COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, 100 Community Place, Crownsville, Maryland, on January 3, 1997.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
James J. Lombardi, Esq.
Anne C. Ogletree, Esq.
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
Sen. Norman R. Stone
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Lynn K. Stewart, Esq., Baltimore City, State's Attorney Office
Gary Bair, Esq., Office of the Attorney General
Martin B. Lessans, Attorney Grievance Commission
Melvin Hirshman, Bar Counsel, Attorney Grievance Commission
David D. Downes, Chairman, Attorney Grievance Commission
James E. Carbine, Esq.
Stewart Jay Robinson, Esq.

The Chairperson convened the meeting, wishing everyone a Happy New Year. He said that after the last meeting, the Vice-Chairperson

had suggested that the Rules Committee meet at an evening dinner and present a gift to the Honorable Alan M. Wilner, former chairperson of the Committee, to honor his years served on the Committee. It was too difficult to schedule this at the time of the holidays, so a tentative date of April or May is being planned. Mr. Howell had pointed out that this year is the 50th Anniversary of the Rules Committee. The Chairperson had spoken with the Administrative Office of the Courts (AOC) about getting some financial aid for the anniversary dinner to which all former Rules Committee members would be invited. At this dinner, Judge Wilner would be honored. The AOC has not yet committed to any funding.

The Chairperson told the Committee that each of them should have been given a copy of the Final Report written by the Commission on the Future of Maryland Courts. One item in this Report which is of concern to the Rules Committee is a suggestion by the Commission that a family division of the circuit courts be created by rule, not by statute. James J. Cromwell, Esq., Chairman of the Attorney Grievance Commission, anticipates that there will be legislation in the upcoming session of the General Assembly, as there has been in the past few years, to create this family division. The Commission feels that this is better done by rule. The Reporter said that this matter could be sent to the General Court Administration Subcommittee. The Chairperson stated that if anyone has any ideas on this, he or she should contact either the Reporter, the Vice-

Chairperson, the Assistant Reporter, or him. Mr. Cromwell will argue before the legislature that the family division be created by rule and not by statute. The fear of the legislature is that the Rules Committee will not give the family division priority. The circuit court judges who are in favor of the family division prefer that it be created by rule.

Mr. Sykes commented that it might be better to first get an informal judgment from the Court of Appeals as to the feasibility of a family division, because if the Court is against the idea, the Subcommittee would have done its work for nothing. The Chairperson agreed that it is a good idea to find out the opinion of the Court of Appeals. He said that he did not think that the Court was opposed to the idea of a family division created by rule. Former Chief Judge Robert Murphy supported the concept when he testified in the legislature.

Mr. Brault remarked that he had spoken with Mr. Cromwell, who is hoping to report to the Legislature that the matter is under study by the Rules Committee which would fend off legislative action. Mr. Brault moved that as a method of preparing a rule to provide for the operation of a family division in the circuit courts, the matter should be submitted by the Chairperson to the appropriate subcommittee. The motion was seconded. Mr. Titus inquired if this motion is intended as an answer to the policy question of whether to have a family division. The Chairperson answered that it is not an

answer to the policy question, it is merely a study of the issue. Mr. Sykes asked why it should be studied if there has not been a determination by the Committee that it is a good idea. The Chairperson responded that it is worth presenting a rule for consideration by the Rules Committee. The positive changes happening in the circuit courts now may obviate the need for a family division. Some of the circuit court judges are reporting that because of differentiated case management, the cases are being scheduled so fast that the parties are not ready to try them. The Chairperson called the question on Mr. Brault's motion, and it carried on a majority vote.

The Reporter said that the next item on the agenda is an additional one. Copies of Rule 11-501 have been distributed at the meeting today. The Reporter presented Rule 11-501, Termination of Parental Rights and Related Adoption Proceedings in the Juvenile Court, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 11 - JUVENILE CAUSES

CHAPTER 500 - TERMINATION OF PARENTAL RIGHTS

AMEND Rule 11-501 to require the clerk to record and index judgments of adoption in the circuit court, as follows:

Rule 11-501. TERMINATION OF PARENTAL RIGHTS AND RELATED ADOPTION PROCEEDINGS IN THE

(a) Applicability of Rule

This Rule applies to actions in which the juvenile court is exercising jurisdiction pursuant to Code, Courts Article, §3-804 (a)(2).

(b) Definition

The word "guardianship" as used in this Rule has the meaning stated in Code, Family Law Article, §5-301.

(c) Applicability of Titles 1, 2, 5, and 9

The Rules in Titles 1, 2, and 5 and Chapter 100 of Title 9 apply to actions under this Rule, except as otherwise provided by law or ordered by the court.

(d) Petition

A proceeding for adoption or guardianship shall be initiated by the filing of a petition in a new action, separate from any other proceedings involving the child who is the subject of the adoption or guardianship proceeding. In addition to complying with the requirements of Rule 9-103, the petition shall state the basis for the juvenile court's jurisdiction and the name of the court and case number of the proceeding in which the child was adjudicated a child in need of assistance.

(e) Consolidation

A proceeding for adoption or guardianship may be consolidated with, or severed from, any other case pending in the juvenile court involving the child who is the subject of the proceeding, as justice may require.

(f) Hearing -- Before Whom Held

All hearings conducted pursuant to this

Rule shall be held before a judge.

(g) Judgments of Adoption -- Recording and Indexing

The clerk shall record and index each judgment of adoption entered by the juvenile court on or after October 1, 1996 in the adoption records of the circuit court for the county where the judgment was entered.

Committee note: Judgments of adoption under this section include judgments entered under former Rule 923.

Source: This Rule is new.

Rule 11-501 was accompanied by the following Reporter's Note.

Proposed new section (g) has been drafted in response to a comment by the Honorable Howard S. Chasanow that all judgments of adoption -- including those entered by the juvenile court -- should be recorded and indexed in the circuit court.

The amendment conforms the rule to existing practice in several jurisdictions and provides statewide uniformity in recording and indexing judgments of adoption entered by the juvenile court. So that all judgments that have ever been entered by the juvenile court are included, the section backdates to October 1, 1996 the clerk's obligation to record and index these judgments.

The Reporter explained that this final version of the Rule came about as a result of the conference at the Court of Appeals on December 9, 1996. Section (f) was changed by the Court to provide that all hearings are to be heard by a judge. The Rule, which does not include section (g), became effective on January 1, 1997. The

Honorable Howard S. Chasanow, a judge on the Court of Appeals, had requested the addition of section (g). Mr. Shipley had stated that in his county, the clerk's office is already following the mandate of section (g), and this is also true in some other counties. The problem of the retention schedule is being resolved. The new section provides that all of the juvenile court adoptions are to be indexed with the regular adoption records, and this is to be backdated to any adoptions granted by the juvenile court as of October 1, 1996. Former Rule 923, the predecessor to Rule 11-501, was rescinded as of December 31, 1996. The Committee note that follows section (g) refers back to the judgments entered under former Rule 923. Mr. Johnson, who is chair of the Juvenile Subcommittee, is in agreement with the proposed amendment to Rule 11-501. Mr. Lombardi asked if this includes termination of parental rights cases, and Mr. Shipley replied that it is not necessary to include them. The revised retention schedule includes both types of cases, and the adoption case refers back to the termination of parental rights case. Mr. Hochberg questioned as to how the juvenile adoption cases are indexed. Mr. Shipley answered that they are indexed according to the names of the natural and adoptive parents as well as the name of the child. The Reporter asked about agency cases, and Mr. Shipley explained that those case are indexed according to the name of the agency, also. The Chairperson inquired if there is any danger inherent in section (g), and Mr. Shipley responded that there is no

danger. Mr. Shipley commented that fifty years from now it will be simpler to look in one place for the information, rather than having to check both the juvenile and adoption records. Mr. Johnson suggested that there could be different identifications, but Mr. Shipley said that the cases are cross-referenced, not identified differently. In his county, there is an automated case number which cannot be changed, so the file contains a notation as to whether the adoption is one in juvenile court or is a regular adoption. Mr. Hochberg inquired if this is standard throughout the State, and Mr. Shipley answered that it is not standard.

Mr. Johnson moved to adopt the changes to Rule 11-501, the motion was seconded, and it passed unanimously.

The Chairperson asked if the minutes of the November 15, 1996 Rules Committee meeting which had been distributed to members of the Committee met with the Committee's approval. Mr. Klein had one change on page 20. He suggested that the third sentence on that page be changed to read as follows: "Mr. Klein commented that, according to the minutes of the September Rules Committee meeting, Mr. Brault had noted that scheduling orders often require disclosure of rebuttal experts." The Committee agreed by consensus to this change. Mr. Klein moved to approve the minutes as amended, the motion was seconded, and the minutes were approved unanimously.

The Reporter told the Committee that at the conference with the Court of Appeals on December 9, 1996, the Court modified the Contempt

Rules and then adopted them, and it adopted the 133rd and 135th Reports to the Court. The Chairperson extended his thanks to Mr. Bowen, who came to the December 9th conference to talk about the garnishment rule, which was approved with no comment by the Court. The Reporter said that some of the new Rules are effective on July 1, 1997, and some went into effect on January 1, 1997. The latter Rules will be published in the January 17, 1997 issue of The Maryland Register. A notice has been published in The Daily Record which provides that copies of the Rules which went into effect on January 1, 1997 are available from the Rules Committee office.

