The agenda for a meeting of the Rules Committee generally will be posted 7-10 days before the date of the meeting. At the discretion of the Chair, items may be deleted from or added to the agenda.

AGENDA FOR
RULES COMMITTEE MEETING

May 19, 2023 (Friday)
9:30 a.m.

Maryland Judicial Center
Rooms 132/133
187 Harry S. Truman Parkway
Annapolis, MD 21401

Item 1	Consideration of proposed Rules changes recommended by the Discovery S.C. Amendments to: Rule 2-422 (Discovery of Documents, Electronically Stored Information, and Property – from Party) Rule 2-433 (Sanctions) Rule 2-504 (Scheduling Order) Rule 2-501 (Motion for Summary Judgment)	Ms. McBride
Item 2	Consideration of proposed amendment to Rule 19-103 (Character Committees)	Mr. Frederick
Item 3	Consideration of proposed amendments to: Rule 19-751 (Reinstatement-Suspension Six Months or Less) Rule 19-752 (Reinstatement-Other Suspension; Disbarment; Disability Inactive Status; Resignation)	Mr. Frederick
Item 4	Reconsideration of proposed amendments to: Rule 19-304.4 (4.4) (Respect for Rights of Third Persons) Rule 19-304.2 (4.2) (Communications with Persons Represented by an Attorney)	Mr. Frederick
Item 5	Consideration of a proposed amendment to Rule 19-301.7 (1.7) (Conflict of Interest-General Rule)	Mr. Frederick

AGENDA ITEM 1

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-422 by creating new subsection (b)(1) with the language of current section (b), by creating new subsection (b)(2) limiting the number of requests by a party, and by making a stylistic change, as follows:

Rule 2-422. DISCOVERY OF DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND PROPERTY – FROM PARTY

(a) Scope

Any party may serve one or more requests to any other party (1) as to items that are in the possession, custody, or control of the party upon whom the request is served, to produce and permit the party making the request, or someone acting on the party's behalf, to inspect, copy, test or sample designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form) or to inspect and copy, test, or sample any designated tangible things which constitute

or contain matters within the scope of Rule 2-402 (a); or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 2-402 (a).

Cross reference: For inspection of property of a nonparty in an action pending in this State and for discovery under the Maryland Uniform Interstate Depositions and Discovery Act that is not in conjunction with a deposition, see Rule 2-422.1.

(b) Request

(1) Content

A request shall set forth the items to be inspected, either by individual item or by category; describe each item and category with reasonable particularity; and specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form in which electronically stored information is to be produced.

(2) Number

Unless otherwise ordered by the court or agreed upon by the parties, no party shall serve upon any other party, at one time or cumulatively, more than 30 requests pursuant to this Rule, including all parts and sub-parts.

(c) Response

The party to whom a request is directed shall serve a written response within 30 days after service of the request or within 15 days after the date on which that party's initial pleading or motion is required, whichever is later. The response shall state, with respect to each item or category, that (1) inspection and related activities will be permitted as requested, (2) the request is refused, or (3) the request for production in a particular form is refused. The grounds for each refusal shall be fully stated. If the refusal relates to part of an item or category, the part shall be specified. If a refusal relates to the form in which electronically stored information is requested to be produced (or if no form was specified in the request), the responding party shall state the form in which it would produce the information.

Cross reference: See Rule 2-402 (b)(1) for a list of factors used by the court to determine the reasonableness of discovery requests and (b)(2) concerning the assessment of the costs of discovery.

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REPORTER'S NOTE

The Rules Committee was contacted by an attorney regarding a proposed change to Rule 2-422 governing the discovery of documents, electronically stored information, and property from a party. The Rule currently permits service of one or more requests to produce items in the possession, custody, or control of a party or to permit entry on the land or other property in

the possession or control of the party. The Rule, however, contains no limit on the number of permitted requests. The attorney informed the Discovery Subcommittee that, because of the unlimited scope, the Rule may be subject to abuse. She noted her involvement in cases where the number of requests to a party have exceeded 150. She advised the Subcommittee that, in the United States District Court for the District of Maryland, US Dist. Ct. Rules Md. Civ. Rule 104 limits the number of requests for production to no more than 30.

Proposed amendments to Rule 2-422 limit the number of requests for production by a party unless otherwise ordered by the court or agreed upon by the parties. New subsection (b)(1), regarding the content of a request for production, is created with the current language of section (b). New subsection (b)(2) sets forth the limit on requests for production, permitting no more than 30 requests.

A stylistic change is made in section (c).

