COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on January 9, 1998.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Joyce H. Knox, Esq.
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
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
Alvin I. Frederick, Esq.
David Downes, Esq., Attorney Grievance Commission
Melvin Hirshman, Esq., Bar Counsel
Glenn Grossman, Esq., Attorney Grievance Commission
Kate Shatszun, The Baltimore Sun
Mary R. Craig, Esq.
James N. Vaseleck, JIS
Natalie Boehm, Lets Co.
Lt. Col. David Czorapinski, Maryland State Police
Lt. Stewart W. Russell, Maryland State Police
Andrea Leahy-Fucheck, Esq., Governor's Office
Del Wilber, The Baltimore Sun
Betty S. Sconion, Esq., Maryland State Police Headquarters
Martha F. Rasin, Chief Judge, District Court of Maryland

The Chair convened the meeting. He asked if there were any additions or corrections to the minutes of the Rules Committee meeting held on November 21, 1997. There were no additions or

corrections. Judge Kaplan moved to approve the minutes, the motion was seconded, and it carried unanimously.

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

---

The Reporter told the Committee that the rules being considered today were in the revised package of the Attorney Discipline Rules, which was distributed prior to the November meeting. The package begins with Rule 16-721.

Mr. Brault presented Rule 16-722, Reciprocal Discipline or Inactive Status, for the Committee's consideration.

> Rule 16-722. RECIPROCAL DISCIPLINE OR INACTIVE STATUS
>
> (a) Duty of Attorney
>
> Upon being disbarred, suspended, or otherwise disciplined, or placed on disability inactive status in another jurisdiction, an attorney shall promptly inform Bar Counsel of the discipline or inactive status.
>
> Committee note: This Rule is new. It enforces reciprocal discipline in the several states.
>
> (b) Duty of Bar Counsel
>
> Upon receipt of information from any source that an attorney has been disciplined or placed on disability inactive status in another jurisdiction, Bar Counsel shall obtain a certified copy of the disciplinary order and file it with a petition for disciplinary action in the Court of Appeals pursuant to Rule 16-731, with service of copies of the petition and order upon the attorney in accordance with

section (b) of Rule 16-708.

(c) Show Cause Order

Upon the filing of a petition and certified copy of a disciplinary order under section (b) of this Rule, the Court of Appeals shall enter an order requiring Bar Counsel and the attorney to show cause within 15 days from the date of the order, based upon grounds set forth in section (e) of this Rule, why the identical discipline or inactive status should not be imposed. An answer to the order to show cause shall be served upon the adverse party and supported by clear and convincing evidence.

(d) Temporary Suspension of Attorney

When the petition and disciplinary order demonstrate that an attorney has been disbarred or is presently suspended from practice by final order of a court in another jurisdiction, the Court of Appeals may enter an order, effective immediately, suspending the attorney from the practice of law, until the further order of that Court. The provisions of Rule 16-737 apply to an order suspending an attorney under this section.

(e) Exceptional Circumstances

Reciprocal discipline shall not be ordered if Bar Counsel or the attorney demonstrates by clear and convincing evidence that

(1) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(2) there was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject;

(3) the imposition of the same discipline by the Court would result in grave injustice;

(4) the misconduct established warrants substantially different discipline in this State; or

(5) the reason for inactive status no longer exists.

(f) Action by Court of Appeals

Upon consideration of the petition and any answer to the order to show cause, the Court of Appeals may enter an order imposing the identical discipline or the inactive status, effective immediately, or any other order as may be appropriate, including an order that assigns the petition to any court pursuant to Rule 16-732 for a hearing in accordance with Rule 16-735. The provisions of Rule 16-737 apply to an order under this section that disbars or suspends an attorney or that places the attorney on inactive status.

(g) Conclusive Effect of Adjudication

Except as provided in subsections (e)(1) and (e)(2) of this Rule a final adjudication in a disciplinary proceeding by another court, agency, or tribunal that an attorney has been guilty of professional misconduct is conclusive evidence of the misconduct in any proceeding under this Chapter. The introduction of such evidence does not preclude the Commission or Bar Counsel from introducing additional evidence nor does it preclude the attorney from introducing evidence or otherwise showing cause why no discipline or lesser discipline should be imposed.

(h) Effect of Stay in Other Jurisdiction

In the event that the discipline or inactive status imposed in the other jurisdiction has been stayed there, any proceedings under this Rule shall be deferred until the stay expires and the discipline or inactive status becomes effective.

Source: This Rule is in part derived from

former Rule 16-710 (e) (BV10 e) and in part new.

Rule 16-722 was accompanied by the following Reporter's Note.

Section (a) is new. The duty of self-reporting is patterned on the first sentence of A.B.A. Model Rule 22.A.

Section (b) is new. It is derived from the second sentence of A.B.A. Model Rule 22.A.

Section (c) is new. It is derived in part from A.B.A. Model Rule 22.B, but requires cause to be shown within 15 days rather than 30 days. It is assumed that collateral attacks on foreign disciplinary orders will rarely prove successful.

Section (d) is new. While not part of the Model Rules, it is a feature of §11(d) of Rule XI of the District of Columbia Bar. The spectacle of a lawyer being disbarred or suspended in another jurisdiction, while permitted to practice in Maryland, exposes the profession to justifiable criticism and is presumptively detrimental to the administration of justice.

Section (e) is new. It requires reciprocal discipline to be imposed unless Bar Counsel or the attorney demonstrates by clear and convincing evidence the existence of one or more exceptions to the rule of reciprocity. The five grounds are taken verbatim from A.B.A. Model Rule 22.D. By comparison, §11(c) of Rule XI of the District of Columbia Bar omits subsection (e)(5) and substitutes: "The misconduct elsewhere does not constitute misconduct in the District of Columbia." The latter provision is inconsistent with the idea of reciprocity but would seem to be covered by subsection (e)(3) in any event. Section (e) represents a major policy shift. In the past, Maryland has not automatically imposed the same

sanction as its sister states in all cases of reciprocal discipline. AGC v. Willcher, 340 Md. 217, 222 (1995); AGC v. Saul, 337 Md. 258, 267 (1995). The Court of Appeals recognizes no requirement in reciprocal discipline cases that it must impose a sanction of equal severity to that imposed by a sister state. AGC v. Gittens, 346 Md. 316, 325-26 (1997). "When the Court considers the appropriate sanction in a case of reciprocal discipline, we look not only to the sanction imposed by the other jurisdiction but to our own cases as well. The sanction will depend on the unique facts and circumstances of each case, but with a view toward consistent dispositions for similar misconduct." AGC v. Parsons, 310 Md. 132, 142 (1987). See AGC v. Gittens, 346 Md. at 326; AGC v. Willcher, 340 Md. at 222; AGC v. Saul, 337 Md. at 270 ("we will give deference to the determination of the Virginia Board".) Nevertheless, the Court's existing practice "does not preclude giving deference to the action taken by the jurisdiction where the misconduct occurred." AGC v. Gittens, 346 Md. at 326. Section (c) mandates deference unless there is clear and convincing evidence supporting an exception.

Section (f) is new. It is derived in part from language in A.B.A. Model Rule 22.D and is comparable with §11(f) of Rule XI of the District of Columbia Bar. However, instead of mandating identical discipline in all cases, section (f) authorizes hearing and recommendation by a lower court when factual issues are presented. An order imposing reciprocal discipline may condition reinstatement upon compliance with any terms and conditions imposed in another jurisdiction, AGC v. Gittens, 346 Md. 316, 327 (1997), including reinstatement to the practice of law in the other jurisdiction, e.g., AGC v. Chisholm, 345 Md. 347 (1997).

Section (g) is derived from language in former Rule BV10 e, with style changes. See AGC v. Gittens, 346 Md. at 325 (final adjudication in a disciplinary proceeding conclusively establishes the misconduct

> charged). It recognizes, however, that a disciplinary adjudication should not be treated as conclusive if the proof or procedure was so deficient as to deny due process.
>
> Section (h) is new. It is patterned on A.B.A. Model Rule 22.C.

Mr. Brault explained that reciprocal discipline is evident in counties such as Prince George's and Montgomery because of their proximity to the District of Columbia (D.C.). Many attorneys are members of both the Maryland and D.C. bars, and some are also members of the Virginia bar. The equivalent D.C. rule calls for automatic reciprocal discipline. If Bar Counsel reports to D.C. that an attorney has been disciplined in Maryland, that attorney is automatically disciplined in D.C. Mr. Hirshman, who is Bar Counsel in Maryland, said that Rule 16-721, which requires an attorney to report to Bar Counsel that he or she has been charged with or convicted of a crime, is very helpful. He also noted that Rule 16-709 (e) requires Bar Counsel to notify the National Discipline Data Bank of the American Bar Association (ABA) and the disciplinary authority of every other jurisdiction in which an attorney is admitted to practice of the attorney's conviction of a serious crime and of the attorney's disbarment, suspension, reinstatement, resignation, or transfer to inactive status by order of the Court of Appeals. By matching the names of attorneys with those in the National Discipline Data Bank, several states have discovered that

members of their bar had been disciplined in other jurisdictions. In the Martindale Hubbell listings, each attorney listed has a number assigned to him or her. The number system is set up by the ABA at no charge, and this is how the attorneys who have been disciplined are identified.

The Chair inquired as to the meaning of the language "otherwise disciplined" in section (a) of Rule 16-722. He asked if this would have a different meaning in a different jurisdiction. Mr. Hirshman noted that in Florida and Virginia, attorneys are permitted to resign before being disciplined, and another jurisdiction would have to go to court to get a waiver to find out for what charge the attorney is being investigated. Mr. Brault commented that the definition of the term "discipline" in Maryland may be different than the definition in another jurisdiction. It is better to be overly broad. Bar Counsel can decide whether to discipline the attorney based on the action in the other jurisdiction.

The Chair suggested that a cross reference or a Committee note could be added to section (a) to indicate that the attorney has to inform Bar Counsel of a disciplinary action in another jurisdiction which would be a disciplinary action in Maryland as well. The Vice Chair remarked that in Maryland, warnings and resignation are not discipline. An attorney would have to report discipline within the Maryland Rules. Mr. Hirshman said that the term "discipline" should be defined as including resignation while a disciplinary

investigation is pending in another jurisdiction. The Vice Chair observed that in another state, a warning may constitute discipline, and it would have to be reported in Maryland. Mr. Hirshman commented that Maryland may decide to discipline the attorney just as the other state did.

The Vice Chair said that the following language could be added to section (a): "pursuant to the meaning of `discipline' in this State or any other." She asked if it would be considered to be discipline if an attorney resigns in Florida. Mr. Brault replied that in Florida, attorneys resign to avoid discipline. Mr. Hochberg suggested that the language "resignation in another jurisdiction" could be added to section (a). The Vice Chair remarked that if she resigned from the D.C. bar, she would not think to report this fact to Bar Counsel in Maryland. This could be a trap for innocent resignees.