Agenda Item 1. Consideration of a proposed amendment to Appendix: Forms, Form Interrogatories, Form No. 2 - General Definitions

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Mr. Titus presented Form No. 2, General Definitions, of the Form Interrogatories.

MARYLAND RULES OF PROCEDURE

APPENDIX: FORMS

FORM INTERROGATORIES

AMEND Form No. 2 - General Definitions, to correct an apparent omission, as follows:

Form No. 2 - General Definitions

**Definitions**

In these interrogatories, the following definitions apply:

(a) **Document** includes a writing, drawing, graph, chart, photograph, recording, and other data compilation from which information can be obtained, translated, if necessary, through detection devices into reasonably usable form. (Standard General Definition (a).)

(b) **Identify**, **identity**, or **identification**, (1) when used in reference to a natural **person**, means that **person*s** full name, last known address, home and business telephone numbers, and present occupation or business affiliation; (2) when used in reference to a **person** other than a natural **person**, **[**includes a description of the nature of the **person]** means that **person's** full name, a description of the nature of the **person** (that is, whether it is a corporation, partnership, etc. under the definition of **person** below), and the **person*s** last known address, telephone number, and principal place of business; (3) when used in reference to any **person** after the **person** has been properly **identified** previously means the **person's** name; and (4) when used in reference to a **document**, requires you to state the date, the author (or, if different, the signer or signers), the addressee, and the type of **document** (e.g. letter, memorandum, telegram, chart, etc.) or to attach an accurate copy of the **document** to your answer, appropriately labeled to correspond to the interrogatory. (Standard General Definition (b).)

(c) **Person** includes an individual, general or limited partnership, joint stock company,

> unincorporated association or society, municipal or other corporation, incorporated association, limited liability partnership, limited liability company, the State, an agency or political subdivision of the State, a court, and any other governmental entity. (Standard General Definition (c).)
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> **Committee note:** These definitions are designed to be used in virtually all cases. In order to flag the use of a defined term in the actual interrogatories and alert the responding party to the need to consult the definition, defined terms have been printed in bold type.

Form No. 2 was accompanied by the following Reporter's Note.

> The proposed amendment to this form corrects an apparent omission in the definition of "identify, identity, or identification." The amendment makes clear that the identification of any person -- whether or not a natural person -- must include that person's full name.

Mr. Titus said that in section (b) the language "means that person's full name, a description of the nature of the person" was added after a comment from Richard G. McAlee, Esq., who had pointed out that this language had been omitted from Form No. 2. Mr. Titus moved that Form No. 2 be approved as amended, the motion was seconded, and it carried unanimously.

Agenda Item 2. Consideration of proposed rules changes concerning Computer-Generated Demonstrative Evidence and Electronic Documentary Evidence: New Rule 2-504.3 (Computer-Generated Evidence -- Pretrial Procedures and Preservation), Amendment to Rule 2-504 (Scheduling Order), Amendment to Rule 2-504.1 (Scheduling Conference), Amendment to Rule 4-263 (Discovery in Circuit Court), and Amendment to Rule 4-322 (Exhibits)

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James E. Carbine, Esq., who is a consultant to the Visual and Electronic Evidence Subcommittee, presented Rule 2-504.3, Computer-Generated Evidence -- Pretrial Procedures and Preservation, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

ADD new Rule 2-504.3, as follows:

Rule 2-504.3. COMPUTER-GENERATED EVIDENCE-- PRETRIAL PROCEDURES AND PRESERVATION

(a) Computer-Generated Evidence

"Computer-generated evidence" means computer-generated data, a computer generated illustration, a computer simulation, and electronically-imaged documentary evidence, as those terms are defined in this subsection. With respect to section (f) of this Rule and Rule 4-322 (b), "computer-generated evidence" also means a computer-generated depiction, animation, or other presentation used solely for argument.

Committee note: The definition of "computer-generated evidence" is not intended to encompass routine videotapes or audiotapes; however, "computer-generated evidence" purposefully has been defined broadly to allow for future technological changes.

(1) "Computer-generated data" means any evidence, prepared in anticipation of litigation or for trial, that is stored electronically or is generated from information that is stored electronically, other than a computer-generated illustration, a computer simulation, or electronically-imaged documentary evidence. Computer-generated data may be used as substantive evidence or as a basis for opinion testimony of an expert in accordance with Rule 5-703.

(2) "Computer-generated illustration" means a computer-generated aural, visual, or other sensory aid, including a computer-generated depiction or animation of an event or thing, that is used to assist a witness by illustrating the witness's testimony and is not used as substantive evidence.

(3) "Computer simulation" means a mathematical program or model that, when provided with a set of assumptions and parameters, will formulate a conclusion in numeric, graphic, or some other form. A computer simulation may be used as substantive evidence or as a basis for opinion testimony of an expert in accordance with Rule 5-703.

(4) "Electronically-imaged documentary evidence" means the image of any document that has been electronically imaged for purposes of presentation at trial, other than computer-generated data, a computer-generated illustration, or a computer simulation. Electronically-imaged documentary evidence may be used as substantive evidence or as a basis for opinion testimony of an expert in accordance with Rule 5-703.

Cross reference: For the meaning of "document," see Rule 2-422 (a).

(b) Notice

Unless the computer-generated evidence is to be used solely for the purpose of argument, any party intending to use computer-

generated evidence at trial for any purpose, including impeachment and rebuttal whenever practicable, shall file a written notice that:

(1) contains a descriptive summary of the computer-generated evidence the party intends to use, including (A) reference by rule number to the definitional subcategory of computer-generated evidence intended to be used, (B) a description of the subject matter of the computer-generated evidence, and (C) a statement of what the computer-generated evidence purports to prove or illustrate;

(2) is accompanied by a written undertaking that the party will take all steps necessary to (A) preserve the computer-generated evidence and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (B) comply with any request by an appellate court for presentation of the computer-generated evidence to that court; and

(3) is filed within the time provided in the scheduling order or no later than 90 days prior to trial if there is no scheduling order.

(c) Automatic Disclosure; Additional Discovery

Within five days after service of the notice required by section (b) of this Rule, the proponent shall make the computer-generated evidence available to opposing parties. Notwithstanding any provision of the scheduling order to the contrary, the filing of a notice of intention to use computer-generated evidence entitles each opposing party to a reasonable period of time to discover any relevant information needed to oppose the use of the computer-generated evidence before the court holds the hearing provided for in section (e) of this Rule.

(d) Objection

Not later than 60 days after service of the notice required by section (b) of this Rule, a party may file any then-available objection that the party has to the use at trial of the computer-generated evidence and shall file any objection that the party has to the authenticity of the computer-generated evidence. The mandatory objection to authenticity is waived if not so filed, unless the court for good cause orders otherwise.

(e) Hearing and Order

If an objection is filed in accordance with section (d) of this Rule, the court shall hold a pretrial hearing to rule on the objection. If the hearing is an evidentiary hearing, the court may appoint an expert or other person that the court deems necessary to enable it to rule on the objection, and the court may assess against one or more parties the reasonable fees and expenses of the court-appointed witness. In ruling on the objection, the court may determine whether any modification to the computer-generated evidence

may be required or may impose other conditions relating to its use at trial. The court's ruling on the objection shall control the subsequent course of the action. At trial, (1) the proponent may, but need not, present any evidence that was presented at the hearing on the objection, and (2) the party objecting to the evidence is not required to re-state an objection made in writing or at the hearing in order to preserve the objection for appeal.

(f) Preservation of Evidence for Record on Appeal

As a condition of the proffer or use of computer-generated evidence at any pretrial or trial proceeding, the party proffering or using the computer-generated evidence shall (1) preserve it and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence to an appellate court upon request.

Committee note: This section requires the proponent of computer-generated evidence computer-generated evidence to reduce the computer-generated evidence to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence and the technology available for preservation of that computer-generated evidence. No special arrangements are needed for preservation of computer-generated evidence that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer-generated evidence. However, when the computer-generated evidence involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence must make other arrangements for preservation of the computer-generated evidence and any subsequent presentation of it that may be

required by an appellate court.

Cross reference: For the shortening or extension of time periods set forth in this Rule, see Rule 1-204.

Rule 2-504.3 was accompanied by the following Reporter's Note.