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-433 by replacing current section (b) with new section (b), by adding a Committee note following section (b), and by making stylistic changes, as follows:

Rule 2-433. SANCTIONS

(a) For Certain Failures of Discovery

Upon a motion filed under Rule 2-432 (a), the court, if it finds a failure of discovery, may enter such orders in regard to the failure as are just, including one or more of the following:

(1) An order that the matters sought to be discovered, or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the failing party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; or

(3) An order striking out pleadings or parts thereof, or staying further proceeding until the discovery is provided, or dismissing the action or any part thereof, or entering a

judgment by default that includes a determination as to liability and all relief sought by the moving party against the failing party if the court is satisfied that it has personal jurisdiction over that party. If, in order to enable the court to enter default judgment, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any matter, the court may rely on affidavits, conduct hearings or order references as appropriate, and, if requested, shall preserve to the plaintiff the right of trial by jury. Instead of any of those orders or in addition thereto, the court, after opportunity for hearing, shall require the failing party or the attorney advising the failure to act or both of them to pay the reasonable costs and expenses, including attorneys' fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs and expenses unjust.

~~(b) For Loss of Electronically Stored Information~~

~~Absent exceptional circumstances, a court may not impose sanctions under these Rules on a party for failing to provide electronically stored information that is no longer available as a result of the routine, good-faith operations of an electronic information system.~~

(b) Failure to Preserve Electronically Stored Information

If electronically stored information that should have been preserved in the reasonable anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and the information cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may (A) presume that the lost information was unfavorable to the party, (B) instruct the jury that it may or must presume that the information was unfavorable to the party, or (C) dismiss the action or enter a default judgment.

Committee note: Section (b) of this Rule applies only to electronically stored information. Its application is limited to parties, and it does not apply to non-party subpoenas. Under this section, the duty to preserve information arises when litigation is reasonably anticipated or commenced. See Rule 2-101 (a). While section (b) of this Rule does not define the scope or limits of the duty to preserve, when the duty arises, the duty under this section is limited to "reasonable steps." No sanction may be imposed if the court determines that secondary evidence reasonably can restore or replace the information that was not preserved. Subsection (b)(1) of this Rule applies where conduct was not intentional. Subsection (b)(2) of this Rule applies to intentional conduct. Section (b) is modeled after Fed. R. Civ. P. 37 (e), as amended in 2015.

(c) For Failure to Comply With Order Compelling Discovery

If a person fails to obey an order compelling discovery, the court, upon motion of a party and reasonable notice to other parties and all persons affected, may enter such orders in regard to the failure as are just, including one or more of the orders set forth in section (a) of this Rule. If justice cannot otherwise be achieved, the court may enter an order in compliance with Rule 15-206 treating the failure to obey the order as a contempt.

(d) Award of Costs and Expenses, Including Attorneys' Fees

If a motion filed under Rule 2-403, 2-432, or 2-434 is granted, the court, after opportunity for hearing, shall require (1) the party or deponent whose conduct necessitated the motion, (2) the party or the attorney advising the conduct, or (3) both of them to pay to the moving party the reasonable costs and expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court, after opportunity for hearing, shall require ~~the~~ (1) the moving party, (2) the attorney advising the motion, or (3) both of them to pay to the party or deponent who opposed the motion the reasonable costs and expenses incurred in opposing the motion, including

attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable costs and expenses incurred in relation to the motion among the parties and persons in a just manner.

(e) Statement Regarding Costs and Expenses, Including Attorneys' Fees

If a motion or a response to a motion contains a request for an award of costs and expenses, including attorneys' fees, the request shall (1) include, or (2) be separately supported by, a verified statement in conformance with Rule 1-341 (b). With the approval of the court, the party requesting the award may defer the filing of the supporting statement until 15 days after the court determines the party's entitlement to costs and expenses, including attorneys' fees.

(f) Response to Request

Within 15 days after the filing of a statement in support of a request for an award of costs, expenses, or attorneys' fees, a party against whom the award ~~in~~ is sought may file a response.

(g) Guidelines

In determining an award of attorneys' fees and related expenses in excess of $500 under this Rule, the court may consider the Guidelines Regarding Compensable and Non-compensable Attorneys' Fees and Related Expenses contained in an Appendix to these Rules.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 422 c 1 and 2.
Section (b) is new and is derived from the ~~2006 version of Fed. R. Civ. P. 37 (f)~~ 2015 version of Fed. R. Civ. P. 37 (e).
Section (c) is derived from former Rule 422 b.
Section (d) is derived from the 1980 version of Fed. R. Civ. P. 37 (a) (4) and former Rule 422 a 5, 6 and 7.
Section (e) is new.
Section (f) is new.
Section (g) is new.

