STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held at Fergie's Restaurant, Edgewater, Maryland on June 16, 2000.

Members present:

Linda M. Schuett, Esq., Vice Chair

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Larry W. Shipley, Clerk
Senator Norman R. Stone
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
Hon. Patrick L. Woodward, Circuit Court for Montgomery County
Master Linda Koban, Circuit Court for Baltimore City
Eva Klain, Esq., American Bar Association
Kathaleen Brault, Esq., Administrative Office of the Courts
Robyn C. Scates, Esq., Maryland Department of Human Resources
Meisha McGuire, Esq., Maryland Department of Human Resources
Catherine Worthington, Rules Committee Intern
Stephen Schenning, Esq. First Assistant U.S. Attorney
Roann Nichols, Esq., Assistant U.S. Attorney
Mary Keating, Esq.
Miriam L. Azrael, Esq., Azrael, Gann & Franz, LLP
James Wyda, Esq., Office of the Federal Public Defender
Nancy Forster, Esq., Office of the State Public Defender
M. Peter Moser, Esq.

In the absence of the Chair, the Vice Chair convened the meeting. She said that at the Court of Appeals conference on June 5, 2000, the Court reconsidered the 144th, 145th, and 147th Reports, which include the Attorney Discipline Rules, the Judicial Disabilities Commission Rules, and Rule 9-207, Referral

of Matters to Masters. The Court adopted the Judicial Disabilities Commission Rules. The Court did not adopt the changes to Rule 2-422, Discovery of Documents and Property, which pertained to the inspection of property owned by a third person. The majority was concerned with improperly bringing a nonparty into the litigation and invading property rights. Judges Rodowsky and Wilner were in favor of the Rule. Because there were four votes against the Rule, Chief Judge Bell did not comment on it or vote. The other judges, except Judge Eldridge, felt that this may be an appropriate matter for legislation.

The Vice Chair said that the Court adopted the package of Judicial Disabilities Commission Rules but did not adopt Rule 16-810.1, Immunity. She added that they believed that the subject was covered by case law. Mr. Brault noted that the Court eliminated the review of a reprimand on the theory that the Maryland Constitution gave the power of reprimand without the right to review. The Reporter observed that there may be a way to obtain review by certiorari. Judge McAuliffe said that there is no right to certiorari without an earlier court review, and it is an open question as to whether a judge has the right to take this issue to the circuit court for judicial oversight. Mr. Brault added that the Court seemed to invite a constitutional amendment.

The Vice Chair told the Committee that the Court is going to appoint two of its members to rewrite the Attorney Discipline Rules. The Reporter stated that the appointees are Judges Wilner

and Harrell. Mr. Brault commented that he has written a letter to Judge Wilner suggesting that the probation rule, alternate substituted service rule, injunction rule, and diversionary program rule be implemented as soon as possible, while the rest of the rules are being redrafted. He asked Judge Wilner if the Court could take up those specific Rules independently.

The Vice Chair noted that the Court adopted an alternative version of amendments to Rule 9-207. The Rule mandates that the circuit court refer civil contempt proceedings in domestic cases to masters, but if it appears to the master that incarceration is likely, the master is to stop the proceeding and refer the matter to a judge for a trial de novo.

Agenda Item 1. Continued consideration of: Proposed amendments to Rule 1.14 in Appendix: The Maryland Lawyers' Rules of Professional Conduct and proposed new Appendix: Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings (See Appendix 1).

The Vice Chair said that proposed amendment to Rule 1.14 of the Maryland Lawyers' Rules of Professional Conduct was approved in concept and that the Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings were discussed preliminarily at the May, 2000 Rules Committee meeting. Mr. Brault presented the Rule and Guidelines for the Committee's consideration. (See Appendix 1). He suggested some style changes to the added language in the Comment to Rule 1.14. The words "Advisory Committee" and the word

"helpful" should be deleted from the third sentence of the Comment. In the fourth sentence, the title of the Guidelines should be changed to "Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings." Mr. Brault asked if the Guidelines would be referenced in the Juvenile Rules. The Reporter responded that the proposed revised Juvenile Rules are going to the Style Subcommittee for a final review, and she can add a cross reference in the Juvenile Rules referencing the Guidelines.

Mr. Brault noted that both the Vice Chair and Mr. Bowen had looked over the Guidelines since the May meeting. The basic concept was to clarify that the provisions are not mandatory; rather, they are to be considered strictly guidelines. They should not be used in a grievance or malpractice setting. The goal is to educate attorneys. The Attorneys Subcommittee went through all of the Guidelines, changing the word "shall" to the word "may" or the word "should." The only "shall" that has been retained is the one providing for the attorney-client privilege. The Rules of Professional Conduct require that the attorney not compromise the attorney-client privilege.

The Vice Chair commented that the Statement of the Issue provides that the Guidelines apply to attorneys appointed by the juvenile court to represent children in child abuse and neglect proceedings. Mr. Brault inquired whether the children could obtain an attorney other than by the court appointing the attorney. Mr. Sykes asked if all attorneys representing children

in child abuse and neglect cases should be within the Guidelines. Ms. Brault responded that the Guidelines apply to attorneys representing children in termination of parental rights cases and adoptions arising from child abuse and neglect proceedings. The Vice Chair inquired about cases involving allegations of child abuse and neglect which do not result in a Child in Need of Assistance (CINA) case, and Ms. Brault answered that the Guidelines are not applicable to those cases.

Mr. Hochberg questioned whether a child can have private counsel. Ms. Brault answered that this is possible. A parent could pay for a private attorney for the child. The Vice Chair pointed out that if the child's attorney is selected and paid by an individual who is a party to the proceeding, there could be a possible conflict of interest. Ms. Brault responded that it would be up to the court to decide. In all cases, the attorney would have to be approved and appointed by the court. Judge Kaplan said that he has been sitting in juvenile court hearing CINA cases, and he has never had a case where the parents hired their own attorney to represent the child. Mr. Sykes suggested that the wording be that the Guidelines apply to attorneys representing children in these cases and not be limited to attorneys who were selected by a particular method. The Vice Chair pointed out that the law requires a court appointment. Mr. Sykes responded that the language should be broad enough to cover any attorney, regardless of who pays the attorney.

Mr. Sykes questioned whether an attorney needs a court order

to act if the attorney appears on behalf of a child pro bono, and enters an appearance. The Guidelines apply to attorneys in child abuse and neglect cases. The Vice Chair noted that Juvenile Rule 11-106, Right to Counsel, does not hinge on a court-appointed attorney. She suggested that the word "appointed" be deleted. Mr. Brault remarked that the Style Subcommittee can take care of this.

Turning to section A. of the Guidelines, Mr. Brault pointed out that this provision elevates the child's wishes. Many attorneys do whatever the attorney thinks is correct, giving little or no consideration to the child. Part of the purpose of appointing counsel to represent a child is to represent the child's wishes, if the child is capable of understanding. Mr. Sykes suggested that the second sentence of section A. should be clarified to read as follows: "If the child has considered judgment, the attorney should so state in open court, the attorney then will be regarded as advancing the child's wishes in the matter." The Committee agreed by consensus to this change.