> Proposed new Rule 2-504.3 reflects several policy determinations by the Rules Committee. The Committee believes that "computer-generated evidence" ("CGE") as that term has been defined in this Rule can be powerful and outcome-determinative. Pretrial disclosure of CGE, early judicial intervention with respect to a determination of its authenticity, and appropriate preparations for the preservation of CGE for appellate review are essential features of this Rule.
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> The Visual and Electronic Evidence Subcommittee debated at length the issue of what CGE should comprise. Under section (a), CGE means "computer-generated data, a computer-generated illustration, a computer simulation, and electronically-imaged documentary evidence," as those terms are defined in subsections (a)(1), (2), (3), and (4), respectively. If a party intends to use any of the four types of CGE at trial for a purpose other than solely for argument, the notice requirement of section (b), the automatic disclosure requirement of section (c), and the evidence preservation requirement of section (f) are triggered. In order to trigger the evidence preservation requirement of section (f) -- but not to trigger the notice and disclosure requirements of sections (b) and (c) -- the definition of CGE set forth in section (a) also includes, with respect to evidence preservation requirements, computer-generated depictions, animations, and other presentations used solely for argument.
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> Under section (b), a party intending to use CGE at trial for any purpose other than argument must file a written notice of that intention within the time allowed under subsection (b)(3). The notice must state by rule number the definitional subcategory of CGE. This requirement, together with the automatic disclosure requirement set forth in

section (c), assists opposing parties in making informed decisions with respect to the extent of discovery needed and whether to file an objection. For example, CGE that is a computer simulation will often be more closely examined than CGE that cannot be used as substantive evidence or CGE that is merely an unmodified electronic image of other clearly-admissible evidence. Subsection (b)(1) also requires that the notice contain descriptive information concerning the CGE -- its subject matter and a statement of what it purports to prove or demonstrate. Subsection (b)(2) requires that a written undertaking be filed with the notice, stating that the party will take all necessary steps to preserve the CGE for appeal and, upon request, present it to an appellate court. The undertaking requirement highlights, at an early stage in the proceedings, the obligation of the proponent of CGE to preserve and present it in accordance with section (f).

Under section (c), after a party files a notice of intention to use CGE, the proponent must automatically make the CGE available to opposing parties and the opposing parties have a reasonable period of time to conduct discovery of any relevant information needed to oppose the use of the CGE. The additional discovery allowed under this subsection is not limited to information pertaining to the authenticity of the CGE -- it may also include information relevant to opposition of the use of CGE on other grounds.

Under section (d), any objection to the use of CGE on the grounds of authenticity must be filed no later than 60 days after service of the notice required by section (b). Objections on the grounds of authenticity are waived unless timely made in accordance with this Rule. Objections on other grounds, such as relevancy, may not be capable of pretrial determination and, therefore, may be made at any appropriate time, including at the time of filing an objection on the ground of authenticity, with a motion in limine, or during the trial.

A cross reference to Rule 1-204 (Motion to Shorten or Extend Time Requirements) follows the Rule. The Committee believes that the complex technical issues that arise with respect to some CGE may preclude adherence to strict timetables in some cases.

The filing of an objection pursuant to section (d) triggers a pretrial hearing under section (e). If the court conducts an evidentiary hearing, it may appoint experts or other persons to assist the court with the assessment of the CGE. Because the Subcommittee was concerned that disparate resources of the parties could lead to the use of CGE that does not meet even minimum standards of authenticity, a provision is included in section (e) that allows the court to assess among the parties the cost of fees and expenses of court-appointed expert witnesses. Section (e) also includes provisions that allow the court the option of ordering modification to the CGE or imposition of conditions to the use of the CGE, rather than outright rejection of CGE. Although the Rule allows a judge to order curative measures with respect to the CGE, there is no requirement or duty imposed on the judge to do so. Section (e), using language borrowed from Rule 2-504.2 (c), states that the court's ruling on the objection controls the subsequent course of the action. At trial, the parties are not required to re-litigate the issue of authenticity, but neither are they precluded from introducing evidence relevant to the CGE's authenticity. Also, a party who filed an objection under section (d) of this Rule is not required to restate that objection at trial.

Section (f) requires the proponent of CGE, as a condition of its proffer or use at any pretrial or trial proceedings, to preserve and furnish the CGE to the clerk in a manner suitable for transmittal as a part of the record on appeal and to comply with any request by an appellate court to have the CGE presented to the appellate court. A Committee note describes acceptable methods of preservation.

The Subcommittee believes that the preservation issue will become less of a problem after this Rule is adopted because vendors of CGE will include preservation of the CGE as part of the package they sell. The Subcommittee intentionally omitted from the Rule any mention of sanctions if a party fails to properly preserve CGE for appeal. If the failure becomes apparent at the trial court level, the implicit sanction is that the trial judge will prohibit use of the CGE because, under section (f), preservation of the CGE is "a condition of" its use. If the failure becomes apparent at the appellate level, the appellate court can order appropriate discretionary consequences in accordance with Rule 1-201 (a).

Because this is a Title 2 Rule, it is applicable only to civil cases, in a circuit court. The Subcommittee considered, and rejected, a comparable Title 4 Rule applicable to criminal proceedings. The Subcommittee believes that such a rule is not feasible because of (1) the time constraints that exist in criminal proceedings as a result of the defendant's Constitutional right to a speedy trial and Rule 4-271 (a), (2) the Constitutional issues surrounding mandatory disclosures from a criminal defendant, and (3) a process of discovery in criminal proceedings that does not contemplate a procedure as detailed as the approach set forth in proposed new Rule 2-504.3. However, the Subcommittee does recommend amendments to Rule 4-263 with respect to disclosure of CGE and to Rule 4-322 with respect to preservation of CGE.

No changes are recommended to the Title 3 Rules. The use of CGE in the District Court, at this time, is not a common occurrence, although the Subcommittee recognizes that with advances in technology, CGE in the form of affordable "canned" programs depicting automobile accidents, bodily injuries, etc. could become more prevalent in the District Court. However, given the limited jurisdiction of the District Court, the volume of cases heard, the time constraints on trials, the

> absence of jury trials, and the limited discovery available, amendments to the Title 3 Rules with respect to CGE are not recommended at this time.
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> The Subcommittee also considered the evidentiary issues raised in a Memorandum from Professor Lynn McLain dated June 6, 1996 (included in the materials for the September 6, 1996 meeting of the Rules Committee). The Subcommittee believes that the Title 5 Rules in their current form are sufficient to handle CGE issues. The Subcommittee suggests that CGE evidentiary issues, such as foundation requirements and hidden hearsay problems, should be the subject of legal and judicial educational programs.
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> The Subcommittee has considered recommendations as to jury instructions pertaining to CGE and whether Rules 2-521 and 4-326 should be amended to specify the circumstances under which CGE may be taken to the jury room. A memorandum concerning those topics is attached. (See Appendix 1).

Mr. Carbine explained that the changes to the Rule were drafted by the Vice-Chairperson, and she would explain them. The Vice-Chairperson noted that the first change to the Rule is in section (b). The words "whenever practicable" were added to provide an "escape valve" with respect to impeachment or rebuttal evidence. The major difference in the revised version is the change in emphasis as to when an objection is filed. Section (d) provides that: "[n]ot later than 60 days after service of the notice required by section (b), a party may file any then-available objection that the party has to use at trial ... and shall file any objection that the party has to the authenticity of the computer-generated evidence."

Gary Bair, Esq., Counsel to the Criminal Appeals Division of the Office of the Attorney General, who is a consultant to the Visual and Electronic Evidence Subcommittee, said he had a style question about section (b). He inquired as to what part of the Rule the phrase "unless the computer-generated evidence is to be used solely for the purpose of argument" modifies. The Reporter commented that the language "whenever practicable" may be too liberal. The Vice-Chairperson remarked that it would be up to the judge to decide, but she agreed that there are style problems with the Rule. The Chairperson asked if the first sentence of section (b) could begin with the language, "[A]ny party intending to use...". The Vice-Chairperson replied that that would not be sufficient, because if someone is presenting the case in chief, there is no excuse for not filing the written notice. Mr. Sykes pointed out that except for impeachment and rebuttal purposes, the notice is mandatory. The Chairperson observed that this could present a problem for the trial judge. An attorney may have known for several months that he or she will use a computer simulation. The judge gives instructions to the jury, then one party shows up with a computer screen. Most trial judges will ask if the party showed the computer screen to opposing counsel. If it had not been shown, the jury would not be allowed to see it. This is the safeguard to deal with sneaky attorneys. To what extent can the Rule handle this? Mr. Klein responded that a typical "Power Point" software presentation, which is often used in

trials, is merely a glorified electronic slide projector. The Subcommittee did not think people would be foolish enough to put a scientific experiment in front of the jury at the end of the case. What was contemplated was something like a visual aid such as a Power Point slide presentation to summarize the case, not bringing a trojan horse in front of the jury. The Chairperson said that the party who does not want the computer presentation has the right to ask the judge to exclude it. The judge will not want to stop the case to resolve this.

The Vice-Chairperson suggested that a Committee note be added which would provide that this section does not obviate the need to disclose the evidence to counsel. Mr. Carbine commented that the reason section (b) was put into the Rule was because argument was included as part of the definition of computer-generated evidence. The Subcommittee felt that final argument was not regulated by rule. Mr. Klein observed that final argument is not evidence. The Chairperson said that something that is unfairly prejudicial during final argument may result in a new trial. Mr. Titus suggested that a Committee note could be added which would provide that nothing is intended to impede the trial court from regulating closing argument. Mr. Howell noted that it may be a problem introducing evidence for the first time in closing argument. Mr. Titus commented that it should not be called evidence. Mr. Howell remarked that if a computer simulation is brought in for the first time in closing

argument, the judge will want to see it, and time will be wasted during the trial. This will create the problem the Rule is trying to avoid. A computer simulation gives the illusion of scientific verity of the evidence. The jury will attach weight to it, even if instructed that it is not evidence. There is a danger in roping off the computer evidence "solely for argument." Mr. Titus suggested that instead of calling this "computer-generated evidence", it should be referred to as "computer-generated information." Mr. Bowen expressed the view that the computer summary would be different from computer-generated evidence such as a simulated plane crash. It is more like posting exhibits.

