COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, 100 Community Place, Crownsville, Maryland on April 25, 1997.

Members present:

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

Lowell R. Bowen, Esq.
Robert L. Dean, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
James J. Lombardi, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
John Broderick, Esq., Assistant Bar Counsel
Glenn Grossman, Esq., Deputy Bar Counsel
Martin B. Lessans, Esq.,

The Chairperson convened the meeting. He announced that the rules in the 134th Report were presented to the Court of Appeals two weeks ago, and the presentation went well. Mr. Bowen attended and discussed Rule 2-601, Entry of Judgment. The Rules were all adopted with the exception of Rule 4-255, Intention to Seek a Sentence of Death or Life Imprisonment Without the Possibility of Parole. The dinner commemorating the fiftieth anniversary of the Rules Committee

will hopefully be held in the fall, since it will be part of the fiscal year 1997-1998 budget. There is also a possibility that a Rules Committee meeting will be held at Donaldson Brown.

The Chairperson said that at the next meeting on May 16, the Committee can look at rules requiring changes in light of the 1997 legislative session which recently ended. A criminal procedure bill covering pretrial release passed which may require a change to the rules. Another bill which passed is one which requires the registration of known sexual predators. If this procedure is not enacted, Maryland could lose federal funding. If anyone knows of any other bills which passed affecting the Rules of Procedure, it would be important to notify the Reporter, Assistant Reporter, Vice Chairperson, or the Chairperson.

The Vice Chairperson asked if the Court of Special Appeals opinion pertaining to the admissibility in evidence of the results of examinations by a neuropsychologist under Rule 2-423 was available yet. The Chairperson answered that it is not yet completed, and the Court will conference on it this coming Tuesday. Once the opinion is finalized, the Chairperson will send it to the members of the Rules Committee. It may require some work on the part of the Committee.

Mr. Lombardi moved to approve the minutes of the March 14, 1997 meeting. The motion was seconded and approved unanimously.

Agenda Item 1. Consideration of "housekeeping" amendments to Forms RGAB 20/M and RGAB 20/O, Appendix of Forms, Forms for Special Admission of Out-of-State Attorneys

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The Reporter presented Forms RGAB 14/M and RGAB 14/O for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX OF FORMS

FORMS FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY

AMEND Form RGAB 20/M to rename it, correct an obsolete reference, and make a certain stylistic change, as follows:

Form RGAB **[**20**]** 14/M

(Caption)

MOTION FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY UNDER RULE **[**20**]** 14 OF THE RULES GOVERNING ADMISSION TO THE BAR

I, _____, attorney of record in this case, move the court to admit, for the limited purpose of appearing and participating in this case as co-counsel with me, _____ of _____, (address) an out-of-state attorney who is a member in good standing of the Bar of_____ _____.

_____
Attorney for

_____

_____
Address

_____
Telephone

CERTIFICATE AS TO SPECIAL ADMISSIONS

I, _____, certify on this ____ day of_____, **[**19**]** _____, that during the preceding twelve months, have been specially admitted in the State of Maryland _____ times.

_____
Out-of-State Attorney

Form RGAB 14/M was accompanied by the following Reporter's Note.

The amendments to Forms RGAB 20/M and RGAB 20/O are proposed at the suggestion of the Secretary to the State Board of Law Examiners. Several years ago, former Bar Admission Rule 20 was revised and renumbered as Bar Admission Rule 14, but conforming changes to the forms were not made. The proposed amendments make these changes. Also, as a matter of style as the turn of the century approaches, the number "19" is proposed to be deleted from the "year" space in each form.

MARYLAND RULES OF PROCEDURE

APPENDIX OF FORMS

FORMS FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTORNEY

AMEND Form RGAB20/O to rename it and make a certain stylistic change, as follows:

Form RGAB **[**20**]** 14/O

(Caption)

ORDER

ORDERED, this ____ day of _____, **[**19**]** _____, by the _____ _____Court for

_____, Maryland, that

☐ _____, Esq. is admitted specially for the limited purpose of appearing and participating in this case as co-counsel for _____.

☐ That the Special Admission of _____, Esq. is denied for the following reasons:_____ _____ _____

and it is further

ORDERED, that the Clerk forward a true copy of the Motion and of this Order to the State Court Administrator.

_____
Judge

Form RGAB 14/O was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Form RGAB 20/M.

The Reporter explained that Bedford Bentley, Esq., Secretary to

the State Board of Law Examiners, had previously notified her that some of the forms used by the State Board were incorrect because they were citing Rules which had been renumbered. Several years ago, Bar Admission Rule 20 was revised and renumbered as Bar Admission Rule 14. The amendments to the forms included in the meeting materials are being renumbered and the term "19____" is being deleted as a stylistic change. These are "housekeeping" amendments. The Vice Chairperson pointed out that the certificate at the end of Form RGAB 14/M is not worded correctly. She suggested that the word "I" be added in before the word "have". The Committee agreed to this change by consensus.

The Vice Chairperson said that she had some problems with some of the forms in the rule book. Rule 1-302, Forms, provides the derivation of the Rule and states in a Committee note that an Appendix of Forms will be developed later. The derivation section should be placed in a source note. Since there is still no appendix of forms, although the Rule has been effective since 1984, either the Note should be deleted, or the appendix should be developed. The Committee approved the deletion of the Committee note, and the placement of the first part of it in a source note.

The Vice Chairperson noted that former Forms 1 to 21, and former Form 611 have been deleted. In her book, Maryland Rules Commentary, she had written that new forms would be developed. She asked if anyone is working on the replacement of those forms. She

also pointed out that Form 22 is outdated. The term "order" should have been replaced by the term "notice", and the reference to "Rule 811" is incorrect, because that Rule no longer exists. The reference to "Mr. Clerk" is obsolete, and so is the language "from the judgment entered in this action on June 1, 1960." A period should be placed after the word "Plaintiff", and the remainder of the sentence deleted. The Rule should either be revised or completely deleted. Judge McAuliffe commented that the form should be revised, and the annotation to it updated, because there are cases pertaining to the form. The Vice Chairperson moved to revise the forms, the motion was seconded, and it carried unanimously.

Mr. Titus suggested that on Form RGAB 14/O a box should be added which would indicate whether the Maryland attorney requests that his or her presence be waived and another box should be added to Form 14/O which provides whether the Maryland attorney's presence counsel has or has not been waived. The Vice Chairperson remarked that in practice the Maryland counsel usually takes no part in handling the case. Mr. Broderick said that the Office of Bar Counsel gets complaints when the moving resident attorney does not show up in court. The judge in the case may be annoyed with out-of-state counsel who is not prepared. This may involve violations of Rules of Professional Conduct 8.4 and 5.5. Mr. Titus added that in most cases, the presence of the resident attorney is not waived unless the judge knows the out-of-state counsel. Mr. Broderick noted that this

is often a problem in District Court because the judge has never seen the motion for the special admission of an out-of-state attorney. Judge Vaughan commented that often only the out-of-state attorneys appear in court, and they do not know that they have to appear with a Maryland attorney.

The Chairperson said that if a proceeding is about to get underway, and an out-of-state attorney appears without being accompanied by a Maryland attorney, the judge is put into a bad position. The burden is on the Maryland attorney to make a request to the judge. Judge Johnson commented that this is a big problem in the jurisdictions which are adjacent to the District of Columbia. The Maryland attorney may not realize that he or she has to be present in court. In Prince George's County, the judges never waive the presence of the Maryland attorney. Mr. Johnson noted that in asbestos cases, when there is an out-of-state attorney, the local counsel tends not to appear whether or not the presence of the local counsel was waived. The Chairperson stated that attorneys have to understand that the admission of an out-of-state attorney is not automatic. Judge Vaughan remarked that District Court cases usually do not involve enough money to support two attorneys.

Mr. Titus moved that another block be added to Form RGAB 14/O upon which the Maryland attorney can indicate whether resident counsel waives his or her or presence at the trial, and a block be added to Form RGAB 14/M upon which the court can indicate

whether the Maryland attorney's presence has or has not been waived. The motion was seconded.

Mr. Johnson commented that the limitation in the phrase in Form RGAB 14/O which reads "admitted specially for the limited purpose of appearing and participating in this case" is the fact that the out-of-state attorney is co-counsel. Mr. Titus inquired if it is clear that in depositions there will be a great deal of participation by out-of-state counsel. The Vice Chairperson responded that it is not clear in the rule. She said that her experience has been that once the attorney is specially admitted, the presence of the resident attorney is waived. Mr. Titus argued that it is not waived. The out-of-state attorney cannot appear and handle the deposition solo. Does the form refer only to waiver of the attorney's presence in the courtroom? The Vice Chairperson commented that to clarify this, the form could state whether the presence of the resident attorney in any of the proceedings (every step of the action) is being waived. The Chairperson noted that depositions can get out of hand. It would be important to clarify that the limitation applies to all phases of the litigation. The Vice Chairperson asked if the court would care if local counsel was present at the deposition, since it is a tremendous expense to have two attorneys. The Chairperson said that an out-of-state attorney may act outrageously at the deposition. This is a policy question, and the Chairperson expressed the opinion that the court would want to have control over the deposition. Mr. Titus

remarked that if a discovery motion was in front of the judge, and the out-of-state attorney was causing problems, the judge could strike the waiver and speak to the Maryland counsel. Mr. Lombardi observed that each case can take care of itself -- in a minor case, it is ridiculous to have two attorneys. This should not be required.