Mr. Brault said that in Guideline B1., the word "client" in the second sentence should be changed to the word "child." Mr. Sykes suggested that the second sentence could be reformulated to read: "If a child has the ability to express a reasoned choice, the client is regarded as having considered judgment." The Vice Chair noted that the Style Subcommittee will look at this.

The Vice Chair suggested that subsections B1. a.(3) and (4) should be moved out of subsection B1.(a). Mr. Bowen suggested

that subsection B1. a.(4) should be moved out into the first margin and not numbered. The Vice Chair noted that subsection B1. a.(4) has two distinct ideas in it -- determination if evaluations are needed and the duty to advocate. She asked if the duty to advocate is part of what the attorney considers in making a decision as to the child's considered judgment. Ms. Scates answered that the attorney considers both parts of subsection B1. a.(4). Mr. Brault stated that he agreed with Mr. Bowen that subsection B1. a.(4) be moved. Mr. Brault suggested that the subsection be moved to section c. and placed after the second sentence. The Committee agreed by consensus with this suggestion.

Judge McAuliffe commented that it seems to him that the Guidelines are neither "fish or fowl" as far as whether they have the force of law. It would be helpful to include them in an appendix to the Rules of Procedure, but enforcement of them is unclear. The Vice Chair said that the last time a similar issue was discussed, the issue involved the Discovery Guidelines. The Discovery Guidelines now appear in the Rule Book, but they are not referred to by rule. However, if the Court of Appeals adopts the change to the Comment to Rule 1.14 which refers to the Guidelines of Advocacy for Attorneys Representing Children, then this reflects more the imprimatur of the Court than the Discovery Guidelines do. Judge McAuliffe suggested that the Guidelines of Advocacy should be recommendations. The Vice Chair suggested that instead of sending the Guidelines to the Style Subcommittee,

they should go back to the Foster Care Court Improvement Implementation Committee to review the changes made by the Rules Committee.

Mr. Sykes remarked that these Guidelines are similar to the Discovery Guidelines. The Comment calls attention to the fact that the Foster Care Court Improvement Project developed Guidelines which will be printed following the Rules. The Vice Chair said that at the last meeting, the question was raised as to whether or not there should be a mechanism to refer to the Guidelines and what any such mechanism should be, such as a cross reference following Rule 1.14. Judge Kaplan expressed the view that the Guidelines of Advocacy are more important than the Discovery Guidelines. Mr. Brault added that if the Guidelines are not included in the Rules of Procedure, then they are worthless. The letter from Chief Judge Bell could be interpreted that he meant for the Guidelines to be in the Rule Book. Mr. Sykes suggested that a cross reference could provide: "For guidance for persons representing children in certain cases, see the Guidelines of Advocacy for Attorneys Representing Children in CINA and Related TPR and Adoption Proceedings."

The Vice Chair pointed out that there is a big difference between a paragraph in a Comment and a cross reference. She said that she understands why it would be preferable to have the reference in a Comment, which is elevated in importance over a cross reference. Mr. Brault noted that the Guidelines have been lowered from a Rule to a Comment, and they should be lowered no

further or they will lose their effect. He told the Committee that he understands from the people working on the Foster Care Court Improvement Project and from Chief Judge Bell that the State of Maryland is in the forefront of setting up this kind of standard and could become a national model. Maryland received federal money to become a national model to improve the handling of cases involving children who are in foster care. These Guidelines should not be downplayed.

Turning to section b. of Guideline B1., Mr. Brault explained that even if a child has developmental disabilities, the attorney should take into consideration the child's wishes. Judge Kaplan suggested that the language in section b. which reads "even significantly" should be deleted. Mr. Bowen remarked that the Style Subcommittee can take care of this change. The Vice Chair stated that the Guidelines will be sent to the Style Subcommittee after the Rules Committee finishes its review of them. Mr. Sykes noted that the Style Subcommittee will make recommendations as to changes. Judge Woodward asked if the Guidelines would be considered to be the product of the Foster Care Court Improvement Project or of the Rules Committee. The Vice Chair responded that the Rules Committee worked with the Foster Care Court Improvement Project, but the work is that of the Project.

Mr. Brault pointed out that in section c. of Guideline B1., the word "client" should be changed to the word "child" to be parallel with other changes to the Guidelines. The last sentence of the section retains the word "shall" to emphasize the

importance of the attorney-client privilege.

The Reporter asked about the attorney representing a child who does not have considered judgment, yet is old enough to express an opinion. Ms. Brault replied that concluding that a child has considered judgment is a simplification of the child's abilities. Most of the time the attorney agrees with his or her juvenile client, who often makes the best decision. The attorney's personal views are not relevant if the child has considered judgment. Ms. Brault pointed out that the checklist in the Rule is the method of determining considered judgment. The Vice Chair noted that in Guideline B2., there is a reference to a potential waiver of the attorney-client privilege. The Guideline provides that the attorney may advocate a position different than the child's wishes if the attorney finds that the child does not have considered judgment at the time. However, the attorney should ensure that the child's position is made a part of the record.

The Vice Chair expressed her agreement with section d. of Guideline B1., commenting that cultural, racial, ethnic, or economic differences between the attorney and the child may also influence the perception of the attorney. Mr. Brault said that he thought that this provision referred to the attorney's perception of the child. Mr. Bowen pointed out that the way this is written, it could mean the child's perception of the attorney. Ms. Brault said that this sentence can be read both ways. The

point is that this speaks to attorneys who are not sensitive to cultural differences. The origination of this is from the perspective of an attorney who is not being sensitive. Mr. Bowen remarked that the sentence could be written so that it means both the child's perception as well as the attorney's. The Vice Chair noted that Ms. Brault had said that this is the attorney's perception. Mr. Brault suggested that the word "attorney's" be put before the word "perception." Mr. Johnson commented that the attorney may be influencing the child. Section d. is ambiguous. The attorney may be sensitive to the factors listed, but the child is influenced by the attorney, anyway.

Ms. Brault said that the important issue is that often there are vast economic and ethnic differences and different experiences between the attorney and the child client. Section d. is asking the attorney to be sensitive to that. Master Koban suggested that section d. could provide that the attorney should consider the child in the context of the child's cultural, racial, ethnic, and economic experiences. The Vice Chair cautioned that the attorney should not let his or her own cultural, racial, ethnic, or economic situation influence the decision as to whether the child has considered judgment. Mr. Sykes remarked that what should be eliminated are inappropriate influences in the attorney's assessment as to whether the child has considered judgment. He suggested that the word "assessment" might work better than the word "perception." The Vice Chair

suggested that the sentence could be reworded to end with the phrase, “may inappropriately influence the attorney’s assessment of whether the child has considered judgment.” The Committee agreed by consensus with this suggestion. Mr. Johnson pointed out that similarities as well as differences may create problems, also.

