STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on Friday, May 19, 2000.

Members present:

Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Kathaleen Brault, Esq., Administrative Office of the Courts
Louise Phipps Senft, Baltimore Mediation Center
L. Toyo Obayashi, Baltimore Mediation Center
Nick Beschen
Rachel Wohl, Esq., Maryland Alternative Dispute Resolution Commission
Hon. Patrick L. Woodward, Circuit Court for Montgomery County
Robyn Scates, Department of Human Resources
Eva Klain, Esq., American Bar Association
Rhonda Lipkin, Esq., Legal Aid Bureau, Inc.
Master Linda Koban, Circuit Court for Baltimore City
Althea Jones, Esq., Administrative Office of the Courts
Kenneth Wardlaw, Esq., Legal Aid Bureau, Inc.
Mitchell Mirviss, Esq., Venable, Baetjer & Howard

In the absence of the Chair, the Vice Chair convened the meeting. She announced that the Chair was progressing well after his surgery. On May 8, 2000, the Court of Appeals held a conference on the 144th, 145th, and 147th Reports, the controversial aspects of which were the Rules pertaining to

contempt matters before masters; proposed new Rule 2-422.1,

Inspection of Property -- Nonparty, allowing the inspection of property in the possession or control of a nonparty; the Attorney Discipline Rules; and the Judicial Disabilities Commission Rules. The Court made no decision on these Rules. The only changes the Court made were the housekeeping changes to rules which contained the date "19___" in forms and the deletion of obsolete references to the Code. The Court held the remainder of the Rules under study.

The Vice Chair told the Committee that the June Rules Committee meeting would be held at Fergie's Restaurant in Edgewater. She had suggested that some of the meetings be held outside of the People's Resource Center on a more regular basis, and for the next fiscal year, the plan is tentatively that two of the meetings will be held elsewhere.

The Vice Chair said that the minutes of the March 10, 2000 Rules Committee meeting had been sent to all of the Committee members. She asked if there were any additions or corrections. There being none, Mr. Klein moved to approve the minutes as presented, the motion was seconded, and it passed unanimously.

Mr. Hochberg asked how the Court of Appeals reacted to the Attorney Discipline Rules. The Vice Chair replied that none of the judges seemed in favor of the Supplement to the 144th Report, containing the alternative set of rules for a one-tiered system. Some members of the Court seemed to be moving toward supporting the two-tiered system. The questions asked indicated that the Court was moving toward accepting a real peer review process

before the part of the process which is no longer confidential. Mr. Brault expressed the view that the Court seems to be split four to three as to which version of the Rules is acceptable, but he is not sure which alternative will be accepted. He noted that the system in the District of Columbia is similar to the alternative procedure submitted by the Committee. However, in D.C., there is a paid professional staff which consists of two staff attorneys and two other administrative staff members to help run the system. Nothing in Maryland compares to this because the operation of the Maryland system depends entirely upon volunteers. The only paid component is the Office of Bar Counsel. Melvin Hirshman, Esq., Bar Counsel in Maryland, had said that he could see no source of funds for a comparable administrative staff in Maryland.

The Vice Chair pointed out that the Honorable Alan M. Wilner, Judge of the Court of Appeals, is opposed to the two-tiered system because other professions do not offer two evidentiary hearings when their members are disciplined. A major concern of Judge Wilner is the length of time that the attorney discipline process takes in Maryland. Some cases take as much time as six or eight years to complete. Judge Wilner had suggested that there be time limits for completing the process and sanctions for not complying. Mr. Brault pointed out that James L. Thompson, Esq., President of the Maryland State Bar Association (MSBA) and other members of the MSBA deserved credit for their contributions to the proposed attorney discipline

rules.

Agenda Item 1. Approval of certain proposed rules changes considered at the April 7, 2000 meeting of the Rules Committee (the materials for approval were sent to Committee members by Memorandum dated April 19, 2000): Proposed amendments to: Rule 7-102 (Modes of Appeal), Rule 7-112 (Appeals Heard De Novo), Rule 7-202 (Method of Securing Review), Rule 7-206 (Record), Rule 8-122 (Appeals from Proceedings for Adoption or Guardianship - Confidentiality), Rule 8-501 (Record Extract), Rule 8-504 (Contents of Brief), Rule 8-502 (Filing of Briefs), and Rule 8-602 (Dismissal by Court). (See Appendix 1)

The Vice Chair explained that when Rules 7-102, Modes of Appeal; 7-112, Appeals Heard De Novo; Rule 7-202, Method of Securing Review; Rule 7-206, Record; 8-122, Appeals from Proceedings for Adoption or Guardianship - Confidentiality; 8-501, Record Extract; 8-504, Contents of Brief; 8-502, Filings of Briefs; and 8-602, Dismissal By Court were considered at the April 7, 2000 Rules Committee meeting, a quorum was no longer present. A copy of the Rules as they were tentatively approved for change at the April meeting was sent out to each member for comment. Judge Kaplan moved that the Rules be approved, the motion was seconded, and it passed unanimously.