Judge Kaplan noted that in mass tort cases, there are many out-of-state attorneys. They file a motion to be admitted, and the order entered thereon shows that each attorney is admitted for one case. Local counsel is often not present, and it is not necessary to have two attorneys at most of the hearings. Judge McAuliffe questioned whether a deposition is considered to be a court proceeding. Rule 14 is couched in terms of being geared toward the actual appearance in court or before an administrative body. Mr. Titus suggested that on Form RGAB 14/M there could be blocks for waiver for all purposes, waiver for court purposes only, and waiver for deposition purposes only. Judge McAuliffe noted that the Rule requires the presence of the resident attorney at all court proceedings. The Vice Chairperson pointed out that the second sentence of section (d) provides that "the specially admitted attorney may participate in the court or administrative proceedings....". The Chairperson suggested that the Rule could provide that the attorney from out-of-state may participate "in any stage of the proceedings." The Vice Chairperson asked if anyone had a problem with this in depositions. Judge Kaplan said that it is not a problem in Baltimore City, but Judge Johnson

commented that it is a problem in Prince George's County. Since the Rule provides the out-of-state attorney is to act as "co-counsel", the judges in that jurisdiction felt that the Rule means what it says.

The Chairperson suggested that at the end of Rule 14 instead of the language "presiding over the action", the following language could be substituted: "presiding at the hearing." The Vice Chairperson disagreed, because this would make the Rule applicable only to hearings. Judge Vaughan expressed the view that the Rule is appropriate as it is written. The Chairperson said that Mr. Titus had suggested some changes to Forms RGAB 14/M and 14/O. Mr. Titus explained that his motion was that a block be added to Form RGAB 14/M where the Maryland attorney can request that his or her presence be waived, and that a block be added to Form 14/O to be used by the court to indicate whether the Maryland attorney's presence has been waived and whether it has been waived for all purposes, for court proceedings only, or for depositions only. The Committee agreed unanimously to these additions.

Agenda Item 3. Consideration of proposed amendments to Rule 9-105 (Show Cause Order; Other Notice)

The Reporter presented Rule 9-105 (h) for the Committee's consideration.

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 100 - ADOPTION; GUARDIANSHIP

TERMINATING PARENTAL RIGHTS

AMEND Rule 9-105 (h) to reword certain portions of the show cause order in light of a certain opinion of the Court of Appeals, as follows:

Rule 9-105. SHOW CAUSE ORDER; OTHER NOTICE

. . .

(h) Form of Show Cause Order

The show cause order shall be in substantially the following form:

THIS IS A COURT ORDER. IF YOU DO NOT UNDERSTAND WHAT THE ORDER SAYS, HAVE SOMEONE EXPLAIN IT TO YOU.

IN THE MATTER OF A PETITION FOR _____ (adoption/guardianship)

IN THE CIRCUIT COURT FOR

OF _____ (Name of individual who is the subject of the proceeding)

_____ (county)

_____ (docket reference)

SHOW CAUSE ORDER

TO:

_____ (name of person to be served)

_____

_____
(address, including county)

_____
(relationship of person served to individual who is the subject of the proceeding)

You are hereby notified that:

1. *Filing of Petition*

A petition has been filed for_____
(adoption/guardianship)

of _____ who
(name of individual who is the subject of the proceeding)

was born at _____ on _____.
(birthplace) (date of birth)

(If the petition is for guardianship, include the following sentence: The petition was filed by _____).
(name of child placement agency seeking guardianship)

2. *Right to Object; Time For Objecting*

(A. This portion should be included when the show cause order is to be served pursuant to Rule 2-121.)

If you wish to object to the_____,
(adoption/guardianship)

you must file a notice of objection with the clerk of the court at _____
(address of courthouse)

within _____ days after this Order is served on you. For your convenience, a form notice of objection is attached to this

Order.

(B. This portion should be included when the show cause order is to be published or posted.)

If you wish to object to the_____
(adoption/guardianship)

you must file a notice of objection with the clerk of the court on or before _____
(date)

at _____.
(address of courthouse)

WHETHER THE PETITION REQUESTS ADOPTION OR GUARDIANSHIP, IF YOU DO NOT FILE A NOTICE OF OBJECTION OR A REQUEST FOR AN ATTORNEY BY THE DEADLINE STATED ABOVE, YOU WILL BE DEEMED TO HAVE IRREVOCABLY CONSENTED TO THE ADOPTION OR GUARDIANSHIP AND A JUDGMENT TERMINATING PARENTAL RIGHTS MAY BE ENTERED **[**WITHOUT YOUR CONSENT**]** AT ANY TIME AFTER THE DEADLINE.

3. *Right to an Attorney*

(a) You have the right to consult an attorney and obtain independent legal advice.

(b) An attorney may already have been appointed for you based on statements in the petition. If an attorney has been appointed and has already contacted you, you should consult with that attorney.

(c) If an attorney has not already contacted you, you may be entitled to have the court appoint an attorney for you if:

(1) you are the person to be adopted and:

(A) you are at least ten years old but are not yet 18; or

(B) you are at least ten years old and have a disability that makes you incapable of consenting to the adoption or of participating effectively in the proceeding.

(2) you are the person to be adopted or the person for whom a guardian is sought and the proceeding involves the involuntary termination of the parental rights of your parents.

(3) you are a parent of the person to be adopted or for whom a guardian is sought and:

(A) you are under 18 years of age; or

(B) because of a disability, you are incapable of consenting to the adoption or guardianship or of participating effectively in the proceeding; or

(C) you object to the adoption and cannot afford to hire an attorney because you are indigent.

IF YOU BELIEVE YOU ARE ENTITLED TO HAVE THE COURT APPOINT AN ATTORNEY FOR YOU AND YOU WANT AN ATTORNEY, YOU MUST NOTIFY THE COURT BEFORE THE TIME YOUR NOTICE OF OBJECTION MUST BE FILED. YOU MAY FILE A REQUEST FOR AN ATTORNEY WITHOUT FILING A NOTICE OF OBJECTION, BUT A REQUEST FOR AN ATTORNEY DOES NOT EXTEND THE DEADLINE STATED ABOVE FOR FILING AN OBJECTION.

For your convenience, a request for appointment of an attorney is printed on the notice of objection form attached to this Order. (Omit the last sentence from a published or posted show cause order.)

(d) If you are a parent of the person to be adopted, you are entitled to consult an attorney chosen by you, even if you are not entitled to an attorney appointed by the court. If you employ an attorney, you may be responsible for any fees and costs charged by that attorney unless this is an adoption proceeding and the adoptive parents agree to pay, or the court orders them to pay all or part of those fees or expenses.

(e) If you wish further information concerning appointment of an attorney by the court or concerning adoption counseling and guidance, you may contact

_____
(name of court official)

_____
(address)

_____
(telephone number)

4. *Option to Receive Adoption Counseling*

If this is an adoption proceeding, you also may have the option to receive adoption counseling and guidance. You may have to pay for that service unless the adoptive parents agree to pay or the court orders them to pay all or part of those charges.

Date of issue: _____

_____
(Judge)

. . .

Rule 9-105 was accompanied by the following Reporter's Note.

> This amendment to Rule 9-105 (h) is proposed to amend the warnings set forth in the show cause order in light of In re Adoption No. 93321055, 344 Md. 458 (1997).

The Reporter explained that the Honorable Alan M. Wilner, Associate Judge of the Court of Appeals, and former Chairperson of the Rules Committee, had written an opinion pertaining to filing an objection to an adoption. The case is In re Adoption/Guardianship No. 93321055/CAD in the Circuit Court for Baltimore City et al., 344 Md. 458 (1997.) In light of this opinion, an amendment to Rule 9-105 (h) is proposed. This would change the warnings in the show cause order. There had been a change to Code, Family Law Article, §5-322 (d). This section now provides that: "[i]f a person is notified under this section and fails to file notice of objection within the time stated in the show cause order or if a person's notification has been waived under subsection (c) of this section:

(1) the court shall consider the person who is notified or whose notice is waived to have consented to the adoption or to the

guardianship; and

(2) the petition shall be treated in the same manner as a petition to which consent has been given."

This is stronger than the previous language in the statute. The Family and Domestic Subcommittee has recommended a change to section (h) of Rule 9-105 tracking the opinion which holds that once the person does not timely object, there is no opportunity to object later. Judge Rinehardt, Chairperson of the Subcommittee, was concerned that the warning in the Rule might not be strong enough. Therefore, the Subcommittee added language to subsection 2. of section (h).

Mr. Hochberg expressed concern over the language at the beginning of section (h) which reads: "IF YOU DO NOT UNDERSTAND WHAT THE ORDER SAYS, HAVE SOMEONE EXPLAIN IT TO YOU." He asked to whom the term "someone" refers, and he suggested that it might be preferable to provide that an attorney should explain the order. Mr. Lombardi commented that using the word "attorney" in this provision would force anyone receiving the show cause order to seek the advice of an attorney. Judge Johnson expressed the view that the language cannot be improved. The Chairperson asked if the clerk's office staff could clarify whether order means if someone were to call them. Mr. Shipley replied that the personnel in the clerk's office have to tread a fine line as to how much information can be provided. He noted that subsection 3 (e) refers to obtaining information from the

clerk's office.

Mr. Titus expressed disagreement with the language at the end of subsection 2 which reads: "WHETHER THE PETITION REQUESTS ADOPTION OR GUARDIANSHIP...". The Reporter explained that the petition can request adoption or guardianship. The Vice Chairperson commented that it does not matter whether a guardianship or an adoption is being requested. Mr. Titus suggested that the first clause to which he just referred should be deleted, and the Committee agreed to the deletion by consensus. Mr. Titus pointed out that the proposed addition to the end of subsection 2 is very lengthy, and if one stops reading before reaching the end of the paragraph, the information may not be communicated properly. The Vice Chairperson suggested that the language "OR A REQUEST FOR AN ATTORNEY" should be deleted, and the Committee agreed by consensus to this change. The Chairperson expressed concern about the language "you will be deemed", and the Vice Chairperson disagreed with the language "irrevocably consented." The Chairperson suggested that in place of the phrase which reads "YOU WILL BE DEEMED TO HAVE IRREVOCABLY CONSENTED", the following language should be substituted: "YOU WILL NOT BE ABLE TO REVOKE YOUR CONSENT." The first sentence of the paragraph would read as follows: "IF YOU DO NOT FILE A NOTICE OF OBJECTION, YOU WILL NOT BE ABLE TO REVOKE YOUR CONSENT." The Committee agreed with this suggestion by consensus.

