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, 100 Community Place, Crownsville, Maryland on February 7, 1997.

Members present:

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

H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
James J. Lombardi, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
Senator 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
Lynn Stewart, Esq., Office of the State's Attorney for Baltimore City
K. King Burnett, Esq.
W. B. Henderson, Trident Engineering Assoc., Inc.
Professor Karen Czapanskiy, University of Maryland School of Law
Professor Deborah Weimer, University of Maryland School of Law
Hilary Kushins, University of Maryland School of Law
Amy Gibson, University of Maryland School of Law
Martin B. Lessans, Esq., Attorney Grievance Commission
Melvin Hirshman, Esq., Bar Counsel
David Downes, Esq., Attorney Grievance Commission
Glenn Grossman, Esq., Deputy Bar Counsel

In the Chairperson's absence, the Vice Chairperson convened the meeting. She explained that the Chairperson was in court this

morning and would attend the meeting later. She said that all of the Committee members had received a memorandum informing them that Mr. Sykes' daughter had passed away recently. There was a moment of silence in her memory. Mr. Sykes thanked the Committee.

Agenda Item 1. Consideration of method of approval of certain unapproved minutes from November, 1993 to October, 1996 (No materials)

The Reporter said that most of the Rules Committee minutes between November, 1993 and October, 1996, had not been approved in final form. The minutes were prepared by the Assistant Reporter and corrected by the Reporter. A brief history of the Rules Committee minutes shows that the earliest versions of the minutes were very short and not helpful, and then long and short sets of minutes for each meeting were prepared. After time, the Committee did away with the preparation of a short set. A decision was made to send a draft of the minutes to each member each month, but about 10 or 12 years ago, the Committee decided not to automatically send the minutes to each Rules Committee member, leaving it to the Chairperson to finalize the minutes. Since that time, quite a few sets of minutes have not been finalized. It takes a large amount of time to review the minutes for accuracy and tactfulness. The Chairperson, upon being apprised of the situation when he took office in November, had suggested that one set of each of the unapproved minutes should be sent to one Rules Committee member for final corrections and

approval.

Judge Vaughan asked why the minutes are so important when the actions of the Committee are reported to the Court of Appeals. The Reporter replied that the Rules Committee staff gets countless research questions as to the meaning of the Rules, and excerpts of the minutes are frequently sent to members of the bench and bar. The minutes are often cited in court opinions. Cathy Cox, the Committee's Administrative Assistant, cuts and pastes the minutes, organizing them in files for the legislative history.

Mr. Lombardi questioned whether members of the Committee will remember what took place at meetings several years ago to be able to correct the minutes. The Reporter said that when she first took the job with the Committee, she could read the minutes of meetings she had not even attended and ask questions about them. Mr. Lombardi moved that the minutes should be approved in the form they are in, assuming they have gone through the process described, and that there need be no further review. The motion was seconded. Mr. Klein noted that if there are any sets of minutes which have specific problems to iron out, he would volunteer to read those minutes. The Committee voted unanimously to approve all of the backdated minutes in the form they are in, unless specific problems exist.

Agenda Item 2. Consideration of "housekeeping" amendments to: Rule 2-432 (Motions Upon Failure to Provide Discovery), Rule 2-504 (Scheduling Order), and Rule 2-504.1 (Scheduling Conference)

The Reporter explained that some "housekeeping" changes needed to be made to three rules containing incorrect internal references which had been discovered by the Vice Chairperson. The Reporter presented Rule 2-432, Motions Upon Failure to Provide Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-432 to correct an internal reference, as follows:

Rule 2-432. MOTIONS UPON FAILURE TO PROVIDE DISCOVERY

. . .

(b) For Order Compelling Discovery

A discovering party, upon reasonable notice to other parties and all persons affected, may move for an order compelling discovery if

(1) there is a failure of discovery as described in section (a) of this Rule,

(2) a deponent fails to answer a question asked in an oral or written deposition,

(3) a corporation or other entity fails to make a designation under Rule 2-412 (d),

(4) a party fails to answer an interrogatory submitted under Rule 2-421,

(5) a party fails to comply with a request for production or inspection under Rule 2-422,

(6) a party fails to supplement a response under Rule 2-401 **[**(d)**]** (e), or

(7) a nonparty deponent fails to produce tangible evidence without having filed written objection under Rule 2-510 (f).

> The motion shall set forth: the question, interrogatory, or request; and the answer or objection; and the reasons why discovery should be compelled. Instead of setting forth the questions and the answers or objections from a deposition, the relevant part of the transcript may be attached to the motion. The motion need not set forth the set of interrogatories or requests when no response has been served. If the court denies the motion in whole or in part, it may enter any protective order it could have entered on a motion pursuant to Rule 2-403. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.
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> . . .

Rule 2-432 was accompanied by the following Reporter's Note.

> This is a "housekeeping" amendment to Rule 2-432 to correct an internal reference to former section (d) of Rule 2-401 that was relettered as section (e) when a new section (c) was added to that rule.

The Reporter explained that an incorrect reference to "Rule 2-401 (d)" is in subsection (b)(6) of Rule 2-432. The correct reference is to "Rule 2-401 (e)." The Committee approved this correction by consensus.

The Reporter presented Rule 2-504, Scheduling Order, for the Committee's consideration.

AMEND Rule 2-504 to correct an internal reference, as follows:

Rule 2-504. SCHEDULING ORDER

. . .

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule **[**1211**]** 16-202;

(B) one or more dates by which each party shall identify each person whom the party expects to call as an expert witness at trial, including all information specified in Rule 2-402 (e)(1)(A);

(C) a date by which all discovery must be completed;

(D) a date by which all dispositive motions must be filed; and

(E) any other matter resolved at a scheduling conference held pursuant to Rule 2-504.1.

. . .

Rule 2-504 was accompanied by the following Reporter's Note.

This amendment corrects an internal reference to Rule 1211, which has been renumbered as Rule 16-202.

The Reporter noted that the reference in subsection (b)(1)(A) to "Rule 1211" is incorrect; that Rule has been renumbered as "Rule 16-202." The Committee approved this change in numbering.

The Reporter presented Rule 2-504.1, Scheduling Conference, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 — CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 — TRIAL

AMEND Rule 2-504.1 to correct an internal reference, as follows:

Rule 2-504.1. SCHEDULING CONFERENCE

(a) When Required

The court shall issue an order requiring the parties to attend a scheduling conference:

(1) in any action placed or likely to be placed in a scheduling category for which the case management plan adopted pursuant to Rule **[**1211**]** 16-202 b requires a scheduling conference; or

(2) in any action, upon request of a party stating that, despite a good faith effort, the parties have been unable to reach an agreement (i) on a plan for the scheduling and completion of discovery, (ii) on the proposal of any party to pursue an available and appropriate form of alternative dispute resolution, or (iii) on any other matter eligible for inclusion in a scheduling order under Rule 2-504.

. . .

Rule 2-504.1 was accompanied by the following Reporter's Note.

> This amendment corrects an internal reference to Rule 1211, which has been renumbered as Rule 16-202.

The Reporter pointed out that in subsection (a)(1), the reference to "Rule 1211" should be changed to "Rule 16-202" as it was just changed in Rule 2-504. The Committee approved this change by consensus.

Agenda Item 3. Consideration of certain amendments to: Rule 2-402 (Scope of Discovery)

Mr. Howell presented Rule 2-402, Scope of Discovery, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 400 - DISCOVERY

> AMEND Rule 2-402 to expand the scope of discovery by interrogatory concerning expert witnesses, to specify that any discovery beyond interrogatories concerning expert witnesses will consist of depositions, and to add certain provisions concerning expert witness fees, as follows:

Rule 2-402. SCOPE OF DISCOVERY

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . .

(e) Trial Preparation--Experts

(1) Expected to Be Called at Trial

Discovery of findings and opinions of experts, otherwise discoverable under the provisions of section (a) of this Rule and acquired or developed in anticipation of litigation or for trial, may be obtained without the showing required under section (c) of this Rule only as follows: (A) A party by interrogatories may require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the findings and the opinions to which the expert is expected to testify and a summary of the grounds for each opinion, to state the qualifications of the witness (including lists of publications authored by the expert and other cases in which the expert has testified at trial or by deposition), the hourly rates and other terms of the expert's compensation, and to produce any written report made by the expert concerning those findings and opinions; (B) a party may [obtain further discovery, by deposition or otherwise, of the findings and opinions to which an expert is expected to testify] take the deposition of any person who has been identified as an expert witness whom another party expects to call at trial, including any written reports made by the expert concerning those findings and opinions.

(2) Not Expected to Be Called at Trial

When an expert has been retained by a party in anticipation of litigation or preparation for trial but is not expected to be called as a witness at trial, discovery of the identity, findings, and opinions of the expert

may be obtained only if (A) a showing of the kind required by section (c) of this Rule is made; or (B) in a condemnation proceeding, the expert at the request of the party has examined or appraised all or part of the property sought to be condemned for the purpose of determining its value or has prepared a report pertaining to its value.

(3) Fees and Expenses

Unless manifest injustice would result, (A) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent **[**in responding to discovery under subsections (e)(1)(B) and (e)(2) of this Rule; and (B) with respect to discovery obtained under subsection (e)(1)(B) of this Rule the court may require, and with respect to discovery obtained under subsection (e)(2) of this Rule the court shall require, the party seeking discovery to**]** in attending a deposition under subsection (e)(1)(B) of this Rule and for time and expenses reasonably incurred in travel to and from the deposition; and (B) with respect to discovery obtained under subsection (e)(2) of this Rule, the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery and pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining findings and opinions from experts. An expert may not charge a fee for attending a deposition under subsection (e)(1)(B) of this Rule that exceeds the lowest rate charged for any other expert services to the party retaining the expert. An expert's fee for time spent preparing for the deposition shall be charged to the party retaining the expert.

. . .

Rule 2-402 was accompanied by the following Reporter's Note.

Rule 2-402 (e)(1) is amended in two respects.

> First, subsection (e)(1)(A) is expanded so as to enable a party to discover by interrogatory the expert's qualifications (including publications and other cases in which the expert has testified and the hourly rates and other terms of the expert's compensation). The language is derived from the current text of F.R.C.P. 26 (a)(2)(B). Second, subsection (e)(1)(B) is narrowed and clarified in order to specify that further discovery (beyond interrogatories) will consist of the deposition of the expert that another party expects to call at trial. This conforms to the current text of F.R.C.P. 26 (b)(4)(A).
>
> Rule 2-402 (e)(3) is also amended with respect to the allocation of expert fees and expenses. Subsection (e)(3)(A) is reorganized so as to apply only to depositions taken under subsection (e)(1)(B). Instead of the vague allowance of a fee for time spent "in responding to discovery," subsection (e)(1)(B) authorizes a fee only for time in attending the deposition and in travel to and from the deposition, plus travel expenses. Subsection (e)(3) further limits the expert's fee to the lowest rate charged for any other expert services to the party retaining the expert and imposes upon the latter party the responsibility for the expert's fee for time spent preparing for the deposition. This conforms to the policy reflected in Rule 11 (a) of the Rules of the United States District Court for the District of Maryland.

Mr. Howell explained that the Litigation Section Council of the Maryland State Bar Association and its special subcommittee, which was chaired by K. King Burnett, Esq., studied the problem of charges by expert witnesses for both depositions and trial. The Council's proposal was submitted to the Trial Subcommittee which considered it and concluded that there needs to be some change as to what experts

charge for testimony at depositions. The Subcommittee has not made a recommendation yet as to charges by experts for their testimony at trial. This is an inherently judicial matter. The consensus of the Trial Subcommittee was that section (e) of Rule 2-402 should be amended. This decision was in response to Mr. Burnett's committee and to testimony before the Trial Subcommittee as to the various aspects of the problems faced pertaining to experts. The Subcommittee also considered recent amendments to Federal Rule of Civil Procedure (F.R.C.P.) 26 which require core disclosure. This concept was considered during the discussions of the Management of Litigation, but was not adopted. Core disclosure requires more disclosure than Rule 2-421, Interrogatories.

Mr. Howell said that one method of compensation of expert witnesses is to tie the fee to the standard expert compensation paid by the retaining party. There would be no cap on the fees charged. An expert who charges one level of compensation for the trial and another for the preparation of the case should get the lower figure if there is a dispute. A recent opinion of the Court of Special Appeals on the subject of expert witness fees is Kilsheimer v. Dewberry & Davis, 106 Md. App. 600 (1995). In this opinion, Judge Ellen Hollander explains the four types of expert witnesses. The first is the witness retained in anticipation of litigation. This witness is expected to testify at the trial and is so designated. The second type of expert is one who will not be called at trial. He

or she may have been retained in anticipation of trial, but is not affected by the trial. The third expert witness is the professional who happens to be involved in the case on historic facts, such as the witness to an accident or the treating physician; however, no learned opinion is sought. The fourth type of witness is the hybrid who is a fact witness but is asked for an opinion beyond that. This type of witness is a cause for concern. The witness is compellable, but is entitled to compensation for his or her learned opinion. This is beyond the scope of the present rule. The case of Turgut v. Levine, 79 Md. App. 279 (1989) held that a witness who is retained in anticipation of litigation is in a separate category from a treating physician who would not fall within the confines of this Rule.