Turning to Guideline B2., Mr. Brault questioned as to why the attorney-client privilege should ever be violated. The Vice Chair noted that Guideline A. provides that the attorney is to state in open court which view the attorney is espousing -- the one in the child’s best interest or the one the child is asking for. This is being repeated in Guideline B2. Ms. Brault commented that this is a confusing issue, and there has been inconsistency nationwide as to the correct role for counsel. Many attorneys follow the American Bar Association standards, assessing the child’s considered judgment. Others rubberstamp the social worker’s opinion. The best interest standard does not require the attorney to act as an advocate, but to act as a guardian ad litem.

The Vice Chair expressed the view that the attorney should state the reasons for adopting the position of the child’s best interest and state in open court why the child does not have considered judgment. The interview with the child may contain confidential information. Ms. Brault noted that this is similar to a hearing to determine the mental competence of an adult. If

the attorney decides that the client does not have considered judgment, the attorney asserts his or her own viewpoint and tells the court this. The Vice Chair pointed out that Guideline B2. provides that the attorney state the reasons with particularity for adopting the best interest standard. Ms. Brault observed that this may be a breach of the fiduciary duty of loyalty. The Vice Chair added that it may involve many kinds of breaches. Master Koban agreed that the court does not need to know all of the details. Ms. Brault commented that the attorney has to determine whether a child has considered judgment, then focus on the least restrictive environment for a child who does not have considered judgment.

The Vice Chair asked how the language in the last two sentences of Guideline B2. adds anything. She also inquired as to the meaning of the last sentence. She suggested deleting the last two sentences. Mr. Brault pointed out that Guideline A. does not contain the language pertaining to the attorney providing the child's position. Master Koban remarked that the court does not need to know the child's position. Mr. Brault disagreed, saying that the court needs to hear the child's position to assess a borderline case.

Ms. Brault stated that she agreed with the suggestion to take out the language which reads "state with particularity the reasons" from Guideline B2. However, she was of the opinion that the last sentence of the guideline should remain. The court

needs to know the child's view. Judge Johnson expressed his agreement with Ms. Brault. Ms. Brault gave the example of a sexual abuse case involving a 12-yr-old boy with considered judgment. The child originally agreed to a placement outside the home. However, the mother told her son that she would be sent to jail if the son were to testify against her. The child had no cognitive limitations and was focused on the issues, but as an alternative home was being lined up for him, he stated that he wanted to stay with his mother. The Legal Aid Bureau felt that he had not waived his considered judgment. Ms. Brault said that she had to shift gears in the case and tell the court the child's position. The court understood why Ms. Brault was opting for this strategy and was able to handle the situation. Sexual abuse cases can be very tricky.

The Vice Chair commented that even though the child was deemed to have considered judgment, it is difficult to state that on one particular issue, there is no considered judgment, and the position the attorney is suddenly taking is one that is in the client's best interest. Ms. Brault explained that the attorney is advocating the child's position, and it is up to the court to decide. Mr. Brault remarked that this is a situation of parental duress. Ms. Brault said that she felt that she had handled the case properly. The client thanked her at the conclusion of the case, and there was a satisfactory disposition. Mr. Sykes suggested that an additional requirement could be added to the

list of factors to determine considered judgment which is free choice by the client. The Vice Chair responded that this may be confusing. Ms. Brault noted that in domestic cases, the court knows the child's wishes, and there is no analysis of considered judgment.

Mr. Brault pointed out that the attorney-client privilege issue is very tricky. There are exceptions, such as where there is imminent bodily harm or great financial harm. Ms. Brault observed that the attorney has to assess when to waive the privilege, but the privilege prevails in most situations. Master Koban remarked that the child may ask to go live with his or her aunt, but the child does not want the parents to feel bad. This is not really coercion, but it clouds the issue. The Vice Chair said that often a child will want a certain situation, but he or she may not want the parents to know about it. Judge Kaplan added that this is a common occurrence, and he often speaks with the child in chambers.

Mr. Brault stated that the language in Guideline B2. which reads "with particularity" will be deleted. Mr. Bowen observed that the phrase "child's wishes" should be used in Guideline B2. for conformity with Guideline A. The Vice Chair stated that the Style Subcommittee could rephrase this.

Turning to Guideline C1., Mr. Brault explained that this provision ensures that the attorney takes the right steps before the hearing. Ms. Ogletree observed that the way the system

works, the contract to provide legal services to the children goes to the lowest bidder. She cited the experience of one attorney in her jurisdiction who never met the client before the hearing.

The Vice Chair suggested that the language in the first sentence of Guideline C1 which reads: "appointed by the court to represent a child in a CINA or a related TPR or adoption case" should be deleted. The Committee agreed by consensus to this suggestion. Mr. Johnson asked what the phrase "in the community" means. Mr. Brault answered that it means the meeting does not take place in the attorney's office. Master Koban commented that the worst case scenario is that the attorneys do not see the client until they get to court. The children think that juvenile court is like the emergency room. Mr. Brault noted that increasing the number of hours an attorney is required to expend to handle a case may cause problems for the Department of Human Resources (DHR) because more attorneys may be needed. Ms. Scates said that she had no problem with the Guidelines. The DHR wants attorneys trained in these areas. It may be necessary to ask the legislature for more money. She clarified that the contracts for attorney services do not go to the lowest bidder. Ms. Brault remarked that a report was made to the legislature recently concerning legal services for the children. The report stated that after calculations of the time some attorneys were spending on these cases, the attorneys were earning about $3.00 an hour.

The Vice Chair asked if, in the situation of a child who needs sign language interpretation, there is a waiver of the attorney-client privilege if the interpreter is someone hired from an official list as opposed to a friend or family member being the interpreter. Ms. Brault responded that if the interpreter is the agent of the attorney, the attorney-client privilege is intact, but if the interpreter talks to third parties, there has to be a waiver. The Vice Chair said that she did not read the third paragraph of Guideline C1. to mean this. Ms. Ogletree remarked that it is inappropriate for the child's mother to be the interpreter. Mr. Johnson pointed out that the attorney who hires an expert may be violating the attorney-client privilege. Mr. Brault expressed the view that it does not matter if the interpreter is a friend, a family member, or is from an official list. The interpreter becomes the attorney's agent. The Vice Chair cautioned that the interpreter, whoever he or she is, must understand the position. Judge Vaughan commented that the use of any interpreter other than one approved by the court should be discouraged. If the mother is interpreting, this may change the testimony. Mr. Brault agreed, pointing out that the attorney should not communicate with the child through family or friends, if a court-appointed interpreter is made available.