Agenda Item 2. Reconsideration and consideration of two proposed rules changes recommended by the Alternative Dispute Resolution Subcommittee: Reconsideration of proposed new Rule 17-109 (Mediation Confidentiality) and Consideration of a proposed amendment to section f of Rule 9-205 (Mediation of Child Custody and Visitation Disputes)

The Vice Chair stated that several consultants were present to discuss the Alternative Dispute Resolution (ADR) Rules, including Rachel Wohl, Esq., Executive Director of the ADR

Commission; Louise Phipps Senft, of the Baltimore Mediation Center; Nick Beschen, Director of Maryland Association of Community Mediation Centers; and L. Toyo Obayashi, Baltimore Mediation Center.

The Vice Chair presented Rule 17-109, Mediation Confidentiality, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 17 - ALTERNATIVE DISPUTE RESOLUTION

CHAPTER 100 - PROCEEDINGS IN CIRCUIT COURT

ADD new Rule 17-109, as follows:

Rule 17-109. MEDIATION CONFIDENTIALITY

(a) Mediator

Except as provided in sections (c) and (d) of this Rule, (1) a mediator shall maintain the confidentiality of all mediation communications and (2) the mediator and any person present at the request of the mediator may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other adversarial proceeding.

(b) Parties

Subject to the provisions of sections (c) and (d) of this Rule, (1) the parties may enter into a written agreement to maintain the confidentiality of all mediation communications and to require any person present at the request of a party to maintain the confidentiality of mediation communications and (2) the parties and any person present at the request of a party may not be compelled to disclose mediation communications in any judicial,

administrative, or other adversarial proceeding.

(c) Signed Document

A signed document that reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

Cross reference: See Rule 9-205 d concerning the submission of an agreement to the court in child access cases.

(d) Exceptions

In addition to any disclosures required by law, a mediator and a party may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it necessary to help:

(1) prevent serious bodily harm or death, or

(2) allege mediator misconduct or defend a mediator against allegations of misconduct.

Cross reference: For the legal requirement to report suspected acts of child abuse, see Code, Family Law Article, §5-705.

(e) Discovery; Admissibility of Information

Mediation communications that are confidential under this Rule are privileged and not subject to discovery. Information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.

Source: This Rule is new.

Rule 17-109 was accompanied by the following Reporter's Note.

New Rule 17-109 is proposed by the Alternative Dispute Resolution Subcommittee in response to a recommendation of the Maryland Alternative Dispute Resolution Commission set out in the Commission's Practical Action Plan (December, 1999).

Section (a) imposes a duty of confidentiality upon the mediator and all persons who, at the request of the mediator, are present at the mediation. The Subcommittee did not specifically include the mediator's employees in section (a) because it believes that requiring the mediator to maintain confidentiality includes the obligation on the part of the mediator to require the mediator's staff to maintain confidentiality. Section (a) also includes a broad protection against compelled disclosure in "any judicial, administrative, or other adversarial proceeding." When applicable, the exceptions set out in sections (c) and (d) of this Rule override the provisions of section (a).

Subject to the provisions of sections (c) and (d), section (b) allows the parties to determine whether they and any persons they bring to the mediation will maintain confidentiality. In the absence of a written agreement to the contrary, the parties may disclose mediation communications. The Subcommittee believes that allowing this disclosure enables the parties to obtain opinions, advice, and information that may help them reach an informed agreement in the mediation. Regardless of whether the parties agree to maintain confidentiality, subsection (b)(2) provides to parties the same protection against compelled disclosure that is provided to mediators in section (a).

Under section (c), any signed document that reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise. The Subcommittee debated limiting this section to "final" agreements, but concluded that it is not always clear when an agreement is "final." Following the

section is a cross reference to Rule 9-205 d, concerning the submission of agreements to the court in child access cases.

Section (d) exempts from the confidentiality requirements of the Rule disclosures that are required by law and disclosures that the mediator or a party believes necessary to help (1) prevent serious bodily harm or death or (2) allege mediator misconduct or defend a mediator against allegations of misconduct. Following section (d) is a cross reference to Code, Family Law Article, §5-705 concerning reporting requirements if acts of child abuse are suspected.

The first sentence of section (e) provides that mediation communications that are confidential under the Rule are privileged and not subject to discovery. The second sentence of section (e) makes clear that by using otherwise admissible or discoverable information in mediation, a person does not render that information inadmissible or not subject to discovery.