Mr. Howell said that the Trial Subcommittee proposes to amend Rule 2-402 (e), retaining the structure of the Rule, while recommending some modifications.

Mr. Burnett was present at the meeting and told the Committee that he practices law in Salisbury, Maryland. He is no longer on the Litigation Section Council. The Council began studying the issue of expert witness fees in 1990 and specifically got into the topic of fees charged by physicians. It is almost impossible to try a case in the District Court, if the treating physician is required to testify, because the parties cannot afford the witness' fees. Three examples of present physician fees for testifying are as follows: in Wicomico County, an orthopedic surgeon charges $780 an hour to testify at

depositions and at trials; in Carroll County, a physician charges $750 for the first hour and $500 each additional hour; and in Anne Arundel County, some surgeons charge $1000 an hour to testify at a deposition. These fees are not unusual. A treating physician is a fact witness, and it is hard to try a case without the testimony of the physician to explain pain, suffering, and treatment. The opinion of the treating physician is often needed to prove that injuries are related to the accident. The victim did not always have the opportunity to choose the particular physician. The purpose of videotaping depositions under Rule 2-416, Deposition -- Videotape and Audiotape, is to cut some of the costs of litigation, but many of the physicians charge the same fee for a videotaped deposition as for testifying at trial. The Litigation Section asked the federal judges to set limits on fees, and they put a cap of $250 per hour on expert fees.

Mr. Burnett said that the proposed revision to Rule 2-402 (e) covers de bene esse depositions, but it does not cover trial testimony. There is a proposal for expert fees at trial, which is attached to the letter dated February 4, 1997 sent by him to Mr. Howell, a copy of which was distributed at today's meeting. (See Appendix 1). One possibility is to have a cap similar to the one used by the federal courts. Although the report by the Section covers engineers and mechanics, the real problem is the treating physician. The change proposed by the Litigation Section covers all

types of professional witnesses. Physicians often ask the attorneys to sign an agreement with them that the attorney will pay $2,500 up front and that the attorney will be responsible for all the fees. Many physicians will not participate without an agreement. The expert witness system is in trouble. The Litigation Section had requested a meeting with the Medical and Chirurgical Faculty of Maryland to discuss this problem, but there was no response. The Medico-Legal liaison committee has not been in existence since 1991.

Mr. Burnett continued that most physicians do not accept the legal distinction between fact and opinion witnesses. It is difficult to argue with the physicians, because it may affect their testimony. It would be helpful if the Trial Subcommittee would work on this matter. The Section can obtain more examples of agreements. Both the plaintiff and defense bars agree that this is a problem. The Vice Chairperson inquired as to the reasons the orthopedic surgeons use to justify requesting such high fees. Mr. Burnett replied that they use the same kind of fee schedule that they charge to do an operation. They say that they are forced to cancel appointments in order to testify at a deposition or in court. They charge the same fee even if the case is settled. Mr. Lombardi asked if the two-day cancellation guidelines in the federal rule are workable. Mr. Burnett answered in the affirmative. Mr. Sykes questioned whether any of these problems have gotten into the press; he expressed the view that this would make a good feature for

investigative reporting. Mr. Burnett said that The Daily Record had a front-page article on this issue. Mr. Hirshman commented that the physicians do not have a right to demand fees in advance. Attorneys can use subpoena power, and this is not a new problem.

Mr. Howell suggested that the Trial Subcommittee needs guidance as to how to proceed. It is difficult to deal with physicians as separate from other experts. Rule 2-402 (e) captures the essence of the local federal rule on deposition of experts, but the Subcommittee had trouble with the $250 cap for only physicians, as opposed to other learned professionals. One figure may be inappropriate for a leading neurosurgeon, yet appropriate for another type of physician. This is close to raising some equal protection or due process problems, and it may require a legislative judgment. Why should a rule be created which treats a treating physician differently from an ordinary witness who is very busy? For example, the time of a chief executive officer of a corporation may be worth a large amount of money. If a fact witness has a learned opinion, then the deposition rule on experts may be applicable. If the physician is asked what he or she did, and the reason for the choice of therapies, this may link facts with special training and opinion. Since Mr. Burnett did not attend the last Subcommittee meeting, the Subcommittee was reluctant to make a proposal.

Mr. Titus expressed the opinion that this issue should be addressed. Before it is addressed, it might be useful to get the

attention of the medical profession. One solution is not to set a fixed rate, but to charge no more than a physician charges for an office visit rate which is time-based. The Rules Committee Chairperson could send a letter to the Medical and Chirurgical Faculty and to the local medical societies explaining what procedures the Rules Committee is considering pertaining to fees of expert witnesses and asking for the medical groups' opinions. The Vice Chairperson expressed her concern that regulating the fees for giving testimony may cause the costs of preparing physicians' reports to skyrocket. Mr. Titus questioned whether the setting of rates should be handled by the General Assembly.

Mr. Karceski asked if the rule would be limited to expert testimony from the medical profession. Mr. Titus responded that that the fees of treating physicians who testify as experts are what needs fixing. This is the area addressed by the federal court. The treating physician is in a unique position, and the federal court has chosen to deal differently with physicians. Mr. Howell remarked that a non-exhaustive search of 15 jurisdictions was performed, and none appeared to have a rule directed toward treating physicians. Mr. Titus reiterated that the formula could be that the physicians cannot charge more for expert testimony than their standard fee rate. Mr. Howell observed that that schedule is consistent with the Subcommittee proposal and consistent with the federal rule on preparing physician reports.

The Vice Chairperson told the Committee that William B. Henderson, the President of Trident Engineering, was present to speak to them. Mr. Henderson explained that he wished to address the issue of fees for expert testimony from the viewpoint of an engineering firm. Employees of his small consulting firm in Annapolis testify at depositions and at trial. They have performed investigations for the legal and insurance communities since 1961. Most of their cases do not get to the trial stage.

Mr. Henderson said that he had several comments regarding Rule 2-402 (e)(1). The language added which allows a party to require another party to provide lists of publications authored by that party's expert puts no time limit on the publications. Some publications may be very old, and to list those would provide more than what is necessary. The time limit imposed by the federal courts is more realistic. His firm treats these as peer review publications. This means presenting a paper at a conference as opposed to writing an article for a journal. Peer review is common in the scientific community.

Mr. Henderson pointed out another problem in subsection (e)(3) which is the interpretation of the language "the lowest rate charged for any other expert services." These rates vary greatly, and in some cases, there may be a huge variance. The language seems to indicate that if someone uses an expert who charges $200 an hour, but other experts in the firm charge $100 an hour, then the first expert

cannot be paid more than $100 an hour. Mr. Klein responded that that was not the intent of subsection (e)(3). Mr. Henderson noted that the language of section 11. a. of Rule 104 of the Rules of the United States District Court for the District of Maryland uses a different wording which is more specific. Mr. Klein commented that the intent of subsection (e)(3) is that the expert should not charge more for the deposition than for the investigation. Mr. Henderson remarked that the language seems to preclude a premium rate. Engineers charge one-and-a-half times as much for testimony at trial or at a deposition which is under oath than for the normal investigation rate. When the expert writes a report, it is not prepared under the same type of pressure as testifying at trial or at a deposition. Testimony under oath is stressful, and it can be disruptive to orderly thinking. Some judges put a tight time limit on the person testifying, and they do not allow any explanations, just a "yes" or "no" answer. The same holds true for the opposing attorney, who may not permit the expert to give an explanation, misleading the jury.

Mr. Klein said that the Subcommittee was concerned about problems such as when party A retains an expert at $100 an hour, and party B wants to depose the expert and then gets a bill for two or three times the rate party A paid to the expert. Party B is essentially funding party A's investigation. Mr. Henderson responded that it should be easy to level this. There is a standard fee schedule for each employee who testifies as an expert, and the fees

are documented. Mr. Klein inquired if there is a different rate for the party who retains the expert. Mr. Henderson answered that there is not a different rate. Any party is charged one-and-a-half times the individual's rate for any testimony under oath. Most engineering firms follow that formula. Mr. Klein remarked that the engineering experts support the physicians' view that testimony under oath is premium time.

Mr. Howell commented that in subsection (e)(3), the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery. The limit is on the adversary paying to discover the expert's opinion, not on what the expert can charge. The Vice Chairperson remarked that if the agreement with the expert is $100 an hour to do an investigative report, and $150 an hour for testimony under oath, the person who retained the expert is paying $50 an hour to find out what his or her expert is saying. Mr. Henderson reiterated that testimony under oath is paid for at a higher rate.

Judge Vaughan pointed out that in terms of a limit on the age of publications, someone may want to have a 40-year-old publication listed. Mr. Henderson noted that the federal limit for publications is 10 years old. Mr. Klein remarked that the state-of-the-art issues in asbestos litigation involves medical literature dating back as far as the late 1800's.

Mr. Lombardi questioned as to what the policy is when an expert

is cancelled at the last minute. Mr. Henderson replied that if the cancellation occurs on the courthouse steps, their firm expects to be paid for the time spent in preparation. In general, there is no payment for cancellations which are made earlier. He commented that he is against having a cap on the payments for expert testimony. He thanked the Committee for the opportunity to speak to them.

Mr. Titus said that he had some questions regarding subsection (e)(1) of Rule 2-402. The concept of core exchange evolved into form interrogatories. There was a philosophical decision made as to documents which are described by category and location. His concern is about interrogatories which ask people for lists of publications. There is no problem with a subpoena duces tecum in a deposition asking for everything, but in every case requiring an expert, the interrogatory should simply require a summary of his or her qualifications. The expert can be deposed as to all of his or her publications and for the expert's fee structure. Mr. Titus suggested that the interrogatory could require a summary of the qualifications of the witness and the hourly rates, and the language pertaining to the lists of publications and the other terms of the expert's compensation could be deleted from the Rule. Anything more that is needed could be obtained in a deposition. Judge McAuliffe pointed out that the effectiveness of the deposition could be diminished by the inability of a party to get this information before the deposition. Mr. Titus said that when the deposition is noticed,

certain documents will be produced in advance. The Vice Chairperson noted that Rule 2-422, Discovery of Documents, may be useful. Mr. Titus remarked that if the person needing the information is a party, he or she can require it in advance. This is not needed in Rule 2-402.

Mr. Karceski asked Mr. Titus to explain what troubles him about the Rule. Mr. Titus noted that Mr. Burnett had explained previously that, after negotiating with a physician to do a report for $150 an hour, if one then asks the physician for a list of all the publications he or she has ever authored, the physician may refuse to cooperate. Mr. Karceski remarked that most experts maintain a list of qualifications. A list of publications may be more difficult to generate, but this information can be obtained by a subpoena. Mr. Titus said that he was troubled by the notion that in all cases the expert has to provide a complete list of publications.

Mr. Howell agreed with Mr. Titus about merely requiring a summary of qualifications in Rule 2-402. He suggested that the underlined language in subsection (e)(1) be modified as follows: "to summarize the qualifications of the witness, to produce any available list of publications authored by the expert." The language which reads "and other cases in which the expert has testified at trial or by deposition" would be deleted. The language which reads "the hourly rates and other terms of the expert's compensation" would remain in the Rule. Mr. Sykes commented that the expert's

compensation arrangement should be stated in full. Mr. Titus proposed that the word "any" could be added after the word "and" and before the word "other," so that the wording would be "and any other terms of the expert's compensation." Mr. Sykes suggested that the language be "and all terms of the expert's compensation." The Committee agreed by consensus to this modification. Judge Rinehardt suggested that the word "authored" be changed to the word "written," and the Committee agreed by consensus to this change.

Mr. Titus suggested that at the end of subsection (e)(1) in place of the language which reads "take the deposition of any person who has been identified as an expert witness whom another party expects to call at trial," the following language should be substituted: "take the deposition of any person who has been identified as an expert witness whom any party expects to call at trial." Mr. Titus pointed out that one does not take a discovery deposition of his or her own expert. He questioned whether the word "another" should be changed to the word "a" in the phrase "another party expects to call." Mr. Lombardi noted that this is broad and includes de bene esse depositions. Mr. Sykes pointed out that all of this is under the category of discovery, and he expressed the view that provisions pertaining to de bene esse depositions should not be buried in the scope of discovery rule. One can take the deposition of one's own expert, but it is not a discovery matter. The problem is that it is not discovery at all. Discovery involves another

party. Provisions elsewhere cover depositions of one's own witness before trial.