Senator Stone said that when the attorney goes to the child's community, the attorney can arrange to obtain an interpreter, if one is necessary. Mr. Titus expressed his

concern as to the requirement that the attorney must interview the child in his or her community. He felt that an interview in the attorney's office would be sufficient. Ms. Brault noted that the second paragraph allows the office interview. The Vice Chair agreed that whenever possible, the attorney should go to the child's community.

Turning to Guideline C2., Mr. Brault pointed out that the importance of the attorney observing the non-verbal child without considered judgment in the child's environment.

Mr. Brault drew the Committee's attention to Guideline C3. The Vice Chair said that she had a problem with the location of Guideline C3. It is highly unlikely that an attorney would be able to decide subsections c. through g. at the interview. The attorney does need to decide these things, but not at the interview. Mr. Bowen clarified that they would be decided as a result of the interview. This can be restyled.

Mr. Brault drew the Committee's attention to Guideline C4. The Vice Chair questioned the meaning of the last sentence on the page. Ms. Ogletree responded that this refers to Foster Care Review Board hearings, etc. The Vice Chair asked whether the attorney has to go to the school case conference even if the conference does not involve legal issues. Ms. Brault replied that the attorney can attend if it is appropriate. She said she often found it was a benefit to go to the case conferences and other proceedings. Mr. Titus suggested that the fourth sentence

of Guideline C4. end with the word “proceedings.” Ms. Brault inquired why the language “involving legal issues” should be deleted. Mr. Titus suggested that in place of the language “involving legal issues,” the language “appropriate to the representation” should be added. The Vice Chair said that this can be restyled.

Mr. Brault drew the Committee’s attention to Guideline C5. Ms. Ogletree cautioned that this should not be a situation where the attorney rubberstamps what the Department of Social Services has recommended.

Mr. Brault drew the Committee’s attention to Guideline D1. The Vice Chair commented that section f. is poorly worded. Mr. Sykes asked if Guideline C2. should be moved to Guideline D1. Master Koban responded that the position of the Legal Aid Bureau is that the attorney need not go to see a client who is a baby. Mr. Brault suggested that Guideline C2 should be moved to become Guideline D2. The Committee agreed by consensus to this change.

Mr. Brault drew the Committee’s attention to Guideline E1. The Vice Chair said that she had some comments, but they pertain only to style. Mr. Brault drew the Committee’s attention to Guidelines E2. and E3., but there were no comments.

Turning to Guidelines F1. and F3., Mr. Brault explained that these involve matters of policy. The position of the Project is that the attorneys need adequate training. Mr. Sykes pointed out that the Maryland Volunteer Lawyers’ Association has a training

program, and he asked if the Guidelines should indicate where training is available. Mr. Brault responded that the Maryland Institute for the Continuing Professional Education of Lawyers (MICPEL) may have programs and there are mentoring systems. Ms. Brault noted that the Guidelines initially had references to specific training programs, but these references were removed.

Mr. Brault suggested that the word "new" be deleted from the beginning language of Guideline F3. The Reporter asked if the Department of Human Resources trains attorneys at the beginning of their contracts. Ms. Scates answered that two years ago, a formal training program was initiated. Prior to that, there had been funding problems. Mr. Sykes asked if the training program was free, and Ms. Scates replied that the State pays for the program, which is free to attorneys. Ms. Klain noted that each state may receive 10 free training days per year from the ABA. Mr. Brault added that in Montgomery County, a pro bono training program provides free training sessions. Ms. Brault remarked that training of programs for children's attorneys that are run by opposing parties, such as DHR and social service agencies have a difference perspective than programs that are run by neutral entities.

The Vice Chair asked about using the terms "attorney" and "lawyer" in the Guidelines. Mr. Bowen explained that before one accepts a case, the person is termed a "lawyer." Once there is a relationship with the client, the individual is termed an

"attorney."

Turning to section G., Compliance, Mr. Brault explained that there are two alternatives. The issue is what enforcement is to be used to ensure compliance. The Vice Chair pointed out that the third alternative is to have no enforcement provision. Ms. Brault observed that the key to the court process for the child is the judge. It is easy to forget that children cannot go to the Attorney Grievance Commission or sue for malpractice. Often their next friend is the abuser. If the child's attorney handles the case improperly, the child does not know to assert the right to adequate representation. It is in the best interest of the child for the judge to monitor these cases closely, because often it is a matter of life and death. If the judge misses something, serious consequences could occur. Alternative 2 is a compromise.

Ms. Scates commented that the best way for the contracts to work is for everyone to work together. Some judges will not communicate with DHR. It is important that the communication be there. The Vice Chair expressed the view that the first paragraph of Alternative 1 is too wordy. Mr. Brault said that he prefers Alternative 1. Because the subject is so controversial, alternatives are presented. These are not rules and they are not to form the basis for grievance proceedings, but there has to be some enforcement.

Ms. Ogletree noted that in Alternative 1, step (4) provides that the appearance of the original attorney will be stricken.

She asked what would happen if there is no other attorney available. Ms. Brault responded that the court can appoint another attorney from the court-appointed list. Ms. Ogletree said that this is not always possible in some counties. She suggested taking out step (4). The Vice Chair noted that the step (4) is the most drastic measure. Mr. Sykes asked about handling these problems through continuing judicial education, which may be preferable to putting sanctions in the Guidelines. Judge Kaplan suggested that a separate booklet could be prepared and distributed to all judges, masters, and participating attorneys. Mr. Brault remarked that once attorneys are familiar with the booklet, any non-compliance by them can be reported to the state contracting agency. Their appearance can be stricken, which would carry an incentive to comply. Mr. Sykes questioned whether there is any assurance that a transgression by an attorney would not be sent to the Attorney Grievance Commission. Ms. Brault said that the attorney should be removed. The attorney has to be held accountable. The Vice Chair commented that a judge or master can encourage compliance by using the four steps in Alternative 1. Judges and masters can also encourage compliance on their own. Mr. Sykes noted that the word “follow” could be substituted for the word “comply.” The Vice Chair asked if the court can report the matter to the Attorney Grievance Commission. Ms. Brault responded that she knew of one court which reported an attorney to the Attorney Grievance Commission,

but this is rare.

Mr. Brault expressed his preference for the word "follow" in place of the word "comply." Judge Woodward remarked that this is a signal to judges and masters that they have a role in assuring compliance. This can be emphasized to judges and masters during judicial education. Mr. Brault observed that the court is parens patriae. This is not like the average civil or criminal case. The Vice Chair said that Alternative 1 will be the provision that will remain, but it has to be restyled. Mr. Johnson suggested that the language about the court monitoring caseloads should be taken out. Mr. Sykes suggested that the Comment should contain a provision that the Guidelines are not part of the Rules of Professional Conduct. He expressed the concern that someone could be referred to the Attorney Grievance Commission if he or she did not follow the Guidelines.