The Vice Chair explained that Rule 17-109 had been discussed at the April 7, 2000 Rules Committee meeting, and it had been sent back to the ADR Subcommittee for further work. Discussions had centered on the difference between confidentiality for a mediator and for a party and on what happens when third parties come in. There had been no provision for the situation where a complaint is made against a mediator for malpractice or for when a mediator wishes to defend his or her actions. The last version of the Rule appeared to require complete confidentiality. Many of the consultants attended the Subcommittee meeting at which the Rule was discussed. There is one change to the version of the Rule in the meeting materials, the addition of the language

“disclose or” in section (b) after the word “be” and before the word “compelled” in the seventh line on the page. Otherwise, the language of the Rule was unanimously agreed upon by the Subcommittee and consultants. This version of the Rule separates out confidentiality relating to the mediator and to the parties. Each provision deals with the people present at the request of the mediator or at the request of a party. The exceptions to confidentiality are spelled out in section (d). Section (e) pertains to mediation communications, the definition of which is in the meeting materials, but it has not been styled.

Mr. Klein pointed out that the last five words of section (a) may mean that the mediator and any person present at the request of the mediator may be compelled to disclose at a legislative hearing or a hearing of some other governmental body which has the power to compel testimony. He expressed the view that the language of the Rule is not broad enough to cover this situation. The Vice Chair commented that the Uniform Mediation Act does not use the same language. She remarked that a legislative hearing normally is not considered “adversarial,” but the United States Congress and other bodies have the right to compel testimony. Mr. Bowen suggested that the word “adversarial” be stricken from section (a). Mr. Sykes suggested that the section end with the word “communications” in the fifth line. The Vice Chair clarified that what is being referred to is the proceedings between the same parties in court. She agreed that the word “adversarial” should be stricken. Mr. Klein asked

if the word “governmental” should be added to the end of section (a) to make this clearer.

Mr. Sykes questioned whether persons present at the mediation are allowed to go to the press with information about the mediation. Ms. Wohl suggested that the language “and any person present at the request of the mediator” should be added to subsection (1) of section (a). Mr. Sykes proposed that a broad statement should be added which would provide that one cannot discuss voluntarily or anywhere be compelled to disclose mediation communications. Mr. Bowen said that the Rule should provide that a mediator may not discuss the mediation and a mediator cannot be compelled to discuss the mediation. Judge Dryden noted that this could mean that a person present at the mediation could disclose mediation communications.

Judge Kaplan suggested that section (a) end at the word “communications,” the second time the word appears. The Vice Chair pointed out that subsection (a)(1) is not a sufficiently strong statement. Language providing that a person present at the mediation should maintain confidentiality should be added. Language may need to be added to indicate that to maintain confidentiality, the person should talk to no one about the mediation. Mr. Sykes questioned the language in section (a) which reads “a mediator shall maintain the confidentiality of all mediation communications...”. The language in subsection (a)(2) provides that a mediator may not disclose or be compelled to disclose mediation communications. Maintaining confidentiality

is quite different than not disclosing or being compelled to disclose. Ms. Senft remarked that subsection (a)(2) is outside of the mediation context. The purpose was that this provision would be broad and ironclad.

Ms. Wohl suggested that subsection (a)(1) could be deleted. The language in subsection (a)(2) could be changed to read "...mediation communications, including in any judicial, administrative...". The Vice Chair suggested that subsections (a)(1) and (a)(2) could be combined into a strong statement that a mediator and any person present at the request of the mediator shall maintain the confidentiality of all mediation communications and shall not disclose or be compelled to disclose any mediation communications in any judicial, administrative, or other proceeding. Section (a) would read as follows: "Except as provided in sections (c) and (d) of this Rule, a mediator and any person present at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other adversarial proceeding." The Committee agreed by consensus to this change.

Mr. Brault commented that this Rule is different from other confidentiality rules. Other rules have a specific provision that all communications are confidential. Rule 17-109 does not contain this kind of language. Mr. Bowen pointed out that one problem with the Rule is that a mediator often may speak to each of the parties separately. The mediator may ask one party what

he or she may tell the other party. If all communications are confidential, that would mean that the mediator could not tell the other party anything. Mr. Sykes observed that section (a) is not intended to prevent a mediator from disclosing something from one party to another as long as the parties consent. He asked about Mr. Brault's statement that all mediation communication is confidential. Mr. Bowen responded that this is not accurate.

Judge Kaplan expressed the opinion that subsection (a)(1) is appropriate. In subsection (a)(2), the sentence should end with the word "communications," or the word "adversarial" should be deleted. The Vice Chair commented that the Subcommittee seems to prefer taking out the word "adversarial." Mr. Hochberg suggested that in subsection (a)(2), the word "may" should be changed to the word "shall."