Mr. Howell commented that the right to take a deposition is not limited to use for purposes of discovery, but also for use as evidence, or both. Rule 2-411 provides this. Mr. Sykes noted that the title of Rule 2-402 is "Scope of Discovery." Chapter 400 pertains to materials for depositions before trial and de bene esse depositions. If one wants to take a deposition of his or her own expert, the rule should be put in a place where it is obvious. It would be hidden in Rule 2-402. This may be a matter for the Style Subcommittee. The Vice Chairperson noted that although a party can take the deposition of his or her own expert, the language in subsections (e)(1) and (e)(2) is intended to refer to the other side.

Mr. Titus commented that Rule 2-419 provides the mechanism to handle this situation. He moved that in the phrase at the end of subsection (e)(1) of Rule 2-402 which reads "whom another party expects to call" the word "another" should be changed to the word "a." There was no second to the motion.

The Vice Chairperson explained that although no changes have been made to subsection (e)(2), there have been changes to the condemnation rules, and this subsection may need to be reviewed. Since subsection (e)(3) relates to subsection (e)(2), she asked if that subsection needs to be changed. Mr. Howell replied that one

change is that the expert is allowed to charge for time and expenses incurred to travel to the deposition. Results of a national survey indicate that in a preponderance of the jurisdictions, the party retaining the witness compensates the witness, and not the adverse party. The Vice Chairperson pointed out that subsection (e)(2) refers to experts not expected to be called at trial. Mr. Howell responded that in the exceptional case where the expert is not expected to be called at trial, extraordinary relief can be granted. Under the Maryland and federal rules, the party obtaining that relief pays for the expert. The Vice Chairperson inquired if this provision covers preparation time, the time spent in the deposition, and expenses. Mr. Howell replied that it does. The Vice Chairperson remarked that this is not clear to her. Mr. Howell observed that this could be spelled out. The Vice Chairperson noted that the phrase in subsection (e)(3) which reads "time spent in responding to discovery" is not clear. Mr. Sykes suggested that the phrase could be changed to "time spent in providing discovery." Mr. Howell added that it is also the time spent in preparing for the discovery. Mr. Sykes suggested that the phrase read "the time spent in preparing for and providing discovery," and the Committee agreed to this change by consensus.

Mr. Titus suggested that in the last sentence of subsection (e)(3), the word "lowest" should be deleted, and in place of the language "for any other," the words "by that" should be substituted.

He pointed out that the rates could be different, but the amount of time spent is equivalent. The Vice Chairperson asked about the concept of an equivalent amount of time. Mr. Titus said that the Rule restricts time. Judge Vaughan commented that this covers the concern that the person taking the deposition pays the same rate as the person who hires the expert. Mr. Sykes remarked that the rate involves time. Using the equivalence complicates the issue. It should be the same rate for the same service. Mr. Titus responded that the concept is the same rate. Mr. Klein commented that the adverse party should be charged the same rate for the deposition that the party who retained the expert was charged for preparing for the deposition. The Reporter noted that the Subcommittee was concerned that the retaining party and the expert would make an agreement as to the fee, so as to earn the money back on the deposition fee. Mr. Klein added that the adverse party would pay an inflated rate for the deposition.

The Vice Chairperson expressed her agreement with evening out the rates for both the retaining and adverse parties, but she pointed out that the legal profession has created an atmosphere that causes some experts to feel humiliated and harassed. Mr. Howell commented that the experts know what testifying means. He said that half of the cases coming after the holding in the case Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) revolve around whether the expert is bona fide and competent to testify. Mr. Klein

suggested that the rate for deposition time should be restricted to the rate charged for preparing for the deposition. The Vice Chairperson suggested that the fee for deposition time should be restricted to a multiple of the fee charged for other expert services, such as one-and-a-half times the amount paid for other services. Mr. Klein explained that his suggestion is to charge both sides the same -- the fees for testimony under oath would be the same as the fees for preparing for the deposition. Mr. Howell said that the first part of the last sentence of subsection (e)(3) refers to the hourly rate. He agreed with Mr. Titus that the word "lowest" should be deleted. Mr. Sykes inquired as to what happens if there is no hourly rate. Mr. Howell responded that the word "hourly" could be placed in front of the word "rate." Mr. Sykes cautioned that the Rule has to provide that the expert is charging by the hour or else there would be a big gap.

Mr. Titus pointed out that the Rule has to be worded properly. He referred to Mr. Burnett's statement that if the physician is scheduled for two hours, he or she will charge
for a minimum of two hours because of the patients who had to be cancelled. Mr. Klein said that the concept is equating preparation time with time under oath. Judge Vaughan remarked that a written agreement is important, so that the expert does not turn around and complain that he or she had agreed to some other arrangement. Mr. Titus commented that this is not regulating the expert's fee

directly. If an attorney takes the deposition of the other party's expert, the court will say what the fee is. Judge Vaughan observed that there should be an even playing field. The expert needs to be made aware that if the other side takes his or her deposition, the expert is limited as to what the fee will be. There have been problems with attorneys who did not pay their experts, because the case was on a contingency basis, and the plaintiff lost.

Mr. Klein noted that rate charged for time spent in the deposition should be linked to the rate charged for preparing for the deposition. He expressed the view that economic forces will regulate this. The linkage should not be to the rate charged for trial testimony, because 95% of the cases settle. The linkage between the rate for deposition preparation time and the rate for the deposition itself would regulate the rates. The Vice Chairperson questioned as to what happens if one is contractually bound to pay the expert time-and-a-half for time spent in the deposition. Mr. Howell responded that in a fee-shifting situation where there is a private arrangement, the agreement is the only evidence of the reasonableness of the fee. Establishing a reasonable fee formula is neither confiscatory nor does it allow the retaining party to set the agenda. Rule 11 of the Rules of the United States District Court for the District of Maryland has middle-of-the-road language which provides that an expert may not charge an opposing party a fee higher than the fee for preparation of the expert's report. Rule 2-402 could

substitute the phrase "preparation for the deposition" in place of "preparation of the report." This is a fair compromise. If a party retains an expert who charges a certain sum, the deposition should go forward at the same rate. Any adjustments should be paid by the party who retained the expert. The last sentence has been changed to provide that the party will pay at an hourly rate. Mr. Klein added that the retaining attorney will negotiate the rate for preparation time, and the marketplace will regulate this.

The Vice Chairperson stated that the Rule does not prohibit a contractual agreement between the expert and the attorney. The party taking the deposition will pay for the amount of time agreed upon. Mr. Titus noted that the beginning of subsection (e)(3) provides that the court shall require that the party seeking discovery pay the expert a reasonable fee. He suggested that the last sentence of the subsection should be structured the same way, so that the last sentence would begin as follows: "The court shall not require a fee that exceeds...". Mr. Karceski asked whether the attorneys who represent defendants in a civil action are charged the same rate by experts at depositions as the experts charge for preparation time. Judge McAuliffe referred to the hapless plaintiff who hires an expert and agrees to pay an hourly rate. Defense counsel, who has money, then makes the deposition go on interminably, diminishing the plaintiff's money. Judge Vaughan pointed out that the opening language in subsection (e)(3) is "[u]nless manifest injustice would

result...".

Mr. Henderson inquired as to why the party who retains the expert is required to pay for the expert's preparation time for the deposition. Sometimes his firm is notified about a deposition in a case which is four or five years old, and to prepare for the deposition, their expert may spend innumerable hours. The opposing party can cause their client to pay. The Vice Chairperson commented that this issue is debated often. The theory is that preparation time benefits the party who retained the expert. Mr. Howell noted that there is discussion in the Kilsheimer case at pp. 629 - 631 which comes down on the side of the deposition time as an adjunct of the work done by the expert. Judge Hollander, who wrote the opinion, allows the party taking the deposition to pay for the expert's fee for preparation time in extraordinary circumstances. The Subcommittee drew the line at putting this into Rule 2-402.

Mr. Howell suggested that the next-to-last sentence of subsection (e)(3) read as follows: "Unless manifest injustice would result, a party seeking discovery shall not be required to pay a fee for taking a deposition under subsection (e)(1)(B) of this Rule that exceeds the hourly rate charged by that expert for time spent preparing for the deposition." The Vice Chairperson noted that the phrase "unless manifest injustice would result" takes care of the situation where the deposition is so long that it drains the funds of the opposing party. Mr. Howell observed that the phrase "unless the

court orders otherwise" could serve the same purpose. Mr. Sykes remarked that the hourly rate should be no more than $150 an hour. The Vice Chairperson expressed the view that the phrase "unless manifest injustice would result" is preferable to "unless the court orders otherwise." Mr. Howell agreed, and he moved that the language he previously suggested become the next-to-last sentence of subsection (e)(3). The motion was seconded, and it carried unanimously.

The Reporter pointed out that the form interrogatories will have to be conformed to the changes made in subsection (e)(1). Mr. Klein inquired as to whether Rule 2-403, Protective Orders, would be applicable to the problem of lengthy depositions, and the Vice Chairperson responded that if it did apply, the added language "unless manifest injustice would result" would not be necessary. Mr. Titus asked if the Medical and Chirurgical Faculty should be told about the proposed changes to Rule 2-402. The Committee was in agreement that correspondence should be sent to that organization.

Agenda Item 5. Consideration of Title 10, Chapter 400 Rules, Standby Guardianship

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Mr. Lombardi, Chairperson of the Probate and Fiduciary Subcommittee, explained that the Standby Guardian Rules were sent to the Court of Appeals as part of the Fiduciary Rules in the 132nd Report, but the Court sent the Standby Guardian Rules back to the

Committee to consider some suggestions by experts in the field and to consider any upcoming legislation that could affect the Rules. A Subcommittee meeting was held to consider suggestions by professors from the University of Maryland School of Law. Two of them are present today, Karen Czapanskiy, Esq. and Deborah Weimer, Esq. They are accompanied by Hilary Kushins and Amy Gibson, students who attend the Law School. In the rules presented today, brackets and underlining denote the Subcommittee's recommended changes from the version of these rules that was included with the 132nd Report.

Professor Czapanskiy told the Committee that she and Professor Weimer are both on the faculty of the University of Maryland Law School. As part of the clinical programs at the school, they perform legal work on behalf of people who are either HIV-positive or who have acquired immune deficiency syndrome (AIDS). Part of their clinic's work is to plan for the children of people who are dying of AIDS. One of the legal tools to help in this endeavor is the Standby Guardian law, found in Code, Estates and Trusts Article, §§13-901 et seq. Professor Weimer noted that the University of Maryland consultants had worked with Delegate Kenneth Montague on the initial legislation. Mr. Lombardi presented Rule 10-401, Definitions, for the Committee's consideration.

Rule 10-401. DEFINITIONS

(a) Statutory Definitions

The definitions stated in Code, Estates and Trusts Article, §13-901 are applicable to this Chapter.

(b) Additional Definition

In these rules the following definition applies except as otherwise provided or as necessary implication requires:

"Interested person" means the minor**[**, a governmental agency paying benefits to the minor**]** and the guardian of the minor, and includes any other person designated by the court.

Source: This Rule is new.

Rule 10-401 was accompanied by the following Reporter's Note.

This Rule is new. Originally, a governmental agency paying benefits to the minor was included as an interested person, but the Subcommittee agreed with the consultants from the University of Maryland Law School that it is not necessary to notify those agencies, and, in fact, some clients who have AIDS may not want the agencies to be notified.

Mr. Lombardi explained that the only change to Rule 10-401 is the deletion of the language which had read "a governmental agency paying benefits to the minor." He commented that the benefits which are mainly involved here are the Aid for Dependent Children (AFDC) funds, and that the agency involved in distributing these funds has

little interest in the matter of standby guardians. The statutes which require notice for Supplemental Security Income (SSI) benefits pertain to adults and not minors.

Professor Weimer commented that there had been discussion in the Subcommittee as to whether it is appropriate to give notice to minors under the age of ten. The Assistant Reporter observed that the age of ten years is the minimum age for notice in the regular Guardianship Rules. Ms. Ogletree added that the age of ten is the cutoff for actions to change names and in the Adoption Rules. Professor Weimer suggested that the Standby Guardian Rules could be conformed to these other Rules. Judge McAuliffe pointed out that Rule 10-203, which pertains to service and notice in regular guardianship cases, contains a provision which allows waiver of notice to minors under the age of ten. Mr. Howell noted that there is a definition of the term "interested person" in Rule 10-103, and something could be added here to indicate that service can be waived for a minor under the age of ten. The Vice Chairperson suggested that the appropriate place for this is in Rule 10-402 (d). The Committee agreed to this suggestion by consensus.

Mr. Lombardi presented Rule 10-402, Petition by a Parent for Judicial Appointment of a Standby Guardian, for the Committee's consideration.