The Vice Chair pointed out that this may be a judicial disabilities issue, also. Mr. Brault responded that at a recent meeting of the Maryland State Bar Association, Charles Ruff spoke on the quality of legal services and what judges are able to do about it. In the District of Columbia, the judges have the authority by rule to refer under-performing attorneys for legal education. There is no such rule in Maryland. Twenty-three years ago, the BX Rules were drafted, but the Court of Appeals did not adopt them. Mr. Titus suggested that there could be revisions to Rule 1-341. Mr. Brault remarked that he had

suggested to Chief Judge Bell that Maryland adopt something similar to the D.C. rule. Judge McAuliffe expressed the opinion that this should be left up to judicial education.

Judge Johnson suggested that language could be added which would provide that a judge should take action if he or she sees a poor pattern emerging from an attorney's practice of law. Mr. Bowen suggested that the paragraph could be restructured as a warning to attorneys that the judge may take certain actions if the attorney is not doing his or her job competently. He said that the Guidelines will next go to the Style Subcommittee. The Reporter added that after the Guidelines have been restyled, the Foster Care Court Improvement Project can look at them again. Once the Project approves them, they can be sent to the Court of Appeals. Judge Woodward thanked the Committee for its consideration of the Guidelines.

Agenda Item 2. Reconsideration and consideration of certain Proposed amendments to Appendix: The Maryland Lawyers' Rules of Professional Conduct - Reconsideration of proposed amendments to Rule 4.2 (Communication With Person Represented By Counsel) and Consideration of proposed amendments to Rule 4.4 (Respect for Rights of Third Person)

While the Vice Chair was temporarily out of the room, Mr. Bowen introduced the guests present for the discussion of Agenda Item 2. They included: Nancy Forster, Esq. of the Office of the Public Defender for Maryland; James Wyda, Esq., Office of the Federal Public Defender; Mary Keating, Esq ; Mimi Azrael, Esq.; Roanne Nichols, Esq. and Stephen Schenning, Esq. of the U. S.

Attorney's office. The Reporter introduced Katherine Worthington, an intern in the Rules Committee Office.

Mr. Brault told the Committee that Rule 4.2 had become far more controversial since the Subcommittee first took up the topic. There have been four different opinions from U.S. District Court judges on the Rule. The Honorable Peter Messitte issued an opinion in the case of Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996), which involved a racial discrimination suit against Bowie State College. The plaintiff's attorneys learned that an employee of the college who was an advisor on race relations had left his job, and the attorneys interviewed the former employee, obtaining enough information to make the case. An Assistant Attorney General filed a motion in limine alleging a violation of Rule 4.2 and attorney misconduct. The court held that the attorneys were disqualified, and the testimony of the former employee was inadmissible. In another case, Davidson Supply Co., Inc. v. P.P.E., Inc, 986 F. Supp. 956 (D.Md. 1997), the Honorable Frederick Smalkin refused to disqualify plaintiff's counsel and to suppress evidence obtained from the former employee of the defendant.

Mr. Brault said that The Daily Record and the Sunpapers had editorials pertaining to the Rule 4.2 issues. The matter came to the Attorneys Subcommittee for the purpose of solving the problem of attorneys interviewing former employees of original parties in civil cases. Other issues arose, including the problem of the Rule interfering with the federal prosecution of drug crime

rings. M. Peter Moser, Esq., the chair of the ABA Ethics Committee, kindly assisted and educated the Subcommittee. At one point, Chief Judge Bell asked the Subcommittee to suspend its work on the Rule, because the matter was being taken up by the National Conference of Supreme Court Justices. This consensus of the highest judges in each state, and they hoped to formulate a uniform approach to the Rule 4.2 issue. Chief Judge Bell was concerned that Maryland should not take a position which would be in conflict with that approach.

Mr. Brault explained that a conflict did arise as a result of a federal law, the McDade Act,28 U.S.C. 530B, which had been passed making federal prosecutors subject to the ethical rules of the state in which the prosecutor was operating at the time. The U.S. attorneys wanted to exempt themselves from this law. The ABA worked on a compromise with the Department of Justice, but it did not succeed. The Subcommittee added a provision to Rule 4.2 to exempt federal and state prosecutors; however, the defense bar disagreed with this. One of the questions for today's discussion is if prosecutors should be exempted from the Rule insofar as it applies to the prosecution of federal crime.

Mr. Schenning told the Committee that he was the first assistant to the U.S. Attorney in Maryland. He noted that the language of Rule 4.2 is no problem as written. However, the proposed change of the word "party" to "person" has a profound impact on the way federal prosecutors conduct themselves. The relationship of federal prosecutors with federal agents is

different than the relationship of state's attorneys with police officers. In the state, police officers get search warrants and put their cases together. Then they go to the state's attorneys and ask for charges to be brought. More typically, federal prosecutors work closely with agents. The conduct of the agent is attributed to the prosecutor. The change from the word "party" to "person" would inhibit federal law enforcement from investigating many types of crimes involving individuals or groups who were represented by counsel. If the change is made, the Office of the U.S. Attorney is requesting that commentary be added exempting law enforcement authorities from the application of the Rule. If federal agents and prosecutors comply with the Constitution and with state law, then their conduct will not be viewed as running afoul of ethical standards.

Mr. Schenning said that the problem in the criminal context is that the person has the attorney shield him from legitimate law enforcement techniques. He cited the case of In re Criminal Investigation #13, 82 Md. App. 609 (1990), an opinion written by the Honorable Charles E. Moylan, Jr., in which the target of a hazardous waste investigation tried to restrain the State from talking to other employees of the organization. Judge Moylan rejected the argument, citing Rule 4.2 as a basis for moving forward. He said that the fact that an organization has an attorney should not preclude a prosecutor from conducting legitimate law enforcement functions. There could be no infiltration of the Communist Party or the Ku Klux Klan. With

the shield of being represented by an attorney, an organization could never be contacted. The concern of the U.S. Attorney's Office is the contacts with organizations through undercover agents. Just because a drug organization has an attorney should not prevent undercover methods. The danger is the ethical rules impacting on substantive law. The suggested change in the language of Rule 4.2 would lead to the problems. Mr. Schenning stated that his office prefers the Rule the way it is now.

Mr. Brault told the Committee that the ABA redraft of Rule 4.2 has changed the word "party" to the word "person." Mr. Moser had explained the change recommended by the ABA because the word "party" means that a lawsuit has been filed. An attorney who is negotiating a divorce settlement cannot talk to the client on the other side if the person has counsel. An insurance company cannot question the plaintiff without the knowledge of the plaintiff's attorney. The change to the word "person" affects the activity of the U.S. Attorney's office prior to indictment. Mr. Moser commented that the fact of the matter is that every court and the Ethics Commission has construed the word "party" to mean the word "person." There is no exception for criminal investigations. A great body of federal law exists. In some of the cases, including criminal cases, the word "party" means the word "person." He had sent out a report which describes the history of the Rule and explains the provisions of the ABA Rule. Mr. Schenning had pointed out that the U.S. Attorneys want to be able to advise FBI agents in the conduct of their investigations.