The Chairman referred to the suggestion to add a Committee note. Mr. Lombardi remarked that a Committee note might tilt against computer-generated slide presentations, such as a Power Point, which is easy to use, and shows simply, but effectively, the points made during trial. It would not be appropriate if the court exercised its discretion based on a Committee note allowing it to exclude the Power Point display. The Chairperson commented that the tilt is more toward avoiding trial by ambush than toward exclusions. Mr. Lombardi asked how different this situation is from a party raising something in closing argument which is not evidence. An example would be a chart or blackboard to which there may be a rightful objection if it is not evidence. This is not intended to make the judge review all of the closing argument. The Vice-Chairperson commented that the

Committee note should not address the question of what is disclosed.

Mr. Carbine pointed out that the first clause of section (b) which reads "[u]nless the computer-generated evidence is to be used solely for the purpose of argument..." could be deleted from section (b) and added instead to section (f). The Committee agreed with this change by consensus. Mr. Carbine then suggested that the word "use" in section (b) be changed to the word "offer," and the Committee agreed with this suggestion by consensus. Mr. Carbine suggested that the second sentence of section (a) be deleted, and the Committee agreed with this change. The Reporter noted that using the word "offer" in section (f) may cover computer-generated material used demonstratively, but would not cover material used solely for argument. Mr. Klein remarked that the phrase "unless the computer-generated evidence is to be used solely for the purpose of argument" may be too broad. Mr. Carbine said that it is important that the material used for argument be part of the record on appeal. Mr. Brault added that other pieces of evidence used for demonstration only must be covered, also.

Mr. Lombardi expressed the view that there should be an affirmative statement as to what is not evidence, such as the use of graphic materials in closing argument. This will not be clear from section (f). There could be a separate section in section (a) which would explain this. Mr. Brault pointed out that subsections (2) and (3) of section (a) cover this. Mr. Klein cautioned that the second

sentence of section (a) did not refer to computer simulations. Mr. Brault said that if simulations are used, they have to be preserved for appeal. Mr. Howell suggested that the second sentence of section (a) could be put into a new subsection. There is a utility to keeping it, since it defines what is used for argument. Mr. Titus commented that, in addition, a Committee note or a separate section could be included which would encourage the use of this material for a power point presentation which is not necessary to show to the opponent ahead of time. However, the judge will have discretion as to prejudicial computer-generated material, including requiring a pre-review and a person to demonstrate the material. The Vice-Chairperson asked why the changes already made to Rule 2-504.3 do not address this problem. Mr. Titus replied that the way the Rule is written would not allow a party to use a Power Point presentation during closing argument without taking other steps first.

Mr. Sykes questioned whether there is a distinction between computer-generated and other material. Judge Vaughan remarked as to the necessity of preserving what is written on a blackboard. Mr. Brault observed that a photograph of the blackboard could be taken. He noted that most courts are not using blackboards; instead, they are using big white sheets of paper, which can be preserved. The Chairperson inquired as to whether there should be a separate section of the Rule for argument. Mr. Klein commented that this is not part of the notice requirement. A separate term, such as the second

sentence of section (a) could be used. This could be added to section (f) in the disjunctive. Mr. Howell suggested that the second sentence of section (a) could be deleted, and a new section (b) could be added using similar language, but adding in the term "illustration" in the list. Section (c) would be the notice section, and it would cover both computer-generated evidence and computer-generated material in terms of preservation and appeal. The Committee agreed with Mr. Howell's suggestion.

Mr. Klein asked about the use of the term "proffer" instead of the term "offer" in section (f). He referred to Mr. Howell's suggestion to include the term "illustration" in his proposed section (b), and he asked if it conflicts with a computer-generated illustration. He reiterated that initially the Subcommittee avoided the word "illustration" in section (a). The Chairperson asked if the computer-generated illustration is included in the list of items used solely for the purposes of argument. Mr. Brault answered that it is. Mr. Klein pointed out that the structure of computer-generated evidence as defined in section (a) means that notice must be given, except where it is used solely for purposes of argument. If this exception is eliminated, then notice must be given. The Chairperson said that a computer-generated illustration should not be included in proposed section (b). The Committee agreed with this suggestion by consensus.

Mr. Carbine pointed out that problems are arising because of

different glossaries. Subsection (a)(2) used to be called "computer animation," and it included documents, data and other things that go in at trial to illustrate witness testimony. It is not used solely for purposes of argument. The confusion is that a computer-generated animation is a counterpoint to a simulation, and it then became an "illustration." The Chairperson noted that the definition in subsection (a)(2) indicates that it is not used as substantive evidence. Mr. Carbine told the Committee that Professor Lynn McLain, a consultant to the Visual and Electronic Subcommittee, had said that there is demonstrative evidence and substantive evidence. He suggested that subsection (a)(2) end with the word "testimony." Mr. Howell commented that his proposal was not to remove "computer-generated illustration" from the list of what evidence is. If it is part of the list, then no notice would be required if the illustration is used solely for argument purposes.

The Chairperson summarized the changes made to Rule 2-504.3. The second sentence of section (a) has been deleted. A new section (b) has been added which reads as follows: "With respect to section (f) of this Rule and Rule 4-322 (b), computer-generated material means a computer-generated depiction, animation, or other presentation used solely for argument." Section (c) now becomes the former section (b) and reads as follows: "Any party intending to offer computer-generated evidence at trial for any purpose, including impeachment and rebuttal whenever practicable, shall file a written

notice that...".

Turning to section (f), Mr. Lombardi suggested that the first clause read, "[a]s a condition of the proffer of computer-generated evidence or use of computer-generated material...". Mr. Shipley suggested that the language of section (f) should be "any party intending to use computer-generated evidence." The Chairperson suggested that section (f) could begin after the first comma which appears now, so the first words of the section would be "the party." Mr. Shipley suggested that the beginning of new section (c), which is section (b) in the current draft, could pick up the wording of the beginning of section (f).

The Vice-Chairperson remarked that it was never intended that one would proffer computer-generated evidence at trial. Mr. Brault suggested that the word "offer" might work better in new section (g), which is section (f) in the current draft of Rule 2-504.3. The Reporter noted that it might be a pretrial proceeding. Mr. Sykes asked if the term "computer-generated material" should be included in new section (g). The Chairperson responded that it could be added in after the term "computer-generated evidence" appears the first time, so the first clause of section (g) would read: "the party proffering or using the computer-generated evidence or computer-generated material...". Mr. Lombardi suggested that the wording should be "the party who uses or intends to use...". Mr. Brault suggested that the word "offer" should be used in place of the

word "proffer." The Vice-Chairperson suggested that the word "offer" replace the word "use." She inquired if "proffer" is better than "offer." The Chairperson pointed out that the evidence is inadmissible unless it can be furnished to the clerk in a matter suitable for transmittal. The Reporter added that the burden is on the proponent. The Vice-Chairperson said that the tagline for section (g) should be: "Preservation of Computer-Generated Evidence and Computer-Generated Material." She commented that the word "proffer" is not appropriate. Mr. Carbine suggested that the wording of section (g) be: "[t]he party offering computer-generated evidence or using computer-generated material shall...". Mr. Howell commented that it would be helpful to add in "at any pretrial or trial proceeding." The Chairperson asked if subsection (2) of section (g) is necessary. The Reporter pointed out that the appellate court may not have the technical abilities to use the computer-generated information. The Chairman said that the suggestion is that section (g) would begin as follows: "The party offering computer-generated evidence or using computer-generated material at any pretrial or trial proceeding shall...". The Committee agreed to this change by consensus.

Mr. Klein commented that the minutes from the November 15, 1996 meeting indicate that there is a trap in new section (e), which is section (d) in the current version of the Rule. Objections to authenticity are mandatory. The references to Rule 5-901 (b)(9) were

deleted, and there is no cross reference. He said that his concern is what "authenticity" is. Is it beyond the provisions of Rule 5-901 (b)(9)? If it has the same meaning as it does in that Rule, there should be a cross reference to it in section (e). The Vice-Chairperson remarked that her sense of the discussion at the November meeting is that the term "authen-ticity" may go beyond the definition in Rule 5-901. Mr. Klein noted that the discussion in the November minutes did not resolve this issue. The Chairperson expressed the view that a cross reference may not go far enough.

Mr. Sykes commented that there is no definition of the term "authenticity" in section (e) of Rule 2-504.3. If the term also includes accuracy, it gets beyond the integrity of the computer process, and it opens up a whole substantive area which may require a mini-trial to determine. The Vice-Chairperson observed that the judge can say that the issue of authenticity can be deferred until the trial. The Chairperson pointed out that under Rule 5-901 (b)(9), the process must produce an accurate result. If this issue is objected to, it can be taken up pretrial. Rule 2-504.3 could include the concept of "lacking reliability." The Vice-Chairperson responded that the Subcommittee already tried to do that.