The Chairperson suggested that the second sentence of the

warning provision should read as follows: "A JUDGMENT TERMINATING PARENTAL RIGHTS MAY BE ENTERED AT ANY TIME AFTER THE DEADLINE." The Committee agreed with this suggestion. The Reporter expressed her concern over the deletion of the opening clause which formerly read, "WHETHER THE PETITION REQUESTS ADOPTION OR GUARDIANSHIP." She pointed out that most people think that a guardianship is temporary, but this language alerts the reader that a guardianship terminates parental rights. The Vice Chairperson remarked that the clause does not state that a guardianship terminates parental rights. The Chairperson asked if the warning should be moved to the beginning of the section pertaining to show cause orders. Mr. Bowen noted that that would create a problem, because the deadline is not apparent until one reads the order.

Judge Vaughan said that he had a problem with the second warning at the end of subsection 3 (c) of section (h). He suggested that the underlined material should be made into a separate sentence. The Vice Chairperson commented that Judge Wilner's opinion makes the point that the recipient of the show cause order has to mail in the form which includes both the opportunity to object and to request an attorney. The statute provides that someone has a right to request an attorney prior to filing any objection. The form almost seems like a trap. If someone asks for an attorney, there would be no paper remaining to later use to file an objection. Mr. Klein observed that requesting an attorney is implicitly making an

objection. The Vice Chairperson responded that the Rule says that asking for an attorney is not the same as making an objection.

The Chairperson said that the notice of objection form is supplied with the order. The Reporter asked if the process involves two pieces of paper. The Vice Chairperson expressed the view that most people would not only request an attorney, but would object, as well. If the person who objected later changes his or her mind, the person does not have to attend the hearing. Mr. Hochberg inquired as to where the form is found, and the Chairperson replied that the form is in the Rule. Judge Vaughan said that the request for an attorney could be deemed to be an objection, but the Vice Chairperson noted that Judge Wilner stated in the opinion that one must file an objection. The Chairperson suggested that there could be two separate forms -- one to request an attorney and one to object to the adoption. The Vice Chairperson responded that if there were two separate forms, someone who only wanted to request an attorney could make a mistake and check the last box which provides for making an objection. Mr. Klein expressed the opinion that requesting an attorney should be treated as an objection. The Chairperson pointed out that the opinion precludes that. Judge Johnson noted that the Rule could supersede the opinion. The Chairperson said that the opinion is an interpretation of the statute.

Judge Vaughan commented that many people in District Court do not understand the notices. The average person to whom the show

cause order is directed will not understand it. Judge Johnson added that generally people involved in these matters have no idea what is taking place; if they did, they would not lose custody of their children. Judge Vaughan said that some people could hire an attorney of their own but still want to file an objection. The two need not necessarily be tied together. The Reporter suggested that the Subcommittee could redraft the form. The Chairperson asked Mr. Shipley about the form filed by most people. Mr. Shipley responded that most people use a combined form. Most of the forms are submitted by the petitioner. Judge Vaughan remarked that once the recipient of the show cause order sends the form back, the person has no record of what he or she sent in. There is no tear-off portion.

Mr. Johnson suggested that the issues being discussed need to be considered. The Chairperson said that the Family and Domestic Subcommittee will address them. The Vice Chairperson expressed the concern that the new Rules which went into effect on January 1, 1997 are already causing problems. The Chairperson suggested that the Committee attempt to solve the problems now. The Vice Chairperson proposed that there could be one form, on the top of which would be a place to indicate an objection. The Chairperson pointed out that Rule 9-105 (h) provides: "The show cause order shall be in substantially the following form...". It is not the form which is causing the problem; it is the manner of notice. The Vice Chairperson explained that her idea is to have only one piece of

paper filed, whether it is a request for an attorney or an objection. The Chairperson said that the proposal before the Committee today is the amendment to the show cause order to conform to the Court of Appeals opinion. Once this is done, the Rule can go to the Subcommittee for further work.

Mr. Johnson reiterated that one of the issues to be discussed is the idea that once the form is sent in, the person sending it has nothing to keep which would give information about the case. The Chairperson referred to the amended provision at the end of subsection 3 (c) and said that a further change could be made which would provide that a copy and an original would be sent to the recipient. Judge Kaplan noted that the recipient could send in the original and keep the copy. The Vice Chairperson inquired what the advantage of retaining a copy is, and Mr. Johnson replied that it would have the caption of the case on it. Mr. Shipley pointed out that there is a separate form sent with the show cause order which has the case caption on it. Judge McAuliffe observed that the Rule has no requirement that the forms have to be served with the show cause order, and he expressed the opinion that the Rule needs further study. Mr. Lombardi suggested that the amendments presented today should be decided.

The Chairperson referred to subsection (e), and he commented that when this is served, it is accompanied by a pre-captioned notice, but it does not say "appointment of counsel." Mr. Shipley

explained that this is supplied by the petitioner when the show cause order is submitted. It is on a separate form. Mr. Lombardi suggested that the show cause order can be modified. The Chairperson suggested that after the first sentence in the form which reads: "THIS IS A COURT ORDER.", the first two paragraphs of subsection 3 (a) and (b) could be moved to that point. Mr. Johnson commented that it may be difficult to separate subsection 3 (c) from (a) and (b). The Chairperson noted that subsection (c) is too long to move to the beginning of section (h). Mr. Klein suggested that in place of moving subsections (a) and (b), the form could cross-reference those subsections.

The Chairperson suggested that the following language could be added to the beginning of the show cause order form after the first two sentences: "YOU HAVE THE RIGHT TO AN ATTORNEY AS IS EXPLAINED IN PARAGRAPH (3)." The Vice Chairperson moved that this language be added. The motion was seconded, and it carried unanimously.

Mr. Hochberg noted that when the form is styled, it should have a date to indicate when it was returned. This would be helpful in deciding timeliness. The Chairperson commented that subsection 2 could be changed to indicate that the notice of objection must be filed no later than the close of business on a certain date. The Vice Chairperson said that when she drafted some of the rules, she did not focus on the failure to file on time. Many people do not understand the concept of "filing." The show cause order could

require the recipient to appear, and if the person fails to appear, it could constitute consent. The Chairperson observed that this issue does not come up often, but when it does, it is a problem. There is always litigation. Procedural forfeiture does not occur very often, but the Subcommittee can review this Rule to clean it up.

The Vice Chairperson noted that in the adoption case, the Office of the Public Defender relied on Rule 1-204 as a basis of extending the time to file an objection. However, in the opinion, Judge Wilner held that Rule 1-204 only applies when a rule or a court order sets forth a time period. Since the time period for the adoption process is statutorily set, Rule 1-204 does not apply. The Vice Chairperson said that she did not agree with this reasoning, because the rules were adopted after the statute, and Rule 9-107 sets forth the time for filing an objection. If the time period to file an objection cannot be shortened or extended under Rule 1-204, that Rule should be amended to provide that. She moved to amend Rule 1-204 accordingly, the motion was seconded, and it passed unanimously.

Mr. Klein questioned whether consideration will be given to the idea that the mere filing of a request for an attorney would be deemed to be an objection. The Chairperson answered that the Subcommittee will look at that and try to come up with a solution.

Agenda Item 4. Consideration of proposed amendments to Rule 3-648 (Enforcement of Judgment Prohibiting or Mandating Action)

The Reporter presented Rule 3-648, Enforcement of Judgment Prohibiting or Mandating Action, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE--DISTRICT COURT

CHAPTER 600 - JUDGMENT

AMEND Rule 3-648 to allow the entry of a money judgment under certain circumstances, as follows:

Rule 3-648. ENFORCEMENT OF JUDGMENT PROHIBITING OR MANDATING ACTION

When a person fails to comply with a judgment prohibiting or mandating action, the court may order the seizure or sequestration of property of the noncomplying person to the extent necessary to compel compliance with the judgment and, in appropriate circumstances, may hold the person in contempt pursuant to Rules 15-206 and 15-207. When a person fails to comply with a judgment mandating action, the court may direct that the act be performed by some other person appointed by the court at the expense of the person failing to comply. <u>When a person fails to comply with a judgment mandating the payment of money, the court may enter a money judgment to the extent of any amount due.</u>

. . .

Rule 3-648 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 3-648 adds a sentence that allows the District Court to enter a money judgment when a person has failed to comply with a judgment mandating the payment

> of money. This sentence is taken verbatim from Rule 2-648 (a).
>
> When Title 3 was adopted, the equity jurisdiction of the District Court was more limited than it is today and Code, Family Law Article, Title 4, Subtitle 5 (Domestic Violence) had not been enacted. Now, the District Court may order a person to pay emergency family maintenance in accordance with Code, Family Law Article, §4-506. If the person fails to make the required payments, the proposed amendment to Rule 3-648 clearly allows the District Court to enter a money judgment to the extent of the unpaid arrearage.

The Reporter explained that when the Rules of Procedure were revised in 1984, the jurisdiction of the District Court was much narrower. Michael Pullen, Esq. wrote a letter, a copy of which is included in the meeting materials, (See Appendix 1) stating that an order for protection against domestic violence may contain a provision ordering payment of emergency family maintenance. If the obligor does not pay, it is not clear whether Rule 3-648 allows the entry of a money judgment. Some District Court judges have interpreted the Rule to allow the entry of a money judgment, and others have not. The solution would be to add another sentence which would conform Rule 3-648 to Rule 2-648 and clarify that the court may enter a money judgment to the extent of any amount due.