U.S. Attorney General Janet Reno felt that U.S. Attorneys should not be exempted from the Rule. The FBI agents typically handle the cases by following the orders of the U.S. Attorneys, in contrast with state prosecutors who do not control police investigations.

Mr. Moser expressed the view that an Assistant U.S. Attorney should have no greater leeway than other attorneys. It is a shame that the problem arises, because the changes to the Rule are otherwise positive, solving the problem presented by the Camden case. The McDade Act opened a can of worms. One possibility is go back to the original language of the Comment, but this is ambiguous. In some instances, government investigations are not subject to the Rules of Procedure. There has been some discussion about looking at the McDade Act again. The problem may be handled on a national basis.

After the lunch break, Mr. Wyda introduced himself to the Rules Committee and said that he also spoke for Ms. Forster, who had to leave the meeting. He said that he was speaking from the perspective of the federal Public Defender's Office. He had spoken with Mr. Karceski yesterday about Rule 4.2. Mr. Wyda wrote a letter in response to Mr. Schenning's letter. He supports the proposed clarification about not speaking to unrepresented persons. He expressed the opinion that it is dangerous to allow the charging process in the criminal context to determine when the protections of Rule 4.2 apply. This should not wait until the a complaint is filed. The Rule 4.2

protections should not be determined solely by when the U.S. Attorney's Office brings an indictment. Mr. Schenning had said that there is a change as to when the ethical rules impact on substantive law. Whatever the states require of attorneys applies also to the U.S. Attorney's Office, just as it applies to the Office of the Federal Public Defender. The U.S. Attorney's Office's complaint that Rule 4.2 provides protection to citizens of Maryland that goes beyond that provided by the Sixth Amendment is actually something to be valued. The U.S. Congress anticipated greater protections from the Rule. In the case cited by Mr. Schenning involving a plot to kill a judge, the covert contacts with represented individuals are not affected by whether the Rule uses the term "party" or "person." The case turns on whether or not the investigation of the plot to kill the judge relates to the subject of the representation or the matter for which the subject is represented by counsel.

Mr. Wyde noted that Mr. Moser had expressed the view that the change in the language of the Rule makes sense. Mr. Wyda urged the Rules Committee to be cautious. It is reasonable for the Maryland Rules to provide greater protections than minimal constitutional protections. Although public safety and law enforcement are important concerns, Congress wanted limitations on the U.S. Attorney's Offices and the Department of Justice, and provided for greater restraint than the Constitution provides.

Mr. Schenning gave the Committee the example of a physician being investigated for Medicare fraud. Although the physician

has not yet been charged, he or she knows about the investigation. When Mr. Schenning subpoenas the physician's records, the physician's attorney calls and says that he or she represents the physician. An undercover FBI agent may be talking with the physician, but the question is if the U. S. Attorney is allowed to proceed in that fashion, since the physician is represented. The concern is that if the U.S. Attorney introduces the record into evidence, and the physician is convicted, the physician could then file a grievance against the U.S. Attorney who had made contact with a represented person. Mr. Wyda remarked that there is a body of law which discusses this. If his client is the target of an investigation, and the U.S. agents talk to the client, this may elicit an incriminating statement. Mr. Wyda noted that his letter states that one can talk to a represented client. Mr. Schenning asked if his office could talk to a client who has been arrested and warned about his Miranda rights. Mr. Wyda responded that this is controlled by the Sixth Amendment. The obligations of the U.S. Attorney's Office begin when someone is charged. Mr. Schenning commented that the ethical rules should not be used as an advantage in an adversary proceeding. Mr. Wyda observed that Judge Moylan in the Criminal Investigation #13 case suggested that even if the judge thought that there was inappropriate ethical conduct, the remedy would be up to the appropriate disciplining body, but the evidence obtained could be admitted. Mr. Brault cautioned that after Judge Moylan's case, the Court of Appeals decided the cases of

Post v. Bregman, 349 Md. 142 (1998) and Son v. Margolius, 349 Md. 441 (1998). In both cases, the Court held that the Rules are not mere guidelines, but are statements of Maryland public policy which can be used in litigation. The Post case involved the unethical splitting of fees, and the Son case involved splitting a fee with a non-attorney. What would the Court say about not talking to someone's client?

Mr. Brault presented Rule 4.4, Respect for Rights of Third Person, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 4.4 to add a new section (b) and commentary, as follows:

Rule 4.4. Respect for Rights of Third Person.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that the lawyer knows violate the legal rights of such a person.

(b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know to be protected from disclosure by statute or by an established evidentiary privilege. If the lawyer nevertheless receives such information, the lawyer shall immediately terminate the communication. If the person entitled to enforce the protection

is represented by counsel in the matter, the lawyer shall advise such counsel of the disclosure and also shall advise any tribunal before which the matter is pending.

Cross reference: See Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996).

COMMENT

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.
>
> Third persons may possess information that is confidential under an evidentiary privilege of another person or under a law providing specific confidentiality protection to another person, such as trademark copyright or patent law. For example, present or former organizational employees or agents may have information protected by the attorney-client privilege or the work product doctrine of the organization itself. A lawyer must not knowingly seek to obtain such confidential information from a person who has no authority to waive the privilege. Regarding present employees of a represented organization, see also Rule 4.2 Comment.

Rule 4.4 was accompanied by the following Reporter's Note.

> The Subcommittee is recommending that a new section (b) be added to Rule 4.4. The first sentence pertains to communications by lawyers with third persons, such as former employees, to ensure that no confidential or privileged information is communicated. The remaining two sentences were drafted by Benjamin Rosenberg, Esq., and Alvin Frederick, Esq., of the Maryland Chapter, American college of Trial Lawyers, and they have requested that this be included to inform attorneys as to how to handle the situation when a non-client is about to reveal confidential information to an attorney.

Mr. Brault said that the issues with Rule 4.2 revolved around talking with former employees. With Mr. Moser's help, the

Subcommittee realized that Rule 4.2 covered represented persons, and since former employees are not represented, the appropriate Rule providing for former employees was Rule 4.4. The new language is in section (b). The situation in the Camden case was attorneys interviewing a former employee, which the court found violated the rights of the corporate defendant, Bowie State College. What is protected is any privilege created by statute or an established evidentiary privilege. The privileges of attorney-client, work product, and trade practices are protected. The Camden case involved work product and attorney-client privilege. When one interviews a third party, such as a former employee, one should not seek protected information. This comports with the holding in Camden. One of the attorneys in that case was upset that Judge Messitte applied the law of the Restatement of Law Relating to Lawyers, which was in the draft stage from the Uniform Laws Committee. The Restatement provided that an attorney can interview a former employee, but cannot extract privileged information. If a former director is involved in the case, no interview can be conducted. If a former employee is an eyewitness, the information is not privileged. To cover the case where an attorney obtained information that he or she did not know was privileged, the Subcommittee preferred the approach taken in Rule 4.4.