The Chair suggested that the following language could be added to section (a): "and placed on inactive status while disciplinary proceedings are pending." Mr. Hirshman clarified that being on inactive status means that the attorney would simply pay dues to go back on active status, but resignation means that to go back on active status, an attorney would have to take the bar examination again. In D.C., if an attorney does not pay dues, he or she is on inactive status and cannot practice law. Mr. Brault suggested that the language "otherwise disciplined" should remain in the Rule, since

it is not feasible to cover the various disciplinary proceedings in every state.

Mr. Titus suggested that the language "upon resigning or" be added into the list in section (a). The Chair reiterated that what is important is that the action taken in the other jurisdiction constitute discipline in Maryland. Judge Rinehardt inquired as to what the harm would be in adding in resignation in section (a). Mr. Brault pointed out that some attorneys resign for legitimate reasons. Mr. Hirshman responded that in that situation, his office would not take any action. Mr. Brault asked what the result would be if the attorney did not report the resignation. The Vice Chair answered that this would be a disciplinary violation. She pointed out that the Reporter's note provides that section (a) is patterned on the first sentence of ABA Model Rule 22 A, and she asked if the language in section (a) is the same as the language of the Model Rule. Judge Rinehardt responded that the Reporter's Note provides that section (a) is patterned after the Model Rule, but section (b) is derived from it.

The Vice Chair moved that the Committee note after section (a) should be removed. The information in the note is more appropriate for a Reporter's note or a source note. The motion was seconded, and it passed unanimously.

Mr. Brault said that section (b) describes the obligations of Bar Counsel. Section (c) describes the prevailing practice. When an

attorney has been disciplined in another jurisdiction, the second jurisdiction usually issues the same discipline without a separate investigation and hearing. The Chair noted that the last sentence of section (c) requires that the answer to the order be supported by clear and convincing evidence. This may be difficult to do, and it may be difficult to look at the answer and tell that there is clear and convincing evidence. The Vice Chair pointed out that this provision ties into section (e) which requires the attorney or Bar Counsel to demonstrate certain items by clear and convincing evidence. Mr. Hirshman commented that New York uses a standard of preponderance of the evidence. The issue is if there can be reciprocal discipline based on New York discipline since that state uses a different standard of proof than Maryland does. The Vice Chair responded that the concept is similar to the full faith and credit given to judgments in other states. Mr. Hirshman said that in the current rule, discipline in other states is conclusive proof of discipline in Maryland, subject to the attorney raising the issue of exceptional circumstances.

The Vice Chair noted that subsection (e)(2) requires that the entire case be argued, and this seems to cause trouble. Mr. Hirshman said that the current rule is the same. The Reporter added that the number of the current rule is Rule 16-710 (e). The Vice Chair expressed the view that the case should not have to be relitigated. The Chair pointed out that section (g) provides that a final

adjudication in a disciplinary proceeding by another court that an attorney has been guilty of professional misconduct is conclusive evidence of the misconduct in any proceeding in Maryland. The testimony of the transcript of the earlier proceeding is insufficient evidence. Under subsection (e)(2), the attorney should be able to argue for use of the transcript. Discipline should not be imposed based on a videotape of the prior proceedings, because the impression from viewing the videotape may be that the attorney is a liar.

Mr. Brault referred to a Court of Appeals case involving the enforcement of a libel judgment in England. The conduct that formed the basis for the libel judgment may not be wrong in Maryland, but it may be in another jurisdiction. Mr. Brault said that he would argue that it is violative of Maryland public policy to enforce the order from the English case. There is a major difference among jurisdictions regarding attorney conduct. The Vice Chair reiterated that it does not matter if the offending behavior of the attorney in another jurisdiction would be permissible behavior in Maryland.

The Chair pointed out that another aspect of the Rule is the extent to which the attorney can relitigate the earlier case. The Vice Chair suggested that subsections (e)(2) and (3) be deleted. The Chair expressed the view that subsection (e)(2) should be deleted, but subsection (e)(3) should not be. The Vice Chair commented that the language in subsection (e)(3) which reads "result in grave injustice" is ambiguous. The Chair responded that this

language gives the attorney the opportunity to argue to the court, and it could include the concept in subsection (e)(2). Mr. Brault noted that the grounds listed in subsection (e) are taken verbatim from the ABA Model Rule. D.C. struck its equivalent of subsection (e)(3). There is even a stronger reason for D.C. to keep that provision. Their rules have been amended with respect to certain types of solicitations in personal injury cases which practices are not allowed in Maryland. It is also improper in Maryland to interview the employees of an opposing corporation, but this is permissible in D.C. The Chair said that the Rules need to cover the situation where an attorney is disciplined in another jurisdiction for an action which is not an ethical violation in Maryland.

Al Frederick, Esq., a consultant to the Attorneys Subcommittee, observed that there is a problem with the standard of proof. The problem is not with the earlier proceeding, but with the proceeding in Maryland which uses a different standard of proof. This is a policy decision, especially where the attorney is sanctioned in Maryland for an action which is not an ethical violation in Maryland. Mr. Brault remarked that in Maryland, pro hac vice attorneys are common. Maryland attorneys who try cases elsewhere need to be careful. It is entirely possible that an ethical Maryland attorney is unaware of rules in a different jurisdiction. The Chair noted that reciprocal discipline should not be ordered for conduct in another jurisdiction which does not give

rise to discipline in Maryland. Mr. Brault responded that he was not sure that he agreed, commenting that it may have been that the attorney was warned about his or her conduct in the other jurisdiction and neglected the warning.

The Chair asked if there should be any changes to section (e). The Reporter suggested that subsection (e)(4) could be changed to read as follows: "the misconduct established warrants substantially different discipline in this State or does not constitute misconduct in this State." The Vice Chair moved to delete subsection (e)(2) from the Rule. The motion was seconded. Mr. Brault inquired if there are any jurisdictions which are so unsophisticated in their fact-finding proceedings that a Maryland attorney could get into trouble. Mr. Hirshman answered that all jurisdictions have organized rules, and most are members of the same organization of which Maryland is a member. Most states have proceedings similar to the Inquiry Panel.

The Chair commented that subsection (e)(2) is awkward. The Vice Chair remarked that the "grave injustice" language in subsection (e)(3) is broad enough to include subsection (e)(2). Mr. Brault said that the Rule should not leave the impression that someone tried in absentia in another state could not raise this issue in Maryland. Mr. Bowen stated that he was against deleting subsection (e)(2). The entire section (e) gives the Court wide discretion to make fair decisions. All of this language is in the ABA Model Rule, and it

should remain here.

The Chair called the question on the motion to delete subsection (e)(2), and it did not pass, with only three votes in favor.

The Reporter asked if the language "or does not constitute misconduct in this State" is to be added to subsection (e)(4). The Chair answered that it should be added, and the Committee agreed by consensus with him.

Mr. Bowen suggested that the last part of section (c) which reads "and supported by clear and convincing evidence" should be deleted because it already appears in section (e). The Committee agreed with this suggestion by consensus.

Mr. Brault drew the Committee's attention to section (f). The Vice Chair noted that the Rule provides that "the Court of Appeals may enter an order," but actually the Court has to enter an order of some sort. She suggested that the word "may" be changed to the word "shall." The Committee agreed by consensus to this change.

Mr. Brault drew the Committee's attention to section (g). The Vice Chair asked the meaning of the language "[e]xcept as otherwise provided," and Mr. Bowen replied that subsections (e)(1) and (e)(2) refer to jurisdictional authority. The Chair commented that the second sentence is inconsistent. The Vice Chair added that it is very broad. The Chair pointed out that the theory is that in an aggravated offense, Bar Counsel may want to put in additional

details. For example, if the discovery shows that the attorney has been disciplined for theft, Bar Counsel may wish to add that the theft was three million dollars from a widow, not putting a slug in a parking meter. Mr. Sykes observed that this also helps the attorney. If only the first sentence were left in, the attorney might not be able to argue infirmity of proof. The Chair said that the introductory clause takes care of that.

Mr. Brault drew the Committee's attention to section (h). He noted that this section pertains to the procedure in Maryland when there is a stay in another jurisdiction. The Chair questioned whether this provision should be mandatory. He hypothesized a situation where an attorney committed a serious crime in another state, yet the attorney can continue to practice in Maryland because the matter in the other state was stayed. Mr. Hirshman answered that if his office has evidence of the prior crime by the attorney, they can take action under other rules. This Rule refers only to reciprocal discipline. The Chair observed that it is easier to prosecute someone under Rule 16-722. Mr. Hirshman commented that making section (h) discretionary would be better for Bar Counsel. The Vice Chair expressed the opinion that the provision should remain mandatory. Mr. Sykes asked what an adjudication is and what is its effect. The Chair said that the distinction is between fact finding and the imposition of discipline. Mr. Bowen added that this affects the decision of guilt, not the decision to stay. The Chair

remarked that a judge in one county may find someone guilty and grant a motion for a stay pending an appeal, but another judge may feel differently and hold that the stay in the prior proceeding pending appeal does not mean that this has no operative effect for other things. Mr. Brault noted that Maryland gives full faith and credit to orders in other states. Judge Vaughan commented that Maryland has the right to start its own proceeding against an attorney. The Chair responded that this would be very time-consuming.

Mr. Brault said that the rule in D.C. is the same as for Maryland. Discipline is administered by the highest court of D.C., and there is no other appeal. D.C. may stay its own order, even though this is not due to an appeal, for other reasons, such as allowing the attorney to wind up his or her practice.

The Vice Chair pointed out that the Reporter's note to section (g) recognizes "that a disciplinary adjudication should not be treated as conclusive if the proof or procedure was so deficient as to deny due process." She suggested that the note refer specifically to the exception for lack of due process and infirmity of proof as provided for in subsections (e)(1) and (e)(2). The Committee agreed by consensus to this revision.

Mr. Brault presented Rule 16-723, Injunction; Expedited Disciplinary Action, for the Committee's consideration.

Rule 16-723. INJUNCTION; EXPEDITED DISCIPLINARY ACTION

(a) Injunction to Prevent Serious Harm

(1) Authority of Commission

Upon receipt of evidence that an attorney is engaging in professional misconduct and poses an immediate threat of causing death or substantial bodily harm to another, or of substantial injury to the financial interest or property of another, or of substantial harm to the administration of justice, and with approval of the Commission, Bar Counsel may apply for an injunction in accordance with the provisions of Chapter 500 (Injunctions) of Title 15 against the attorney as may be appropriate, including restricting the practice of law and limiting or prohibiting withdrawals from any trust or commercial account.

Committee note: Except as otherwise provided in this Rule, Rules 15-501 through 15-505, the rules relating to injunctions, apply. Appealability of injunctions under this Rule is governed by Code, Courts Article, §12-303.

(2) Parties

The action for injunction shall be brought in the name of the Commission against the attorney whose conduct is alleged to be causing or threatening the harm, and any other person alleged to be assisting or acting in concert with the attorney. The court shall dispense with the requirement of a bond.

(3) Effect of Disciplinary Investigation or Proceeding

A court shall not delay or refuse to issue an injunction against an attorney on the ground that misconduct is or may become the subject of an investigation under Rule 16-711 or disciplinary proceedings under Rule 16-713.