Mr. Lombardi commented that the proposed language would allow a judgment for the arrearage. It seems self-evident that this arrearage is a money judgment. The Committee was in agreement with

the addition to Rule 3-648.

Agenda Item 5. Continued consideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys

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Mr. Howell presented revised Rules 16-717 and 16-717A for the Committee's consideration.

Rule 16-717. PREHEARING PROCEDURES

(a) Initial Prehearing Review

Upon appointment to a Hearing Panel, the Panel members shall review the statement of charges and any response. If the Panel concludes that the statement of charges does not allege facts which, if true, constitute professional misconduct or incapacity, the Panel shall dismiss the charges without a hearing, terminate the proceedings, and serve notice of the dismissal upon the attorney and Bar Counsel, who shall also notify the complainant. Otherwise, the Panel shall keep the matter open pending receipt of Bar Counsel's disclosures.

(b) Bar Counsel Disclosures

Upon request of the attorney at any time after service of the statement of charges, Bar Counsel shall promptly allow the attorney to inspect and copy (1) all evidence accumulated during the investigation; (2) all statements as defined in Rule 2-402 (d); (3) summaries of any oral statements for which contemporaneously-recorded recitals do not exist; and (4) the record of prior final discipline or previous adjudication of misconduct or incapacity of the attorney that Bar Counsel intends to introduce after a hearing pursuant to subsection (g)(3) of Rule 16-717A. The obligation of disclosure

pursuant to this Rule shall be continuing as provided in Rule 2-401 (e).

(c) Depositions of Unavailable Witnesses

Bar Counsel or the attorney may take the deposition of a witness and offer it in evidence before the Hearing Panel if the notice of the deposition alleges that (1) the witness is unable to attend the hearing or testify because of age, mental incapacity, sickness, infirmity, or imprisonment or (2) the party noting the deposition has been unable to procure the attendance of the witness by a subpoena or certified letter as provided in section (c) of Rule 16-718. The deposition may be admitted in evidence at the hearing if the Panel Chair finds that the statements in subsection (1) or (2) exist. Chapter 400 of Title 2 governs the taking of a deposition under this section except that the notice of deposition shall be filed with the Panel Chair. The Panel Chair may enter protective orders permitted by Rule 2-403 and make other rulings as justice may require pertaining to the deposition of an unavailable witness.

(d) Mental or Physical Examination

When the statement of charges or any response alleges that the attorney is incapacitated, the Panel Chair, on motion of Bar Counsel for good cause, may order the attorney to submit to a mental or physical examination pursuant to Rule 2-423.

(e) Perpetuation of Evidence Before Statement of Charges

(1) Right to Take

Bar Counsel or an attorney who may have an interest in an anticipated statement of charges may perpetuate testimony relevant to any complaint or defense that may be asserted in the expected statement of charges in accordance with these Rules.

(2) Notice

The notice of deposition shall include a description of the subject matter of the expected statement of charges, the substance of the testimony that the person expects to elicit, and a statement that any person served has a right to be present. The notice shall include a statement that the testimony sought may be used in a later action.

(3) Filing

The notice and any exhibits as well as the transcript of testimony shall be filed with the Commission under seal.

(4) Service

The notice, request, or motion shall be served in the manner provided by Chapter 100 of Title 2 for service of summons on each person against whom the testimony or other evidence is expected to be used and on any other interested person. If the court orders that service be made upon a person in accordance with Rule 2-122, the court may appoint an attorney to represent that person.

(5) Subpoena or Court Order

No sanctions shall be available against a person from whom evidence is sought under this Rule in the absence of service of a subpoena or court order.

(6) Use of Perpetuated Testimony

Testimony perpetuated in accordance with the requirements of this section may be used in any action involving the same subject matter and against any attorney served with a notice in the manner provided by subsection (1) of this section.

(f) Final Prehearing Review

Following Bar Counsel's disclosures as provided in section (b) of this Rule, Bar Counsel shall provide to the Panel all information which has been disclosed. If the Panel concludes after reviewing the material provided that the investigation of the statement of charges, even if true, does not constitute professional misconduct or incapacity or does not constitute misconduct that warrants discipline, the Panel may dismiss the charges with or without a hearing, terminate the proceedings and serve notice of the dismissal upon the attorney and Bar Counsel who shall also notify the complainant. Otherwise, the Panel shall schedule a hearing.

(g) Dismissal Review

If dissatisfied with a dismissal without a hearing pursuant to section (a) or (f) of this Rule, subject to the approval of the Chair of the Commission, Bar Counsel may file with the Commission within 15 days of service of the dismissal a request for review of the dismissal by the Review Board and a statement of reasons by Bar Counsel for the review. Bar Counsel shall serve copies of any request for review and statement of reasons upon the attorney. Within 15 days of service, the attorney may file with the Commission a reply to the statement of reasons. The review shall be conducted in accordance with Rule 16-720.

Source: This Rule is in part derived from former Rule 16-706 (d) (BV6 d) and Rule 2-404, and is in part new.

Rule 16-717 was accompanied by the following Reporter's Note.

> Section (a) is based upon Commission Guidelines §5-102. The current Rule and the guideline are consistent in providing that the only action that may be taken without a hearing is dismissal. However, Bar Counsel is afforded the opportunity to request the review of a dismissal without a hearing pursuant to section (g) of this Rule.
>
> Section (b) is a new provision which is based upon, and is consistent with, Commission Guidelines §5-106. Section (b) is patterned upon the "open file" policy declared in Rule 16-808 (d)(1) governing proceedings before the Commission on Judicial Disabilities.
>
> Section (c) is derived from former Rule BV6 d 3 (b), with conforming style changes. It authorizes de bene esse depositions of unavailable witnesses, but not depositions for discovery purposes.
>
> Section (d) is new. Because the extent that an attorney is incapacitated may become an issue, the Panel Chair is authorized to invoke the medical examination procedures of Rule 2-423 on motion of Bar Counsel for good cause. For example, an attorney who raises alcohol or drug abuse as a defense or in mitigation may be an appropriate candidate for a mental or physical examination under Rule 2-423. See, e.g., ACG v. Keister, 327 Md. 56, 77 n.17 (1992). This conforms to Rule 23.C of the A.B.A. Model Rules.
>
> Section (e) is derived from Rule 2-404, Perpetuation of Evidence. The Committee was of the opinion that the perpetuation of evidence doctrine is applicable when a statement of charges is about to be filed against an attorney.
>
> Section (f) is derived from former Rule BV6 d 4 (c). The Committee wanted to clarify

that if the Panel found there was misconduct on the part of an attorney but it did not warrant discipline, the Panel could dismiss the charges with or without a warning and without a hearing.

Section (g) is new and is based upon Commission Guidelines §5-102. The next-to-last sentence is new and was added by the Subcommittee to afford the attorney the opportunity to respond to Bar Counsel's statement of reasons. The last sentence was added by the Committee to clarify that Rule 16-720 pertains to the consideration of Bar Counsel's request for review.

Rule 16-717A. HEARING PROCEDURES

(a) Procedural Rights of Attorney

The attorney who is the subject of the statement of charges has the right to a fair and impartial hearing on the charges, to be represented by counsel, to the issuance of a subpoena for the attendance of witnesses and for the production of designated documents and other tangible things, to present evidence and argument, and to examine and cross-examine witnesses.

(b) Notice of Hearing

The Panel Chair shall notify Bar Counsel, the attorney, and the members of the Panel of the time and place scheduled for a hearing. The notice shall be in writing and mailed at least 15 days before the scheduled

date. If the attorney fails to appear for the hearing, after adequate notice, the Panel may proceed with the hearing in the attorney's absence and, if the attorney was served with a subpoena to appear, may consider the attorney's failure as evidence of the factual allegations.

(c) Exchange of Information

Within a reasonable time before the date scheduled for the hearing, Bar Counsel and the attorney shall provide to each other a list of the names of the witnesses that each intends to call and copies of the documents that each intends to introduce into evidence at the hearing.

(d) Continuance

On written request of a party or on the Panel's own initiative, the Panel Chair may postpone or continue a hearing for good cause. The absence of a necessary witness is not cause for a postponement or continuance unless supported by an affidavit meeting the requirements of Rule 2-508 (c).

(e) Oaths

The Panel Chair may administer oaths to witnesses.

(f) Testimony

The Panel may take the testimony of witnesses. The testimony shall be under oath. The attendance and testimony of a witness or the production of documents or other tangible things may be compelled in accordance with Rule 16-718.

(g) Rules of Evidence

(1) Generally

Unless excluded by the Panel Chair pursuant to Rule 5-403, all relevant evidence disclosed in accordance with section (b) Rule

16-717 and section (c) of this Rule, shall be admissible at the hearing. Otherwise, the hearing shall be conducted in accordance with the Rules of Evidence in Title 5. The Panel Chair shall rule on objections to the evidence.

ALTERNATE

(1) Generally

Unless excluded by the Panel Chair pursuant to Rule 5-403, all relevant evidence disclosed in accordance with section (b) of Rule 16-717 and section (c) of this Rule, shall be admissible at the hearing. Although the Rules of Evidence need not apply, to the extent that the Rules of Evidence are not followed in admitting evidence, standards designed to give reasonable assurance of authenticity and veracity should be applied. The Panel Chair shall rule on objections to the evidence.

(2) Burden of Proof

Bar Counsel shall have the burden of persuading the Panel that it is more likely than not that the attorney engaged in misconduct or was incapacitated. The burden of going forward regarding defenses is on the attorney and the burden of persuasion regarding mitigating factors is on the attorney who asserts such defenses or factors.