Mr. Klein asked if the last sentence pertains to the situation where the attorney accidently receives privileged information. Mr. Brault replied in the affirmative. The Vice

Chair asked about the last sentence of the Comment which provides that a lawyer must not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Mr. Brault responded that the privilege has to be that of the person, not the organization the person works for. The Vice Chair said that if this adds to the idea that one can ask about a privilege and if the person can waive it, this should go into the Rule itself. Mr. Moser agreed that it might be better in the text of the Rule. The Vice Chair remarked that this provision does not have to redrafted now. Mr. Brault added that the policy issue should be determined. This was added because attorneys have no way of knowing how the federal judges will treat this. The Rule can be redrafted.

Mr. Brault presented Rule 4.2, Communication With Person Represented by Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 4.2 to modify section (a) and to add new sections (b), (c), (d), as follows:

Rule 4.2. Communication With Person Represented by Counsel.

(a) In representing a client, a lawyer shall not communicate about the subject of

the representation with a ~~party~~ person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) The term "represented person" in the case of a represented organization denotes an officer, director, managing agent, or any agent or employee of an organization who supervises, directs, or regularly consults with the organization's lawyers concerning the matter or whose authority, act, omission, or statement in the matter may bind the organization for civil or criminal liability.

(c) In representing a client, a lawyer may communicate about the subject of the representation with an agent or employee of the opposing organization who is not a represented person, or with a former agent or employee, without obtaining the consent of the organization's lawyer. However, prior to communicating with such agent or employee, a lawyer shall make inquiry to assure that the agent or employee is not a represented person and shall disclose to the agent or employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization.

(d) This Rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in section (c) of this Rule are made to the government official to whom the communication is made.

Committee note: The changes in the text and comment to Rule 4.2, including substitution of the word "person" for "party" in section (a), are not intended to enlarge or restrict the extent of permissible law enforcement activities of government lawyers under applicable judicial precedent.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit communication with a ~~party~~ person, or an employee or agent of such a ~~party~~ person, concerning matters outside the representation. For example, the existence of a controversy between ~~a government agency and a private party, or between~~ two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification or legal authorization for communicating with ~~the other party~~ a represented person is permitted to do so. ~~Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.~~

[3] Communications authorized by law include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent holding either that the activity is permissible or that the Rule does not apply to the activity. When communicating with a represented criminal defendant, a government lawyer must comply with this Rule in addition to honoring the defendant’s constitutional rights.

[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order in

exceptional circumstances. For example, when a represented criminal defendant expresses a desire to speak to the prosecutor without the knowledge of the defendant's lawyer, the prosecutor may seek a court order appointing substitute counsel to represent the defendant with respect to the communication.

[5] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

OPTIONAL ADDITIONAL PARAGRAPH:

This Rule is not intended to enlarge or restrict law enforcement activities which are authorized and permissible under the Constitution and laws of the United States or Maryland.

[6] ~~In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.~~ If any agent or employee of ~~the~~ an organization is not a represented person as defined in paragraph (b), but is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f). In communicating with a current or former agent or employee of an organization, a lawyer must not seek to

obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Regarding communications with former employees, see Rule 4.4 (b).

[7] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of

counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in the matter. Paragraph (d) does not, however, permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the

resolution of disputes.

Rule 4.2 was accompanied by the following Reporter's Note.

> Section (a) is derived from current Rule 4.2 a, but the word "person" has been substituted for the word "party." This is a broader term encompassing more individuals, including persons involved in a potential lawsuit even before it is actually filed. A reference to a "court order" has been added. This was a suggestion of the ABA Ethics 2000 Commission to alert lawyers to the availability of judicial relief.
>
> Section (b) is new and is derived from Rule 4.2 (c) of the District of Columbia Rules of Professional Conduct. The term "represented person" has been substituted for the term "party," referring only to employees who have counsel.
>
> Section (c) is new and is derived from Rule 4.2 (b) of the District of Columbia Rules. The term "person" is used in describing an agent or employee, limiting the group of people to which this refers to those individuals who are not deemed to be represented by the organization's counsel, and not those who are not parties.
>
> Section (d) is new and is substantially the same as section (d) of the District of Columbia Rules of Professional Conduct. Comment from the D.C. Rules also has been added.

Mr. Titus said that he was not in agreement with the position of the U.S. Attorney's Office. He hypothesized a case where the U.S. Attorney's Office is investigating an accident where someone was driving while intoxicated. The attorney for a civil plaintiff who was injured in the accident cannot hire an investigator to talk to the driver, but the investigator for the

U.S. Attorney can go talk to the driver at a bar. He inquired as to why the U.S. Attorneys should be able to do what the lawyer for a civilly injured plaintiff cannot do. Mr. Schenning replied that this would not happen that way. When the employees of his office investigate a physician for Medicare or Medicaid fraud, an incriminating statement by the physician is used to prove intent, which is difficult to prove in white collar crime cases. The Vice Chair expressed the view that a civil case involving money is different from a case where a crime may have been committed, jeopardizing the health, safety, or welfare of the public.

Mr. Brault referred to Comment [3]. The Vice Chair remarked that the black letter law referred to in the Comment may conflict with the Rule itself. Mr. Brault said that the Comment appears to provide that communications pre-indictment are authorized by law, and communications post-indictment are subject to this Rule. This was an attempted compromise. The Vice Chair noted that the word “may” in the first sentence would mean that Mr. Schenning’s example of talking to the physician would be permitted. Mr. Brault commented that there is an optional additional paragraph on the next page of the Rule. The Vice Chair noted that this is in the Comment, not the Rule. Mr. Brault observed that the Comment is the official interpretation of the Rule. The Vice Chair pointed out that it appears to contradict the Rule. Mr. Brault noted that the former ethics code, the Code of Professional Responsibility, had a provision which was similar to this. Mr. Moser suggested that the word “may” be deleted from

the first sentence of Comment [3]. He cited the parallel paragraph to Comment [3] from Report 122B of the American Bar Association Standing Committee on Ethics and Professional Responsibility Commission on Evaluation of the Rules of Professional Conduct as submitted to the ABA House of Delegates in August, 1999. The paragraph reads as follows: "Communications authorized by law include ... investigative activities of lawyers representing government entities prior to an arrest or filing of a formal criminal charge or civil complaint in the matter, when there is applicable judicial precedent that either has found the activity permissible under this Rule or has found this Rule inapplicable. When communicating with a represented criminal defendant, a government lawyer must comply with this Rule in addition to honoring the defendant's constitutional rights. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permitted by this Rule."

Mr. Brault said that the Subcommittee was of the opinion that there should be some uniform language in Rule 4.2 interpreting case law. The Vice Chair questioned whether it is premature to change the Maryland version of the Rule, but Mr. Brault responded that no other entity is working on it. Ms. Azrael commented that the conflict among the federal judges is being used as a sword against plaintiff's attorneys. In discovery, information is being hidden. A rule is needed.