(4) Order Granting Injunction - Contents

An order granting a preliminary or permanent injunction against an attorney

pursuant to this section, in addition to meeting the requirements of Rule 15-502 (e) shall include specific findings as to whether or not the attorney so enjoined has engaged in the professional misconduct alleged in the complaint and whether the misconduct, if any, is established by clear and convincing evidence or by a preponderance of the evidence.

(5) Service of Injunction on Financial Institution

When served upon an approved financial institution defined in Rule 16-602 (a), an order granting an injunction against an attorney under this section shall prohibit the institution from making any payment or allowing the withdrawal of any funds from any trust account the attorney is required to maintain under Rule 16-603 or any commercial account, except as specifically provided in the order.

(b) Expedited Disciplinary Action

(1) Petition for Disciplinary Action

When an order granting an injunction in accordance with subsection (a)(4) of this Rule includes a specific finding that the attorney so enjoined has engaged in the professional misconduct alleged in the complaint, and regardless of the pendency of an appeal from the order or any motion to modify or dissolve the order, Bar Counsel shall immediately commence a disciplinary action against the attorney by filing in the Court of Appeals a petition for disciplinary action pursuant to Rule 16-731. A certified copy of the order granting the injunction and including the finding shall be attached to the petition.

**[**(2) Show Cause Order; Temporary Suspension

Upon filing the petition and order granting the injunction, if the order contains a specific finding of misconduct established by

clear and convincing evidence, the Court of Appeals shall issue an order requiring the attorney within 15 days from the date of the order to show cause why the attorney should not be suspended immediately from the practice of law until the further order of the Court of Appeals. Upon consideration of the petition and the answer to the order to show cause, the Court of Appeals may enter an order, effective immediately, suspending the attorney from the practice of law pending final disposition of the disciplinary action, subject to the further order of that Court. The provisions of Rule 16-737 apply to an order suspending an attorney under this subsection.**]**

**[**(3)**]** (2) Further Proceedings on Petition

Except as provided in this subsection, a disciplinary action commenced under this section shall proceed in accordance with Rules 16-731 through 16-737. If the Court of Appeals assigns the petition for hearing **[**pursuant to Rule 16-732**]**, the order assigning the petition may designate the court or judge that granted the injunction. If the order granting the injunction contains a specific finding of misconduct established by clear and convincing evidence, that finding shall govern a hearing conducted pursuant to Rule 16-735 and the judge may receive additional evidence of misconduct or may restrict the scope of the hearing to evidence relevant to the appropriate disciplinary sanction to be imposed upon the attorney.

Committee note: This is a new Rule allowing the circuit court the authority to issue an injunction followed by an immediate disciplinary action in the Court of Appeals.

Source: This Rule is new.

Rule 16-723 was accompanied by the following Reporter's Note.

This Rule is new in its entirety. There is no corresponding provision in the former BV Rules or in the A.B.A. Model Rules.

As noted in the commentary to A.B.A. Model Rule 20, certain misconduct poses such an immediate threat to the public and the administration of justice that the attorney should be suspended immediately pending a final determination of the ultimate discipline to be imposed. Emergency suspension is also appropriate when the attorney's conduct is causing or is likely to cause serious injury to a client or the public as, for example, when the attorney is engaged in an ongoing conversion of trust funds. The suspension is said to resemble a temporary restraining order, but does not expire automatically and requires a motion to vacate or modify. Since the suspension may be imposed ex parte following reasonable efforts to notify the attorney, A.B.A. Model Rule 20 contemplates that the lawyer must be afforded some opportunity to have the suspension order vacated or modified on an expedited basis.

However, injunctive relief would appear to be a more logical remedy and may be preferable to suspending an attorney (even temporarily) without notice or hearing. A temporary suspension contemplated by A.B.A. Model Rule 20, as adopted in part in the District of Columbia, New Jersey, and elsewhere, would require the Court of Appeals to make nisi prius rulings in an emergency, without lower court findings of any kind and perhaps on an ex parte basis and an incomplete record. Because the Court of Appeals will ultimately review findings and conclusions based upon clear and convincing evidence, it should not be put in a position to prejudge the case at the very outset.

To alleviate some of these concerns, this Rule contemplates the more familiar remedy of a lower-court injunction, reviewable as such by ordinary avenues of appeal. Indeed, A.B.A. Model Rule 20 analogizes temporary suspension

to a temporary restraining order, indefinite in duration. However, a lower court is in a much better position than the Court of Appeals to hear evidence, make findings, and tailor specific relief to the needs of the case. This Rule does give explicit authority (now lacking) for the Commission to seek injunctive relief and the standing to request such relief in its own name.

Section (a) authorizes an injunction to prevent serious harm, including a temporary restraining order (Rule 15-504), as well as a preliminary and a permanent injunction under Rules 15-501 to 15-505. Subsection (a)(1) employs substantially the same standard as Model Rule 20, but instead authorizes the Commission to seek an injunction rather than temporary suspension. Subsection (a)(2) makes clear that any person assisting or acting in concert with an offending attorney may be joined as a defendant. Because the injunction is being sought by the Commission for a public purpose, bond should not be required. Compare Rule 15-503 (b). Subsection (a)(3) is included to preclude an attorney from opposing an injunction or seeking delay on the ground that an investigation or disciplinary proceeding is pending. Subsection (a)(4) requires the lower court to make specific findings whether the attorney so enjoined has engaged in the professional misconduct alleged in the complaint and, if so, whether the misconduct is established by clear and convincing evidence or, alternatively, by a preponderance of the evidence. If the lower court makes a positive finding based upon such evidence, the Commission through Bar Counsel has every justification for filing a disciplinary action under Rule 16-731 without need for Inquiry Committee proceedings under Rule 16-715. Subsection (a)(5), which permits service of an injunction upon a financial institution in appropriate cases, is derived in part from §§3(C) of XI of the District of Columbia Bar rules.

Section (b) is designed to allow a

disciplinary action to be commenced in the Court of Appeals, regardless of an appeal or further proceedings in regard to the injunction, if the specific finding is made by the lower court. Subsection (b)(1) authorizes Bar Counsel to file a petition for disciplinary action pursuant to Rule 16-731 whenever the order enjoining an attorney contains a specific finding that the attorney has engaged in professional misconduct. In that situation, the judicial finding obviates the need for Inquiry Committee proceedings. If the attorney remains under injunction, enforcement by contempt may be effective to restrain the attorney from further misconduct. Subsection (b)(2) declares that a disciplinary action commenced under this section is governed by the rules applicable to disciplinary actions in general. This is particularly true of actions based upon a finding of misconduct supported only by a preponderance of the evidence. However, if the injunction order contains a finding of misconduct established by clear and convincing evidence, that finding shall govern the hearing and the hearing judge may either receive additional evidence of misconduct or dispense with such evidence and restrict the scope of the hearing to evidence that is relevant to the appropriate disciplinary sanction to be imposed on the attorney. In addition, this subsection makes it clear that the same judge who presided over the injunction proceedings may be designated to conduct the hearing and make additional findings under Rule 16-735.

The primary justification for drastic emergency action lies in cases of misappropriation and other dishonest conduct. The Court of Appeals has "consistently found misappropriation by an attorney of entrusted funds, be it intentional, knowing, or negligent, to be of great concern, representing serious professional misconduct." AGC v. Glenn, 341 Md. 448, 489 (1996). See AGC v. Drew, 341 Md. 139, 150 (1996); Bar Association v. Marshall, 269 Md. 510, 519 (1973). "Misappropriation of funds by an attorney

> involves moral turpitude; it is an act infected with deceit and dishonesty and will result in disbarment in the absence of compelling extenuating circumstances justifying a lesser sanction." AGC v. Ezrin, 312 Md. 603, 608-09 (1988). See AGC v. Glenn, 341 Md. at 490. If Bar Counsel can prove misappropriation by clear and convincing evidence, the public interest requires enjoining and/or suspending the culpable attorney before further harm is inflicted.

Mr. Brault explained that the Subcommittee worked on this Rule with Mr. Hirshman. The Rule clarifies that there is authority in the circuit courts to enjoin an attorney from practicing law. Mr. Hirshman's concern was that there would be a challenge to the issuance of an injunction without a rule providing for it. The idea is that in certain cases, such as where an attorney is stealing money from clients, his or her activities can be stopped.

Mr. Bowen referred to the language at the end of subsection (a)(1) which reads "any trust or commercial account," pointing out that this would not include a savings account. He suggested that the language in the Rule should be either "any bank account" or "any account in a financial institution." Mr. Brault stated that the language would be "any bank account," but Mr. Bowen noted that there is some argument as to whether thrift institutions are considered to be banks. He suggested that the wording be "from any account in any financial institution." The Committee agreed to this change by consensus.

Mr. Brault commented that this is a very important rule. The

Chair asked if the words "death or" could be deleted from subsection (a)(1). He questioned whether by retaining this language, the Rule indicates that some offense which is less than substantial bodily harm committed by the attorney would not entitle Bar Counsel to get an injunction. Mr. Bowen suggested that the word "substantial" be removed. The Chair expressed the view that the words "death or" should also come out.

Mr. Hirshman suggested that the following language should be added to the end of subsection (a)(1) "or transfers of funds of property from or to any source." Judge Kaplan inquired if the word "property" refers to real property. The Chair said that the term "property" includes both real and personal property. He questioned whether the term "property" also includes intangible property. Mr. Bowen answered that it did.

Turning to subsection (a)(2), Mr. Brault pointed out that the second sentence is not in the right place in the Rule. Judge Vaughan remarked that Bar Counsel brings the action on behalf of a state agency, so the second sentence is not necessary. The Chair said that if someone persuades the court that an attorney is about to do substantial harm to a complainant, but the attorney argues that the complainant is a spiteful individual and the injunction would harm the attorney, to be fair, the attorney is entitled to the protection of a bond. The Rule provides that the court <u>shall</u> dispense with the bond--there is no discretion. Mr. Bowen expressed the view that the

second sentence of subsection (a)(2) should be at the end of subsection (e)(4). Mr. Brault agreed with this suggestion. He said that the sentence should not be mandatory, but it should provide that the court may waive the requirement of a bond; however, it must waive if the law so requires. The Chair noted that in most cases, a bond is not necessary. It should be up to the court to decide. Why should the Rule provide that the court may never consider a bond? Mr. Bowen suggested that the Rule provide that the court may dispense with the requirement of a bond unless exceptional circumstances require one. Bar Counsel should not have to argue about a bond in every case. Mr. Bowen also suggested that this provision be moved to the end of subsection (e)(4). The Committee agreed by consensus to both of Mr. Bowen's suggestions.

The Vice Chair pointed out that the Committee note to subsection (a)(1) provides that the rules relating to injunctions apply. However, the change as to the requirement of a bond is not in accordance with Title 15. Mr. Brault responded that Title 15 allows the court to waive the bond requirement. The Vice Chair disagreed with this statement. She noted that Rule 15-503 (b) provides that the court may dispense with the requirement of a bond and shall do so when required by law. Mr. Sykes pointed out that subsection (b)(4) of Rule 16-723 requires that the order granting the injunction contain specific findings that the attorney engaged in the professional misconduct alleged in the complaint, but it does not

require findings of a threat of bodily harm as subsection (a)(1) does. He expressed the view that subsection (a)(4) should also contain the requirement that the order include findings of threat of bodily harm. The Chair questioned whether this is required by Rule 15-502 (e). Mr. Bowen said that he agreed with Mr. Sykes about adding in the reference to a finding of a threat of bodily harm so that subsection (a)(4) is consistent with subsection (a)(1). Mr. Brault pointed out that Rule 15-502 (e) does not address the issue of presenting a finding of threat of bodily harm. This is found in case law.