The Vice Chair commented that outside of section (a), there should be a statement of confidentiality, as Mr. Brault pointed out. Mr. Brault suggested that the statement could be that the parties shall maintain as confidential all mediation communications. Mr. Sykes commented that maintaining confidentiality means maintaining as confidential that which has been designated as confidential. Mr. Bowen said that it really means maintaining as confidential with respect to third parties that which has been designated as non-confidential during the mediation. The Vice Chair commented that section (a) is not intended to apply inside to the mediation. Judge Kaplan added that it applies to outside sources. Ms. Senft suggested that

there could be a Committee note which would provide that within the mediation session, the parties have authority to disclose.

The Vice Chair stated that all agree that conferring between the parties in different rooms is an appropriate mediation technique. It is often used in the mediation of commercial disputes, but it is not the standard in domestic cases. A Committee note could provide that the Rule is not intended to apply to a mediator dealing with parties in two separate rooms. Mr. Sykes suggested that a subparagraph could be added to the exceptions which would provide that with the consent of the parties, a mediator may disclose to another party a matter stated to the mediator during the mediation. The Vice Chair remarked that in 95% of mediations, this is not sensible, unless one is of a commercial litigation mindset. Mr. Brault said that this is a definitional trap. Commercial mediation is more like a settlement negotiation. Most mediations do not involve having the parties in separate rooms, with someone going back and forth offering different numbers for settlement. The Vice Chair noted that at a traditional settlement conference, the judges put people in different rooms. Using two separate rooms helps the mediator learn each side's view. Ms. Wohl observed that the prohibition against disclosure is not meant to apply to internal communications.

Judge Kaplan inquired as to whether the change to sections (a) and (b) will be ending the sections with the word "communications" or deleting the word "adversarial." The Vice

Chair suggested that the word “adversarial” be deleted, and the Committee agreed with this suggestion by consensus.

Mr. Sykes asked if, under section (b), the parties may disclose mediation communications if they do not enter into a written agreement. Ms. Wohl answered that the agreement covers communications to others. Typically, parties want to talk to other people, such as a spouse or attorney. People should be free to seek advice. The parties can talk to others, but they may not disclose mediation communications in a proceeding. Or, the parties could agree that they are not allowed to disclose to anyone. Ms. Senft added that they may agree to not disclose a particular aspect of the mediation. Mr. Sykes questioned whether someone can tell his or her spouse, who can then go the press if there is no written agreement. Ms. Wohl commented that the language “or other persons” could be added to subsection (b)(1).

The Vice Chair inquired if one is entitled to require that his or her accountant keep communications confidential. Is it intended that if a confidentiality agreement is signed at the first mediation session, the communications to the accountant are still confidential after the third or fourth session, or must another agreement be signed? Mr. Sykes noted that parties cannot require a third person to maintain confidentiality. The Vice Chair said that this could be a condition in the agreement. Mr. Brault inquired as to how an agreement could preclude someone from telling his or her spouse something. No penalty exists for a breach of the agreement.

The Vice Chair asked if the language "or any other person" should be added to subsection (b)(1) in the fourth line. The Committee responded in the negative. Delegate Vallario inquired if someone could hold a press conference concerning communications from a mediation. The Vice Chair replied that under subsection (b)(1), a party may agree to keep this confidential. Mr. Klein pointed out that there is a gap -- the Rule prohibits everyone from disclosing in a proceeding, but does not prohibit a party or a person present at the mediation at the request of a party from disclosing outside of a proceeding. The Vice Chair responded that as a preliminary matter, this has to be resolved up front.

Ms. Wohl observed that in section (e), mediation communications that are confidential are also inadmissible. Mr. Klein commented that if no agreement is reached, the parties can tell someone what happened at the mediation. Ms. Wohl observed that the third party could be compelled to testify, but parties and the mediator cannot be compelled.

Mr. Brault noted that discussions of settlement are inadmissible in court. Ms. Wohl added that they are inadmissible to prove the underlying case, but may be used for impeachment purposes. The Vice Chair questioned the meaning of the second sentence in section (e). Ms. Wohl answered that an example of a communication that is otherwise admissible would be the admission by someone during a mediation to having previously committed a crime. The Vice Chair said that just because information was

given to an accountant or attorney, it is not automatically privileged. If the information was developed independently of the mediation, it is admissible. Ms. Wohl stated that information given during the mediation is inadmissible and suggested that the word "inadmissible" be added to section (e). Mr. Bowen expressed the opinion that the section should not be changed.

Mr. Brault commented that at the April 2000 meeting of the Rules Committee, he had discussed medical peer review. Most aspects of this are privileged, private, and confidential, but if three nurses testify at the hearing that they saw a physician drunk in the operating room, this is not necessarily inadmissible in the trial against the physician. Ms. Wohl added that the nurses can testify at the trial to their eyewitness observations, but if, during the peer review, some terrible fact is learned, the nurses cannot testify later as to that fact. Mr. Bowen remarked that this would be hearsay.