(3) Prior Discipline

Evidence concerning prior final discipline or previous adjudication of misconduct of the attorney shall not be admitted or considered by the Panel until a finding of misconduct is made under Rule 16-719, unless such evidence is probative or the issue of misconduct presented in the statement of charges or is otherwise admissible under Rule 5-404 (b). At the conclusion of the hearing, Bar Counsel may submit to the Panel a sealed envelope containing such evidence and Bar Counsel's written statement as to whether or not the evidence was disclosed under

subsection (e)(4) of this Rule, and the attorney at that time may submit a sealed envelope containing written argument on the effect to be given to such evidence. Upon a finding of misconduct, the Panel may unseal the envelopes and consider the contents in arriving at an appropriate disposition of the charges.

(h) Record of Proceedings

All testimony and argument at the hearing shall be recorded stenographically or electronically. Except as required by section (b) of Rule 16-720, a transcript shall not be prepared. The attorney may, at the attorney's expense, have the recording of the hearing transcribed.

(i) Disposition of Charge

At the close of the evidence the Panel, after hearing any argument, shall render a decision in accordance with Rule 16-719.

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

Rule 16-717A was accompanied by the following Reporter's Note.

Section (a) omits part of the first sentence of former Rule BV6 d 1 and adds new language regarding the attorney's procedural rights. It is similar to Rule 16-808 (f), which applies the procedural rights of judges before the Commission on Judicial Disabilities.

The first and second sentences of section (b) are based upon Commission Guidelines §5-103. The third sentence incorporates the substance of the last sentence of former Rule BV6 d 1, but allows the Panel to consider the attorney's unexcused absence as evidence of the factual allegations.

Section (c) is new. It reflects Bar Counsel's practice and is derived from the required exchange of information provision in Rule 16-808 (d)(2).

Section (d) is a new provision based in part on Rule 2-508 (a) and (c). It is essentially consistent with Commission Guidelines §5-104.

Section (e) is derived from former Rule BV6 d 3 (a) but provides that the Panel Chair, rather than the Panel as a body, may administer oaths to witnesses. Ordinarily, this will not be necessary if a court reporter is present.

Section (f) is derived from former Rule BV6 d 3 (a) also; because the subpoena provisions are in a separate Rule, it goes on to refer to the Panel's powers in that regard.

Section (g)(1) rejects the policy expressed in former Rule BV6 d 1 that the rules of evidence "need not apply". Instead, section (g) obliges the Panel to apply the Maryland Rules of Evidence; however, the evidence disclosed in accordance with section (b) of Rule 16-717 and section (c) of Rule 16-717A is made automatically admissible at the hearing. In this respect, it is identical to the requirement in Rule 16-808 (e)(4). The Panel Chair rules on objections to the evidence.

Alternate subsection (g)(1) is derived from Commission Guidelines §5-204.

Subsection (g)(2) is new and declares that the standard of proof at the Panel hearing stage is a preponderance of the evidence. This familiar standard represents a compromise between a relaxed standard of "probable cause" and the more demanding "clear and convincing evidence" standard required by former Rule BV10 d at the judicial hearing stage (see Rule 16-735). Similarly, subsection (g)(2) imposes upon the attorney the burden of proving by a preponderance of the evidence any factual matters in defense of mitigating circumstances

existing at the time of the alleged misconduct. See ACG v. Glenn, 341 Md. 448, 470 (1996).

Subsection (g)(3) is new and is an amplification of A.B.A. Model Rule 11.D (5). Although prior discipline is relevant and materials to the sanction to be imposed for proven misconduct, it is usually irrelevant to the issue of whether or not the alleged misconduct actually occurred, and it may be prejudicial. However, in order to avoid delay resulting from bifurcated hearings, a mechanism is created to allow evidence of prior discipline and the attorney's arguments in mitigation to be submitted in sealed envelopes which the Panel may open only upon a finding of misconduct.

Section (h) is new but is based on Commission Guidelines §5-203. A sentence is added to provide that the attorney may order a transcript at his or her own expense. Section (h) is similar to Rule 16-808 (e)(5).

Section (i) incorporates the substance of former Rule BV6 d 4 (a) but leaves to Rule 16-719 the details of the various possible dispositions.

Mr. Howell explained that at the March meeting, the Rules Committee had decided to divide Rule 16-717 into two rules -- one covering prehearing procedures, one covering hearing procedures. Copies of the revised rules are included in the meeting materials for today's meeting.

Mr. Howell noted that subsection (g)(1) of Rule 16-717A contains an alternate provision to the Subcommittee proposal. The issue is whether the Rules of Evidence in Title 5 are applicable at the Inquiry Panel stage of the proceedings. The Committee can assume

that the Subcommittee recommends the first version, although its chairperson, Mr. Brault, had stated some misgivings about it at the last meeting. Mr. Johnson asked why Rule 16-717 was separated into two rules. Mr. Howell answered that this was the decision of the Committee at its March meeting. Once the two Rules were drafted, both the Reporter and Mr. Brault agreed that they reflect the decisions made by the Committee. Mr. Howell stated that he had some misgivings about the separation into two rules. This creates a double procedure to review the complaint and adds a new stage of motions. There is also the matter of the Panel getting a preview of the evidence, especially if the Rules of Evidence apply. Mr. Howell's view is that section (g) should be deleted. He also felt that the new section (e) in Rule 16-717 is too lengthy, especially since this issue does not come up very often.

The Vice Chairperson remarked that Mr. Sykes had said at the previous meeting that he did not want evidence perpetuated pursuant to Rule 2-404 because that Rule is very broad, including request for documents, etc. Rule 16-717 could refer to Rule 2-404, but exclude the portions that do not apply. The Chairperson inquired why Rule 2-404 cannot be applied to perpetuate evidence. The Reporter suggested that this question be deferred to Mr. Brault, who had drafted the two new Rules, but was not present at the meeting. Judge McAuliffe observed that section (e) appears to be very different from Rule 2-404.

Mr. Klein referred to section (b) of Rule 16-717A, questioning whether the language "fails to appear" should be added to the second sentence after the word "subpoena" and before the word "to." The Reporter said that that provision needs restyling.

Mr. Lombardi inquired what the standard of review is for determining whether or not the case goes forward in Rule 16-717. Mr. Howell responded that section (f) provides that after Bar Counsel makes disclosures under section (b), the Panel can review the statement of charges and the information provided to determine if the charges are supported by the evidence as a basis for a finding of misconduct. The case can be dismissed similar to a summary judgment. Mr. Lombardi commented that the Panel can find a prima facie case or more. The Chairperson observed that if the Panel finds an even balance, the Panel can hold a hearing, or it can dismiss. The question is if the Panel must dismiss. Section (f) states that the Panel "may" dismiss. The Reporter noted that the language in section (f) reads "[i]f the Panel concludes...that the investigation of the statement of charges ...does not constitute misconduct that warrants discipline, the Panel may dismiss the charges with or without a hearing...", but section (a) provides "[i]f the Panel concludes that the statement of charges does not allege facts, which, if true, constitute professional misconduct or incapacity, the Panel shall dismiss the charges without a hearing...". The Vice Chairperson questioned why section (f) is necessary. Mr. Johnson said that he

had suggested it at the last meeting, but the way it was drafted, it missed the point he had made. He had argued that the previous version of the Rule did not provide for the Panel to be able to dismiss without a hearing, but this Rule creates an additional step. All that is needed is in section (f), and section (a) is not necessary.

The Vice Chairperson noted that at the previous meeting the point had been made that Bar Counsel can put everything into the disclosures, including irrelevant or prejudicial hearsay, which go to the Panel, and the respondent's attorney cannot argue that the evidence should not come in. The Panel may be judging the irrelevant or prejudicial hearsay as if it were true. She said that she preferred the section (a) review. The Chairperson pointed out that section (f) provides additional protection for the respondent attorney. It affords a second look at the evidence after everything has been gathered. The Vice Chairperson remarked that this type of review would be very helpful in a civil case. The Chairperson said that this provides a mechanism to get rid of the case.

The Vice Chairperson reiterated that her problem is what evidence the Panel has in its hands. The disclosures by Bar Counsel make the review under section (f) different than the review under section (a) of Rule 16-717. There is the potential for unfair material to go to the Panel in the section (f) review. Mr. Broderick told the Committee that he had made the point at the previous meeting

that this can be viewed as a screening mechanism or as a Grand Jury hearing. Case law provides that due process rights do not attach to the fullest extent at this point in the proceedings. The only requirement is notice and an opportunity to be heard. These Panels serve to show that the Rules of Evidence are not necessary, since the Panel has the ability to screen the evidence. He expressed the concern that if all of the protections are incorporated at this level, the system will not move expeditiously, and problems at the trial level will arise when the Panel decision is reviewed. As a policy matter the Rules Committee needs to address what is to be accomplished.

The Chairperson stated that frivolous complaints need to be eliminated. The Panel should be provided with some degree of review to see if the case should go forward. Unfair evidence can prejudice the Panel. Twenty-five years ago, a well-known attorney was almost disbarred because of an unjust accusation. The fact that the witness was lying did not come up until late in the proceedings. Section (f) would apply to this type of situation. In the case referred to by the Chairperson, it turned out that later in the proceedings, scientific evidence proved that the key witness had forged incriminating evidence in an unrelated federal case. Section (f) provides the mechanism to ascertain the value of the evidence. He said that he was not as worried as the Vice Chairperson about the evidence being tainted. The people who review the evidence are

professionals. He expressed the opinion that both sections (a) and (f) are needed.