Rule 10-402. PETITION BY A PARENT FOR JUDICIAL APPOINTMENT OF A STANDBY GUARDIAN

(a) Filing of Petition

Except for a petition filed by a standby guardian in accordance with Rule 10-403, a petition for the judicial appointment of a standby guardian of the person or property of a minor shall be filed by a parent of the minor. Each person having parental rights over the minor shall join in the petition unless an affidavit pursuant to subsection (c)(13) of this Rule is included in the petition.

(b) Venue

The petition shall be filed in the county where the minor resides or is physically present.

(c) Contents

The petition shall be captioned "In the Matter of..." [stating the name of the minor]. It shall be signed and verified by the petitioner and shall include the following information:

(1) The petitioner's name, address, age, and telephone number;

(2) The petitioner's familial relationship to the minor;

(3) The name, address, and date of birth of the minor;

(4) Whether the minor has any siblings and, if so, their names and ages;

(5) The proposed standby guardian's name, address, age, and telephone number;

(6) The proposed standby guardian's relationship to the minor;

(7) A statement explaining why the appointment of the proposed standby guardian is in the best interests of the minor;

[(7)**]** (8) Whether and under what circumstances the standby guardianship is to be of the minor's person, property, or both;

[(8)**]** (9) If the standby guardian is to be a guardian of the property of the minor, the nature, value, and location of the property;

[(9)**]** (10) A description of the duties and powers of the standby guardian, including whether the standby guardian is to have the authority to apply for, receive, and use public benefits and child support payable on behalf of the minor;

Cross reference: For a listing of the powers of a guardian of the person, see Code, Estates and Trusts Article, §13-708 and for a guardian of the property, see Code, Estates and Trusts Article, §15-102.

[(10)**]** (11) Whether the authority of the standby guardian is to become effective on the petitioner's incapacity, death, or on the first of those circumstances to occur;

Cross reference: Code, Estates and Trust Article, §13-906.

[(11)**]** (12) A statement that there is a significant risk that the petitioner will become incapacitated or die within two years of the filing of the petition and the basis for the statement;

Cross reference: Code, Estates and Trusts Article, §13-903 (a).

[(12)**]** (13) If the petitioner is medically unable to appear in court for a hearing pursuant to Rule 10-404, a statement explaining why; and

[(13)**]** (14) If a person having parental rights does not join in the petition, a statement that the identity or whereabouts of the person are unknown and a description of the reasonable efforts made in good faith to identify and locate the person.

(15) If the petitioner believes that notice to the minor would be unnecessary or would not be in the best interests of the minor, a statement explaining why.

(d) Notice

Unless the court orders otherwise,
[T**]**the petitioner shall send by ordinary mail and by certified mail to all interested persons a copy of the petition and**[**, unless the court orders otherwise,**]** a "Notice to Interested Persons" pursuant to section (e) of this Rule.

(e) Notice to Interested Persons

The Notice to Interested Persons shall be in the following form:

In the Matter of _____ (Name of minor)

In the Circuit Court for _____ (County)

_____ (docket reference)

NOTICE TO INTERESTED PERSONS

A petition has been filed seeking the appointment of a standby guardian of the [person] [property] [person and property] of _____, who is alleged to be a minor.

You are receiving this because you are related to or otherwise concerned with the welfare of the minor.

Please examine the attached papers carefully. If you object to the appointment of a standby guardian, please file a response with the court. (Be sure to include the case number.) If no response is received by the court, the court may rule on the petition summarily. If you wish to participate in this proceeding in any way, notify the court and be prepared to attend any hearing.

Source: This Rule is new.

Rule 10-402 was accompanied by the following Reporter's Note.

This Rule is substantially derived from Code, Estates and Trusts Article, §13-903.

Section (a) is derived from Code, Estates and Trusts Article, §13-903 (a).

Section (b) is derived from proposed Fiduciary Rule 10-201 (b).

> Section (c) is derived from Code, Estates and Trusts Article, §13-903 (b) and (c) and proposed Fiduciary Rule 10-201 (c) and is in part new. The University of Maryland consultants requested the additional language in subsection (c)(7) and (c)(8) for the courts' clarification, and the additional language in subsection (c)(10) because it is not always clear if the standby guardian is to have the authority to apply for and use public benefits and child support payable on behalf of the minor. The consultants also requested the additional language in subsection (c)(15), because of the concern that some minors should not be apprised of their parent's illness at the time the petition is filed.
>
> Sections (d) and (e) are derived from proposed Fiduciary Rule 10-203 (b)(1) and (c) and were added because the Code does not provide for notice to interested persons. The additional language in the notice form in section (e) was included to inform interested persons that they should respond if they are not in favor of the guardianship.

Mr. Lombardi pointed out that subsection (c)(7) is new, and there is new language added to subsection (c)(8) giving the court the right to circumscribe the parameters as to how and when the minor's property is to be distributed. Subsection (c)(10) contains new language concerning a statement in the petition as to whether the standby guardian is to have the authority to apply for, receive, and use public benefits. Subsection (c)(15) is new, and it may cover some of the consultants' concerns about a young minor getting notice, since it requires the petitioner to explain if he or she feels that notice to the minor would be unnecessary or not in the minor's best interests. There was no discussion of any of the changes to section

(c), so the changes were approved as presented.

Professor Weimer said that she needed some clarification as to subsection (c)(14) which does not address the situation where the parent whose whereabouts are known does not respond. The consultants had suggested including in the Standby Guardian Rules a definition of "a person having parental rights," who would be someone who would receive notice. Mr. Lombardi explained that that definition was not included, because it was extremely broad and seemed to include persons who otherwise would not be notified. Ms. Ogletree cautioned that the parent whose whereabouts are known has to be notified, even if he or she did not join in the petition. The Reporter noted that the Standby Guardian statute does not cover the situation of the parent whose whereabouts are known, but who does not join in the petition. Subsection (a)(1) provides that the petition shall be joined by each person having parental rights unless the person cannot be located. Ms. Ogletree reiterated that if the whereabouts of the person are known, he or she must receive notice of the standby guardianship proceedings, even if the parent chooses not to join in the petition. Professor Czapanskiy remarked that the court could later provide the notice to the parent who chooses not to join the petition. The Vice Chairperson stated that the guardianship would be defective without notice to a person with parental rights whose whereabouts are known. She asked why that person would not be categorized as an "interested person." Mr. Lombardi suggested that

the language of Rule 10-103 which provides in subsection (f)(3) that an interested person "includes a fiduciary appointed for that person, or, if none, the parent or other person who has assumed responsibility for the interested person" could be added to Rule 10-401.

Judge Vaughan hypothesized that there could be two parents, one ill and one who is a ne'er-do-well, and he asked if the court is foreclosed from going forward with the guardianship if the latter parent does not join in the petition. Ms. Ogletree noted that there is language in Rule 9-105 of the Adoption Rules which covers this type of situation. Mr. Sykes pointed out that subsection (c)(14) of Rule 10-402 is different from Rule 9-105, because the latter requires an affidavit as to the inability to find the parent. Ms. Ogletree said that Rule 10-402 needs a two-pronged approach -- one for the parent whose whereabouts are known and one for the parent whose whereabouts are unknown. Professor Czapanskiy added that a statement, and not an affidavit, will be sufficient. Mr. Lombardi suggested that this could be added to section (d) of Rule 10-402. The Committee agreed by consensus to these modifications.

Ms. Ogletree noted that the language at the end of section (d), which provides that if no response is received, the court may rule on the petition "summarily", should be changed, so that the words "without a hearing" are substituted for the word "summarily." This would be more understandable for those receiving the Notice to

Interested Persons. The Committee agreed by consensus to this suggestion.

Mr. Howell suggested that a time limit as to when to respond should be included in the Notice to Interested Persons. Ms. Ogletree added that a blank space should be included, so that the date by which to respond can be filled in. The notice deadline could be the same as for initial pleadings. Judge Vaughan expressed the view that 30 days to respond is too long. The Reporter noted that at the time the date is filled in, it will not be clear as to when the notice will actually be served. Judge McAuliffe suggested that this could be set up similar to a show cause order, so that the response is within so many days of the date the notice is served. Ms. Ogletree pointed out that section (d) provides for both notice by certified and ordinary mail, and she said that the easiest way to handle the cutoff is to provide a specific date on the notice form. The Vice Chairperson commented that the form should clarify that the response has to be received by the court on the date specified. The Committee agreed by consensus to add a cutoff date on the notice form.

Mr. Lombardi presented Rule 10-403, Petition by Standby Guardian for Judicial Appointment After Parental Designation, for the Committee's consideration.

Rule 10-403. PETITION BY STANDBY GUARDIAN FOR JUDICIAL APPOINTMENT AFTER PARENTAL DESIGNATION

(a) Filing of Petition

If a parent designates a standby guardian by a written designation pursuant to Code, Estates and Trusts Article, §13-904 and the standby guardian wishes to retain authority for a period of more than 180 days, the standby guardian shall file a petition for judicial appointment within 180 days after the effective date of the standby guardianship.

(b) Venue

The petition shall be filed in the county where the minor resides or is physically present.

(c) Contents

The petition shall be captioned "In the Matter of ..." [stating the name of the minor]. It shall be signed and verified by the petitioner and shall contain the following information:

(1) The petitioner's name, address, age, telephone number, and relationship to the minor;

(2) The name, address, and date of birth of the minor;

(3) Whether the minor has any siblings and, if so, their names and ages;

(4) A statement explaining why the appointment of the proposed standby guardian is in the best interests of the minor.

[(4)**]** (5) Whether and under what circumstances the standby guardianship is to be of the minor's person, property, or of both;

[(5)**]** (6) If the standby guardian is to be a guardian of the property of the minor, the nature, value, and location of the property;

[(6)**]** (7) A description of the duties and powers of the standby guardian, including whether the standby guardian is to have the

authority to apply for, receive, and use public benefits and child support payable on behalf of the minor; and

[(7)**]** (8) If the petition is filed by a person designated by a parent as alternate standby guardian pursuant to Code, Estates and Trusts Article, §13-904 (b)(2), a statement that the person designated as standby guardian is unwilling or unable to act as standby guardian and the basis for the statement.

(d) Documentation

The petitioner shall file with the petition:

(1) The written parental designation of the standby guardian signed, or consented to, by each person having parental rights over the child, if available, and, if not, the documentation required by Code, Estates and Trusts Article, §13-904 (f)(4);

(2) A copy of a physician's determination of incapacity or debilitation of the parent pursuant to Code, Estates and Trusts Article, §13-906; and

(3) If a determination of debilitation is filed pursuant to subsection (d)(2) of this Rule, a copy of the parental consent to the beginning of the standby guardianship pursuant to Code, Estates and Trusts Article, §13-904 (f).

(e) Notice

The petitioner shall send by ordinary mail and by certified mail to all interested persons a copy of the petition and, unless the court orders otherwise, a "Notice to Interested Persons" pursuant to section (f) of this Rule.

(f) Notice to Interested Persons

The Notice to Interested Persons shall be in the following form:

In the Matter of _____ (Name of minor)

In the Circuit Court for _____ (County)

_____ (docket reference)

NOTICE TO INTERESTED PERSONS

A petition has been filed seeking appointment of a standby guardian of the [person] [property] [person and property] of

_____, [who is alleged to be] a minor.

You are receiving this notice of this proceeding because you are related to or otherwise concerned with the welfare of the minor.

Please examine the attached papers carefully. If you object to the appointment of a standby guardian, please file a response with the court. (Be sure to include the case number.) If no response is received by the court, the court may rule on the petition summarily. If you wish to participate in this proceeding in any way, notify the court and be prepared to attend any hearing.

Cross reference: Code, Estates and Trusts Article, §13-904 (e) and (f).

Source: This Rule is new.

Rule 10-403 was accompanied by the following Reporter's Note.

> This Rule is derived from Code, Estates and Trusts Article, §§13-904 (e) and (f), except for section (b) which is derived from proposed Fiduciary Rule 10-201 (b), the beginning of section (c) which is derived from proposed Fiduciary Rule 10-201 (c), and sections (e) and (f) which are derived from proposed Fiduciary Rule 10-203 (b)(2) and (c). New language has been added to subsections (c)(4), (c)(5), and (c)(7), as well as to section (f) for the reasons stated in the Reporter's Note to Rule 10-402.

Mr. Lombardi explained that the changes made to Rule 10-402 would also be made to Rule 10-403.

Mr. Lombardi presented Rule 10-404, Hearing, for the Committee's consideration.

Rule 10-404. HEARING

(a) **[**Generally**]** No Response to Notice

[The court shall hold a hearing on the record prior to entering an order appointing a standby guardian.**]** If no response to the notice is filed and the court is satisfied that the petitioner has complied with the provisions of Rules 10-402 or 10-403, the court may rule on the petition summarily.