The Vice Chair drew the Committee's attention to section (c). She explained that at the April meeting, Mr. Bowen had suggested that the last part of section (e) of Rule 17-102 should be moved to section (c) of Rule 17-109. Mr. Sykes inquired as to who signs the document. Can the mediator sign the document? The Vice Chair answered that what is intended is that the document is signed by the parties.

Section (d) contains the two exceptions to confidentiality. Mr. Brault commented that before Rule 1.6 of the Maryland

Lawyers' Rules of Professional Conduct was revised, the former rule provided that the attorney could reveal what a client had previously told the attorney only to prevent serious bodily harm or death. When the rule was revised, permission for the attorney to disclose information to prevent serious financial harm was added. Should the mediation rule include this, also? The Vice Chair responded that this was in a previous draft of the Rule, but it was deleted by the Subcommittee.

Ms. Wohl pointed out that people in a mediation have to be able to speak freely, especially on issues that they would not talk about in court. The Vice Chair said that if the concept of serious financial harm is added in as an exception, it is not clear exactly what this means. This was considered and rejected as not advisable as an exception to confidentiality in a mediation.

The Vice Chair drew the Committee's attention to section (e). Mr. Sykes suggested that the two sentences of section (e) be combined into one by deleting the period after the word "discovery" and adding in a comma and the word "but." He said that the Style Subcommittee could look at this.

The Committee approved Rule 17-109 as amended.

The Vice Chair presented Rule 9-205, Mediation of Child Custody and Visitation Disputes, for the Committee's consideration.

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT AND ALIMONY

AMEND Rule 9-205 for conformity with proposed new Rule 17-109, as follows:

Rule 9-205. MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES.

. . .

f. Confidentiality.

~~Except for an agreement submitted to the court pursuant to section d of this Rule, no statement or writing made in the course of mediation is subject to discovery or admissible in evidence in any proceeding under this Chapter unless the parties and their counsel agree otherwise in writing. Neither the mediator nor an attorney may be called as a witness in such a proceeding to give evidence regarding the mediation or custody or visitation.~~ Confidentiality of mediation communications under this Rule is governed by Rule 17-109.

~~Committee note: See Code, Family Law Article, §5-701 et seq. for provisions that require the reporting of suspected child abuse.~~

Cross reference: For the definition of "mediation communication," see Rule 17-102 (e).

. . .

Rule 9-205 was accompanied by the following Reporter's Note.

With the proposed addition of new Rule 17-109 (Mediation Confidentiality) and the proposed addition of a definition of "mediation communication" to Rule 17-102, Rule 9-205 f is proposed to be amended to provide that the more comprehensive provisions of Rule 17-109 govern the confidentiality of mediation communications

under Rule 9-205. A cross reference to the definition of "mediation communication" is also proposed to be added.

The Vice Chair explained that Rule 9-205 is recommended to be changed to provide that the more comprehensive provisions of Rule 17-109 govern the confidentiality of mediation communications under Rule 9-205. There being no discussion, the Rule was approved as presented.

Agenda Item 3. Consideration of: A proposed amendment to Rule 1.14 in Appendix: The Maryland Rules of Professional Conduct and Proposed new Appendix: Uniform Guidelines of Representation for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings. (See Appendix 2)

The Vice Chair said that several consultants were present to discuss Agenda Item 3. They were: The Honorable Patrick Woodward, Circuit Court for Montgomery County and Chair of the Foster Care Court Improvement Project Implementation Committee; Master Linda Koban, Circuit Court for Baltimore City; Rhonda Lipkin, Esq., Legal Aid Bureau; Mitchell Mirviss, Esq., Venable, Baetjer, and Howard, and former Legal Aid attorney; Robin Scates, Esq., Department of Human Resources; Eva Klain, Esq., ABA; Kenneth Wardlaw, Esq., Legal Aid Bureau; Althea Jones, Esq. and Kathaleen Brault, Esq., Foster Care Improvement Project staff.

Mr. Brault told the Committee that there had been several difficult cases involving children in foster care. A recent example was in the District of Columbia. An attorney had been appointed to represent the child, a toddler girl. The mother

wanted her child returned to her, so the mother's attorney had contacted the child's attorney. A consent order was drawn up, and the judge signed it. At Christmastime, the child was returned to her mother, who then killed the little girl. Apparently, the judge had not received some material from the Department of Social Services indicating that the mother was not ready to take care of the child. The case generated much comment from the press, which criticized the Department of Social Services as well as the judge. Mr. Brault said that he had spoken with several other D.C. judges, who all agreed that this type of situation could happen to any one of them. Both the Vice Chair and Judge Johnson expressed their criticism of the judge in the case. Mr. Brault stated that the child's attorney should have investigated the stability of the mother's home life before agreeing to the consent order.