The Vice Chairperson remarked that she remembered that at the previous meeting the Committee wanted the Rule to be amended so that all evidence goes to the Panel, there is a period for objection, and then the Panel can dismiss with or without a warning. Mr. Howell expressed his agreement with Mr. Broderick. Bar Counsel, after a thorough investigation, files a statement of charges and requests a hearing. There is a paper review on the statement of charges, and then downstream a dismissal review. If there is a period for the attorney to object, this builds in constitutional delay which goes along with the delay when Panels have trouble getting together. This system would require objections, briefs, and memoranda. He said that Mr. Lombardi had referred to the Panel finding a prima facie case. This would work. The Panel looks at the evidence and considers objections. The Panel either dismisses or finds that Bar Counsel has made a prima facie case and takes it to the Court of Appeals. The Rules Committee had previously decided that this is a probable cause hearing. If the Panel finds probable cause, the case can be brought to formal Court of Appeals charges. The Panel can screen out a weak case. He suggested that the language in section (f) which reads "with or without a warning" should be changed.

Mr. Lombardi expressed the view that the structure of Rule 16-717 works. Section (a) is simply a fast-track screening mechanism

which gets rid of cases totally lacking in probable cause. As a safeguard if Bar Counsel argues that there is more than meets the eye, he or she can ask for a section (f) hearing. The test is whether there is probable cause to send the case to the Court of Appeals. Mr. Broderick noted that this Rule does not provide for a hearing. There is no participation except by the Panel. He explained that under the present system all goes to the Panel Chair at the same time. Under the proposed Rule, only the statement of charges goes to the Panel. This is why the prehearing process was developed to structure what goes to the Panel. At the Panel hearing, no advocates are present. The review is conducted in camera. Mr. Grossman remarked that, at present, the Panel will receive investigative reports and correspondence between the complainant and respondent. Panels do throw these cases out.

The Vice Chairperson asked if section (f) is proper. Mr. Broderick inquired as to how the Panel is given the information it needs. This is defined by the investigative file. The Commission Guidelines state that all correspondence from the complainant and respondent is to be put into the investigative file. It is screened when it goes to the Panel. Mr. Broderick said that he and Mr. Johnson were concerned that there was no provision for a dismissal without a hearing. Mr. Grossman asked why this cannot be done in one step as it is done in the current system. Bar Counsel supplies a statement of charges and an answer. The Vice Chairperson inquired if

Bar Counsel has always disclosed to the attorney everything that was given to the Panel even before the Panel gets it. Mr. Grossman answered in the negative. Mr. Broderick suggested that there could be a short rule which provides that once the Panel is appointed, the statement of charges and the investigative file are provided. The Vice Chairperson responded that Rule 16-717 provides this. Mr. Broderick argued that this is done seriatim in the Rule. His proposal is that a statement of charges is drafted once the Panel is appointed. The investigative file goes to the respondent or his or her counsel, and then to the Panel with any response of the respondent. The Chairperson noted that the Rule does not provide that the Panel gets the respondent's response.

Mr. Broderick commented that section (b) provides that Bar Counsel shall allow the attorney to inspect and copy "all evidence accumulated during the investigation...". The use of the word "evidence" triggers admissibility issues. The same Rule goes on to say that the attorney can inspect and copy "all statements...". He explained that the Office of Bar Counsel does not take statements. They do not interview witnesses and reduce the statements to writing. He said that his focus is on a very informal procedure. Case law says that the screening process is informal. If the procedure is defined by the Rules of Evidence, the Court of Appeals may be relegated to reviewing what Panels do. Under the current system the panoply of due process rights does not apply until the case goes to

the Court of Appeals.

The Chairperson suggested that language could be added to Rule 16-717 which provides that a violation of the Rule does not necessarily result in a dismissal. He asked what else is causing problems in the new Rule. Mr. Grossman said that the revised suggested procedure is not that far removed from the current system. He agreed with Mr. Broderick that formalizing the procedure will create procedural challenges at an earlier stage than in the current system. When attorneys seek injunctions, his office has not always followed the specific rubrics of the Rule. Currently, if an attorney has not responded, he does not supply the attorney with the entire investigative file. The Office of Bar Counsel must give to the respondent attorney what the Rules and Commission Guidelines require. All attorneys are notified of the investigation, and they can come to the Office of Bar Counsel to see the file. Bar Counsel generally gives everything to the respondent attorney.

The Chairperson asked if there were any suggestions for changes to Rule 16-717. Judge McAuliffe expressed the view that both sections (a) and (f) are not needed. Mr. Lombardi explained that section (a) is important to screen out frivolous cases. Mr. Johnson remarked that sections (a) and (f) are repetitive. Mr. Lombardi commented that section (f) cannot function without section (a). Mr. Johnson noted that section (f) allows the Panel to look at the evidence Bar Counsel will be providing. The Chairperson pointed out

that it can happen that Bar Counsel is under intense pressure to file charges against an attorney who did something politically incorrect. The Panel can end the proceedings after reviewing the statement of charges, or it can look at the additional material under section (f) before it makes its decision.

Mr. Broderick noted that the proposed Rule is different from the present system. It provides for mental and physical examinations and for the perpetuation of evidence, which are not available under current Rule 16-706 (d) (BV 6 d.) Their need is obviated by the fact that depositions are available at the discretion of the Panel. Mr. Titus commented that he had participated in the drafting process of disciplinary rules at the American Bar Association level. The Panel process is a Grand Jury screening, not a trial. He said that he is uncomfortable with the application of the Rules of Evidence at the Panel level, and that no hearing is needed. The right to submit one's position to the Panel provides a check on Bar Counsel. One is better off in front of a Panel than in front of a trial judge where the Rules of Evidence and other rights apply.

After lunch, Mr. Howell told the Committee that during the lunch break, he had discussed the issue of proposed Rules 16-717 and 16-717A with the representatives of the Office of Bar Counsel. They came up with a system which codifies existing practice. The proposal is that when the Panel is appointed, Bar Counsel will provide the Panel and the respondent attorney with the information Bar Counsel

has. There would be one review similar to the one in section (f). The Panel will dismiss the case or set it for a hearing. Bar Counsel would have a right of review of a dismissal without a hearing. Other provisions of the Rules are unchanged. A new Rule will be drafted. Mr. Lombardi liked the idea of the Panel treating the charge as a demurrer, finding that the charges may be true, but still able to dismiss the case for charges not rising to the level of misconduct. Mr. Howell explained that the newest revision would avoid the two-step process. Some of the Panels from rural counties may be located in different parts of the county, and it may be difficult for them to meet. This would eliminate the need for the Panel to meet more than one time. At the hearing, the Panel can find that the statement of charges does not rise to the level of misconduct and rule on it as a demurrer. Sections (a) and (f) of Rule 16-717 will be collapsed, and there will be a dismissal with or without a warning.

Mr. Hochberg asked whether there would be an opportunity for the respondent attorney to submit material. Mr. Howell answered that this provision would have to be added in. The decision about whether a hearing is needed has not yet been made, and if one is required, it might cause the attorney an unnecessary expense, because he or she may feel obliged to submit material. The panoply of rights is provided in the next rule. The type of hearing has also not yet been decided, but it would be similar to the one described in section (f) of the version of Rule 16-717 in today's meeting materials. Both the

Panel and the attorney will get information from Bar Counsel. Mr. Grossman agreed that the description by Mr. Howell of the concept of the proposed new Rule is what was discussed during the lunch break.

Judge Johnson suggested that the Committee vote on the concept of the proposed new Rule. Mr. Titus moved that the concept of the proposed new Rule be adopted by the Rules Committee. The motion was seconded, and it passed, with one opposed.

Mr. Titus expressed the view that the Rules should not include the notion that a panoply of rights is afforded the attorney at the Inquiry Panel stage. The Rules of Evidence should not apply, and the standard for review should be that it was more likely than not that there was misconduct on the part of the attorney. Mr. Titus reiterated that no hearing should be required as it slows down the process. If a check on a Bar Counsel who is out of control is needed, a paper review is adequate. The matter can go in front of a judge later on, if it is necessary. Mr. Howell remarked that confidentiality is important at the Inquiry Panel stage.

Mr. Titus said that he advises the Board of Education of Montgomery County, which uses procedural rules to decide cases. Since there is a high volume of cases, most are conducted on a paper review. The Chairperson remarked that he recently testified on behalf of an attorney before an Inquiry Panel. If Bar Counsel could make a prima facie case that an attorney violated a disciplinary rule, a paper review could help the Panel determine mitigating

circumstances, so the case need not go to the circuit court. Mr. Johnson commented that the public is involved in these cases. The hearing process serves a purpose. The public person complains, and members of the public are on the Inquiry Panel. This would negate the criticism that the attorney discipline process is one in which attorneys protect attorneys. Mr. Johnson agreed with Mr. Titus that the Inquiry Panel process should not include use of the Rules of Evidence and should not have procedural rights attaching. Mr. Lombardi asked what is wrong with having procedural rights. The history of the Rules reflects providing for a fair and impartial hearing. Mr. Howell pointed out that some of Rules 16-717 and 16-717A are taken from Rule 16-706 (BV 6). The remainder is drawn from the Judicial Disabilities Commission Rules which lack protection for judges. The Subcommittee had argued over the issues in Rules 16-717 and 16-717A.

The Chairperson stated that using the term "fair and impartial" should be eliminated, because all hearings are supposed to be fair and impartial. Mr. Howell observed that this is not a judge-enforced rule, and using the language "fair and impartial" is a reminder that a hearing should be fair. Mr. Howell said that the language could be deleted from section (a) of Rule 16-717A. Mr. Bowen moved to delete the language, the motion was seconded, and it passed unanimously.

Turning to section (b) of Rule 16-717A, the Chairperson inquired if the 15-day period is appropriate. Mr. Howell explained

that it was added at the previous meeting. Mr. Grossman added that the 15-day period is used in present practice. The Vice Chairperson commented that it could be changed to ten days. Previously the Rule had provided that the notice should be mailed a "reasonable time" before the scheduled date of the hearing. Mr. Broderick said that the Commission Guidelines require 15 days prior written notice. Judge Kaplan expressed the view that this is fairer than within 15 days of mailing. Mr. Broderick noted that this time period can be waived.