(b) **[**Attendance at Hearing**]** Response to Notice

If a response is filed to the notice objecting to the appointment of the standby guardian, the court shall hold a hearing and shall give notice of the time and place of the hearing to all interested persons. Unless excused for good cause shown, the petitioner, the proposed standby guardian, and the minor named in the petition shall be present at the hearing.

Source: This Rule is new.

Rule 10-404 was accompanied by the following Reporter's Note.

This Rule is derived from proposed Fiduciary Rule 10-205. There is a reference to a hearing in Code, Estates and Trusts Article §13-903 (c) when a parent files for the appointment of a standby guardian, and the Committee was of the opinion that a hearing should also be required when a petition is filed by standby guardian who had been previously designated by a parent pursuant to Code, Estates and Trusts Article §13-904.

Mr. Lombardi noted that in section (a) the word "summarily" would be changed to the phrase "without a hearing" to conform to changes made to Rules 10-402 and 10-403. Professor Weimer observed

that the requirement in section (b) that the minor must be present at the hearing may create a burden on the petitioner. Judge Johnson said that this provision should be left in, and each individual case would be left up to the judge to determine if the minor's presence would be a burden on the petitioner.

Mr. Lombardi presented Rule 10-405, Order, for the Committee's consideration.

Rule 10-405. ORDER

(a) Judicial Appointment of Standby Guardian

After the filing of a petition for judicial appointment of a standby guardian pursuant to Code, Estates and Trusts Article, §13-903 (a), the court shall enter an order appointing the person as a standby guardian if the court finds that the requirements of Code, Estates and Trusts Article, §13-903 (d) have been met.

(b) Judicial Appointment of Standby Guardian After Parental Designation

After the filing of a petition for judicial appointment of a standby guardian who was previously designated as standby guardian or alternate standby guardian by a parent pursuant to Code, Estates and Trusts Article, §13-904 (a), the court shall enter an order appointing the person as a standby guardian if the court finds that the requirements of Code, Estates and Trusts Article, §13-904 (g) have been met.

(c) Order Appointing a Standby Guardian

(1) An order appointing a standby guardian shall state whether the standby guardianship is of the minor's person, property, or both,

whether the guardian shall have the authority to apply for, receive, and use public benefits and child support payable on behalf of the minor, and [the] any other duties and powers of the standby guardian; and

(2) When the order is entered pursuant to section (a) of this Rule, the order shall also

(A) Specify whether the authority of the standby guardian is effective on the receipt of a determination of the petitioner's incapacity pursuant to Code, Estates and Trusts Article, §13-906, on the receipt of the certificate of the petitioner's death, or on whichever occurs first; and

(B) Provide that the authority of the standby guardian may become effective earlier on written consent of the petitioner in accordance with Code, Estates and Trusts Article, §13-903 (e)(3).

(d) Duty to File Documentation

A copy of the appropriate document referred to in subsection (c)(2) of this Rule shall be filed by the standby guardian with the court within 90 days after the standby guardian receives the document.

(e) Revocation of Standby Guardian's Authority

The court may revoke the standby guardian's authority for failure to file any of the required documentation.

Source: This Rule is new.

Rule 10-405 was accompanied by the following Reporter's Note.

This Rule is derived from Code, Estates and Trusts Article, §§13-903 and 13-904.

Section (a) is derived from subsection (d)(1) of Code, Estates and Trusts Article, §13-903.

Section (b) is derived from Code, Estates and Trusts Article, §13-904 (g).

Sections (c) and (d) are derived from Code, Estates and Trusts Article, §13-903 (d) and proposed Fiduciary Rule 10-108. New language has been added to subsection (c)(1) in conjunction with the language added to subsections (c)(10) of Rule 10-402 and (c)(7) of Rule 10-403. Although the proposed Rule follows Code, Estates and Trusts Article, §13-903 (e)(1)(ii), (e)(2)(ii), and (e)(3)(iii) in allowing the standby guardian 90 days to file the appropriate documentation after its receipt by the standby guardian, the Committee is of the opinion that the documentation should be filed promptly and recommends that the legislature consider amending §13-903 accordingly.

Section (e) is new.

Mr. Lombardi told the Committee that language has been added to section (c) to conform with the language added to subsection (c)(10) of Rule 10-402 and subsection (c)(7) of Rule 10-403, which pertains to whether the standby guardian is to have the authority to apply for, receive, and use public benefits and child support payable on behalf of the minor. The Rule was approved as presented.

Mr. Lombardi presented Rule 10-406, Accounting, for the Committee's consideration.

Rule 10-406. ACCOUNTING

(a) Records

A standby guardian of the property appointed by the Court shall keep records of the fiduciary estate and, upon request of any interested person or of the court that has assumed jurisdiction over the standby guardianship of the property, shall make the records available for inspection.

(b) Annual Fiduciary Accounts

When the court has assumed jurisdiction over a standby guardianship of the property, the standby guardian shall file each year an account in substantially the form set forth in Rule 10-708. The provisions of Rule 10-706 shall apply to the account, except that the end of the accounting year shall be the anniversary of the date upon which the court assumed jurisdiction over the standby guardianship.

Source: This Rule is new.

Rule 10-406 was accompanied by the following Reporter's Note.

This Rule was derived from proposed Fiduciary Rule 10-706 and was added because no accounting is specifically provided for in the Code.

The Vice Chairperson pointed out that style changes need to be made to the first sentence of section (a) so that it reads: "A court-appointed standby guardian of the property shall keep...". The Committee agreed with this suggestion.

Mr. Lombardi presented Rule 10-407, Removal for Cause or Other Sanctions, for the Committee's consideration.

Rule 10-407. REMOVAL FOR CAUSE OR OTHER SANCTIONS

(a) On Court's Initiative

The court that has assumed jurisdiction over a standby guardianship may order the standby guardian to show cause why the guardian should not be removed or be subject to other sanctions for failure to perform the duties of that office.

(b) On Petition of Interested Persons

An interested person may file a petition to remove a standby guardian. The petition shall be filed in the court that appointed the standby guardian or, if there is a written parental designation pursuant to Code, Estates and Trusts Article, §13-904 (a) and the court has not yet assumed jurisdiction over the standby guardianship, in the county where the minor resides or is physically present. The petition shall state the reasons why the guardian should be removed.

(c) Action by Court

The provisions of Rule 10-208 (c) and (e) shall apply to proceedings for removal of a standby guardian. If the court finds grounds for removal, it may remove the standby guardian and appoint an alternate standby guardian pursuant to Code, Estates and Trusts Article, §13-904 (b)(2).

Source: This Rule is new.

Rule 10-407 was accompanied by the following Reporter's Note.

This Rule is derived from proposed Fiduciary Rule 10-208 and was added to provide a means for removing a standby guardian since none was provided for in the statute.

Professor Weimer expressed the concern that section (b) of Rule

10-407 would permit anyone to ask the court to remove a standby guardian. She explained that there are situations where a father contests a standby guardianship and loses; then the mother dies, and the father wants a reconsideration. Ms. Ogletree pointed out that this Rule does not abrogate the rights of other parents. Professor Weimer said that once the guardianship has been litigated, she had concerns about relitigation. Judge Johnson advised that the judge in each case can decide how to handle this. Judge Rinehardt remarked that the usual rule is that the guardianships are not tampered with unless there has been a change in circumstances. Ms. Ogletree commented that the Rules cannot stop a father from relitigating the guardianship. Professor Czapanskiy explained that their concern is that the general rule referred to by Judge Rinehardt is not stated in Rule 10-407.

Mr. Sykes observed that removal of a guardian is depriving the guardian of a job. This is not the same issue as who should be the guardian. Rule 10-407 does not permit relitigation of who should be guardian. Good cause to challenge the guardianship is needed. Professor Weimer remarked that the Rule does not read that narrowly. Professor Czapanskiy said that if the guardianship is changed, it could change the physical residence of the child, creating instability, and she expressed the concern that the Rule may be opening the door to this. The Assistant Reporter commented that the Standby Guardian statute does not contain a removal rule. The Vice

Chairperson noted that without a rule, no one can file a petition to remove a standby guardian. All of the rules assume the judge will take care of any problems. Judge Johnson expressed the opinion that the Rule should not be changed. Lynn Stewart, Esq., commented that the last sentence of section (b) should take care of any problems. Mr. Sykes reiterated that removal is punitive. The Rule was approved as presented.

Mr. Lombardi presented Rule 10-408, Revocation, Renunci-ation, and Resignation, for the Committee's consideration.

Rule 10-408. REVOCATION **[**AND**]**, RENUNCIATION, AND RESIGNATION

(a) Revocation by Parent

A parent who joined in a petition to appoint a standby guardian may file a petition to revoke a standby guardianship **[**created by order entered pursuant to Rule 10-405 by executing a written revocation, filing the revocation with the court that issued the order, and promptly notifying the standby guardian in writing of the revocation**]** in the court that appointed the standby guardian.The petition shall state the reasons for the revocation and shall be served on the standby guardian and all interested persons. The court shall grant or deny the relief requested, but if an objection to the revocation is filed, the court shall hold a hearing prior to making its decision.

(b) Renunciation by Standby Guardian

A person who is judicially appointed as a standby guardian may renounce the appointment at any time before the effective date of the person's authority by executing a written

renunciation, filing the renunciation with the court that issued the order, and promptly notifying the parent in writing of the renunciation.

(c) Resignation by Standby Guardian

A person who has been judicially appointed as a standby guardian and whose authority has become effective may file a petition to resign in the court that appointed the standby guardian. The petition shall state the reasons for the resignation and shall be served on all interested persons. The court shall grant or deny the relief requested, but if an objection to the resignation is filed, the court shall hold a hearing prior to making its decision.

Source: This Rule is new.

Rule 10-408 was accompanied by the following Reporter's Note.

Section (a) of this Rule is derived from Code, Estates and Trusts Article, §13-903 and proposed Fiduciary Rule 10-208. Section (b) is derived from Code, Estates and Trusts Article, §13-903 (g). Section (c) is derived from proposed Fiduciary Rule 10-207.

The Vice Chairperson pointed out that the court has the option of taking actions other than granting or denying the relief, and she suggested that the last sentence of section (a) should read as follows: "If an objection to the revocation is filed, the court shall hold a hearing prior to ruling on the petition." Other parallel provisions in the Standby Guardian Rules would be conformed to this. The Committee agreed to this change by consensus.

Judge Vaughan questioned what would happen if a parent did not join in the petition due to being imprisoned, and then after he or she gets pardoned and wins the lottery, wishes to have the child back. Professor Czapanskiy responded that the person has a statutory entitlement to the child, and the remedy is to seek custody. Judge Johnson added that a standby guardianship would not take custody away from that parent. The guardian has no rights superior to the natural parent. If the parent wants his or her child back, the parent gets the child. Judge Rinehardt added that this would not be true if the parent's rights had been terminated by the court. Judge Johnson remarked that if there is a problem with the natural parent, the guardian should seek custody of the child.

Mr. Lombardi noted that section (c) has been added. There was no further discussion of Rule 10-408, so it was approved as presented.

Mr. Lombardi presented Rule 10-409, Bond, for the Committee's consideration.

Rule 10-409. BOND

The furnishing of a bond by a standby guardian shall be governed by the provisions of Code, Estates and Trusts Article, §13-208.

Source: This Rule is new.

Rule 10-409 was accompanied by the following Reporter's Note.

This Rule is derived from Code, Estates and Trusts Article, §13-908.

Judge Johnson asked what Code, Estates and Trusts Article, §13-908 provides, since it is referenced in the Reporter's note. The Assistant Reporter answered that that Code section references Code, Estates and Trusts Article, §13-208. Judge Johnson explained that problems arise if someone dies, and the insurance company pays benefits to the guardian before the bond is filed. The money can dissipate quickly. Mr. Lombardi noted that the statutory 180-day period before the court gets involved in the guardianship may be too long. Delegate Montague had spoken with the Subcommittee previously about trying to shorten the period to 90 days. Professor Weimer said that her group at the University of Maryland did not agree with the 90-day period, because it may not allow enough time for someone to get an attorney, and it is not realistic that property would not be misused in 90 days. Judge Johnson expressed the view that before any property is distributed to a guardian, the bond should be filed

first. Ms. Ogletree suggested that the proceeding should be bifurcated, so that the guardianship of the person goes into place as soon as possible, but the guardianship of the property takes effect once the bond is posted.

Professor Czapanskiy remarked that very few of their clients have any insurance money. Ms. Ogletree noted that other monies may be involved, such as Social Security benefits, child support, and tax refunds. Judge Johnson suggested that there be two separate orders in the Rule, one for guardianship of the person and one for guardianship of the property. Professor Czapanskiy expressed the view that the risk of loss of the property is small, but Judge Johnson disagreed. Judge Rinehardt commented that she had previously represented children where the estate was dissipated by well-intentioned people who did not understand the situation. The Reporter commented that the problem is with the statute which allows the guardianship of the property to go into effect before a bond is filed. Since no changes were made to Rule 10-409, it was approved as presented.