Mr. Bowen reiterated that it is necessary in subsection (a)(4) to add in the parallel language to subsection (a)(1). Mr. Brault suggested that the language could be "and poses the threat alleged" so that subsection (a)(4) would read as follows: "An order granting a preliminary or permanent injunction against an attorney pursuant to this section, in addition to meeting the requirements of Rule 15-502 (e), shall include specific findings as to whether or not the attorney so enjoined has engaged in the professional misconduct alleged and poses the threat alleged in the complaint...". The Committee agreed by consensus with Mr. Brault's suggested change.

The Reporter asked about the remainder of subsection (a)(4), which provides for establishing the misconduct by clear and convincing evidence. Mr. Sykes expressed his agreement with this standard, since the court order is taking away the attorney's right

to practice. The Vice Chair inquired as to why the judge would state in the order granting the injunction whether the misconduct is established by clear and convincing evidence or a preponderance of the evidence. Mr. Hirshman explained that the Rule is designed to provide for a standard of clear and convincing evidence.

The Vice Chair asked if the judge could issue a temporary restraining order (TRO) for a period of time. Mr. Brault replied that a TRO is only good for ten days. The Vice Chair said that the Rule could be modified to provide for a TRO. Mr. Brault responded that a TRO should only be used for extraordinary circumstances. An injunction affords greater due process. Mr. Sykes commented that he had no problem with an injunction being issued, because it allows the defense more time to prepare. The Chair questioned as to why the judge cannot issue the injunction using a standard of preponderance of the evidence. Mr. Sykes answered that the standard in a disciplinary proceeding is clear and convincing evidence. If the judge uses that standard, and the disciplinary proceeding is bypassed, the requisite standard of proof is met.

Mr. Brault commented that the trial may be lengthy with extensive findings. Since there is a right to appeal, the disciplinary proceedings could be bypassed. Ex parte injunctions should be added to the list of injunctions in Rule 16-723. The Rule only provides for preliminary and permanent injunctions. Frequently, the trial judge will ask if all the parties agree to wait until the

hearing. The judge will say that the entire matter will be handled, including a preliminary and permanent injunction, the fact-finding, and the order. The judge ought to be in a position to determine clear and convincing evidence, so the decision is binding on a subsequent disciplinary proceeding. The Chair commented that the injunction is an extraordinary remedy, and it should be limited. Mr. Brault said that this does not bind a subsequent Panel finding. What discipline is to follow has not been decided, only the issuance of an injunction. The Chair pointed out that a finding of misconduct established by clear and convincing evidence controls the course of subsequent proceedings. Mr. Brault countered that it only controls the fact-finding of the fact that produces the injunction. The discipline is subject to the trial.

The Vice Chair expressed the concern that if a TRO is entered for 10 days and then for another 10 days, and there is a full-blown hearing on the preliminary injunction within the 20 days, how can the attorney present a decent defense on the merits? Mr. Brault responded that if there is a doubt, the court has to continue the hearing. The Vice Chair remarked that the judge may be convinced from affidavits to temporarily stop the attorney from practicing. Mr. Brault said that at this point live testimony comes in. If the attorney is being railroaded, the judge can pick up this information. The Chair commented that with the injunction in place, the status quo is protected. If the judge makes a finding that Bar Counsel is

entitled to a preliminary injunction, the next step can be disciplinary proceedings. Mr. Brault responded that Bar Counsel should not get the injunction and then hold up the proceedings for two years.

The Chair noted that once the injunction has been issued, those involved can be given time to prepare for the hearing. There is no need to rush through the proceedings. The Vice Chair remarked that the Rule allows for a preliminary injunction which has an effect of res judicata, but it is not even a judgment. Mr. Brault commented that he was not sure about that.

Mr. Sykes suggested that the last clause of subsection (a)(4) which reads, "and whether the misconduct, if any, is established by clear and convincing evidence or by a preponderance of the evidence" should be stricken. The Vice Chair pointed out that subsection uses the same language in the second sentence which begins, "[i]f the order granting the injunction contains a specific finding of misconduct established by clear and convincing evidence...". Mr. Sykes said that that would be consistent with subsection (a)(4), even if the language in his motion were deleted. Mr. Brault noted that Rule 15-502 requires specific findings. He asked if Rule 16-723 means for someone to guess about which standard to use. He suggested that the Rule either require only the standard of preponderance of the evidence or provide that the standard has to be announced. Mr. Sykes agreed with the suggestion of including the standard of

preponderance of the evidence. Even if there is a 49% doubt, the injunction is limited in time, and the attorney will be able to have a full-scale hearing. The clear and convincing evidence standard should be taken out of the Rule.

The Chair commented that if a judge considers the request for an injunction and is persuaded by clear and convincing evidence that the injunction is necessary because of a danger that the attorney violated some code of professional conduct, Bar Counsel can go to the Court of Appeals who assigns the case to the circuit court, bypassing the Inquiry Panel. The Chair inquired if this could be done on the basis of a preponderance of the evidence. Mr. Brault replied that it could.

The Chair asked the Committee about Mr. Sykes's suggestion to strike the final language of subsection (a)(4). The Committee agreed by consensus with this change. Mr. Brault suggested that the language referring to preponderance of the evidence should be added to subsection (a)(4). Without it, the judge may use the clear and convincing standard. The Committee agreed by consensus with this suggestion. Subsection (a)(4) will now read as follows: "An order granting a preliminary or permanent injunction against an attorney pursuant to this section, in addition to meeting the requirements of Rule 15-502 (e), shall include specific findings by a preponderance of the evidence as to whether or not the attorney so enjoined has engaged in the professional misconduct alleged and poses the threat

alleged in the complaint. Except in exceptional circumstances, the court shall dispense with the requirement of a bond."

Mr. Brault drew the Committee's attention to subsection (a)(5). Mr. Sykes asked whether the accounts to which the subsection refers include savings accounts. Mr. Bowen suggested that the subsection should be modified to be consistent with the changes to subsection (a)(1). The Committee agreed by consensus with Mr. Bowen's suggestion. The Vice Chair suggested that the reference to Rule 16-602 (a) should be deleted. The subsection should include any account in any financial institution. The institution should be prohibited from making any transfers as well as payments. The Committee agreed by consensus to these changes to subsection (a)(5).

The Chair drew the Committee's attention to section (b). Mr. Brault asked if ex parte injunctions should be mentioned in subsection (b)(1). Judge Vaughan responded that in reality there are no more ex parte injunctions. The Vice Chair said that the term is TRO's. She pointed out that the Committee note to subsection (a)(1) allows TRO's. If it is not clear in subsection (b)(1), a Committee note could be added which would provide that TRO's are included. The Chair commented that Bar Counsel may apply for appropriate relief in accordance with the provisions of Chapter 500. He added that a Committee note could provide that the Rule includes TRO's. Mr. Sykes pointed out that the term "injunctive relief" covers all types of injunctions, including TRO's. The Chair asked if a petition for

disciplinary action can be filed if a TRO is granted. Mr. Sykes replied that the petition can be filed only after a preliminary or permanent injunction, not a TRO. Mr. Brault added that there is no evidentiary hearing before a TRO is issued. The Chair remarked that no change to subsection (b)(1) is necessary.

The Vice Chair pointed out that the phrase in subsection (b)(1) which reads "includes a specific finding that the attorney so enjoined has engaged in the professional misconduct alleged in the complaint.." is meaningless and should be deleted. The Committee agreed with this suggestion by consensus. The Chair stated that subsection (b)(1) would begin as follows: "When an injunction has issued in accordance with subsection (a)(4) of this Rule regardless...".

The Reporter inquired if the Subcommittee had discussed including in Rule 16-723 a reference to the disability of the attorney which is included in the ABA rule. The Vice Chair said that the whole injunction procedure does not apply to the disability of an attorney. Mr. Grossman remarked that it could. The Chair noted that even if the attorney had a disability, he or she would have to engage in misconduct before an injunction would be sought. The Vice Chair commented that she thought that misconduct does not include disability. Mr. Brault reiterated that even if the attorney has a disability, there would still have to be misconduct.

The Chair drew the Committee's attention to subsection (b)(2).

The Vice Chair suggested that the third sentence be deleted to be consistent with other changes made to the Rule. The Committee agreed with this suggestion by consensus. The Vice Chair questioned whether the subsection should be entitled "Expedited Proceedings on Petition." The Chair inquired if the judge who issued the injunction should be the judge assigned to hear the case. Mr. Zarnoch answered that that would depend on the facts of the case. Judge Vaughan commented that having the same judge hear the later proceeding might speed up the process. The Chair asked if language should be added which would provide that the same judge shall not preside at the later hearing unless the parties agree. The Vice Chair observed that the judge who grants a TRO in a civil case is not disqualified from hearing the case on the merits. Judge Kaplan remarked that the attorney can move to recuse the judge from presiding at the hearing, but there does not have to be automatic recusal. Judge Johnson added that this is done now. The Chair commented that occasionally there may be a credibility issue. He expressed the view that it is a good rule which contributes greatly to the process. If the parties agree to the same judge considering the injunction and then hearing the case, that is appropriate. If not, another judge can hear the case.

Judge Kaplan observed that in the injunction cases, Bar Counsel seeks an injunction for a serious matter, and the injunction is seldom contested. Usually the attorney has been caught redhanded committing a crime, and there is documentary proof. It would be a

waste of judicial power to preclude the judge who already went through the documentary evidence and granted an injunction from hearing the case. The Chair commented that there may be preclusive effect to the injunction. The Vice Chair said that she thought the Rule implied that a different judge than the one who granted the injunction would hear the case. Mr. Sykes remarked that this can be handled by the judge.

The Chair stated that the final sentence of subsection (b)(2) would be deleted. The Vice Chair suggested that the Committee note also be deleted, and the Committee agreed by consensus to this deletion.

Mr. Sykes inquired about the issue of disability which was raised previously in the discussion. Mr. Brault stated that if the attorney is incapacitated and as a consequence mishandles money, this is misconduct. The Chair pointed out that Rule 16-724 permits Bar Counsel to put the attorney on inactive status. He asked Mr. Brault about the relationship between willful, deliberate behavior and disability. Mr. Brault replied that the remedy of an injunction is not available for disability alone. It may be a defense as to the misconduct.

The Chair said that an attorney may not have committed an act of misconduct yet, but due to a mental disability is planning to do so. An example would be an attorney who is in the hospital and is planning to give away a client's trust account as soon as the

attorney is out of the hospital. Injunctive relief may be necessary, so that the attorney is prevented from having access to client accounts. Mr. Brault responded that another area of proof would be opened up for cases due to disability. There are no cases suggesting that type of case. Mr. Sykes said that he was convinced that disability need not be mentioned in Rule 16-723.