Mr. Howell asked how the time is counted for an absconding attorney. The Vice Chairperson said that all of the Rules of Procedure run from the date of service and not from the date of receipt, except for time periods dating from the entry of a court order. She expressed her preference for a longer time period. Mr. Howell suggested that the time period be 20 days. The Vice Chairperson questioned as to how long the time period is between the date the hearing is scheduled and the date it takes place. Mr. Broderick replied that the time is usually between two and three months, depending on where the Panel is located. The Chairperson asked if using 30 days would be a problem.

Mr. Titus moved that the time period in section (b) be changed from 15 to 30 days. The motion was seconded, and it carried unanimously.

Mr. Broderick said that under the current system if the

respondent attorney does not answer the certified mail notice, the hearing will take place without the attorney being present, and the Panel will put on the record an explanation of the best efforts to notify the respondent. The Review Board reviews the decision to proceed without the respondent. Proposed Rule 16-708 provides for substituted service on an absent attorney. The Vice Chairperson noted that service for a subpoena is covered in Rule 16-718. If the attorney got a letter and did not appear, the Panel cannot draw any inferences unless the attorney was served with a subpoena. Mr. Broderick pointed out that section (b) of Rule 16-717A provides for the notice of the hearing, but it does not relate to whether the attorney was served with a subpoena. If the certified mail comes back unanswered, it may mean that the attorney got no notice of the hearing. His recommendation is notice by ordinary and certified mail, so that the Panel can infer that the notice was received. This would be different for purposes of a subpoena. The Vice Chairperson said that the practice is to notify the attorney using a subpoena. A letter sent by certified mail is the equivalent of a subpoena. The Chairperson observed that if the respondent attorney signs the certified mail receipt and fails to appear for the hearing, this can be considered as evidence of the factual allegations.

Mr. Broderick said that this is a new procedure. Current Rule 16-706 d 3 (d), which was previously numbered as BV6 d 3 (d), provides that in a proceeding before an Inquiry Panel, the Panel may

command the attorney's attendance by sending a letter by certified mail. Mr. Lombardi argued that the attorney has to be subpoenaed, because his or her failure to attend the hearing can be considered as evidence of the factual allegations. The Chairperson noted that current Rule 16-706 d 3 (d) provides that "the letter shall be as effective against the attorney as if a subpoena had been issued...". Mr. Grossman asked if this provision should be in section (b) of Rule 16-717A. Mr. Titus suggested that there could be a separate section pertaining to the effect of the attorney's failure to appear.

Mr. Klein noted that there is no requirement that the subpoena must be filed a certain amount of time before the hearing. It could possibly be served the day before the hearing. The Vice Chairperson observed that the notice will have been sent 30 days prior to the hearing according to the change made to section (b) at today's meeting. She asked if the sentence referring to consideration of the failure to appear as evidence should be moved. The Chairperson said that it could go into a new section entitled "Effect of Failure to Appear." Mr. Lombardi asked if the attorney is notified of the effect of his or her absence, and he suggested that it could be put into the notice. Mr. Bowen commented that an attorney is charged with knowledge of the Rules. Mr. Lombardi referred to the prior discussion where the point was made that some attorneys may choose not to appear, because they feel that the charges are so frivolous. This may be a trap for the unwary attorney. Another issue is if the

attorney gets a notice to appear which is not in the form of a subpoena, there might be repercussions for failure to appear. This should be spelled out in the notice. The Chairperson stated that the notice could advise the attorney that if the attorney fails to appear, the Panel may proceed. Mr. Lombardi suggested that the attorney also be notified that a failure to appear may be used as evidence of the factual allegations. The Chairperson said that the notice could provide both. The Vice Chairperson expressed the view that the attorney should already know that he or she must appear, even without being given the extra warnings.

Mr. Hochberg asked about the certified letter being the equivalent of a subpoena. Mr. Howell suggested that the Rule provide that a certified letter be sent. Mr. Broderick noted that under current practice, the Panel Chair signs a form which is sent to the attorney. It provides that the attorney is notified of the date of a hearing. If it is a subpoena duces tecum, it provides that the attorney is to appear and bring certain documents. The certified mail acts as a subpoena pursuant to current Rule 16-706.

The Chairperson stated that Mr. Lombardi's motion is that the Rule expressly provide that the attorney is notified of the date, time, and place of the hearing, and that the notice contain a specific provision that the Panel may proceed in the absence of the attorney, and that the attorney's absence may be considered as evidence of the factual allegations. There was no second to the

motion.

Mr. Titus suggested that in section (c) of Rule 16-717A, the words "a reasonable time" should be changed to "at least 15 days." The Committee agreed to this change by consensus.

Mr. Hochberg asked if the time period in section (c) is calculated by the date of mailing or the date of receipt. Judge Rinehardt responded that it is measured in terms of mailing the list of witnesses within 15 days of the scheduled hearing date. Mr. Titus suggested that the Rule provide that the list may be mailed or delivered. The Chairperson pointed out that the sender can argue that the list is in the mail. Judge Kaplan expressed the opinion that it is clearer to count from when the recipient has the list in hand. Mr. Howell suggested that the time period could be 20 days to mail the list. The Vice Chairperson remarked that this may be difficult to remember as it does not conform with the Title 2 mailing requirements.

The Vice Chairperson inquired what a reasonable time before the hearing date would be to send the list of witnesses. If it is mailed 15 days before the hearing, it is likely to get to the recipient on time. Mr. Broderick suggested that the list could be in the hand of the recipient at least 15 days before the hearing. Mr. Titus said that it could be sent 15 days plus the time for mailing before the hearing. The Reporter added that it could be delivered 15 days before the hearing, and Mr. Howell suggested that faxing 15 days

before may suffice. Judge Kaplan suggested that the word should be "deliver", but the Reporter noted that the word "deliver" has the same connotation as the word "provide." The Chairperson said that each side has to ensure that each other is in possession of the list.

Mr. Titus moved that the time period to send the list of witnesses be 15 days plus time for mailing before the hearing, and that the word "provide" be deleted and the word "mail" substituted. The motion was seconded, and it passed with one opposed.

Mr. Johnson said that he had a question about the second sentence of section (d). He hypothesized a case in which an attorney is alleged to be an alcoholic, and the Panel wants to wait for the testimony of a therapist, who is treating the attorney, but is currently unavailable to testify. He inquired as to who would file the required affidavit. The Chairperson said that he did not see why the second sentence was in section (d). Mr. Titus moved to delete the sentence, the motion was seconded, and it carried unanimously.

The Chairperson drew the Committee's attention to section (e). Mr. Grossman pointed out that currently the court reporter administers oaths. Ms. Ogletree questioned why it is necessary to provide in the Rule who administers the oaths. Mr. Howell responded that the Rule deliberately authorizes the Panel Chair to do this. The Vice Chairperson commented that the Panel Chair may not be authorized to administer an oath. The Chairperson suggested that

section (e) should include affirmations as well as oaths. The wording of this section could be "A witness shall testify under oath or affirmation." This would avoid identifying the person who administers the oaths. Mr. Howell pointed out that the Rule should provide the authorization for the Panel Chair to administer oaths. The Chairperson suggested that the second sentence of section (e) could read as follows: "The Panel Chair is authorized to administer oaths or affirmations to witnesses." The Vice Chairperson noted that Rule 1-303 provides that an oath includes an affirmation. She suggested that both sections (e) and (f) be left alone, and the Committee agreed.

Turning to subsection (g)(1), Mr. Titus suggested that the Committee approve the alternate version. Mr. Howell suggested that the word "evidence" in the first sentence of whichever version is adopted should be changed to the word "information." The Committee agreed to these suggestions by consensus. Mr. Howell explained that the Subcommittee's position was that the Rules of Evidence would be available to all persons, and would give everyone a chance to know the rules. Otherwise, decisions might vary from Panel to Panel. Any error in admission would not count until charges have been filed in the Court of Appeals. Without the Rules of Evidence, the playing field will be uneven.

The Chairperson noted that subsection (g)(1) does not refer to privileged information. Mr. Broderick said that this is addressed in

Rules 1.6 and 8.1 of the Rules of Professional Conduct. The Chairperson remarked that there are also statutory privileges. Mr. Titus commented that this provision does not do away with statutory privileges. The Chairperson pointed out that before its 1994 amendment, Rule 3-701 provided: "The court shall conduct the trial of a small claim action in an informal manner without being bound by technical rules of evidence, except those relating to privileged communications." Mr. Titus noted that the language in the alternate provision could include a reference to privileged communications.

Mr. Howell explained that the first version was a compromise on the part of the Subcommittee, which had decided that the Rules of Evidence would not be required unless the evidence were prejudicial. The Subcommittee felt that in fairness to Bar Counsel, who has made disclosures to the Panel which the attorney also got, the evidence should all come in. Anything else would conform to the Rules of Evidence or some other standard. The Rules of Evidence did not exist when the statutory provisions and the original Rule 3-701 were drafted. Mr. Howell questioned what the term "technical rules of evidence" means. The Rules of Evidence are more will-known.

Mr. Titus moved that the alternate be adopted, except that the second sentence would be deleted, and in its place, the former sentence from Rule 3-701 would be added. He also moved that the first sentence of the alternate would be deleted. The Chairperson suggested that subsection (g)(1) have one sentence which would read

as follows: "The Panel Chair shall rule on objections to the evidence and shall conduct a hearing without being bound by the technical rules of evidence." Mr. Lombardi noted that the small claims formula has a different standard of proof than proof by clear and convincing evidence. He said that he would be in favor of the proposed change if the standard were stronger, but if it were a preponderance of the evidence, he would be opposed. Mr. Howell asked why the first sentence is proposed to be deleted, and the Chairperson answered that it would not be necessary if the relaxed view of not applying the Rules of Evidence is used.