Mr. Sykes explained that the confusion is that the idea of authenticity is not applicable to computer-generated evidence. It generally means that what is established is what it purports to be. The concern with computer-generated evidence may be validity, not

accuracy. He suggested that section (e) leave out the term "authenticity" and instead track the language of Rule 5-901 (b)(9). The Chairperson suggested that section (e) refer to "accuracy" instead of "authenticity" and then track the language of Rule 5-901. The Vice-Chairperson noted that the term "accuracy" is broader than the way it is used in Rule 5-901. The evidence could be off-base and inaccurate, but the process could be accurate. She expressed the opinion that it is better to refer to Rule 5-901 (b)(9). Mr. Sykes suggested that the language "does not meet the requirements of Rule 5-901 (b)(9)" could be added, and this is a matter for the Style Subcommittee. The Reporter asked if the term "authenticity" should be retained, and the Committee's view was that it should not be.

Delegate Vallario commented that the Rule may be going too far in requiring disclosure pretrial. The Chairperson responded that the value of disclosure is if there is a legitimate objection to an inaccurate process, the judge should see the evidence pretrial. Judge Kaplan moved that section (e) of Rule 2-504.3 be changed to remove the term "authenticity", and include the language "does not meet the requirements of Rule 5-901 (b)(9)." The motion was seconded, and it carried unanimously.

Mr. Sykes said that there are other rules to conform to these changes. Mr. Carbine presented Rules 2-504 (Scheduling Order), 2-504.1 (Scheduling Conference), 4-263 (Discovery in Circuit Court),

and 4-322 (Exhibits) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 to add a certain provision concerning computer-generated evidence to the required contents of a scheduling order, as follows:

Rule 2-504. SCHEDULING ORDER

. . .

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 1211;

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

(C) one or more dates by which each party shall file the notice required by Rule 2-504.3 (b) concerning computer-generated evidence;

**[**(C)**]** (D) a date by which all discovery must be completed;

**[**(D)**]** (E) a date by which all dispositive motions must be filed; and

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

. . .

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

This amendment to Rule 2-504 is proposed in light of new Rule 2-504.3 (b), which specifies that the notice of a party's intention to use computer-generated evidence must be filed "within the time provided in the scheduling order or no later than 90 days prior to trial if there is no scheduling order."

MARYLAND RULES OF PROCEDURE

TITLE 2 — CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 — TRIAL

AMEND Rule 2-504.1 to require a scheduling conference in any action in which an objection to the use of computer-generated evidence is filed in accordance with Rule 2-504.3 (d), as follows:

Rule 2-504.1. SCHEDULING CONFERENCE

(a) When Required

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

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

(2) in any action in which an objection to computer- generated evidence is filed in accordance with Rule 2-504.3 (d); or

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

. . .

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

Note.

This amendment to Rule 2-504.1 is proposed because the Committee believes that if an objection to the use of computer-generated evidence is filed in a case in accordance with Rule 2-504.3, the case is probably somewhat complex and a required scheduling conference would be helpful in the management of the case.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-263 to add certain disclosure requirements concerning computer simulations and other computer-generated evidence, as follows:

Rule 4-263. DISCOVERY IN CIRCUIT COURT

Discovery and inspection in circuit court shall be as follows:

. . .

(b) Disclosure Upon Request

Upon request of the defendant, the State's Attorney shall:

. . .

(4) Reports or Statements of Experts

Produce and permit the defendant to inspect and copy all written reports or

statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, **[**or**]** comparison, or computer simulation, and furnish the defendant with the substance of any such oral report and conclusion;

Cross reference: For the definition of "computer simulation," see Rule 2-504.3 (a).

(5) Evidence for Use at Trial

Produce and permit the defendant to inspect, copy, and photograph any documents (including any computer-generated evidence that is a document under Rule 2-422 (a)), recordings, photographs, or other tangible things that the State intends to use at the hearing or trial;

Cross reference: For the definition of "computer-generated evidence," see Rule 2-504.3 (a).

. . .

(d) Discovery by the State

Upon the request of the State, the defendant shall:

. . .

(2) Reports of Experts

Produce and permit the State to inspect and copy all written reports made in connection with the action by each expert whom the defendant expects to call as a witness at the hearing or trial, including the results of any physical or mental examination, scientific test, experiment, **[**or**]** comparison, or computer simulation, and furnish the State with the substance of any such oral report and conclusion;

Cross reference: For the definition of

"computer simulation," see Rule 2-504.3 (a).

. . .

Rule 4-263 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-263 adds disclosure requirements concerning computer simulations to subsections (b)(4) and (d)(2). The amendment also specifically includes computer-generated evidence that is a "document," within the meaning of that term set forth in Rule 2-422 (a), as a "document" that must be disclosed in accordance with subsection (b)(5).

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-322 to add certain provisions concerning the preservation of computer-generated evidence, as follows:

Rule 4-322. EXHIBITS

(a) Generally

All exhibits marked for identification, whether or not offered in evidence and, if offered, whether or not admitted, shall form part of the record and, unless the court orders otherwise, shall remain in the custody of the clerk. With leave of court, a party may substitute a photograph or copy of any exhibit.

Cross reference: Rule 16-306.

(b) Preservation of Computer-Generated Evidence

As a condition of the proffer or use of computer-generated evidence at any pretrial or trial proceeding, the party proffering or using the computer-generated evidence shall (1) preserve it and furnish it to the clerk in a manner suitable for transmittal as a part of the record on appeal and (2) present the computer-generated evidence to an appellate court upon request.

Cross reference: For the definition of "computer-generated evidence," see Rule 2-504.3.

Committee note: This section requires the proponent of computer- generated evidence to reduce the computer-generated evidence to a medium that allows review on appeal. The medium used will depend upon the nature of the computer-generated evidence and the technology available for preservation of that computer-generated evidence. No special arrangements are needed for preservation of computer-generated evidence that is presented on paper or through spoken words. Ordinarily, the use of standard VHS videotape or equivalent technology that is in common use by the general public at the time of the hearing or trial will suffice for preservation of other computer generated evidence. However, when the computer-generated evidence involves the creation of a three-dimensional image or is perceived through a sense other than sight or hearing, the proponent of the computer-generated evidence must make other arrangements for preservation of the computer-generated evidence and any subsequent presentation of it that may be required by an appellate court.

Rule 4-322 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-322 adds a new section (b) concerning the preservation of computer-generated evidence. The new section and Committee note are taken verbatim from section (f) of proposed new Rule 2-504.3.

A cross reference to that Rule is also proposed.

The Reporter noted that the section numbers of Rule 2-504 will need to be changed. Also, section (b) of Rule 4-322 will have to be modified to conform to section (g) of Rule 2-504.3. Mr. Sykes moved to conform the Rules in the meeting materials for Agenda Item 2 to the changes made to Rule 2-504.3. The motion was seconded, and it passed unanimously.

The Chairperson commented that his law clerk had done some research, and as of yesterday, no other jurisdictions had a rule on computer-generated evidence. Maryland is the first juris-diction to have done this. He thanked Mr. Carbine for his help with the Rules on Visual and Electronic Evidence. Judge Johnson commented that he was very appreciative of the tremendous contribution made by Mr. Carbine to the work done by the Visual and Electronic Evidence Subcommittee.

Agenda Item 3. Continued consideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys

_____

The Chairperson told the Committee that Stuart Jay Robinson, Esq., was present to address them. Mr. Robinson represents other attorneys in disciplinary matters. He has submitted some written materials pertaining to the proposed Attorney Discipline Rules. (See

Appendix 2). Mr. Robinson thanked the Rules Committee for allowing him to address them, and he thanked the Reporter and Cathy Cox, Rules Committee Secretary, for their help in distributing his materials. He said that the attorney discipline process needs to contain an evenhandedness to it, and this does not exist presently from the respondent's point of view. He and Melvin Hirshman, Esq., Bar Counsel, have disagreed on many points of the discipline process. One of Mr. Robinson's ideas is that there should be an office available for respondents, which would provide counsel to them in defending an attorney discipline charge. Another thought is that there should be a statute of limitations on attorney discipline actions just as there is in other civil actions. There should be a three-year window for actions to be brought. Otherwise, certain defenses, such as laches, are not available to the respondent. There is no obligation for a fact-finding hearing before an attorney's license is suspended. Since suspension cuts off an attorney's livelihood, there should be a bond requirement similar to the one provided by the BB Rules. Case law suggests that a law license is a constitutionally protected privilege, so before it is taken away, there needs to be a fact-finding hearing.

Mr. Robinson pointed out that under proposed Rule 16-717, Hearing Procedure, Bar Counsel presents a statement of charges to the Inquiry Panel. The burden of proof is by a preponderance of the evidence, but it should be by clear and convincing evidence.

Respondents indicate that their perception of the attorney discipline process is that they do not get the same rights as regular litigants in the court system. A hearing to determine whether there has been a violation of probation should be confidential. There should be a generous time period allowed for responses to complaints. Failure to answer is often interpreted by Bar Counsel as non-compliance. The question is how long does due process take. Bar Counsel must respond both in the pre-complaint and complaint stage with time specificity. The Rules Committee should proceed with care on the Attorney Discipline Rules because of the impact on the community at large and on attorneys. Using the term "statement of charges" should be reconsidered, because the term "complaint" is used in civil proceedings, and the term "statement of charges" carries an innuendo of probable cause and criminal wrongdoing. It might be a good idea for some respondents to address the Rules Committee. The Chairperson pointed out that attorneys who represent respondents are members of the Committee. Mr. Robinson stated that hearing the respondents themselves would put a different twist on some issues.