Mr. Schenning expressed his concern that a prosecutor's successful investigation may result in an allegation that the prosecutor violated the Rule. The Vice Chair observed that the first sentence of Comment [3] is appropriate. Mr. Schenning pointed out that the second sentence is ambiguous. The Vice Chair said that the second sentence is confusing in juxtaposition with the first sentence. The Rule does not cover honoring constitutional rights. Mr. Titus noted that that pertains to anything civil or criminal. Ms. Nichols observed that statutes allow the federal government to proceed civilly in the law enforcement context. A civil action brought by the government should follow the same rules as in a criminal action. The Vice Chair said that the law enables the government to bring civil proceedings, allowing the U.S. Attorney to investigate even against a represented person. Ms. Nichols commented that civil and criminal proceedings are parallel. The only information which cannot be shared is the information before the Grand Jury. The investigation techniques are the same.

The Vice Chair remarked that the civil area is a problem. Why should the federal government be treated differently from a civil plaintiff? Mr. Moser said that the Rule does not apply in ordinary cases where the government is a party. It applies in a case where there is a civil penalty, such as in an oil spill or tax case. If this were limited to criminal matters, the government would be more inclined to charge criminally. This is important in the tax area. The Vice Chair commented that in the

tax area, there are civil tax suits. Some people believe that a criminal tax case cannot be won by the government. Ms. Nichols remarked that under the False Claims Act in Maryland, a physician can be charged with Medicaid fraud. The physician knows about the investigation and retains a lawyer. A current employee of the physician comes to the U.S. Attorney's Office during the investigation stage before a complaint is filed. Ms. Nichols expressed the opinion that her office should be able to use the information from the employee. Mr. Wyda responded that they can use that information. Mr. Titus agreed, but noted that sending in a wired FBI agent is a problem. Mr. Wyda expressed the view that the Rule should not distinguish civil and criminal cases, because the lines blur. Someone may be charged with civil fraud, and then if the person is uncooperative, he or she may be charged with criminal fraud. The U.S. Attorney's Office should have the same standards as everyone else. Mr. Schenning reiterated his concern that an undercover person would have to stop the investigation if the subject of the investigation declares that he or she has an attorney. He asked that Rule 4.2 not be changed because it may interfere with legitimate law enforcement proceedings authorized by law.

The Vice Chair commented that the result of the Rule should not be different when someone is in Maryland. She suggested that Comment [3] should contain the language of the ABA draft. Mr. Moser stated that this language has been widely circulated and seems to be widely supported. The Vice Chair said that the ABA

supports the notion that the federal government in both civil and criminal cases can approach a represented defendant prior to the indictment. Mr. Moser remarked that the case law can come from each jurisdiction. The Vice Chair asked about the ABA language, and Mr. Moser replied that it is suitable if case law allows. Mr. Brault commented that the cases interpret a "party" as a "person." Mr. Moser noted that in some cases, the term "party" requires that the proceeding has been started. Regardless of that, Rule 4.2 does not apply to criminal investigations and does not turn on the use of the word "party" or the word "person." Ms. Ogletree pointed out that a body of case law exists, and if the Rule is changed, no case law would apply.

Mr. Sykes observed that the U.S. Attorney has expressed satisfaction with the current Rule. An additional paragraph could be added to the Rule to preserve the status quo. The language could be similar to: "The Rule is not intended to enlarge or restrict the ethical obligations of law enforcement attorneys as presently exist in Maryland." Mr. Brault said that a sentence could be added to Comment [3] which would read: "The Rule is not intended to enlarge or restrict the ethical obligation of law enforcement attorneys as authorized by Maryland law." The Vice Chair stated that she was uncomfortable deciding this question with her present knowledge. The revision has the potential to change law enforcement investigations. If the Rule is not changed, there is a potential ethical violation or the exclusion of evidence.

Mr. Titus suggested that the word “party” not be changed to the word “person” until the ABA finalizes its changes. Mr. Sykes expressed the opinion that the word “party” should be changed to the word “person.” This is not intended to change the current situation. Mr. Karceski observed that there has been no resolution as to what attorneys are permitted to do under this Rule. Mr. Schenning again referred to the ethical complaint problem. Judge Kaplan pointed out that section (c) of the Rule is a problem. It is not clear how far down the line one can go. Mr. Brault stated that some action should be taken. Lawyers in employment cases need some guidance as to how to proceed. The Rule should provide that communications authorized by law include investigative activities. Mr. Sykes suggested that the civil side of the Rule should be changed, but not the criminal side. In terms of the U.S. Attorney’s problems, the Rule should be status quo. Changing the word “party” to the word “person” should not change the status quo.

The Vice Chair said that the change could be made in the Rule to civil cases, and a sentence could be added which provides that the word “party” remains for criminal cases. Ms. Nichols pointed out the problem of cases filed under the False Claims Act. Mr. Brault expressed the view that segregating criminal and civil cases is not a good idea. There is no precedent for this. He felt that Mr. Sykes’ suggested language to Comment [3] would be preferable. Mr. Sykes suggested that his proposed language could contain a reference to “criminal or civil law enforcement

proceedings." Ms. Nichols noted that there is no Sixth Amendment right for civil defendants. The Vice Chair asked what the point is of the second sentence in Comment [3]. Ms. Nichols expressed the view that this sentence is not necessary. Mr. Titus suggested that Mr. Sykes' proposed language should be added in place of the second sentence. Mr. Brault reiterated that the new language would be: "Nothing in this Rule is intended to enlarge or restrict the ethical obligations of lawyers engaged in law enforcement activities which are authorized." The Committee agreed by consensus to these changes.

Ms. Azrael pointed out that Comment [1] is supposed to level the playing field, but it is not level in employment law. In Equal Employment Opportunity cases, organizations often refuse to identify the status of their employees. A lawyer on the other side often cannot tell if an employee is current or former. She suggested that language be added to the Rule which would provide that an attorney acting on behalf of an organization has a duty to identify the status of any officer, director, or managing agent. Mr. Brault said that while discovery problems do exist, the ethical rules cannot mandate this identification procedure. Mr. Titus expressed the opinion that some action should be taken to remedy this. He suggested that the form interrogatories could be modified to address this situation. Ms. Azrael noted that as a fallback, a note could be added to Comment [1] which would provide that the Rule seeks to promote the fair exchange of necessary information. Mr. Brault agreed with Mr. Titus that the

form interrogatories could address this.

Mr. Brault commented that there is no way to handle an employment case without interviewing former employees. The Vice Chair questioned as to how the Rule would help if the lawyer does not know the status of potential witnesses. Mr. Bowen remarked that the lawyer could ask the person being interviewed about his or her employee status. Mr. Brault said that the Rule would be redrafted to adopt the suggestions made today. Mr. Moser will then look it over. Mr. Titus added that then it can be sent to the Style Subcommittee.

The Vice Chair adjourned the meeting.