The Chair told the Committee that in light of previous discussions about the effect of a warning by Bar Counsel and the Inquiry Panel, Mr. Frederick was at the meeting to present an issue regarding questions on attorney malpractice insurance applications about attorneys being subject to disciplinary actions. Mr. Frederick has handed out two sample questions from application forms. (See Appendix 1). Mr. Frederick explained that the two questions on the sheet he distributed are from two separate malpractice insurance application forms. The first question is from the form of the leading legal malpractice carrier; the second is from the form of the least predominant carrier. Other carriers' forms are basically the same. Carriers provide discounts to attorneys who have been free from discipline for certain periods of time. The discounts range from five to fifteen percent. If an attorney answers affirmatively the question which is the same as or similar to the ones on the sheet distributed today, the attorney is disqualified from receiving the discount. At the previous Attorneys Subcommittee meeting, concern about this situation was voiced. If a warning is not discipline,

then the answer to the question is "no." However, a prior Panel warning may be considered to be discipline. Judge McAuliffe had raised the issue that considering a warning as discipline may violate due process if there is no right to appeal or complain about the issuance of the warning. The ultimate effect is that attorneys may be penalized in attempting to get malpractice insurance and to qualify for discounts.

The Vice Chair questioned whether an attorney receiving a warning has to answer "yes" to the first question 10 on the handout page which asks if the attorneys have been "subject to" any disciplinary proceedings. Mr. Frederick responded that if the Office of Bar Counsel sends out a letter to an attorney, it is not worth answering a question such as question 10 affirmatively. Mr. Brault noted that if an attorney has been before the Inquiry Panel, it may require an affirmative answer on the malpractice insurance application form. Mr. Frederick observed that if the Panel dismisses the case, or dismisses with a warning, this may mean that the attorney was not subject to proceedings.

The Chair compared the question on the handout to a question on the insurance application form which asked if the attorney had ever been subject to criminal charges. In the latter case, if someone was investigated by the Grand Jury, but was not indicted, the answer to the question of being subject to criminal charges would be "no." However, if someone was indicted, tried, and then acquitted, the

answer would be "yes." Mr. Brault commented that the danger with the insurance company not agreeing with the attorney's answer is that the company may deny coverage because it considers the attorney to have lied on the application.

The Chair asked how this problem can be handled. It may require some research to see how the courts have interpreted cases involving this question. The Vice Chair said that a warning is not discipline. This concept can be expanded upon, so it is clear that it is not necessary to report a warning on the insurance application form. Mr. Brault remarked that if the insurers get wind of this, they could change the question on the form to "has a complaint ever been filed against you?" The Vice Chair said that language could be set forth which would indicate that this would be as if the complaint had never occurred. The Chair added that it could be similar to a Probation Before Judgment. Judge Vaughan observed that applications for judicial vacancies have similar issues. The Chair inquired if Bar Counsel answers affirmatively to questions about letters of complaint written about attorneys which result in no action taken. Mr. Hirshman replied that he does not answer affirmatively to questions about these letters.

After the lunch break, the Chair announced that since Agenda Item 2 was scheduled for 1:30 p.m., the next item for consideration would be Agenda Item 3.

Agenda Item 3. Consideration of proposed amendments to certain

rules pertaining to jurors' notes: Rule 2-521 (Jury --Review of Evidence -- Communications), Rule 4-326 (Jury -- Review of Evidence -- Communications), and Rule 5-606 (Competency of Juror as Witness)

---

Mr. Titus presented Rule 2-521, Jury -- Review of Evidence-- Communications), for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-521 to add certain provisions concerning juror notes and notepads, as follows:

Rule 2-521. JURY - REVIEW OF EVIDENCE - COMMUNICATIONS

(a) Items Taken to Jury Room

The court may, and upon request of any party shall, provide notepads for use by the jurors during trial. Jurors may take notes on the notepads regarding the evidence and the notepads shall be collected during recesses in the trial. The jurors may keep the ~~notes~~ notepads with them when they retire for their deliberation. The notepads shall be collected at the end of the trial and destroyed promptly. The notepads may not be reviewed by any person, nor may the notes be relied upon by any person for any purpose. The court may, and upon request of any party shall, instruct the jurors that no juror may use or share with any other juror any notes made by a juror outside the courtroom. If a juror is unable to use a notepad due to a disability, the court shall provide reasonable accommodations. Unless the court for good cause orders otherwise, the jury

may also take exhibits that have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and consent of the court. Written or electronically recorded instructions may be taken into the jury room only with the permission of the court.

Cross reference: See Rule 5-802.1 (e).

(b) Jury Request to Review Evidence

The court, after notice to the parties, may make available to the jury testimony or other evidence requested by it. In order that undue prominence not be given to the evidence requested, the court may also make available additional evidence relating to the same factual issue.

(c) Communications With Jury

The court shall notify the parties of the receipt of any communication from the jury pertaining to the action before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action.

Source: This Rule is derived as follows:

Section (a) is derived in part from former Rules 558 a, b and d and 758 b and is in part new.

Section (b) is derived from former Rule 758 c.

Section (c) is derived from former Rule 758 d.

Rule 2-521 was accompanied by the following Reporter's Note.

At the request of Chief Judge Bell, the Evidence Subcommittee considered the matter of control of jurors' notes, in light of Aron v. Brock, ___ Md. App. ___ (No. 1545, September Term, 1996, filed May 29, 1997), cert. denied, 346 Md. 629 (1997).

Proposed amendments to Rules 2-521 and 4-326 provide for notepads to be distributed by the court to jurors for notetaking during the trial and use during deliberation, upon the request of any party or sua sponte by the court. The court maintains control of the notepads by collecting them during recesses in the trial and promptly destroying them after the trial. As to notes made by a juror outside the courtroom, the proposed amendments require the court upon request of a party, and allow the court sua sponte, to instruct the jury that notes made outside the courtroom may not be used or shared with other jurors. The amendments also require the court to provide a reasonable accommodation under the Americans with Disabilities Act, 42 U.S.C. §12101, et. seq., for any juror who is unable to use a notepad due to disability.

AMEND Rule 4-326 to add certain provisions concerning the use of juror notes and notepads, as follows:

Rule 4-326. JURY - REVIEW OF EVIDENCE - COMMUNICATIONS

(a) Items Taken to Jury Room

The court may, and upon request of any party shall, provide notepads for use by the jurors during trial. Jurors may take notes on the notepads regarding the evidence and ~~they~~ the notepads shall be collected during recesses as in the trial. The jurors may keep the ~~notes~~ notepads with them when they retire for their deliberations. The notepads shall be collected at the end of the trial and destroyed promptly. The notepads may not be reviewed by any person, nor may the notes be relied upon by any person for any purpose. The court may, and upon request of any party shall, instruct the jurors that no juror may use or share with any other juror any notes made by a juror outside the courtroom. If a juror is unable to use a notepad due to a disability, the court shall provide reasonable accommodations. Unless the court for good cause orders otherwise, the jury may also take the charging document and exhibits which have been admitted in evidence, except that a deposition may not be taken into the jury room without the agreement of all parties and the consent of the court. Electronically recorded instructions or oral instructions reduced to writing may be taken into the jury room only with the permission of the court. On request of a party or on the court's own initiative, the charging documents shall reflect only those charges on which the jury is to deliberate. The court may impose safeguards for the preservation of the exhibits and the safety of the jurors.

Cross reference: See Rule 5-802.1 (e).

(b) Jury Request to Review Evidence

The court, after notice to the parties, may make available to the jury testimony or other evidence requested by it. In order that undue prominence not be given to the evidence requested, the court may also make available additional evidence relating to the same factual issue.

(c) Communications With Jury

The court shall notify the defendant and the State's Attorney of the receipt of any communication from the jury pertaining to the action before responding to the communication. All such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action.

Source: This Rule is derived as follows:

Section (a) is derived in part from former Rules 758 a and b and 757 e, and is in part new.
Section (b) is derived from former Rule 758 c.
Section (c) is derived from former Rule 758 d.

Rule 4-326 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 2-521.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 600 - WITNESSES

AMEND Rule 5-606 to prohibit impeachment of a verdict by a juror's notes or other

writings, as follows:

Rule 5-606. COMPETENCY OF JUROR AS WITNESS

(a) At the Trial

A member of a jury may not testify as a witness before the jury in the trial of the case in which the juror is sitting. If the juror is called to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry Into Validity of Verdict

(1) In any inquiry into the validity of a verdict, a juror may not testify as to (A) any matter or statement occurring during the course of the jury's deliberations, (B) the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict, or (C) the juror's mental processes in connection with the verdict.

(2) A juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.

(3) A juror's notes or other writings may not be used to impeach a verdict.

(c) "Verdict" Defined

For purposes of this Rule, "verdict" means (1) a verdict returned by a petit jury or (2) a sentence returned by a jury in a sentencing proceeding conducted pursuant to Code, Article 27, §413.

Committee note: This Rule does not address or affect the secrecy of grand jury proceedings.

Source: This Rule is derived in part from

F.R.Ev. 606.

Rule 5-606 was accompanied by the following Reporter's Note.

> The proposed amendment to Rule 5-606 prohibits impeachment of a verdict by the use of a juror's notes or other writings.

Mr. Titus explained that this proposed Rule change came about as a result of the case of Aron v. Brock, ___ Md. App. ___ (No. 1545, September Term, 1996, filed May 29, 1997), cert. denied, 346 Md. 629 (1997). The Rule would make it mandatory, if any party so requests, that the court allow jurors to take notes of the proceedings on notepads provided by the court. The jurors would be permitted to use the notes in their deliberations. The notes would only be allowed to be used for specific purposes, and accommodations as to the notes would be made for any juror who is disabled.

Judge Johnson expressed concern about the provision for disabled persons which could lead to other people being allowed in the jury room. The Vice Chair pointed out that the Rule provides for reasonable accommodation. The Chair gave the example of a case where a juror was blind and was allowed to have a transcript of the case made on a braille machine and then bring the transcript in with her.

Mr. Bowen asked if in the second sentence of section (a), the language "the notepads shall be collected during recesses in the trial" means that the pads would be given back to the jurors. Mr. Titus answered that the pads would be given back. Mr. Bowen inquired

about the fifth sentence which reads, "The notepads may not be reviewed by any person...". The Chair said that the word "other" should be added in before the word "person." The Vice Chair pointed out that one juror could review another juror's notepad. The Chair stated that any notes taken by a juror would be for that juror's own use during the deliberations. Mr. Sykes commented that the way the language is written is very broad. An affirmative statement should be made about the use of the notes in the jury room, and then a statement should be made that no other use can be made of the notes.