Mr. Howell presented Rule 16-712, Investigative Subpoena, for the Committee's consideration.

Rule 16-712. INVESTIGATIVE SUBPOENA

(a) Issuance and Notice

In a preliminary investigation, upon application by Bar Counsel, the Chair of the Commission may authorize Bar Counsel to issue a subpoena to compel the attendance of witnesses and the production of designated documents or other tangible things at a time and place specified in the subpoena. In addition to giving any other notice required by law, promptly after service of the subpoena, Bar Counsel shall provide notice of its service to the attorney under investigation, in accordance with section (a) of Rule 16-708.

(b) Objection and Enforcement

On motion of the attorney or the person served with the subpoena filed promptly and, whenever practicable, at or before the time specified in the subpoena for compliance, the circuit court for the county in which the subpoena was served may enter any order permitted by section (e) of Rule 2-510. Upon a failure to comply with a subpoena issued pursuant to this Rule, the court on the motion of Bar Counsel may enforce compliance with the subpoena.

(c) Confidentiality

To the extent practicable, a subpoena shall not divulge the name of the attorney under investigation. Any motion or other papers filed in Court with respect to a subpoena shall be sealed upon filing and shall be open to inspection only by order of the court. Hearings before the court on any motion shall be on the record and shall be conducted

out of the presence of all persons other than Bar Counsel, the attorney, and those persons whose presence the court deems necessary or desirable.

(d) Proceeding in Another Jurisdiction

Upon application by Bar Counsel, and a determination by the Chair of the Commission that a subpoena is sought by a disciplinary authority of another jurisdiction pursuant to the law of that jurisdiction for use in a disciplinary proceeding to determine alleged misconduct or incapacity of a lawyer, Bar Counsel may issue a subpoena as provided by this Rule to compel the attendance of witnesses and the production of documents or other tangible things.

Cross reference: See Code, Financial Institutions Article, §1-304, concerning notice to depositors of subpoenas for financial records, and Code, Health General Article, §4-307, concerning notice of a request for issuance of compulsory process seeking medical records related to mental health services.

Source: This Rule is new.

Rule 16-712 was accompanied by the following Reporter's Note.

This Rule is similar to former Rule BV4 c, but is applicable to a preliminary investigation before charges are filed. In this respect, it resembles provisions in Rule 16-806 (b) authorizing Investigative Counsel to issue a subpoena in an investigation of a judge. The Court's authority to enforce compliance with an investigative subpoena includes any order permitted by Rule 2-510 (e).

The provisions of this Rule shall also apply to the issuance of a subpoena to compel the attendance of witnesses and production of documents or other tangible things for use in a lawyer disciplinary proceeding in another jurisdiction, if the subpoena is authorized by the law of the other jurisdiction.

Mr Howell explained that Rule 16-712 is related to Rule 16-718, Panel Subpoena. There are similarities and differences between the two Rules. Rule 16-712 is essentially new. It is patterned on the existing rule which provides for subpoenas, Rule 16-704 c. (former Rule BV4 c.). Delegate Vallario had pointed out that Rule 16-712 provides the direct authority to issue subpoenas without being sanctioned by the legislature. Most of the Attorneys Subcommittee members felt that it was proper for Bar Counsel to issue a subpoena with the approval of the Chair of the Attorney Grievance Commission as a check. This is at the investigatory stage to obtain the attendance of witnesses and the production of documents.

Mr. Howell said that there are two issues for the Rules Committee to determine. The first is a policy decision as to whether the Chair of the Commission has the authority to authorize Bar Counsel to issue the subpoenas. In the Judicial Disabilities Rules, a parallel authority is given to Investigative Counsel without court intervention. Another viewpoint is one that the Subcommittee does not recommend. This is to track the language of Rule 16-718, which requires in section (a) that the subpoena is to be issued by a clerk of a circuit court. The Subcommittee recommends the wording that is in section (a) of Rule 16-712.

Another issue is that Rule 16-718 provides in section (b) that the subpoena is to be served in accordance with Rule 2-510, and the question is if this should be put into Rule 16-712. Mr. Johnson

pointed out Rule 16-806, Further Investigation, provides that in a judicial disabilities matter, to the extent practi-cable, the subpoena shall not divulge the name of the judge under investigation. Section (c) of Rule 16-712 is similar, and Mr. Johnson asked whether it is practicable not to disclose the attorney's name. Mr. Howell responded that in some other jurisdictions, the subpoenas in attorney discipline matters do not divulge the name of the attorney being investigated. Mr. Hirshman pointed out that when a bank subpoena is issued, it does disclose the name of the attorney, because the bank has to know which customer's records are to be sent. This is governed by Code, Financial Article, §1-304.

Mr. Johnson inquired how one would get a subpoena which did not divulge the attorney's name. Mr. Hirshman acknowledged that Mr. Johnson's point was well-taken. He said that a witness receives a subpoena to come to the Office of Bar Counsel to discuss an unnamed attorney. Mr. Howell questioned the use of the language "to the extent practicable." Mr. Hirshman said that this concept is not new. At least 10 or 11 jurisdictions have this rule established by court.

Mr. Sykes commented that Rule 16-712 is not practicable for a subpoena duces tecum, but it is for a subpoena for the attendance of witnesses. Judge Rinehardt observed that it depends on where the application is filed. Mr. Sykes asked why there is a distinction made between the subpoena by Bar Counsel and the one by the Inquiry Panel. Bar Counsel seems to have more authority than the Panel,

which has to go to court to get the subpoena. Mr. Howell replied that this is from existing law. Mr. Hirshman explained that previously he had to go to court to get a subpoena, but with the recent change to the current Attorney Discipline Rules, he no longer has to. The Vice-Chairperson pointed out that one still has to go to the circuit court on enforcement issues.

Mr. Howell pointed out that the intent of the first sentence of section (c) is to keep the matter as confidential as possible. The Chairperson commented that there is a parallel sentence in the Judicial Disabilities Rules. He asked if lack of confidentiality is grounds for a challenge, since the attorney gets notice of the subpoena. Mr. Howell replied in the affirmative, explaining that this Rule provides more due process than in some other jurisdictions which issue subpoenas without direct notice to the attorney. The Chairperson inquired whether the attorney would have grounds, such as complaining that it is a "fishing expedition", to quash the subpoena. Mr. Howell answered that there may be grounds for the attorney to quash. The Chairperson questioned as to what the standard is. If it is referred to the civil rules enforcement mechanism, the civil rules do not deal with this. Mr. Howell agreed, stating that the civil rules handle this on an ad hoc basis.

Mr. Brault asked whether the addition of the phrase "upon good cause shown" would help this situation, since the cause could then be challenged. The Vice-Chairperson remarked that the purpose of the

investigatory phase is to see if there is cause to charge someone. The standard should be the same as in Rule 2-510 civil proceedings. The Chairperson pointed out that when Rule 2-510 is used, there is already a judicial proceeding underway. Rule 16-712 potentially would allow Bar Counsel to issue a subpoena if he or she does not like someone's tie. The Rule provides sweeping authority and power. Checks and balances may be needed. Mr. Hirshman responded that case law already provides some checks and balances.

Mr. Brault suggested that the concept of good cause be included in Rule 16-712, so that Bar Counsel must have some cause to issue a subpoena. Mr. Bowen commented that good cause is not a prerequisite to the issuance of a subpoena. Mr. Johnson pointed out that Bar Counsel is not limited to responding to a complaint when issuing a subpoena. Information about an attorney may have been gleaned from a discussion at a cocktail party. Trying to discover information when no complaint has been filed is a very broad power. If a good cause provision were added, would the Chairman of the Commission determine good cause? The Chairperson said that good cause includes the fact that a complaint has been received. It is a "chicken or egg" problem --one needs to see the subpoenaed material to determine good cause. Article 10, §39A provides for a subpoena power for the State's Attorney. Mr. Dean observed that this subpoena is only for the production of documents and not for the attendance of witnesses. The

legislature has toyed with this power, but there is no probable cause standard necessary for a subpoena to issue. Delegate Vallario said that he had requested an opinion from the Attorney General as to whether subpoena power for Bar Counsel should emanate from a rule or whether it should be from a legislative authority. Mr. Zarnoch explained that the opinion has now been written, and the Attorney General has said that legislation to give Bar Counsel subpoena power is not necessary; the power can be authorized by a rule.

The Chairperson noted that a good cause standard is found in the parallel Judicial Disabilities Commission provision, which is in Rule 16-805 (b)(3). Mr. Brault expressed the view that adding a good cause standard to Rule 16-712 would avoid the "fishing expedition" charge, and would prevent Bar Counsel from going after an attorney's trust account for no reason. Mr. Bowen pointed out that even if Bar Counsel shows good cause, the respondent attorney does not find out about the subpoena until it is served. The Vice-Chairperson remarked that the attorney can ask for the subpoena to be quashed. Mr. Sykes commented that the good cause should be documented. If there is no written application to the Chair of the Commission, the issuance of subpoenas could be slipshod.