Mr. Mirviss told the Committee that about 10 years ago, he was involved in the case of Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549 (1990), in which a three-month-old child had been placed in foster care because he had been abused by his mentally ill mother. The abuse was so severe that the child had to be placed in a body cast. Several months later, after the mother went through counseling, she claimed that she was ready to get her child back. The court ordered an evaluation, but the Baltimore City Department of Social Services (DSS) did not disclose the evaluation to the court, nor did the child's attorney see it. The evaluation revealed that the mother

was pathologically ill, and that there was a severe risk of the child being killed. The evaluation was forgotten. The child was returned later to the mother pursuant to a court order with extensive conditions, but the case was not monitored. Six months later, the mother appeared to be in a daze, and the father had been killed in a shooting. The DSS petitioned to remove the child from the mother's control after she lied about the whereabouts of the child. She resisted the court's order to produce her child, relying on her Fifth Amendment rights. The case went to the U.S. Supreme Court, which held that a mother who is the custodian of her child pursuant to a court order may not invoke the Fifth Amendment privilege against self-incrimination to resist a subsequent court order to produce the child. The mother spent 7½ years in the Baltimore City Detention Center held on a civil contempt charge.

Mr. Mirviss noted that the attorney representing the child was a good attorney who had a very large caseload. His mistake was not pressing to see the evaluation pertaining to the mother. The problem is the climate created when the attorneys representing children are handling 15 or 16 cases a day. They cannot investigate, go to the children's homes, or obtain the necessary information to handle a case. The Vice Chair asked who the attorneys were in the case. Mr. Mirviss answered that a lawyer from Legal Aid represented the child and a lawyer from the Public Defender's Office represented the mother. The Vice Chair commented that it is a major problem if the attorneys who

represent the child have too many cases. Mr. Mirviss pointed out that at the time of the case this was a problem. Mr. Dean asked if the situation has improved, and Mr. Mirviss answered that the caseloads are down. Thirteen thousand children are in state custody today. There is a wide spectrum of attorneys -- some are diligent and some are not. Minimal qualification requirements are needed. Judge Vaughan commented that it bothers him that out of 13,000 cases, there are no headlines about the cases which are resolved adequately. He added that he is not opposed to the Guidelines to avoid the tragic cases.

Mr. Brault explained that the tragic cases do not constantly happen, but the clients are children who cannot protect themselves. The history of the Guidelines is that the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, wrote a letter to Chief Judge Joseph F. Murphy, Jr., Chair of the Rules Committee, explaining the background of the Foster Care Court Improvement Implementation Committee, which Chief Judge Bell had set up to implement the recommendations of the Foster Care Court Improvement Project Advisory Committee. A copy of the letter is in the meeting materials. Recently, a meeting was held which Mr. Brault and Mr. Johnson, Chair of the Juvenile Subcommittee, attended. The Rules Committee Chair, the Reporter, Judge Woodward, and members of the Implementation Committee also were present at the meeting. The purpose of the meeting was to determine what Rules changes may be needed to implement the recommendations of the Implementation Committee, which they had

titled “Uniform Standards of Representation for Attorneys Representing Children in CINA, TPR, and Related Proceedings.” One suggestion was to add a black letter rule to the Maryland Lawyers’ Rules of Professional Conduct. Mr. Brault said that he disagreed with this suggestion because of the problems posed by the cases of Post v. Bregman, 349 Md. 142 (1998) and Son v.Margolius, 349 Md. 441(1998). If a lawyer violates an ethical rule and that rule is a statement of public policy, the violation could form the basis for civil liability. The Attorneys Subcommittee asked the Implementation Committee to reformulate the Standards as Guidelines. The Subcommittee decided not to amend Rule 1.14 to add the Guidelines to them, but to simply refer to the Guidelines in the Rule.

Mr. Brault said that the question is how to make the Guidelines visible to the legal community. The commentary of the Maryland Rules of Professional Conduct can have the effect of being a rule. In interpreting the commentary, the courts and members of the lawyer disciplinary system who enforce the Rules of Professional Conduct look to the comments to determine what the rule is. The Guidelines can be placed in the appendix of the rule book, so that they are available to attorneys, without being a rule. The Honorable David B. Mitchell, of the Circuit Court for Baltimore City, had written a letter to the Reporter expressing the judge’s concerns that referring to the Guidelines in a comment is too much like the Guidelines being treated as a rule. (See Appendix 3). Rule 1.14 deals with the representation

of clients under a disability. The Guidelines address other problems -- the attorney who is appointed to represent children, not always, but not uncommonly, plays the role of judge and jury to determine what should be done, even if it is against the child's wishes. The Guidelines provide that the attorney should represent the child as the attorney represents any other client, advocating the child's position unless there is good reason not to do so, for example, if the attorney determines that the child is incapable of forming a decision. The Vice Chair commented that Legal Aid attorneys are aware of this, but she is not sure how many other attorneys are.