Mr. Brault observed that if too many restrictions are imposed, there will be juror misconduct impeachment. He asked what the meaning of a notepad is. Judge Johnson pointed out that "notepad" is also a term for a laptop computer. Mr. Hochberg said that what is meant in the Rule is paper notepads. The Chair commented that among the federal courts, the circuits do things differently. The Rule could provide that the court may, and upon request, shall permit jurors to take notes during trial and include the accommodation language. Mr. Titus reiterated that the court issues the notepads. Mr. Brault inquired if a juror can use his or her own notepad, and Mr. Titus answered that this is not permitted. The Vice Chair asked what the sanction is for not following this. Mr. Titus responded that this is a policy question. There could be problems with post-judgment inquiries concerning jurors' notes. The integrity of judgments could be questioned.

Mr. Dean asked about the fifth sentence in section (a) which reads "The notepads may not be reviewed by any person, nor may the notes be relied upon by any person for any purpose." Mr. Titus said that this means that the notes may not be reviewed except by the jurors during the deliberations. Judge Johnson remarked that in Prince George's County, notepads are used routinely. At every trial every juror gets one, and the jurors leave the pads and pencils, keeping the notes. There are no problems with this. The Chair pointed out that the Aron case indicates that there has been a problem. One of the jurors took his notes home with him and used them to create a transcript on his computer. At the end of the trial after the verdict, the juror showed the attorneys a notebook full of the notes. The attorneys tried to get it from him. The presiding judge looked at the notebook and decided that it was not useful and should not be part of the record. It was kept among the exhibits, and when the case went up on appeal, the notebook was lost. Once there was an attack on the verdict based on outside influence, the notebook was needed.

Judge Johnson said that the procedure should be that once the jurors leave the courtroom for a recess, the notepads are left behind. The Chair responded that not every judge requires this. Certain basic procedures need to be followed. Should the court be required to furnish pads, or should this be left permissive? Mr. Titus replied that the Subcommittee strongly favors the view that if

the judge is asked to provide notepads, the judge must do so. These would be collected at any recess. There should not be variance among the circuits.

Judge Vaughan questioned when technology will produce immediate transcripts of the case for the jurors to review during their deliberations. The Chair answered that immediate transcripts are not far off in the future. Many judges are giving juries written jury instructions, and this is lengthening deliberations. Mr. Hochberg suggested that at the end of the sixth sentence of section (a) which provides that jurors may not share notes outside the courtroom, the following language should be added, "and the jury shall be so instructed." The Chair suggested that the Rule begin as follows: "The court may, and upon request of any party shall, permit the jurors to take notes during trial. Juror notes shall be collected during recesses in the trial. Jurors may use the notes during deliberations, but the notes will be collected at the end of the trial and destroyed promptly. The notepads may not be reviewed by any person, nor may the notes be relied upon by any person other than jurors for any purpose. The court shall instruct the jurors that no juror may use or share with any other juror any notes made by a juror outside the courtroom." Mr. Titus asked why the Rule cannot have language which states that the court shall provide the notepads. Mr. Sykes suggested that the Rule distinguish from computer notepads. The Chair suggested that the following sentence could be added to

section (a): "The court may, and upon request of any party shall, provide paper notepads."

The Vice Chair questioned whether the beginning of the second sentence which reads "Jurors may take notes on the notepads regarding the evidence and" should be deleted. The Chair replied that the second sentence would read as follows: "The notepads shall be collected during recesses in the trial." The Vice Chair suggested that in the first sentence the following language should be added after the word "use" and before the word "during": "for the jurors to take notes." The Chair clarified that the Rule should provide that the notepad shall be collected during recesses in the trial and shall be destroyed at the end of the trial. Mr. Bowen pointed out that the notes, not the notepads, should be destroyed. Mr. Titus suggested that the Rule clarify that it is the notes that are to be destroyed. Mr. Sykes added that the Rule must make clear that the jurors review the notes, not the notepads. Mr. Titus suggested that the sentence providing for no review by any person begin as follows: "Except by the jurors during deliberations, the notes may not be reviewed...". The Committee agreed by consensus to the proposed changes.

Mr. Sykes commented that the sentence which provides that the court shall instruct the jurors not to use the notes outside the courtroom does not cover impeachment of the verdict. More language may need to be added. The Reporter pointed out that Rule 5-606

covers impeachment of the verdict. Mr. Titus remarked that Rule 2-521 does not overrule Rule 5-606. Mr. Sykes observed that the juror notes may reveal impropriety, prejudice, and improper motives. Mr. Titus said that this is a policy question. Mr. Sykes noted that the Rule does not provide that the jurors' notes cannot be used for any other purpose. Judge Johnson commented that the Rule provides that the notes are to be destroyed. The Chair asked if a sentence should be added which would provide that the court instructs the jurors that the basis of their verdict should be the evidence presented in the courtroom. The Vice Chair expressed the view that she did not disagree with the substance of the proposed changes to Rule 2-521, but she had a problem with the placement of certain provisions dealing with what can go into the jury room. Mr. Sykes pointed out that it was the time for Agenda Item 2 to be considered.

Agenda Item 2. Consideration of proposed amendments to certain rules pertaining to arrest warrants and charging documents: Rule 4-212 (Issuance, Service, and Execution of Summons or Warrant) and Rule 4-201 (Charging Document -- Use)

---

The Chair welcomed the guests present for the discussion of Agenda Item 2. Judge Johnson presented Rules 4-212 and 4-201 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-212 to add certain provisions concerning the inspection of certain files and records of the court pertaining to warrants and charging documents, as follows:

Rule 4-212. ISSUANCE, SERVICE, AND EXECUTION OF SUMMONS OR WARRANT

(a) General

When a charging document is filed or when a stetted case is rescheduled pursuant to Rule 4-248, a summons or warrant shall be issued in accordance with this Rule. Title 5 of these rules does not apply to the issuance of a summons or warrant.

(b) Summons -- Issuance

Unless a warrant has been issued, or the defendant is in custody, or the charging document is a citation, a summons shall be issued to the defendant (1) in the District Court, by a judicial officer or the clerk, and (2) in the circuit court, by the clerk. The

summons shall advise the defendant to appear in person at the time and place specified or, in the circuit court, to appear or have counsel enter an appearance in writing at or before that time. A copy of the charging document shall be attached to the summons. A court may order the reissuance of a summons.

(c) Summons -- Service

The summons and charging document shall be served on the defendant by mail or by personal service by a sheriff or other peace officer, as directed (1) by a judicial officer in the District Court, or (2) by the State's Attorney in the circuit court.

(d) Warrant -- Issuance and Inspection

(1) In the District Court

A judicial officer may, and upon request of the State's Attorney shall, issue a warrant for the arrest of the defendant, other than a corporation, upon a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document and that (A) the defendant has previously failed to respond to a summons that has been personally served or a citation, or (B) there is a substantial likelihood that the defendant will not respond to a summons, or (C) the whereabouts of the defendant are unknown and the issuance of a warrant is necessary to subject the defendant to the jurisdiction of the court, or (D) the defendant is in custody for another offense. A copy of the charging document shall be attached to the warrant.

(2) In the Circuit Court

Upon the request of the State's Attorney, a warrant shall issue for the arrest of a defendant, other than a corporation, if an information has been filed against the defendant and the circuit court or the District Court has made a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document or

if an indictment has been filed against the defendant; and (A) the defendant has not been processed and released pursuant to Rule 4-216, or (B) the court finds there is a substantial likelihood that the defendant will not respond to a summons. A copy of the charging document shall be attached to the warrant. When the defendant has been processed and released pursuant to Rule 4-216, the issuance of a warrant for violation of conditions of release is governed by Rule 4-217.

(3) Inspection

If the judicial officer decides to issue a warrant for the arrest of the defendant rather than a summons, until the warrant has been served and a return of service has been filed in compliance with section (g) of this Rule, files and records of the court pertaining to the warrant and charging document shall not be open to inspection except by order of the court. After the return of service is filed, the files and records shall be open to inspection.

Committee note: This subsection does not preclude the release of statistical information concerning unserved arrest warrants nor does it prohibit a State's Attorney or peace officer from releasing information pertaining to an unserved arrest warrant and charging document.

Cross reference: See Rule 4-201 concerning charging documents.

(e) Execution of Warrant -- Defendant Not in Custody

Unless the defendant is in custody, a warrant shall be executed by the arrest of the defendant. Unless the warrant and charging document are served at the time of the arrest, the officer shall inform the defendant of the nature of the offense charged and of the fact that a warrant has been issued. A copy of the warrant and charging document shall be served on the defendant promptly after the arrest.

The defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest or, if the warrant so specifies, before a judicial officer of the circuit court without unnecessary delay and in no event later than the next session of court after the date of arrest. The Court shall process the defendant pursuant to Rule 4-216 and may make provision for the appearance or waiver of counsel pursuant to Rule 4-215.

Committee note: The amendments made in this section are not intended to supersede Code, Courts Article, §10-912.

(f) Procedure -- When Defendant in Custody

(1) Same Offense

When a defendant is arrested without a warrant, the defendant shall be taken before a judicial officer of the District Court without unnecessary delay and in no event later than 24 hours after arrest. When a charging document is filed in the District Court for the offense for which the defendant is already in custody a warrant or summons need not issue. A copy of the charging document shall be served on the defendant promptly after it is filed, and a return shall be made as for a warrant. When a charging document is filed in the circuit court for an offense for which the defendant is already in custody, a warrant issued pursuant to subsection (d)(2) of this Rule may be lodged as a detained for the continued detention of the defendant under the jurisdiction of the court in which the charging document is filed. Unless otherwise ordered pursuant to Rule 4-216, the defendant remains subject to conditions of pretrial release imposed by the District Court.

(2) Other Offense

A warrant issued pursuant to section (d) of this Rule for the arrest of a defendant in custody for another offense may be lodged as

a detainer for the continued detention of the defendant for the offense charged in the charging document. When the defendant is served with a copy of the charging document and warrant, the defendant shall be taken before a judicial officer of the District Court, or of the circuit court if the warrant so specifies, without unnecessary delay. In the District Court the defendant's appearance shall be no later than 24 hours after service of the warrant, and in the circuit court it shall be no later than the next session of court after the date of service of the warrant.

(g) Return of Service

The officer who served the defendant with the summons or warrant and the charging document shall make a prompt return of service to the court that shows the date, time, and place of service.

(h) Citation -- Service

The person issuing a citation, other than for a parking violation, shall serve it upon the defendant at the time of its issuance.

Source: This Rule is derived as follows:
Section (a) is in part derived from former Rule 720 a and M.D.R. 720 c and in part new.
Section (b) is derived from former Rule 720 a and M.D.R. 720 c.
Section (c) is derived from former Rule 720 b and M.D.R. 720 d.
Section (d) is in part derived from former Rule 720 c and M.D.R. 720 e and is in part new.
Section (e) is derived from former Rule 720 d and e, M.D.R. 720 f, and M.D.R. 723 a.
Section (f) is derived from former Rule 720 f and M.D.R. 720 h.
Section (g) is derived from former M.D.R. 720 g.
Section (h) is derived from former M.D.R. 720 i.

Rule 4-212 was accompanied by the following Reporter's Note.