Agenda Item 4. Consideration of certain amendments to: Rule 2-510 (Subpoenas), Rule 3-510 (Subpoenas), and Rule 5-901 (Requirement of Authentication or Identification)

After the lunch break, Mr. Howell presented Rule 2-510, Subpoenas, for the Committee's consideration.

AMEND Rule 2-510 to clarify how a subpoena may be used, to require sanctions if a subpoena is used improperly, to require the issuance of a blank subpoena under certain circumstances, to require a certain good faith effort concerning the time of service of a subpoena, to allow a court to modify a subpoena under certain circumstances, to add a provision concerning protection of nonparty deponents from certain expenses, and to add certain provisions concerning the protection of persons subject to subpoena, as follows:

Rule 2-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator an opportunity to be heard, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court shall impose an appropriate sanction upon the party or attorney, which may include, but is not limited to, a fine, an award of a

reasonable attorney's fee and costs, and the exclusion of evidence obtained by the subpoena.

Committee note: It is improper to use a trial or hearing subpoena to circumvent discovery procedures. See Rule 3.4 (c) of the Maryland Lawyers' Rules of Professional Conduct.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk **[**may**]** shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

. . .

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named. A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to serve a trial or hearing subpoena at least five days before the trial or hearing.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time

specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for **[**such**]** an order to compel the production. Such an order shall protect any

person who is not a party or an officer of a party from significant expense resulting from the compelled inspection and copying.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing unnecessary burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

Cross reference: See Rule 1-341 concerning conduct in bad faith or without substantial justification that harms an adverse party.

[(g)**]** (h) Hospital Records

. . .

[(h)**]** (i) Attachment

. . .

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is **[**consistent with**]** derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former Rules 114 a and b, 115 a and 405 a 2 (b).
Section (d) is derived from former Rules 104 a and b and 116 b.
Section (e) is derived from former Rule 115 b.
Section (f) is derived from FRCP 45 (d)(1).
Section (g) is derived from FRCP 45 (c)(1).
Section **[**(g)**]** (h) is new.
Section **[**(h)**]** (i) is derived from former Rules 114 d and 742 e.

Rule 2-510 was accompanied by the following Reporter's Note.

The Trial Subcommittee recommends a number of changes to Rule 2-510.

In section (a), the words "and permit inspection and copying of" have been added, making clear in the subpoena that a deponent is required to allow inspection and copying in accordance with Rule 2-415 (c).

The amendments to section (a) also address misuse of subpoenas. If section (a) is violated, the amendment requires the court to impose a sanction, which may include a fine, attorney's fees and costs, and exclusion of the evidence obtained. A Committee note is added to make clear that the practice of issuing a trial subpoena for discovery purposes (in order to circumvent the notice require of Rule 2-412 (c)) is impermissible. The Subcommittee discussed adding a provision similar to the last sentence of FRCP 45 (b)(1), which reads as follows:

Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5 (b).

The Subcommittee concluded that such a broad approach was not necessary to combat a narrow problem.

An amendment to section (b) requires the clerk, upon request, provide a blank subpoena to an attorney or other officer of the court entitled to issuance of a subpoena.

A sentence is added to section (d) to require a party to make a good faith effort to serve a trial or hearing subpoena at least five days before the court date, unless it is impracticable to do so. Last-minute service of subpoenas on nonparties can be very disruptive to the plans of business persons and others, and affords the subpoenaed person who may have

a valid objection to the subpoena no realistic opportunity to formulate and assert that objection.

An amendment to section (e) makes clear that the court has the power to modify a subpoena, on motion of a person served with a subpoena to attend a court proceeding.

An amendment to section (f) provides that if the court enters an order compelling production of designated materials at a deposition by a nonparty who objected to the production, the order shall protect the nonparty from any significant expense resulting from the compelled inspection and copying.

New section (g) is taken verbatim from FRCP 45 (c)(1), except that the phrase "undue burden or expense" is changed to "unnecessary burden or expense." It imposes a duty upon parties and attorneys to avoid imposing unnecessary burden or expense on a person subject to a subpoena. The duty is enforceable by sanctions including lost earnings and attorney's fees.

Following section (g) is a cross reference to Rule 1-341, regarding harm to an adverse party that occurs because of conduct

in bad faith or without substantial justification.

In light of the addition of new section (g), existing sections (g) and (h) are relettered as sections (h) and (i), respectively.

Mr. Howell explained that the Trial Subcommittee reviewed the subpoena rules in the circuit and District courts. The Subcommittee discussed whether the provisions of F.R.C.P. 45 could be introduced into Rule 2-510. Subpoenas are routinely issued to attorneys in civil cases. Occasionally, subpoenas are served in a manner not authorized by the Rules, and this may be inconvenient to witnesses. Some limits need to be placed on this, so that witnesses do not have to bring a civil proceeding to obtain relief.

Mr. Howell said that one of the major changes proposed by the Subcommittee is the addition of the last sentence in section (a). The Subcommittee felt that it was appropriate to state in Rule 2-510 the sanctions for the unauthorized use of a subpoena. There are some situations where a subpoena is issued for an ulterior motive, such as corralling a witness for a non-testimonial purpose. Judge Johnson referred to a case where the defense attorney subpoenaed the victim to come to a supplementary hearing, and when she appeared he took her to his office to obtain further information. Mr. Howell commented that another example could be issuing a subpoena to a witness to testify at a deposition, then cancelling the deposition without

letting the witness know. Mr. Sykes observed that these would be cases where sanctions are appropriate.

Mr. Howell told the Committee that currently there is a bright line rule which has no sanctions except for resorting to contempt. The wrong should be redressed when it occurs. Mr. Titus noted that there is a comparable provision in Rule 4-265, and these kinds of problems also arise in the criminal context. Mr. Howell pointed out that there is no corresponding language pertaining to sanctions in the criminal subpoena rule. Rule 4-265 should be referred to the Criminal Subcommittee to discuss this.

The Vice Chairperson commented that she had no problem with the concept of adding in sanctions, but she noted that since 1984, Rule 1-201, the general sanctions rule, can be used by the court to impose any sanctions. The Reporter noted that it is difficult to know when the subpoena rule is not being followed because opposing parties may have no notice of the infraction. Mr. Klein remarked that there is an educational aspect to the amendment.

Mr. Howell drew the Committee's attention to section (b) of Rule 2-510. He pointed out that the word "may" has been changed to the word "shall" in the second sentence. The Vice Chairperson inquired as to whether all the clerks are issuing subpoenas to attorneys upon request, and Ms. Ogletree replied that not all of them are doing so. Mr. Howell asked why the clerk should have the

discretion not to issue subpoenas and why the practice should vary from court to court. The Vice Chairperson remarked that when this Rule was amended to allow the issuance of blank subpoenas, the use of the word "may" had been a compromise to address concerns of clerk regarding this change. Mr. Howell commented that Maryland is still lagging behind. The federal courts issue subpoenas to the parties, but an attorney may issue a subpoena on behalf of the court. There is no clerical intervention. Rule 2-510 can move gradually toward the federal rule by substituting the word "shall" for the word "may." Mr. Howell said that he could not think of an area where the clerk should have discretion. Mr. Shipley agreed that clerks do not have discretion in this area.

Ms. Ogletree observed that the circuit courts are not uniform as to how subpoenas are handled. Mr. Klein added that a rule is needed. Mr. Titus noted that the federal rule provides that subpoenas can be signed by the attorney as an officer of the court. The Maryland system has not gone as far as the federal courts. Mr. Titus commented that if Maryland were to follow the federal practice, the subpoena form could be the same one as is used currently, but it would be signed by a member of the bar. The Vice-Chairperson noted that there is a parallel criminal rule covering subpoenas, Rule 4-265, Subpoena for Hearing or Trial, which provides that on the request of an attorney or other officer of the court, the clerk <u>may</u> issue a subpoena.

Turning to section (d), Mr. Howell pointed out that a new sentence has been added which provides that a party shall make a good faith effort to serve a trial or hearing subpoena at least five days before the trial or hearing. This is intended to be subjective, with good faith being the only standard. Mr. Titus commented that the Rule is silent as to depositions and that the wording of the new sentence differs from the wording in Rule 2-412 (a) which is "a subpoena ... shall be served at least ten days before....". Mr. Shipley suggested that the wording of Rule 4-265, Subpoena for Hearing or Trial, which is the criminal subpoena rule, should be reviewed in light of this change. Judge Johnson said that Rule 4-265 will be reworded at the next Criminal Subcommittee meeting.

Mr. Howell pointed out to the Committee that the words "or modified" have been added to subsection (e)(1). This is consistent with the federal rule. At the end of section (f), language has been added to require that an order compelling a non-party witness who has objected protect that witness from significant expense resulting from the compelled inspection and copying. The Vice Chairperson suggested that the word "significant" should be replaced by the word "undue" to be consistent with Rule 2-403, Protective Orders, which provides in section (a) that persons may need to be protected from "undue burden or expense..". Mr. Howell said that the word "significant" could be replaced by the word "unnecessary" which

appears in the next section of Rule 2-510. The Chairperson commented that the word "undue" is preferable, both in this section and in section (g), and the Committee agreed to these changes.

Mr. Titus asked why the word "shall" is used in the last sentence of section (f). Mr. Howell replied that this tracks the language of the federal rule. Mr. Sykes remarked that if the expense is undue, an order should protect the person. Mr. Titus observed that anyone who gets a subpoena could argue that the expense is undue. The Vice Chairperson said that the word "may" would not be appropriate in the last sentence of section (f). The purpose of the added sentence is to conform this to the federal rule. Otherwise, the sentence is not needed. Mr. Klein commented that the implication of the last sentence is that the party does not have the same protections as to undue expense as the non-party does. Mr. Howell explained that a party has the use of other protective provisions, such as a protective order. The Vice Chairperson pointed out that a protective order applies to both parties and non-parties. The added language in section (f) does not add any remedies.

Mr. Titus moved to strike the last sentence of section (f). The motion was seconded, and it carried unanimously.

Mr. Howell drew the Committee's attention to section (g). He noted that this is taken from F.R.C.P. 45 (c)(1). The Vice Chairperson commented that this provision makes her uneasy. It is not difficult to figure out a reasonable attorney's fee, but the lost

earnings amount is troubling. Mr. Titus questioned whether the second sentence of section (g) is necessary, because of Rule 1-341, and he questioned the use of the word "shall" in that sentence. Mr. Klein observed that Rule 1-341 covers the opposing party, but not other witnesses. Mr. Titus said that Rule 1-341 pertains to the adverse party or the party affected by the conduct. Mr. Howell noted that the second sentence could use the word "may" rather than the word "shall." The first sentence is the same as the federal rule. The second sentence could leave it up to the court to determine if sanctions are necessary.

The Vice Chairperson pointed out that Rule 1-201 explains the use of the words "may" and "shall." She agreed that the first sentence of section (g) could be retained, and the second sentence deleted, leaving a cross reference to Rule 1-341 with an additional cross reference to Rule 1-201. Mr. Titus moved that the second sentence be deleted, with an additional cross reference added. The motion was seconded, and it passed with two opposed.

Mr. Howell presented Rule 3-510, Subpoenas, and Rule 5-901, Requirement of Authentication or Identification, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 500 - TRIAL

AMEND Rule 3-510 to clarify how a subpoena may be used, to require sanctions if a subpoena is used improperly, to require the issuance of a blank subpoena under certain circumstances, to require a certain good faith effort concerning the time of service of a subpoena, to allow a court to modify a subpoena under certain circumstances, to add a provision concerning protection of nonparty deponents from certain expenses, to add certain provisions concerning the protection of persons subject to subpoena, and to add a certain cross reference, as follows:

Rule 3-510. SUBPOENAS

(a) Use

A subpoena is required to compel the person to whom it is directed to attend, give testimony, and produce designated documents or other tangible things at a court proceeding, including proceedings before a master, auditor, or examiner. A subpoena is also required to compel a nonparty and may be used to compel a party over whom the court has acquired jurisdiction to attend, give testimony, and produce and permit inspection and copying of designated documents or other tangible things at a deposition taken pursuant to Rule 3-401 or 3-431. A subpoena shall not be used for any other purpose. If the court, on motion of a party alleging a violation of this section or on its own initiative, after affording the alleged violator an opportunity to be heard, finds that a party or attorney used or attempted to use a subpoena for a purpose other than a purpose allowed under this section, the court shall impose an appropriate sanction upon the party or attorney, which may include, but is not limited to, a fine, an award of a reasonable attorney's fee and costs, and the exclusion of evidence obtained by the subpoena.

Committee note: It is improper to use a trial or hearing subpoena to circumvent discovery

procedures. See Rule 3.4 (c) of the Maryland Lawyers' Rules of Professional Conduct.