Judge Kaplan said that for the past eight months he has been hearing CINA and TPR cases. The attorneys who handle the cases are both government-appointed and private. Since the State of Maryland began contracting with private attorneys, very few attorneys are from the Legal Aid Bureau. The attorneys provide various levels of representation. The problem is that there are no standards as to how to practice in these cases. Judge Kaplan remarked that he finds that many of the attorneys are doing a good job. However, standards for representation are needed. Master Koban commented that there are many difficult decisions judges and masters have to make, and it is easy to make a mistake. Many of the children's attorneys do not see the clients before the hearing, especially if the child is under three years of age. However, even if a baby cannot speak, a visit to the child's home allows a check on the environment. The babies in

foster care rely on the Department of Social Services and the child's attorney to make an assessment as to where the children belong. The Vice Chair asked Master Koban if she questions attorneys who come before her as to what steps they have taken in representing the child and if she orders the attorneys to take further actions on behalf of their clients. Master Koban answered these questions in the affirmative. She referred to a case in which a teenage mother had a baby who was in Johns Hopkins Hospital. The attorney did not go to the hospital to find out about the baby who had some medical problems. The attorney took no position in the case and obtained no records. Judge Dryden inquired if the attorney was appointed by the court, and Master Koban replied that the attorney was hired pursuant to a contract with the Department of Human Resources (DHR). Ms. Jones told the Committee that Ms. Scates was an attorney working for DHR. Ms. Scates commented that the DHR was in support of the standards for representing children. Attorneys should have clear guidelines. The DHR put out a solicitation in 1993 for competitive bids from attorneys to represent children in CINA, TPR, and related cases. No guidelines existed for the 1993 program. The next solicitation was in 1997, and there will be one on July 1, 2000. Mr. Sykes asked if the DHR monitors the performance of attorneys. Ms. Scates replied that the attorneys' performance has been monitored since January of 1999, including soliciting comments from the bench. DHR staff members make site visits. In Baltimore City, there are bimonthly meetings with

Judge Martin Welch, of the Circuit Court for Baltimore City, and providers.

The Vice Chair asked if the DHR can terminate a contract with an attorney. Ms. Scates answered that a contract can be terminated. The Vice Chair then inquired if a contract has ever been terminated. Ms. Skates responded that she is not familiar with the past history of these contracts, but recently, there have been no terminations. Payments to attorneys have been withheld when the attorney is not cooperating.

The Vice Chair remarked that it is troubling to learn about the problems with the representation of children. There may be a lack of resources to cure the problem, but the Guidelines are at least a step in the right direction. The real issue is the one raised by Judge Mitchell -- how can better representation of the children be accomplished? If the Guidelines use the word "shall," it sounds like rules. The reference should be to the steps that an attorney should take. The Vice Chair expressed her concern about incorporating the Guidelines into Rule 1.14. Another approach could be to attach the Guidelines to the contract under which the attorney provides the services to the children.

Mr. Sykes observed that even though the Discovery Guidelines are not part of the Rules, the Michie Company printed them in the rule book, and gradually, the courts began citing them. This provides some precedent for the publication of the Guidelines for attorneys representing children in CINA cases. Mr. Brault

explained that there had been too many discovery disputes among the members of the bar. The Litigation Section of the Maryland State Bar Association created a committee to draft discovery guidelines. The guidelines have had a very positive effect on the bar. They were not meant to be rules, although judges do cite the guidelines in court.

The Vice Chair reiterated that the Guidelines for Attorneys Representing Children can go into an appendix. Mr. Brault commented that Chief Judge Bell is interested in some rules action and would like the Guidelines to go into the Rules of Procedure somewhere.

Ms. Jones told the Committee that she had been working for the past two years on developing the standards for representation of children in CINA, TPR, and adoption proceedings. The problems are national. Her research showed that there are no rules or statutes pertaining to this.

Ms. Klain remarked that she is a representative of the American Bar Association ("ABA"), which has specific standards for attorneys representing children in these proceedings. In developing the standards in Maryland, the people who drafted them considered the ABA standards. At the national level, there are major issues to tackle. Grants to the highest court in the various states are available to improve the handling of child abuse and neglect cases.

Judge Vaughan noted that some of the problems may stem from the State hiring the lowest bidder for providing legal services.

He said that there seem to be several options pertaining to the Guidelines. One is to do nothing. The second is to adopt the Guidelines as rules. Another is to have Michie print them as an appendix only. Judge Vaughan expressed his agreement with the Subcommittee's recommendation. The Vice Chair commented that it is important for judges to be made aware of the Guidelines. If they are not referred to in the Rules, judges will be unaware of them.