The amendments to Rules 4-212 and 4-201 are proposed in response to public safety concerns raised by Colonel David Mitchell, Superintendent of the Maryland State Police, and others involved in law enforcement. Currently, unless a charging document is sealed before an arrest warrant is served, court files and records pertaining to the warrant and charging document are open to public inspection. Criminal defendants are becoming aware of the existence of arrest warrants before the warrants can be served. This increases the risk that defendants will flee or endanger officers attempting to execute the warrants.

The Criminal Subcommittee recommends that Rule 4-212 be amended to provide that when circumstances compel issuance of a warrant (rather than a summons), the court files and records pertaining to the warrant and charging document not be open to inspection (except by order of the court) until the warrant has been served and a return of service filed in compliance with section (g) of the Rule. Proposed Committee Notes following Rules 4-212 (d)(3) and 4-201 (d) make clear that statistical information concerning unserved warrants may be released and that, unless a court has directed that a charging document be kept secret pursuant to Rule 4-201 (d), the warrant and charging document are not sealed and a law enforcement official who wishes to disseminate information known by the official concerning the warrant and charging document (e.g., to encourage a defendant to surrender, to compile a "most wanted" list, etc.) is not prohibited by the Rule from doing so.

AMEND Rule 4-201 to add a Committee Note following section (d), as follows:

Rule 4-201. CHARGING DOCUMENT--USE

(a) Requirement

An offense shall be tried only on a charging document.

(b) In the District Court

In the District Court, an offense may be tried (1) on an information, (2) on a statement of charges filed pursuant to section (b) of Rule 4-211, or (3) on a citation in the case of a petty offense or when authorized by statute.

(c) In the Circuit Court

In the circuit court, an offense may be tried

(1) on an indictment, or

(2) on an information if the offense is (A) a misdemeanor, or (B) a felony within the jurisdiction of the District Court, or (C) any other felony and lesser included offense if the defendant requests or consents in writing to be charged by information, or if the defendant has been charged with the felony and a preliminary hearing pursuant to Rule 4-221 has resulted in a finding of probable cause, or if the defendant has been charged with the felony as to which a preliminary hearing has been waived, or

(3) on a charging document filed in the District Court for an offense within its jurisdiction if the defendant is entitled to

and demands a jury trial or appeals from the judgment of the District Court.

(d) Sealing a Charging Document

When a court directs that a charging document be kept secret until the defendant has been arrested or served, the clerk shall seal the charging document until arrest or service. While the charging document is sealed no person shall disclose the fact that it has been filed or its contents, except as necessary for the issuance and execution of a summons or warrant. Committee note: When a warrant for the arrest of the defendant has been issued and the charging document has not been sealed pursuant to this Rule, the right to inspect the charging document is governed by Rule 4-212 (d)(3).

(e) Docket in Place of Citation

A court may conduct a trial of an offense charged by citation without having a copy of the citation before it if the court has a docket containing all pertinent details extracted from the citation. The docket shall be prima facie proof of the contents of the citation. If any material entry on the docket is contested by any party, the court shall obtain a copy of the citation before proceeding with the trial.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 710 a and M.D.R. 710 a.
Section (b) is derived from former M.D.R. 710 b, c and d.
Section (c) is derived from former Rule 710 b, c and d.
Section (d) is derived from former Rule 710 e and M.D.R. 710 e.
Section (e) is new.

Rule 4-201 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed

amendment to Rule 4-212.

Judge Johnson explained that currently when a charging document is filed and an arrest warrant is issued, the information pertaining to this goes into a computer system. A file identifies outstanding warrants, and the file is accessible by computer modem to anyone with a computer. Over time, the files have been accessed, and solicitation letters have developed. The letters offer the services of the attorney who sends them and are sent out to persons who have not yet been served with a warrant. There has been publicity about this process in the last month or two. Concern has been expressed about the police being endangered and evidence being destroyed, because violent people know they are about to be arrested. Governor Parris Glendening wrote to the Rules Committee asking if the Committee could handle this matter by rule. If not, the Governor will recommend legislation in the General Assembly. The Criminal Subcommittee met, and it decided to recommend modification of Rules 4-212 and 4-201.

Judge Johnson drew the Committee's attention to subsection (d)(3) of Rule 4-212 which contains the changes proposed by the Subcommittee. The Committee note provides that subsection (d)(3) would not preclude the release of information concerning unserved arrest warrants by law enforcement agencies. The proposed cross reference refers to Rule 4-201. A Committee note is proposed to be added to section (d) of Rule 4-201. The Vice Chair inquired if any

consideration had been given to asking the Attorneys Subcommittee to discuss a possible prohibition against solicitation by attorneys. Judge Johnson replied that Judge McAuliffe had been present at the Criminal Subcommittee meeting. Judge McAuliffe had said that when the Court of Appeals modified the Attorney Discipline Rules pertaining to advertising, he had dissented, because he has been persuaded that according to several U.S. Supreme Court cases, direct contact between attorneys and potential clients can be prohibited. He would like the Rules Committee to take a look at this issue.

The Vice Chair commented that she had not reviewed all the case law on the issue of solicitation. Solicitation by mail cannot be prohibited across the board. The situation being discussed today is that the solicitation is directed to a class of people who could cause harm to the administration of justice. The Chair noted that the solicitation issue is in many ways both a criminal and a civil matter. In the criminal case, the only situation which should be considered is where an arrest warrant has been issued, but not yet served. Once the defendant has been arrested and processed, no one is prohibited from contacting him or her. When a summons has been issued, no one is prohibited from contacting the defendant, even if the summons has not been served. The Chair told the Committee that the Honorable Martha Rasin, Chief Judge of the District Court, had attended the Subcommittee meeting and was present today.

Chief Judge Rasin said that she had received a letter from Mr.

Roland Knapp, Director of the Division of Parole and Probation, who had heard about the proposed rule and was concerned about limited access to the computer system by public safety officials, some of whom work in pretrial services, local detention centers, and the Division of Parole and Probation. These individuals may need access to information about arrest warrants. James Vaseleck, Director of Judicial Information Systems (JIS), explained that MILES, a computer system, handles the arrest warrants. The system allows access to the District Court, and the Department of Public Safety. A statewide warrant system is being planned for early summer, and this would allow access by law enforcement agencies and agencies such as the Division of Parole and Probation and the Department of Correction. Judge Rasin inquired as to who enters the information into the MILES system. Mr. Vaseleck replied that the designated service agency, which arranges for the warrant to be issued by the court, enters it into the system. Judge Rasin asked if anyone has to find out about it from the court. Mr. Vaseleck replied that no one has to find out about it from the court. The Vice Chair questioned whether the press has access to MILES. Mr. Vaseleck answered that he did not know.

The Chair said that Andrea Leahy-Fucheck, Esq., Counsel to Governor Glendening, who was present at the meeting today, had discussed the problem with officials of the Maryland State Police. Ms. Leahy-Fucheck introduced two of the State Police officials, Lt. Col. David Czorapinski and Lt. Stewart Russell. Lt. Col. Czorapinski

told the Committee that he was Chief of Administrative Services for the Maryland State Police. He explained that his agency controls the MILES system which has a certified access code with restricted dissemination of information. Only law enforcement agencies, not the press, can access the system. The Vice Chair questioned whether allowing the press access to the MILES system would cause problems, and Lt. Col. Czorapinski replied that it would. The Reporter asked whether agencies such as Pretrial Services and Division of Parole and Probation have access to the MILES system, and Lt. Col. Czorapinski replied that those agencies have terminals which access the system.

Mr. Titus referred to the letter from Mary R. Craig, Esq., who represents The Baltimore Sun. The letter had been distributed at today's meeting. (See Appendix 2). Mr. Titus noted that his law firm also does legal work for The Baltimore Sun. He remarked that the mechanism which the Subcommittee has chosen to correct the evil shuts off access to the information on warrants totally. He inquired whether a less severe mechanism could address the evil. Could the Rule provide that when a return has not been issued, thirty days after the issuance of the warrant, access to the information is available? This would be instead of perpetually leaving unserved warrants in non-access status.

The Vice Chair expressed her concern about closing records to the press across the board. She inquired if the press has generated any problems by its use of this information. The Chair stated that

in the overwhelming percentage of cases, the press has never interfered with law enforcement officials serving arrest warrants. The problem is not directed to depriving the press of access to information. He asked what else can be done to solve the problem.

Mr. Brault remarked that there had been a recent federal case which attempted to block the solicitation of clients by letters from attorneys which were sent within 30 days of an accident or criminal arrest. Mr. Zarnoch said that the criminal aspect of the case lost on appeal to the Fourth Circuit, but the civil aspect was decided in favor of not allowing solicitation letters to be sent for 30 days following an accident or disaster. He pointed out that Rule 4-212 does not run afoul of the federal case.

Mr. Bowen questioned whether the suggestion to prevent access to the warrant information for 30 days would be appropriate. Lt. Col. Czorapinski answered that 30 days would be an inappropriate time period. The paperwork to process warrants from one jurisdiction to another can take longer than 30 days. In a high profile or very serious case, the police may not know where the suspect is, and it may take time to locate him or her. There is the potential for these type of suspects to be difficult. Betty Sconion, Esq., an Assistant Attorney General for the Maryland State Police, pointed out that notifying someone that he or she is going to be arrested gives the suspect the opportunity to clean house before the police arrive, possibly getting rid of incriminating evidence. Rule 4-601, Search

Warrants, does not set a time after which unexecuted search warrants are open to inspection. The same interests are served as with arrest warrants. It is not uncommon to find a suspect with evidence of the crime for which he or she is charged. No time limits should be set for arrest warrants.

The Chair commented that search warrants are good for 15 days, and then they are returned to the judge. If the court records concerning arrest warrants are not open to the public for a period of time, and thereafter are opened, this would solve Mr. Knapp's problem. The probation officer would know if someone has been arrested. When the judge signs a search warrant, nothing happens until the warrant is executed. It does not become a public record. Mr. Sykes observed that it may make sense to solve the problem with a balanced rule which distinguishes between serious and minor charges. A person charged with a minor crime is not likely to flee. Access to that person's records could be allowed after 30 days. Where there is a serious charge with a danger of flight, the Subcommittee's version of the Rule would be appropriate. Judge Vaughan noted that a determination as to seriousness of the charge could vary from jurisdiction to jurisdiction. He asked how bench warrants figure into this equation and if they are sealed. The Chair answered that they are not sealed and are issued on the record in open court. Mr. Brault added that when a bench warrant is issued, the defendant has already been charged and has not appeared.

The Chair stated that this Rule does not change procedures for service of a warrant by law enforcement officers. It pertains only to access to the court records and files. Mr. Dean expressed the opinion that Mr. Sykes' suggestion about differ- entiating between serious and minor crimes was a good idea. The Chair responded that this may cause problems for the District Court Commissioner to parcel out the crimes. Which crimes are included may lead to a debate. This is more situational to the defendant than to the offense. An aggressive person committing an assault may be more dangerous that someone who solicits to commit murder. Judge Rasin said that the Commissioner uses certain criteria, one of which is whether the person is likely to appear in court. A different factor is dangerousness. Warrants can be issued in trespass cases, not because the person is inherently dangerous, but because the person failed to appear previously. There are assault cases where the person is served by a summons. The assault may be that the person pushed someone else's hand off of the television. It is difficult to catalogue charges.