(b) Issuance

On the request of a person entitled to the issuance of a subpoena, the clerk shall issue a completed subpoena, or provide a blank form of subpoena which shall be filled in and returned to the clerk to be signed and sealed before service. On the request of an attorney or other officer of the court entitled to the issuance of a subpoena, the clerk **[**may**]** shall issue a subpoena signed and sealed but otherwise in blank, which shall be filled in before service.

(c) Form

. . .

(d) Service

A subpoena shall be served by delivering a copy either to the person named or to an agent authorized by appointment or by law to receive service for the person named. A subpoena may be served by a sheriff of any county or by any person who is not a party and who is not less than 18 years of age. Unless impracticable, a party shall make a good faith effort to serve a trial or hearing subpoena at least five days before the trial or hearing.

(e) Objection to Subpoena for Court Proceedings

On motion of a person served with a subpoena to attend a court proceeding (including a proceeding before a master, auditor, or examiner) filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the court may enter an order that justice requires to protect the person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more the following:

(1) that the subpoena be quashed or modified;

(2) that the subpoena be complied with only at some designated time or place other than that stated in the subpoena;

(3) that documents or other tangible things designated in the subpoena be produced only upon the advancement by the party serving the subpoena of the reasonable costs of producing them; or

(4) that documents or other tangible things designated in the subpoena be delivered to the court at or before the proceeding or before the time when they are to be offered in evidence, subject to further order of court to permit inspection of them.

(f) Objection to Subpoena for Deposition

A person served with a subpoena to attend a deposition may seek a protective order pursuant to Rule 2-403. If the subpoena also commands the production of documents or other tangible things at the deposition, the person served may seek a protective order pursuant to Rule 2-403 or may file, within ten days after service of the subpoena, an objection to production of any or all of the designated materials. The objection shall be in writing and shall state the reasons for the objection. If an objection is filed, the party serving the subpoena is not entitled to production of the materials except pursuant to an order of the court from which the subpoena was issued. At any time before or within 15 days after completion of the deposition and upon notice to the deponent, the party serving the subpoena may move for **[**such**]** an order to compel the production. Such an order shall protect any person who is not a party or an officer of a party from significant expense resulting from the compelled inspection and copying.

(g) Protection of Persons Subject to Subpoenas

A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing unnecessary burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

Cross reference: See Rule 1-341 concerning conduct in bad faith or without substantial justification that harms an adverse party.

[(g)**]** (h) Hospital Records

A hospital served with a subpoena to produce at trial records, including x-ray films, relating to the condition or treatment of a patient may comply by delivering the

records to the clerk of the court that issued the subpoena at or before the time specified for production. The hospital may produce exact copies of the records designated unless the subpoena specifies that the original records be produced. The records shall be delivered in a sealed envelope labeled with the caption of the action, the date specified for production, and the name and address of the person at whose request the subpoena was issued. The records shall be accompanied by a certificate of the custodian that they are the complete records for the patient for the period designated in the subpoena and that the records are maintained in the regular course of business of the hospital. The certificate shall be prima facie evidence of the authenticity of the records.

Upon commencement of the trial, the clerk shall release the records only to the courtroom clerk assigned to the trial. The courtroom clerk shall return the records to the clerk promptly upon completion of trial or at an earlier time if there is no longer a need for them. Upon final disposition of the action the clerk shall return the original records to the hospital but need not return copies.

When the actual presence of the custodian of medical record is required, the subpoena shall so state.

Cross reference: Code, Courts Article, §10-104.

[(h)**]** (i) Attachment

. . .

Source: This Rule is derived as follows:
Section (a) is new but the second sentence is **[**consistent with**]** derived in part from former Rule 407 a.
Section (b) is new.
Section (c) is derived from former M.D.R. 114 a and b, 115 a.
Section (d) is derived from former M.D.R. 104 a and b and 116 b.

Section (e) is derived from former M.D.R. 115 b.

Section (f) is derived from FRCP 45 (d)(1).

Section (g) is derived from FRCP 45 (c)(1).

Section **[**(g)**]** (h) is new.

Section **[**(h)**]** (i) is derived from former M.D.R. 114 d and 742 e.

Rule 3-510 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 3-510 track the proposed amendments to Rule 2-510. In addition, a cross reference to new Code, Courts Article, §10-104 has been added following section **[**(g)**]** (h) (Hospital Records).

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 900 - AUTHENTICATION AND IDENTIFICATION

AMEND Rule 5-901 to add a certain cross reference, as follows:

Rule 5-901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION

. . .

Cross reference: Code, Courts Article, §10-104 and §§10-1001 through 10-1004.

Source: This Rule is derived from F.R.Ev. 901.

Rule 5-901 was accompanied by the following Reporter's Note.

The Trial Subcommittee recommends the addition of a cross reference to new Code, Courts Article, §10-104 (Admissibility of medical, dental, and hospital records and

writings) following this Rule.

Mr. Howell commented that Rule 3-510 will be conformed to the changes made to Rule 2-510. He pointed out that at the end of section (h) of Rule 3-510, a cross reference to Courts Article, §10-104, which applies to admissibility of medical and hospital records without the need for a physician, dentist, or hospital employee to testify, is being proposed. The Reporter added that the new Code provision only applies in the District Court. Mr. Howell said that the Trial Subcommittee is proposing that the same cross reference be added after Rule 5-901. There was no further discussion, so the addition of the cross reference to Rules 3-510 and 5-901 was approved as presented.

Agenda Item 6. 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 16-713, Disciplinary Proceedings, for the Committee's consideration.

Rule 16-713. DISCIPLINARY PROCEEDINGS

(a) How Commenced

Bar Counsel may initiate disciplinary proceedings against an attorney by filing with the Commission a statement of charges alleging that the attorney has engaged in professional misconduct or is incapacitated. Bar Counsel shall maintain a docket and records of the

proceedings.

(b) Statement of Charges

The statement of charges shall be signed by Bar Counsel and shall include (1) the name of the attorney and the last known address at which the attorney had an office for the practice of law; (2) the nature of the alleged misconduct or the incapacity; (3) a citation of any rule or statute allegedly violated by the attorney; (4) a brief statement sufficiently clear and specific to inform the attorney of the facts constituting the alleged misconduct or incapacity; and (5) notice requiring the attorney to file a written response to the charges within 15 days after service of the charges.

(c) Service; Notice

A copy of the statement of charges shall be served on the attorney in accordance with section (a) of Rule 16-708. Bar Counsel shall file with the Commission a return of service of the statement of charges pursuant to Rule 2-126. Bar Counsel shall notify any complainant that a statement of charges has been filed.

(d) Response

Within 15 days after service of the statement of the charges, the attorney shall serve upon Bar Counsel an original and three copies of a written response to the statement of charges. For good cause shown, on written request made within 15 days after service of the statement of charges, the time for serving the response may be extended by Bar Counsel. Failure of the attorney after service to serve a timely response without asserting, in writing, a privilege or other basis for such failure, may be treated by the Panel as an admission of the factual allegations in the statement of charges unless excused for good cause.

Committee note: An attorney should be aware

that a failure to respond or to assert an applicable privilege may constitute a violation of Rule 8.1 of the Rules of Professional Conduct.

(e) Amendments

At any time before a Panel hearing, Bar Counsel may amend the statement of charges and an attorney may amend a response. If the statement of charges is amended, the attorney shall be served with the amendment and afforded a reasonable time to respond to it and present any defense. At any time before a decision, the statement of charges or the response may be amended to conform to proof.

Source: This Rule is new.

Rule 16-713 was accompanied by the following Reporter's Note.

Section (a) is new and expresses the concept that disciplinary proceedings (as distinct from a complaint or a preliminary investigation) are commenced by the filing of a statement of charges by Bar Counsel with the Commission. It includes the idea, found in former Rules BV4 b (vi) and BV6 d 3 (c), that Bar Counsel should keep records of proceedings.

Sections (b) and (c) are new but based in part on the portions of the Commission's Administrative and Procedural Guidelines that deal with complaints, response by the attorney, and the time allotted for responding (Guidelines §3-201, §3-202, and §3-401). The new term "statement of charges" is used throughout the Rule instead of "complaint."

Section (b) formalizes existing practice somewhat by requiring Bar Counsel to file a statement of charges in every case, in effect summarizing the facts developed by the preliminary investigation. The statement of charges must request the attorney to respond

within 15 days. Section (b) is patterned on Rule 16-808 (a).

Section (c) provides for service of the statement of charges upon the attorney and notice to any complainant. It is parallel with Rule 16-808 (b).

Section (d) requires the attorney to file a response within 15 days, unless upon written request Bar Counsel extends the time. One of the Commission's Guidelines, §3-401, requires the attorney to answer if Bar Counsel so requests. Section (d) mandates a response. The Subcommittee recognizes that substantive privileges (such as the privilege against self-incrimination) may be implicated. Nonetheless, an attorney should be aware that a failure to respond or to assert an applicable privilege may constitute a violation of Rule 8.1 of the Rules of Professional Conduct. Admission of the alleged facts is believed to be an appropriate sanction for an attorney's disregard of the duty to respond. See Rule 33 of the A.B.A. Model Rules. It should also be noted that Maryland Rule 2-323(e) provides that averments in a pleading to which a responsive pleading is required are admitted unless denied in a pleading. This rule applies to disciplinary actions, AGC v. Willcher, 340 Md. 217, 219 (1995), and by analogy to disciplinary proceedings under Rule 16-713.

Section (e) provides for amendment of the charge and response, subject to reasonable limitations. It is patterned upon Rule 16-808 (g).

Mr. Howell explained that disciplinary proceedings against an attorney are instituted by the filing of a statement of charges. The Subcommittee decided to start with a statement of charges to differentiate from the language of the predecessor rule. There was no discussion of Rule 16-713, so the Rule was approved as presented.

Mr. Howell presented Rule 16-714, Disposition Without Hearing, for the Committee's consideration.

Rule 16-714. DISPOSITION WITHOUT HEARING

(a) Voluntary Dismissal

(1) Authority of Bar Counsel

If it appears to Bar Counsel after a statement of charges is filed that disciplinary proceedings against an attorney should be discontinued, Bar Counsel, at any time before a hearing, may dismiss the charges upon approval by the Chair of the Inquiry Committee or, if a Hearing Panel has been appointed, the Panel Chair. The dismissal terminates the disciplinary proceeding without action, but shall be without prejudice to the later filing of the same or similar charges.

(2) Notice of Dismissal

Upon dismissal of the charges, Bar Counsel shall notify in writing the attorney and any complainant of the dismissal. The dismissal may be accompanied by a warning as provided in subsection (a)(3) of this Rule.

(3) Warning

If Bar Counsel concludes that the attorney has engaged in some form of professional misconduct that is not serious enough to require a reprimand, but that a warning against future misconduct would be a sufficient remedy, subject to the approval of the Chair of the Commission, Bar Counsel may accompany the notice of dismissal with a warning to the attorney against future misconduct. A warning is not a reprimand, does not constitute discipline, and may not be disclosed to any person other than the attorney and any complainant.

(b) Joint Waiver of Proceedings

(1) When Permitted

Disciplinary proceedings may be waived at any time before a hearing by filing with the Commission a written stipulation signed by Bar Counsel and the attorney who is the subject of the investigation or proceedings that is accompanied by either (A) the reprimand administered by Bar Counsel and accepted by the attorney pursuant to section (g) of Rule 16-711, or (B) the probation agreement signed by the attorney and Bar Counsel pursuant to Rule 16-716.

(2) Contents of Stipulation

A stipulation filed under this section shall certify where applicable that (A) the attorney desires to consent to the imposition of discipline, (B) the attorney's consent is free and voluntary, without coercion or duress, (C) the attorney is fully aware of the implications of submitting the consent, (D) the attorney is aware that there is a pending investigation into or proceeding involving allegations of that attorney's professional misconduct, the nature of which shall be acknowledged unless a statement of charges has been filed, (E) the attorney knows that Bar Counsel has the burden of proving the allegations during a hearing before any discipline may be imposed, (F) the attorney knows that, if a hearing was conducted, the attorney could not successfully defend against the allegations, and (G) the attorney is aware that the discipline to which consent is given is subject to public disclosure.

(3) Limit on Withdrawal of Waiver

A waiver of disciplinary proceedings by stipulation filed under this section may not be withdrawn except upon approval of the Commission for good cause shown.

Source: This Rule is derived in part from

former Rule 16-706 (a) and (b) (BV6 a and b).

Rule 16-714 was accompanied by the following Reporter's Note.