Mr. Sykes commented that from the practitioner's point of view, an attorney who sees these Guidelines does not know if he or she is liable for malpractice if there is non-compliance. If they are mandatory, can an attorney ignore them? The practicing attorney needs to have clearer lines drawn. If a violation is a basis for malpractice, this needs to be stated. If the Guidelines are advisory only, this should be expressed. Mr. Brault explained that the intention is that the Guidelines are not mandatory. Mr. Sykes pointed out there could be civil liabilities. Mr. Brault responded that there are civil liabilities. Whenever attorneys do not follow applicable standards of practice, they can be held responsible. Mr. Sykes pointed out that the name "guidelines" means they are not mandatory.

The Vice Chair noted that the Subcommittee was of the opinion that non-compliance with the Guidelines should never be a matter for the Attorney Grievance Commission. Mr. Brault remarked that the Guidelines could go under Rule 1.1, Competence.

Two major areas of malpractice are getting into a case about which an attorney knows nothing and getting into a case where the attorney knows the law, but does nothing.

Ms. Scates commented that it may be difficult to attach the Guidelines to the attorneys' contracts for providing services because at least 500 court-appointed attorneys are not under contract. Mr. Sykes suggested that there could be an administrative order endorsing the Guidelines issued by the Court of Appeals. This would be in lieu of putting them in the Rules. Mr. Brault expressed the concern that no one would be aware of an administrative order. Judge Johnson observed that the Guidelines are important enough that they should not be overlooked.

Judge Kaplan suggested that the title of the Guidelines be clarified. He questioned whether the word "recommended" should be a modifier of the word "guidelines." They could be titled "Recommended Advisory Guidelines....". Mr. Bowen questioned whether the word "uniform" should remain in the title. Ms. Jones noted that at the Subcommittee meeting, Mr. Titus had suggested that the word "shall" should be taken out of the Guidelines. However, Ms. Jones and Ms. Brault felt that a few phrases required the word "shall," because that guideline expressed a basic minimum. The Vice Chair said that the word "shall" is inconsistent with being a guideline.

Judge Vaughan pointed out that Guidelines are nothing more than a description of what a good attorney does. It is sad that they are necessary, but it is important that they be distributed.

Master Koban pointed out the problem of the infant client or the mentally retarded client who cannot file a complaint against the attorney. The population is a very vulnerable one. With the proper representation, there is a chance that some of the children may grow up to be successful adults. For the highest profile on the Guidelines, they should be attached to the Rules. The Vice Chair inquired as to whether the Guidelines are taken directly from the parallel language of the ABA, and Ms. Klain answered that they are not.

Judge Woodward explained that the Guidelines were developed from an assessment of how the courts have handled juvenile foster care cases in Maryland. Over 100 attorneys were surveyed. Court personnel were also surveyed, and researchers made site visits to 12 jurisdictions. A review of the information gathered showed that no standards of practice existed. The judges were not clear as to how to handle the cases and what the role of the child's attorney should be. There was a difference in the quality of the cases. The Guidelines should have some impact if they have the official imprimatur of the Court of Appeals. They should be referenced in the Rules and published in the appendix.

Mr. Hochberg pointed out that the new language in the Comment to Rule 1.14 gives CINA and TPR proceedings as examples, but the Comment does not apply only to CINA and TPR proceedings. The first paragraph of the Guidelines limits them to applying to children in abuse and neglect cases only. Is the Rule broader than that? The Vice Chair replied that Rule 1.14 applies to any

case involving the representation of a disabled person. Ms. Brault noted that the Guidelines are limited in scope to the foster care grant. Mr. Bowen commented that the title of the Guidelines does not appear in the Comment, so that there is no indication as to whether the Guidelines are uniform. He expressed the view that the title does not state the issue clearly. The Vice Chair observed that the Style Subcommittee can handle this. The question is if the concept is satisfactory. Specific points in the Guidelines can be considered later.

The Reporter said that she received a telephone call from Master James Casey, Circuit Court for Baltimore City, who pointed out that there is another side to the Comment -- the attorney should advocate a position when the client does not have considered judgment. Mr. Dean remarked that the Guidelines state this point, but the Reporter noted that this point is not made in the Comment. Judge Kaplan suggested that this should be in the Comment. The Vice Chair suggested that the new language be: "if the client does not have considered judgment, then the attorney should advocate the position which he or she believes is in the best interest of the child."

Mr. Brault suggested that each of the Guidelines be reviewed by the Subcommittee. The Vice Chair stated that since the Committee approved the concept of the amendment to Rule 1.14 and publication of the Guidelines, they will go back to the Subcommittee for further review of their substance and then be considered again by the full Committee.

The Vice Chair adjourned the meeting.