Mr. Hochberg suggested that the attorney who is the subject of the subpoena should get a copy of the subpoena as well as notice. Mr. Hirshman responded that when a subpoena is served on a bank, the customer gets an identical one as required by Code, Financial

Institutions Article, §1-304. Mr. Howell said that he was willing to amend section (a) of Rule 16-712 so that Bar Counsel would also provide a copy of the subpoena as well as notice of it to the attorney. Mr. Hirshman remarked that the exception to this would be the attorney who has disappeared, but Mr. Brault pointed out that the principles already established in the revised Rules which state that an attorney who cannot be found can be served at his or her last known address and at the Clients' Security Trust Fund will take care of this problem. The Committee agreed by consensus to include a provision that the attorney under investigation would receive a copy of the subpoena.

Delegate Vallario commented that there may be a problem with obtaining confidential records protected by the attorney-client privilege. He agreed that a good cause standard is needed in the Rule. Mr. Brault moved that a good cause standard be added to Rule 16-712, the motion was seconded, and it passed with one opposed.

Mr. Howell said that there could be a new section (b), and the word "notice" could be deleted from the tagline to section (a). Section (b) could be entitled "Service and Notice" and read as follows: "A subpoena shall be served in accordance with Rule 2-510. In addition to giving any other notice required by law, Bar Counsel shall serve a copy of the subpoena and notice of its service to the attorney under investigation." The Vice-Chairperson asked about the service aspect of this, and Mr. Howell answered that this is the same

language as in the second sentence of present section (a). The Vice-Chairperson pointed out that once the subpoena is mailed, it is served, and it is not necessary to include notice of its service. The Chairperson suggested that the language of proposed section (b) should be: "... Bar Counsel shall serve a copy of the subpoena on the attorney under investigation." The Vice-Chairperson said that the tagline to new section (b) should be "Service." The Committee approved the addition of new section (b) and its tagline by consensus. Mr. Howell noted that the Rule will have to be renumbered.

The Vice-Chairperson referred to new section (e), which appears in the current draft as section (d). She asked if section (e) contemplates that the subpoenaed witness from another jurisdiction will go to the Office of Bar Counsel. If so, this would be subject to enforcement and confidentiality issues. Mr. Howell explained that this is treated as Bar Counsel's own investigation. The Vice-Chairperson commented that this may not be clear, since this provision is at the end of the Rule. It might be better to move it to the beginning of the Rule. Mr. Sykes suggested that section (e) could become a subsection of section (a). Section (a) could be divided into subsection (1) which would be entitled "Preliminary Investigation" and subsection (2) which would be entitled "Proceeding in Another Jurisdiction." Mr. Johnson suggested that the good cause provision could be placed here. He noted that the language in

section (e) which reads "... for use in a disciplinary proceeding..." may not be appropriate, since an investigatory proceeding is not a disciplinary proceeding.

Mr. Brault observed that the provision in section (e) could be used to investigate. He inquired as to what the venue would be. Mr. Howell replied that it would be where the subpoena is served. Mr. Brault commented that normally venue is where the subpoena is served or issued. It could be where the subpoena is served or where the attorney maintains an office for the practice of law. Mr. Howell said that he did not want the Rule to provide multiple choices of places. Mr. Brault remarked that many banks keep their records in Baltimore, but the attorney may be in Oakland or Ocean City. Mr. Hirshman noted that some bank records are kept in Virginia. The Vice-Chairperson observed that one would serve the local bank, not where the bank records are kept. Mr. Sykes suggested that a provision could be added which says that if the witness challenges the subpoena, the witness could file where he or she resides or has a place of business.

The Vice-Chairperson moved that the place for the witness to file should be the circuit court for the county where the witness lives or works. Mr. Brault added that the venue should be the same for the attorney who is under investigation. Mr. Howell pointed out that this would create five places of venue. He said that this is not the Subcommittee proposal and is not in the current rule on

Inquiry Panel subpoenas. The current provision has not caused any trouble so far. The Chairperson stated that the Style Subcommittee can handle the issue of venue. The way the Rule reads now, a person who was located in Ocean City when served with the subpoena but lives in Garrett County has to go to Worcester County to file to quash the subpoena. Mr. Hirshman suggested that the Rule provide that the venue is where the subpoena is returnable. The Chairperson asked if the attorney should get the same protection as the witness. The Vice-Chairperson hypothesized that the witness could live and work in Ocean City, but the attorney who is under investigation is located in Annapolis. The witness is served in Ocean City, and if he or she moves to quash the subpoena, under the motion on the floor, the attorney would not be allowed to move the case to Anne Arundel County. The Vice-Chairperson explained that her intention was that the witness should file where the witness was served with the subpoena or where the witness lives or works. Mr. Bowen commented that the Rule as it appears is simple, and changing it is certain to cause confusion. It should be left as it is. The Vice-Chairperson withdrew her motion.

After the lunch break, Delegate Vallario stated that he had a problem with the idea of issuing subpoenas to compel the attendance of witnesses. He expressed the view that the subpoena should be limited to the production of documents. The subpoena provided for in Rule 16-805 (b)(3) of the Judicial Disabilities Rules is to obtain

"evidence", and Delegate Vallario remarked that he was not sure what that meant. He suggested that the words "to compel the attendance of witnesses and" should be stricken from section (a) of Rule 16-712. Mr. Howell said that originally the subpoena was designed only for the production of documents. Two factors contributed to the inclusion of witnesses. One is that the Judicial Disabilities Rule extends to the attendance of witnesses, and the other is that the American Bar Association (ABA) Rules, which are a source for the Maryland Rules, have a subpoena to compel the attendance of witnesses. The Subcommittee felt that there was no reason to limit Bar Counsel to issuing a subpoena only for the production of documents when many of the states have granted subpoenas for both documents and witnesses.

The Chairperson asked about witness immunity. Mr. Howell replied that there is no authority to create such an immunity. The Chairperson then inquired about transactional immunity. Mr. Howell responded that the immunity is limited to civil suit immunity and not witness immunity. The only protection is that the witness has the right to seek an appropriate order from the court, as does the attorney. A good cause requirement has been added. The Rule could be limited to documents, but the Subcommittee does not recommend this. The Rule could also require that any authority be exercised sparingly by the Commission and used only in certain circumstances.

The Vice-Chairperson commented that Bar Counsel seems to have a

broader authority to investigate than the State's Attorney does. Mr. Dean pointed out that the State's Attorney has access to the Grand Jury. The Vice-Chairperson asked about recalcitrant witnesses. Mr. Hirshman said that if someone is recalcitrant, talking to that witness could make the hearing unnecessary and exonerate the attorney. The Chairperson questioned whether testimony can be compelled. Mr. Hirshman commented that there are protective rights under the Fifth Amendment, and there is spousal immunity. Mr. Howell noted that there are concerns by Bar Counsel, the Commission, and other jurisdictions that a witness with information could be intimidated by a third party and refuse to testify. Senator Stone observed that this Rule pertains only to a preliminary investigation and not to a hearing. Mr. Hirshman told the Committee that four years ago he was granted the ability to obtain records, but he often must wait eight weeks for the banks to produce the records. Other states have given Bar Counsel subpoena power, and there are no waiting periods or complaints about protection of the public.

The Chairperson pointed out that there are some practical issues to consider. A witness could say that he or she was reluctant to testify and was threatened with criminal prosecution. The witness could state that in exchange for testimony, the Office of Bar Counsel promised to recommend to the judge of the pending criminal case of the witness that the case should be nol prossed. The Rule contains no provision for recording what went on during the interrogation.

Mr. Hirshman remarked that the same problems exist with an investigative report, since the witness can later take the stand and say that the investigator lied. The Chairperson expressed the opinion that some requirement for recording should be built into the Rule. Mr. Hirshman responded that he had no problem with that. The Vice-Chairperson clarified that recording should take place only when the witness comes in by virtue of a subpoena. Mr. Howell noted that an investigative subpoena rule has been adopted by the ABA and a large number of states. Another provision in the ABA Rules which the Subcommittee did not incorporate was a requirement that the witness has to give his or her statement under oath administered by Bar Counsel. Lynn K. Stewart, Esq., an Assistant State's Attorney, commented that the recording of someone's statement can be intimidating to the witness who may feel compelled to tell the truth. Mr. Hirshman said that there will be instances in which he could compel a witness to give a statement in order to determine if it is necessary to go forward with a case. He would prefer that an independent court reporter administer the oath. The attorney who is the subject of the investigation can also be present, similar to the way a deposition is conducted.

Judge Rinehardt suggested that the Judicial Disabilities Commission Rules should be tracked. The Vice-Chairperson noted that in Rule 16-805, the word "evidence" includes testimony. The Chairperson read the following language from section (b)(1) of Rule

16-806: "... the Commission may authorize Investigative Counsel to issue a subpoena to compel the attendance of witnesses and the production of documents or other tangible things at a time and place specified in the subpoena." Mr. Sykes suggested that in addition to using that language, Rule 16-712 should also incorporate a requirement that the witness's statements be recorded and preserved, and it should have a provision that the attorney under investigation is allowed to attend when the witness testifies.

Mr. Howell pointed out that if the Rule is limited to subpoenas for documents only, Maryland would be one of the few states in the country which does not give Bar Counsel the power to subpoena the attendance of witnesses. The Chairperson expressed his concern as to what can happen when a witness is subpoenaed and interrogated without the proceedings being recorded. Mr. Howell suggested that if the attendance of a witness is subject to a subpoena, the interview should be recorded from start to finish, and the witness should be entitled to the protection of counsel. Senator Stone commented that if the witness's statements are under oath, and the witness has no counsel, the witness could say something that could result in a charge of perjury.