Mr. Bowen pointed out that there are two issues to be decided. One is the addition of new language to subsection (g)(1), and the other is the deletion of the first sentence. Mr. Howell noted that the first sentence refers to the standards of Rule 5-403. The Vice Chairperson moved that subsection (g)(1) would read as follows: "The Panel Chair shall rule on objections to the evidence and shall conduct a hearing without being bound by the technical rules of evidence." The motion was seconded, and it passed with two opposed.

The Chairperson asked if there should be a second sentence in subsection (g)(1). Mr. Bowen suggested that the second sentence should be the first sentence of alternate subsection (g)(1). Mr. Hochberg remarked that if the attorney has disclosed relevant information, the first sentence only applies to Bar Counsel. Mr. Klein said that Bar Counsel is allowed to introduce more information.

The defense puts in lists of witnesses, but Bar Counsel puts in summaries of oral statements. Mr. Broderick observed that section (c) of Rule 16-717A provides that Bar Counsel and the attorney shall provide each other with a list of witnesses and copies of documents each intends to introduce. It is possible that a document with triple hearsay could come in. Under the first sentence of either version of subsection (g)(1), this might not come in. Mr. Klein suggested that the reference to section (b) of Rule 16-717 be deleted. The Vice Chairperson expressed the view that the first sentence in subsection (g)(1) may lead to arguments over relevance.

The Chairperson suggested that the administrative law rules, which are applied in hearings before an administrative law judge, be used. He asked if Bar Counsel was concerned about respondent attorneys sneaking information in. Mr. Broderick responded that that was not a concern. The problem is in section (c) which refers to the witness lists and documents expected to be introduced at the hearing. These may hinge on their admissibility at the hearing. Mr. Howell explained that the Subcommittee intended that the material exchanged in advance would be admissible subject to the weight the Panel gave it. The Chairperson commented that this could be unfair to Bar Counsel or the respondent. Mr. Howell said that he recognized there is an element of unfairness in admitting inadmissible material. Most advocates put in evidence with probative value, and the escape valve is Rule 5-403. The Chairperson noted that Rule 5-403 applies only

after there has been a judgment that evidence is relevant. Some irrelevant evidence may come in.

The Chairperson pointed out that Code, State Government Article, §10-213 provides in section (b) that "[t]he presiding officer may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs and give probative effect to that evidence." Mr. Howell responded that language similar to this could be included in Rule 16-717A. Mr. Grossman noted that the first sentence of subsection (g)(1) gives the Panel Chair the opportunity to rule on the evidence and keep things out. He questioned whether this is necessary.

Mr. Bowen commented that in the first sentence of subsection (g)(1), the reference to Rule 5-403 could be deleted and in its place, there would be a reference to the preceding sentence. In the alternative, the language from the State Government Article could be plugged in here. He moved that the reference to Rule 5-403 be deleted and language referring to the preceding sentence be added. The motion was seconded, and it carried unanimously.

Turning to subsection (g)(2), Mr. Titus suggested that since this provision "ain't broke", it should not be fixed. Mr. Howell explained that this provision is a bridge between the positions expressed by Mr. Lombardi and Mr. Titus. Instead of choosing a standard of clear and convincing evidence or one of probable cause, this standard of "more likely than not" is a middle ground. When the

case goes to a trial judge, it will use the standard of clear and convincing evidence.

Mr. Howell drew the Committee's attention to subsection (g)(3). He said that this will keep the Panel members focused on the case that is before them, but at the appropriate time, there is a mechanism available to allow evidence concerning prior final discipline or previous adjudication of misconduct. Mr. Grossman inquired whether the term "adjudication of misconduct" is defined. The present practice is that the envelope, which goes to the Panel, contains determinations of public and private sanctions and dismissals with warnings. Mr. Howell observed that the Subcommittee felt that dismissals with warnings should not be included in the envelope, because they are not considered to be discipline. The Chairperson suggested that this should be clarified in subsection (g)(3) or as a Committee note. The Reporter suggested that a cross reference be added to Rule 16-717A referring to the Rules which provide that a warning is not misconduct.

Mr. Grossman asked what the difference is between prior final discipline and previous adjudication of misconduct. Mr. Howell answered that the latter was determined in court. The Chairperson questioned whether the two terms are redundant. Mr. Broderick remarked that a dismissal with a warning under the current Rules is considered to be an adjudication. He noted that an individual may have received several dismissals with warnings which may be relevant

to another case in front of the Inquiry Panel. He inquired why the dismissal with a warning is not included in the envelope. Mr. Howell replied that there is no procedure to contest a warning by Bar Counsel, so it is not considered as discipline. Judge Vaughan pointed out that the warnings may be for very minor infractions, such as coming to court late, which would not be relevant for the Panel to hear about.

Mr. Broderick reiterated that currently the envelope contains all the dismissals with warnings. The envelope is opened only if the Panel has found a violation. The Panel can determine what is relevant in the envelope. Mr. Bowen asked if there is always an envelope present. If there is only one present when the respondent attorney has a past history, this would let the Panel know that there has been some prior disciplinary activity. Mr. Broderick responded that there is always an envelope, even if there has been no prior activity.

Judge Kaplan expressed the opinion that it is a bad idea to exclude consideration of prior warnings. If warnings mean nothing, there is no point in issuing them. The Chairperson said that it might be better to list in the Rule the specific things that can be disclosed in the envelope. Mr. Howell noted that if the Committee feels that warnings with dismissals should be included in the envelope, the Subcommittee will want to go back to Rule 16-711 and modify it so that it provides that the attorney can reject the

warning. Mr. Broderick remarked that if dismissals with warnings have to be litigated, it may burden the system.

The Chairperson commented that he can see both sides of the argument as to whether to include dismissals with warnings in the envelope. He asked how much harm there would be for the Panel, having found a violation in the recent case, to see that the attorney had been previously warned. If the warnings were on an unrelated area, it would mean little. If the warnings were on the same issue just decided by the Panel, it would mean more. Finding out about the previous warnings would not go to the issue of whether the recent violation was committed. Mr. Hochberg noted that these warnings may make a difference at the trial level. Mr. Broderick responded that if an attorney has a history of multiple neglects, but only one case goes to a reprimand or charges, the Court of Appeals will only know about that one case. The previous dismissals with warnings will not be disclosed to the Court.

The Chairperson stated that this is a policy question. Mr. Howell pointed out that the Subcommittee intended for there to be a change from the current practice. The Chairperson suggested that the Rule include which final sanctions should go into the envelope. Mr. Grossman said that these are listed in the Commission Guidelines. Mr. Howell noted that proposed Rule
16-707 lists the sanctions. Judge Vaughan suggested that the envelope contain all that has ever happened to the attorney relating

to discipline. The Panel can sift through and determine what is relevant. He expressed the concern that the fact that someone received a series of warnings could be eliminated from the envelope. He cautioned about warnings from many years ago. Mr. Broderick responded that records of dismissals with warnings are only kept for 12 years. He said that he has faith that the Panels are able to figure out what is relevant. Judge Kaplan suggested that dismissals with warnings be added. The Chairperson stated that there are two issues to determine. One is whether to add in specific final disciplinary sanctions against an attorney. Mr. Howell moved that this be added to the Rule, the motion was seconded, and it passed unanimously.

The Chairperson said that the second issue to consider is whether to include dismissals with warnings in the envelope given to the Panel. Judge Kaplan moved that dismissals with warnings be added to the envelope. The motion was seconded. Mr. Lombardi commented that if the warning is an isolated case, and other warnings have not been issued previously, it would be appropriate to not include the one warning in the envelope. The concern is a series of repeated warnings. Judge Johnson observed that the Panel can make the decision as to whether to consider the warning or not. Mr. Lombardi asked why the Rule should risk tainting the process. Judge Vaughan remarked that the Panel can look at the warning and see whether or not it is serious. If this is not the first warning, it can be given

more consideration.

Mr. Howell raised one possible way to decide this issue. The Bar Counsel representative who is at the preliminary hearing may or may not consider the attorney's position. The distinction could be made between a Panel dismissal with a warning and a dismissal by Bar Counsel with a warning. Mr. Bowen commented that the Committee is tinkering with an exclusionary rule. Nothing is admitted unless the panel has decided that the alleged misconduct probably occurred. After that finding, everything comes in.

Mr. Broderick noted that on page 34 of the proposed disciplinary rules, Rule 16-711 (f) provides that the warning has to be subject to the approval of the Chair of the Commission. This is a change from the current practice which requires the approval by the Chair or Vice Chair of the Inquiry Committee. No distinction is made for dismissals with warnings. The Chairperson asked if the evidence concerning prior final disciplinary sanctions should be on a piece of paper or given through testimony. Mr. Howell responded that he had not considered using a form.

Mr. Bowen reiterated that this is an exclusionary rule. There should be a rule which provides that only prior discipline which has probative value can be in the envelope. The word "final" should be deleted. Judge Rinehardt remarked that before the provision is worded properly, the concept has to be decided. The Chairperson stated that the concept is that unless and until the Panel decides

the respondent committed misconduct, the Panel will not be told of the respondent's prior misconduct. Mr. Bowen added that if the prior misconduct is related to the present violation, it has to have probative value. He expressed the view that a Bar Counsel warning should be excluded. Mr. Broderick argued that there should be no distinction between Bar Counsel and Panel warnings.

The Chairperson pointed out that there was no longer a quorum present at the meeting. He told the Committee that this issue will have to be looked at again. The evidence of past discipline cannot be used to prove that the person committed the present charge. This is covered in Rule 5-404 (b). The evidence of prior discipline does not come in until a finding by the Panel that the attorney committed misconduct. Prior dismissals with a warning may have some relevance.

The Chairperson adjourned the meeting.