes the decisions.

The Vice Chair asked about the Committee note to section (g). The Reporter explained that the Assistant Reporter and Mr. Howell had flagged provisions which were new. The notes can be taken out. Mr. Howell suggested that the note to section (g) should be deleted, and the Committee agreed by consensus to take it out. The Vice Chair asked if section (i) is necessary as it is obvious. Mr. Howell replied that it does no harm to leave it in.

The Rule was approved as amended.

Mr. Howell suggested that Rule 16-737 be discussed at the next meeting, since it is very long. He moved to adjourn the meeting, the motion was seconded, and passed unanimously. The meeting was adjourned.