> This Rule is new, although it combines policies reflected in scattered provisions of the former BV Rules. It is similar to the coverage of Rule 16-807, allowing disposition without proceedings before the Commission on Judicial Disabilities.
>
> Section (a) is derived from former Rule BV6 a 2 but makes some changes for clarification.
>
> Subsection (a)(1) is derived from the first sentence of former Rule BV6 a 2. Bar Counsel's discretionary determination that a "complaint is without merit or the attorney has engaged in misconduct which does not warrant discipline" is intended to be subsumed in the determination that "disciplinary proceedings against an attorney should be discontinued." The former rule blurs the distinction between the two stages of the screening process.
>
> Subsection (a)(2) incorporates the substance of the second and fourth sentences of former Rule BV6 a 2, but omits the former authority to send "any additional information which the Chairman or Vice Chairman directs."
>
> Subsection (a)(3) incorporates the substance of the last sentence of former Rule BV6 a 2 and the existing Committee note. The important point is that a warning is not "discipline." The threshold for a warning is the same as under the current Rule -- there was some professional misconduct but it was not serious enough to warrant a reprimand or more extensive proceedings. The last sentence provides that the dismissal and any warning may be disclosed to the complainant. Former Rule BV6 a 2 indicated only that the complainant is entitled to notice of the dismissal, not the

fact of the warning.

Section (b) is new. Subsection (b)(1) is derived in part from former Rule BV6 b 1 (a), but ties the stipulation of waiver to the specific procedures of Rule 16-711 (g) (Reprimand by Bar Counsel) and Rule 16-716 (Probation Agreement).

Subsection (b)(2) provides a uniform format for the waiver stipulation. It contains the criteria formerly required for disbarment by consent pursuant to former Rule BV12 d 2, but also adds to it.

Subsection (b)(3) is identical to former Rule BV6 b 2 apart from minor style changes.

Mr. Howell explained that the first part of Rule 16-714 provides how Bar Counsel can dismiss the case. This may happen because Bar Counsel realizes later in the proceedings that the attorney has a defense, it may be due to the lack of a witness, or it may be for some other reason. The dismissal is without prejudice and must be approved by the Chair of the Inquiry Committee or the Panel Chair. It may be accompanied by a warning, a feature present at all stages of dismissal. A warning is not discipline and is not a reprimand, but it is not to be given lightly. The attorney can reject the warning, and then Bar Counsel can go forward with the proceeding.

Section (b) adds the concept of a joint waiver of the proceedings. This has two purposes. The first is when Bar Counsel and the attorney have entered into a probation agreement, and the second is when Bar Counsel and the attorney have agreed to a

reprimand without further proceedings. Mr. Klein inquired whether there is a warning under the current BV Rules. Mr. Hirshman answered that there is a warning. Mr. Howell noted that a warning may not be disclosed to anyone other than the attorney and the complainant. Mr. Klein asked about disclosure of a warning to a malpractice insurer, and Mr. Howell reiterated that the warning cannot be disclosed. Mr. Hirshman commented that if a Maryland attorney applies for admission to the bar of another state, the admitting body of that state will generally request information from him concerning that attorney. The request is accompanied by a waiver signed by the attorney. Under those circumstances, there is disclosure of the warning.

Judge Rinehardt questioned whether the fact that a complaint has been filed can be disclosed. Mr. Howell responded that this can be disclosed, but not the fact that a warning has been issued, the purpose of which is to advise the attorney to correct the offending behavior. Warnings serve a limited function, and they can be rejected. Mr. Lessans noted that dismissals with warnings are often issued when lawyers advertise in the Yellow Pages using misleading language such as "no recovery, no fee." Mr. Hirshman remarked that in current practice, the policy of the Attorney Grievance Commission is that an attorney can reject a warning. Since no changes were made to Rule 16-714, the Rule was approved as presented.

Mr. Howell presented Rule 16-715, Hearing Panel, for the Committee's consideration.

Rule 16-715. HEARING PANEL

(a) Appointment

After the time for service of the response has expired, Bar Counsel shall send copies of the statement of charges and any response to the Chair of the Inquiry Committee. Except as otherwise provided in section (f) of this Rule, the Chair or Vice-Chair shall appoint a Hearing Panel consisting of at least three members of the Inquiry Committee.

(b) Composition

A majority of the members of a Hearing Panel shall be attorneys. At least one member of the Panel shall not be an attorney. Whenever practicable, the Chair shall appoint to the Panel members from the Circuit in which the attorney who is the subject of the charges has an office for the practice of law.

(c) Panel Chair

The Chair of the Inquiry Committee shall appoint an attorney member of the Panel as the Panel Chair. The Panel Chair may be removed for cause at any time by the Chair of the Inquiry Committee.

(d) Notice

Upon appointment of the Panel and Panel Chair, the Chair of the Inquiry Committee shall furnish Bar Counsel, who in turn shall furnish the attorney, with the names of the members of the Panel.

(e) Quorum

The presence of any three members of the Hearing Panel constitutes a quorum. With the consent of the Panel members present, Bar Counsel and the attorney may waive the quorum. The concurrence of a majority of the members

present is necessary to a finding of professional misconduct or incapacity.

(f) Single-Member Panel

(1) Appointment

A Hearing Panel consisting of one attorney member of the Inquiry Committee may be appointed if (A) the response admits the factual allegations of the statement of charges, (B) an attorney served with the statement of charges fails without good cause to file any response, without asserting in writing a privilege or other basis for such failure, (C) Bar Counsel and the attorney stipulate in writing that the decision after hearing by the single-member Panel shall be final and conclusive and shall be limited to a reprimand or a dismissal of the charges, or (D) Bar Counsel requests the appointment of a single-member Panel after revoking a probation agreement under section (g) of Rule 16-716.

Committee note: This provision, which is new, allows a single member to act as a Hearing Panel if certain conditions are met.

(2) Eligibility

The Panel member appointed pursuant to this section shall be an attorney having an office for the practice of law in the same Circuit as the attorney who is the subject of the charges.

(3) Authority

The Panel member appointed pursuant to this section shall exercise the same authority and duties of a Hearing Panel and shall discharge the duties of Panel Chair.

(4) Expedited Hearing

A Panel appointed pursuant to this section, whenever practicable, shall set the date for a hearing within 30 days of appointment and expedite the proceeding in all other respects.

(g) Disqualification for Interest

A member of a Hearing Panel shall not participate in any proceeding in which a member or an attorney with whom that member is associated for the practice of law is the subject of the proceedings, a complainant, or a witness likely to be called to testify. A member shall withdraw, if disqualified, and request the Chair of the Inquiry Panel to appoint another member as substitute.

(h) Ex Parte Communications

A member of a Hearing Panel may not communicate ex parte with Bar Counsel or the attorney who is the subject of the statement of charges regarding a pending disciplinary proceeding, except for communications related to scheduling or emergency matters that are unrelated to any substantive issue to be decided by the Panel.

Source: This Rule is derived from former Rule 16-706 (c) and (d) (BV6 c and d).

Rule 16-715 was accompanied by the following Reporter's Note.

This Rule is derived from former Rule BV6 c and BV6 d 2 as they relate to the appointment of the Hearing Panel, its composition, and quorum requirements.

Sections (a), (b), and (c) incorporate the substance of former Rule BV6 c with minor style and organizational changes. Except as provided in section (e), a Hearing Panel consists of

three members. The requirement that one-half of the Panel shall consist of members from the District in which the attorney complained about has an office for the practice of law has been changed to a guideline that whenever practicable, the Panel members shall come from the Circuit in which the attorney has a law office. The second sentence of section (c) is new and was added at the request of the Chairman of the Inquiry Committee.

Section (d) is new and was added because the attorney may wish to know ahead of time the identity of the members of the Panel in preparation for the attorney's defense.

Section (e) is derived from former Rule BV6 d 2, except that the revised provision permits Bar Counsel and the attorney to waive the quorum, with the consent of the Panel members present. Since the Inquiry Committee no longer consists of three members exactly, the concurrence of two members has been changed to the concurrence of a majority of the members present.

Section (f) is new. It enables a single member to act as a Hearing Panel, if the attorney either fails to serve any response or admits the allegations or upon stipulation that the decision should be final and conclusive and limited to reprimand or dismissal. In addition, Bar Counsel may request the appointment of a single-member Panel after revoking a probation agreement pursuant to section (g) of Rule 16-716. The purpose of section (f) is to expedite proceedings when there is no genuine issue of fact or Bar Counsel seeks no discipline other than a reprimand. Whenever practicable, the hearing must be scheduled within 30 days of appointment.

Section (g) is new. It flags the attention of an appointed member to disqualifying factors that require recusal in advance of a hearing in order to prevent unnecessary delay for lack of a quorum.

> Section (g) resembles the interested member provision of Rule 16-804 (b), relating to the recusal of members of the Commission on Judicial Disabilities.
>
> Section (h) is new. It adopts the prohibition in Rule 4.D (1) of the A.B.A. Model Rules without declaring the explicit sanctions for violation as contained in Model Rule 4.D (2).

Mr. Howell explained that the Chair of the Inquiry Committee appoints the Hearing Panel consisting of at least three members of the Inquiry Committee. The attorney is notified of the names on the Panel, and the attorney can strike members for cause. Most provisions of Rule 16-715 are carryover provisions from the BV Rules, except for section (f). This is new and provides for an expedited one-member Hearing Panel if one of the conditions of subsections (f)(1)(A) through (f)(1)(D) are met. The Vice Chairperson questioned how anyone would know the reason the attorney fails to respond to the statement of charges, which is the provision in subsection (B) of Rule 16-715 (f)(1). She then asked who will determine the good cause referred to in that subsection, and what will happen if a panel of one is formed, and then the attorney files a late response. Mr. Howell replied that a late response filed without good cause would fall within the purview of subsection (f)(1)(B).

The Vice Chairperson observed that an attorney who wants a one-member panel can deliberately respond late. Mr. Howell added that the attorney can also stipulate to Bar Counsel that he or she wants a

one-member panel. The Chairperson observed that proceeding under subsection (B) could be a strategic move by an attorney. Mr. Howell commented that the attorney would have to show good cause for filing a late response. The Chairperson noted that a late response is still a response, and subsection (f)(1)(B) specifies that no response is filed. The Vice Chairperson suggested that in place of the language, "any response", the words "timely response" should be substituted. Mr. Howell added that section (d) of Rule 16-713, imposes a 15-day outer limit for responding to the statement of charges. He agreed to the use of the language "timely response" in subsection (f)(1)(B). The Chairperson commented that if an attorney answers by saying that he or she cannot supply all of the information requested due to privilege or for some other reason, this is a response. Mr. Howell pointed out that section (d) of Rule 16-713 provides that an attorney can request an extension of time. However, if the attorney has not heard from Bar Counsel as to whether the extension has been granted, the attorney has no guarantee that it will be granted. The Chairperson said that the term "timely response", which has been proposed for inclusion in subsection (f)(1)(B), should be substituted for the language "any response," and the Committee agreed to this change by consensus.

Mr. Sykes inquired if the status of a reprimand is public after a final stipulation is filed, and there is a joint waiver of a hearing. Mr. Howell responded that the fact that an attorney has

been reprimanded is public, and Rule 16-709 makes that clear. The Committee may wish to make the text of the reprimand public to serve a deterrent effect. The Court of Appeals rarely reprimands attorneys. Judge Rinehardt asked what the answer is if someone inquires about the disposition of a case. Mr. Howell said that the Subcommittee contemplated allowing greater disclosure if a disciplinary authority or a public agency inquires. The Commission can publicize or answer on a "need-to-know" basis.

Mr. Grossman referred to section (b) of Rule 16-715 which requires that at least one member of the Panel shall not be an attorney. Section (e) provides that the presence of any three members of the Hearing Panel constitutes a quorum. He pointed out the problem of lay people who do not show up at hearings. It is not necessary for a lay person to be on a hearing panel. Mr. Hirshman remarked that the Rule does not require this. Mr. Grossman expressed the view that this may not be clear from the wording of the Rule. Mr. Howell asked how the procedure is handled under the BV Rules. Mr. Hirshman replied that a non-attorney is appointed to the Hearing Panel, but his or her presence is not necessary to constitute a quorum. The Chairperson asked if there is any reason to change this. Mr. Sykes answered that there is no reason to change the system. Having a non-attorney member of the Panel shows the public that it can be represented, but if the non-attorney member does not attend a scheduled hearing, the hearing should still go forward as long as

three Panel members are available. The requirement is that the person is part of the pool, but not an individual panel.

Mr. Howell stated that the question is if the current rule, which does not require a non-attorney member on an individual Hearing Panel, should be changed. The Vice Chairperson said that she did not think that the language of Rule 16-715 was intended to change the current rule. The Chairperson questioned whether a Committee note could clarify this. Mr. Sykes suggested that the first sentence of section (e) of Rule 16-715 be changed to read as follows: "The presence of any three members of the Hearing Panel, whether or not a non-attorney member is among them, constitutes a quorum." The Committee agreed by consensus to this change.

The Reporter said that when the Attorney Discipline Rules are considered at the next Rules Committee meeting, the discussion will begin with Rule 16-717. The Vice Chairperson adjourned the meeting.