Mr. Titus questioned conforming the Attorney Discipline Rules to the Judicial Disabilities Commission Rules. Mr. Howell said that the Attorneys Subcommittee looked at the Judicial Disabilities Rules, but did not use them as a model. Ms. Stewart remarked that the

witness may not know of the right to counsel, and she inquired whether witnesses will be apprised of this right. Mr. Howell responded that the subpoena can contain the information that there is a right to counsel, a right to recordation, and a right to object.

Delegate Vallario moved that Rule 16-712 should apply only to subpoenas for the production of documents and not for the attendance of witnesses. Mr. Lombardi seconded the motion.

The Vice-Chairperson asked Mr. Hirshman if there has ever been a case which his office could not bring because a witness refused to give testimony. Mr. Hirshman replied that regularly witnesses refuse to talk. David Downes, Esq., Chairman of the Attorney Grievance Commission, added that there are times when there is no case without the testimony of a witness. Mr. Brault remarked that if the witness's statements are recorded, they can only be offered later to impeach the witness's testimony, but not as substantive evidence. Mr. Sykes observed that if the statements are made under oath and recorded, they can be used later as substantive evidence. Mr. Hirshman remarked that some cases are difficult, such as where an attorney steals funds, but then pays them back, and the victims will not testify. Since there is no perfect system, some people will escape justice, and some are punished unnecessarily. Mr. Sykes said that the Rule should provide for statements to be under oath and recorded, and for the right of the accused attorney to attend when the witness testifies. This affords fairness and protection all

around.

Mr. Hochberg commented that he has a problem with the Rule giving the attorney the right to be present at the interrogation of the witness. The Chairperson stated that this is the equivalent of a discovery deposition. Mr. Brault agreed that if all the parties are present, it is nothing but a deposition. Mr. Howell pointed out that taking depositions destroys the concept of an investigative subpoena, which is to be used before any statement of charges has been filed. It would be appropriate to have a recorded statement available when charges are filed. At the point of the subpoena being issued, there has been no determination of misconduct. Some of the protections can bog down investigations. The Vice-Chairperson agreed with Mr. Howell. She expressed the opinion that the interrogation of a witness should remain informal.

The Chairperson said that once the subpoena is issued, the attorney gets notice of the fact, and he or she may go to court complaining of a "fishing expedition." The judge may deny the motion to quash, but tell the attorney that he or she has the right to be present during the questioning of the witness. The Vice-Chairperson observed that generally the attorney need not be present, unless the circuit court judge grants an exception to this. Mr. Brault expressed the view that the interrogation should be recorded, since witnesses may give wrong answers. Senator Stone remarked that he liked the idea of witnesses being advised of their rights.

Delegate Vallario commented that the State's Attorney is an elected official, and Bar Counsel, who is not elected, is being given more authority with the subpoena power than the State's Attorney. Mr. Hirshman noted that at least an elected official has a term of office to serve, whereas Bar Counsel can be fired by the Attorney Grievance Commission at any time, since Bar Counsel has no tenure. The Chairperson added that Bar Counsel has public accountability. Mr. Dean said that by keeping the witness interrogation informal, there will be a quicker discovery of facts.

The Chairperson called the question on Delegate Vallario's motion to eliminate the ability of a subpoena to compel the attendance of witnesses in Rule 16-712. The motion failed on a vote of four in favor, eleven opposed.

Judge Kaplan moved that the statement of the witness should be under oath and electronically recorded. The motion was seconded. Judge Johnson suggested that the witness should consent to the recording, but Judge Kaplan did not agree. The Vice-Chairperson suggested that the oath requirement be eliminated, because she was concerned about perjury issues. Judge Kaplan accepted the amendment to his motion to eliminate the oath requirement, as did the person who seconded. The motion carried unanimously.

Mr. Titus moved that the Rule should contain a provision that the witness is to be subpoenaed under oath and a provision that the subpoena is to advise the witness of the right to consult with

counsel and the right to the protections of Rule 2-510. The motion was seconded. The Chairperson suggested that the motion should be considered in steps. The first is the oath requirement. Judge Rinehardt commented that electronic recordings need to be under oath so they can be used as substantive evidence. Senator Stone cautioned that the summoned witness could make an innocent mistake. The Chairperson noted that no where else in the Rules is there a provision for witnesses to be subpoenaed under judicial compulsion, and no requirement that the statements be under oath.

Senator Stone said that it is important that the witness be fully advised on the record of his or her rights. Delegate Vallario added that there is the right to remain silent. The Chairperson commented that the Rule could provide for a preliminary statement by Bar Counsel before the interview with the witness. Mr. Howell expressed the view that that would be sensible, since Bar Counsel talks to the witness before the interview. Mr. Sykes remarked that a witness has the right to not appear at this stage; he or she is not subject to a contempt charge. Mr. Dean observed that the subpoena power will facilitate getting the statements of recalcitrant witnesses. The Chairperson agreed that it is an extraordinarily powerful tool. The Vice-Chairperson expressed the concern that when Bar Counsel explains the rights a witness has, such as the right against self-incrimination, the witness may not understand and may not know about the various privileges. Delegate Vallario added that

the warnings given to witnesses may be meaningless to them. Judge Kaplan pointed out that this is not a criminal prosecution. The witness is being summoned to talk about the attorney's improper conduct, not that of the witness. The rights are to protect the attorney, not the witness. Mr. Hirshman remarked that the majority of actions his office brings against attorneys either involve the handling by the attorney of personal injury, estates and trusts, family law, or bankruptcy cases. Criminal law is at the bottom of the list.

The Chairperson said that there are some controls. One is to subpoena only tangible evidence, and not witnesses. Another is to provide safeguards for the witness, the attorney who is the subject of the investigation, and Bar Counsel. Judge Johnson asked Mr. Hirshman if a witness who testified in an action against an attorney has ever been criminally charged afterwards. Mr. Hirshman replied that this has never happened. Mr. Dean inquired if the Rule should provide that leave of court must be obtained to subpoena the testimony of a witness. The Vice-Chairperson asked Mr. Dean if he meant ex parte leave of court, and he answered in the affirmative. The Chairperson noted that this would be similar to a search warrant.

The Chairperson called the question on Mr. Titus' motion. He said that it would be considered in two parts. The first part was the motion to have the statements of the witness made under oath. The motion failed on a vote of five in favor, ten opposed. The

Chairperson stated that the second part of Mr. Titus' motion was that the witness who is subpoenaed is to be advised of the right to seek judicial relief under Rule 2-510. Mr. Titus explained that this advice would also include the right of the witness to consult with an attorney with respect to the assertion of privilege or any other legal matter. The Chairperson called the question on the second part of the motion, and the motion carried on a vote of nine in favor, seven opposed.

Mr. Klein referred to the point made by Mr. Bowen about enforcing the subpoena in a single place. The Chairperson clarified that this refers to the person served with the subpoena, not the attorney under investigation who also received a copy of the subpoena. Mr. Sykes inquired what the attorney does when he or she receives notice of the subpoena, but cannot attend the session where the witness is questioned. The Chairperson replied that the attorney can go to court to have the subpoena quashed or to limit the questions asked of the witness. Judge Johnson asked whether the attorney would have standing to quash the subpoena given to someone else. Only the person who is subpoenaed would have standing to quash the subpoena. The Chairperson said that since the attorney is the subject of the investigation, he or she would also be given standing to quash the subpoena. Judge Johnson commented that this could cause a problem if the witness who is subpoenaed does not want the subpoena quashed. Mr. Brault pointed out that the current rule, Rule 16-704

c. 2. (formerly numbered Rule BV4 c.2.) allows the attorney to object to the subpoena. Judge Johnson stated that this Rule applies only to subpoenas for the production of documents, and not to the attendance of witnesses. He moved that in Rule 16-712, only the person served with the subpoena can object to it. This would apply only to subpoenas for the attendance of witnesses, and not to subpoenas for tangible evidence. Judge Kaplan seconded the motion.

Mr. Brault pointed out that Rule 2-510 (e) has a protective order overlay affording certain rights to the witness. A litigant has a right under Rule 2-403 to protection from the testimony of anyone. The Chairperson asked why the attorney should be notified about the issuance of the subpoena if the attorney cannot do anything about it. Mr. Hirshman said that even without the Rule, the attorney can file something in court to complain about the subpoena. The Chairperson noted that if the Rule is amended, the person served with the subpoena can seek Rule 2-510 relief, but he questioned if the Rule should give the attorney the same right. Mr. Hirshman commented that he would support any rule which is passed, so that the ability of his office to investigate and protect the public is not impeded. The Chairperson observed that notice to the attorney is fair, but he noted that Judge Johnson had expressed the view that only the person subpoenaed has the right to object when the subpoena is for the person's attendance. Judge Johnson's motion amends Mr. Titus' motion by limiting the right of the attorney to object to only a subpoena

for tangible evidence and not for the attendance of witnesses. The vote on the motion was 11 in favor, six opposed, so the motion carried.

The Chairperson adjourned the meeting. He thanked all the consultants who worked on the Rules pertaining to computer-generated evidence.