The Vice Chair inquired whether statistics are kept as to the average length of time for service of the arrest warrants. Lt. Col. Czorapinski responded that statistics are not kept --there are thousands of active warrants. The Vice Chair asked Lt. Col. Czorapinski what time period he felt was necessary to have an adequate opportunity to serve the warrants. He replied that he would

have to think about it before he could answer. The Vice Chair asked about a 60-day time period, and Lt. Col. Czorapinski answered that 60 days would not be sufficient.

Mr. Titus suggested that subsection (d)(3) be modified to provide that the files and records of the court pertaining to the warrant and charging document shall be open to inspection on the first to occur of ___ days after the warrant has been issued or until the warrant has been served and a return of service filed. The blank would contain the appropriate number of days, whether it be 60 or 90 or some other number. Mr. Vaseleck noted that he would have to check the data bases in the computer system to make sure that the date of issuance of the warrant is recorded.

Mr. Brault asked the law enforcement officials who were present at the meeting if the length of time it takes to serve the warrant is an inverse factor in that the longer it takes, the more likely it is that the suspect will flee. He asked what happens if an attorney writes a letter to a suspect who has not yet been served with a warrant, and someone else gets the letter. Lt. Col. Czorapinski replied that often the recipient of the letter, who is generally a friend or relative of the suspect, tips the suspect off about the impending arrest warrant. The suspect then changes locations. Mr. Brault inquired as to how fast the attorney letters are reaching someone. Lt. Col. Czorapinski answered that generally the letters get to the location within 14 days. Mr. Titus commented that with a

60-day delay in sending the letter by the attorney, there would be less risk of flight. This also protects the public. The Chair commented that Mr. Titus' suggested change that the record is open to the public when the warrant is served and returned or on a date certain takes care of the problems with the current Rule, and it does not pose problems for court computers. Mr. Dean added that Rule 4-201 is not affected by Mr. Titus' suggested language. Any charging document can be sealed.

The Chair said that Ms. Craig had argued at the Subcommittee meeting that the mechanism for public access is being cut off. Public access provides a mechanism to test the sufficiency of the court system. Ms. Natalie Boehm, whose LETS Company sends out letters notifying attorneys of people who are about to be served with arrest warrants, explained that in one of the cases in which she was involved, the letter to the defendant was mailed on November 21, and the warrant was served on November 25. The defendant turned himself in. Mr. Brault asked if the defendant hired the attorney who had written the letter. Ms. Boehm replied that the defendant called the attorney who advised him about the process, the warrant, extradition, and representation by the Public Defender. The attorney was not hired, and the defendant received all the benefits of the letter. The Chair stated that law enforcement is entitled to serve warrants without competing with attorneys trying to be hired. Warrants are not issued unless there is a serious reason. He questioned whether

there is a problem disclosing the existence of unserved warrants 60 days after the warrant is issued.

Ms. Leahy-Fucheck thanked the Rules Committee and the Chair for their attention to the matter of the arrest warrants. She noted that a version of a legislative bill to solve this problem was handed out at the meeting. The bill's language is incomplete, but it would attempt to mirror any language developed by the Rules Committee. The reason that the Governor asked the Rules Committee to get involved is that law enforcement officials are very concerned. Ms. Leahy-Fucheck expressed the view that if the Rules Committee recommends a 60-day delay in opening up the court files and records, law enforcement officials are going to be opposed. Her suggestion was that the Committee distribute the proposed amendment to the Rule to get an opinion from law enforcement. The Vice Chair commented that she supported the idea of the proposal. If 60 days is not long enough, what would be a fair number based on statistics? Mr. Titus added that law enforcement officials could decide on the number.

The Chair asked Lt. Col. Czorapinski what number of days after the warrant has been issued would be adequate to open up the court files and records. Lt. Col. Czorapinski responded that the number differs from jurisdiction to jurisdiction depending on the efficiency of service. It would be less in rural areas, and higher in metropolitan areas. He said that he would like to ask the Superintendent and Chiefs of Police for a consensus.

Judge Johnson pointed out that problem cases can be sealed by the court. Mr. Titus remarked that language could be added to subsection (d)(3) which provides that in an individual case, the court may extend the time that the record is not open to the public. The Chair observed that once the time frame has been established, law enforcement officials can go to the State's Attorney towards the end of that period, and the State's Attorney can decide if the records in that particular case should continue to be closed. The provision on the right to seal cases in Rule 4-201 can be cross referenced. Once the time frame is chosen by the Committee, the Rule will be published for comment, and law enforcement officials or anyone else can inform the Court of Appeals what an appropriate time frame would be.

Judge Kaplan suggested that there be a 90-day time frame included in the Rule. Within 10 days of the expiration date, the State's Attorney would be able to apply to seal the warrant. The Chair pointed out that Rule 4-201 already contains a sealing provision. Judge Kaplan expressed the opinion that this provision should also be in Rule 4-212 for clarity. The Chair stated that there would be two triggering events in the Rule --one is if an arrest warrant is served and returned, and the other is if a certain period of time has elapsed, and there is no reason to require that the court records should continue to be shielded from the public. He asked Judge Rasin if this would pose any problems in the District Court. She replied that it would not pose any problems as long as it

does not pose problems for JIS. Ms. Craig inquired if this would include bench warrants, and the Chair answered that it would not -- it would only be traditional arrest warrants.

Ms. Boehm told the Committee that closing files to the public presupposes that the government is doing what it is supposed to be doing. She had told the Subcommittee at the last meeting that there are many abuses in the system. Her perusal of the files had turned up several cases in which warrants were issued for relatively minor offenses, or in which both members of a married couple were charged with assaulting each other, but the wife was issued a warrant while the husband was issued a summons.

The Chair told Ms. Boehm to give the information she had to him, so that it could become part of the record of the meeting. (See Appendix 3).

The Chair commented that the focus of the discussion at today's meeting should be the narrow issue of whether the public has the right to know whether an arrest warrant has been issued for a defendant. Ms. Boehm pointed out that Rule 4-216 (f) lists the factors which the District Court Commissioner may consider when determining whether a defendant should be released pretrial. If the defendant is not allowed to receive letters offering legal representation, the defendant may not be prepared in his or her appearance before the Commissioner. The Chair remarked that this is not a common problem.

Mr. Bowen moved to adopt the Rule with the modification that after the warrant has been served or after a period of 90 days, whichever is earlier, the files and records would become open to the public. The motion was seconded. Mr. Bowen noted that it is important to agree upon a rule, so that it can be published for comment and decided upon by the Court of Appeals. The legislature can also act on this. Del. Vallario commented that in the last session, the legislation which prevented criminal attorneys from contacting clients for 30 days after arrest had been approved by the Attorney General, but it was overturned by the Fourth Circuit. The issue considered today is a different problem and concerns a safety issue. He had asked counsel to the House Judiciary Committee to draft language for a bill to remedy the situation, and he read some of the bill to the Committee.

Mr. Brault observed that there may be some ethical issues for the Attorneys Subcommittee to discuss. One concerns the receipt by a defendant of a computer-generated letter which is from an attorney but is not signed.

The Chair called the question on Mr. Bowen's motion to approve Rule 4-212 with his suggested modifications, and the motion carried unanimously.

There being no further discussion of Rule 4-201, the Rule was approved as presented.

Agenda Item 3. Consideration of proposed amendments to certain

rules pertaining to jurors' notes: Rule 2-521 (Jury --Review of Evidence -- Communications), Rule 4-326 (Jury -- Review of Evidence -- Communications), and Rule 5-606 (Competency of Juror as Witness) (Continued)

---

The Chair stated that the discussion of Rule 2-521 would continue. The Reporter listed the changes already made to the Rule in the discussion earlier in the meeting. Mr. Sykes pointed out that the Rule now provides that the jurors may use their notes only during deliberations. The Chair said that he did not like the language in the first sentence which reads "in taking notes." He suggested that the first sentence read as follows: "The court may, and upon request of any party shall, provide notepads for use during trial and deliberations." Mr. Sykes suggested that the words "by jurors" be added in after the word "use" and before the word "during." The Chair suggested that the second sentence read as follows: "The notepads shall be collected during recesses, and the notes shall be collected at the end of the trial and destroyed promptly." Mr. Bowen suggested that in the third sentence, the word "notepads" should be "notes." The Committee agreed by consensus to these suggestions.

The Chair suggested that a sentence be added which provides that after the deliberations are over, the notes cannot be used for any other purpose. Delegate Vallario inquired whether this would mean that in a case like Aron, the judge could not review the juror's notebook later. The Chair replied that the judge could not later review the notebook. Mr. Brault said he had argued the Aron case.

He suggested that the Rule provide how the notepads are distributed, collected, and protected. However, the juror impeachment rule should not be expanded. The problem in the case was the failure of the court to take control of the notes. If the notes were allowed to be distributed after a notorious trial, such as the O.J. Simpson trial, magazines would buy them. Mr. Titus remarked that some clerks' offices may not destroy the notes, but simply throw them away. The Chair responded that the Rule will provide that the notes are to be collected and destroyed. The use of the notes is covered by the juror impeachment rule. One other important part of this is that a juror who decides to make notes about the trial at some time other than during the trial cannot bring those notes to court.

Mr. Bowen commented that it should be clear that if someone gets possession of the jurors' notes, the trial cannot be reopened. Mr. Titus observed that if a trash collector finds the notes, there could be impeachment of the verdict. The Chair reiterated that notes taken by the jurors during the trial cannot be used to impeach the verdict. Mr. Hochberg pointed out that another loophole is that jurors may bring in other written materials. Mr. Brault explained that this situation is covered by the case of GMC v. Wernsing, 54 Md. App. 19 (1983), aff'd, 298 Md. 406 (1984.)

Judge Johnson asked about the meaning of destruction of the notes. He said that not all courts have a shredder. Mr. Brault responded that the notes can be ripped up. Delegate Vallario

remarked that the Rule provides that only a party can request that the jurors take notes. He asked if a juror can request a notepad for jurors to take notes. Mr. Titus reiterated that only a party can request that jurors take notes, and the jurors themselves cannot make this request. He stated that this will be reflected in the minutes of the meeting.

The Chair suggested that a sentence be added which will instruct jurors that any notes made outside the courtroom cannot be brought in. The Committee agreed by consensus to this suggestion. Judge Johnson pointed out that the tagline to section (a) should be changed. The Chair said that the first part of section (a) refers to jurors' notes and should be captioned that way, and the latter part of the Rule which begins with the sentence pertaining to exhibits would have a separate section. Mr. Titus commented that the Style Subcommittee could rename the Rule. Mr. Brault expressed the view that the changes made today concerning jurors' notes shoudl be put in a separate section of the Rule. The Chair noted that the same changes will be made to Rule 4-326. Mr. Titus suggested that the amendment to Rule 5-606 (b) read as follows: "(3) A juror's notes made in accordance with Rule 2-521 (a) or Rule 4-326 (a) may not be used to impeach a verdict." The Committee agreed with these suggestions, and Rules 2-521, 4-326, and 5-606 were approved as amended.

The Chair adjourned the meeting.