REPORTER'S NOTE

Proposed amendments to Rule 2-433 were presented to the Discovery Subcommittee by an attorney to address concerns regarding Maryland's "safe harbor" Rule. Current section (b) of Rule 2-433 prohibits a court, absent exceptional circumstances, from sanctioning a party for failing to provide electronically stored information when the information is unavailable as the result of routine, good faith operations of an electronic information system. In *It is Time to Replace Maryland's "Safe Harbor" Rule*, a white paper published by the MSBA in October 2022, Michael D. Berman, Esq. wrote that the "safe harbor" provision is shallow and offers little protection, has not been used since its adoption in 2008, and lacks clarity. Mr. Berman advised the Subcommittee that Rule 2-433 (b) no longer is functioning. Amendments can clarify the culpability required to support sanctions when electronically stored information is lost. Mr. Berman informed the Subcommittee that the "safe harbor" provision of the parallel federal rule was amended in 2015 and suggested similar changes to Rule 2-433.

The deletion of current section (b) of Rule 2-433 is proposed. A new section (b), derived from the 2015 amendments to Federal Rule of Civil Procedure 37 (e), addresses the failure to preserve electronically stored information. The new section sets forth appropriate sanctions when information that should have been preserved in reasonable anticipation or conduct of litigation and cannot be restored or replaced through other discovery is lost because a party failed to take reasonable preservation steps. Subsection (b)(1) permits the court to order measures to cure the prejudice when the loss of information prejudices another party. Subsection (b)(2) sets forth specific sanctions that may be ordered, including presumptions, jury instructions, dismissals, or default judgments, upon a finding that a party acted to deprive another party of the information intentionally.

A proposed Committee note following section (b) reiterates that the section applies only to electronically stored information requested from parties. The Committee note highlights the duty to preserve information, emphasizes that sanctions are not imposed if the lost information can be restored or replaced with secondary evidence, and clarifies the different sanctions for intentional and unintentional conduct.

Stylistic changes are made in sections (d) and (f).

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-504 by clarifying the actions that may not occur after completion of discovery in subsection (b)(1)(D), by adding new subsection (b)(1)(E), by adding a Committee note following the section, and by re-lettering subsequent subsections, as follows:

Rule 2-504. SCHEDULING ORDER

(a) Order Required

(1) Unless otherwise ordered by the County Administrative Judge for one or more specified categories of actions, the court shall enter a scheduling order in every civil action, whether or not the court orders a scheduling conference pursuant to Rule 2-504.1.

(2) The County Administrative Judge shall prescribe the general format of scheduling orders to be entered pursuant to this Rule. A copy of the prescribed format shall be furnished to the Chief Judge of the Court of Appeals.

(3) Unless the court orders a scheduling conference pursuant to Rule 2-504.1, the scheduling order shall be entered as soon as practicable, but no later than 30 days after an answer is

filed by any defendant. If the court orders a scheduling conference, the scheduling order shall be entered promptly after conclusion of the conference.

(b) Contents of Scheduling Order

(1) Required

A scheduling order shall contain:

(A) an assignment of the action to an appropriate scheduling category of a differentiated case management system established pursuant to Rule 16-302;

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

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

(D) a date by which all discovery must be completed, after which no deposition or other discovery may be had, except by leave of court on a showing of good cause;

(E) a date, not less than 35 days before the date for completion of discovery pursuant to subsection (b)(1)(D) of this Rule, after which no interrogatories, requests for admission,

requests for production or inspection, or motions for physical or mental examination may be served;

Committee note: The dates set forth pursuant to subsections (b)(1)(D) and (E) of this Rule are not intended to alter a party's obligation to promptly supplement discovery responses as required by Rule 2-401 (e).

~~(E)~~ (F) a date by which all dispositive motions must be filed, which shall be no earlier than 15 days after the date by which all discovery must be completed;

Cross reference: See Rule 2-501 (a), which provides that after the date by which all dispositive motions are to be filed, a motion for summary judgment may be filed only with the permission of the court.

~~(F)~~ (G) a date by which any additional parties must be joined;

~~(G)~~ (H) a date by which amendments to the pleadings are allowed as of right; and

~~(H)~~ (I) any other matter resolved at a scheduling conference held pursuant to Rule 2-504.1.

(2) Permitted

A scheduling order also may contain:

(A) any limitations on discovery otherwise permitted under these rules, including reasonable limitations on the number of interrogatories, depositions, and other forms of discovery;

(B) the resolution of any disputes existing between the parties relating to discovery;

(C) a specific referral to or direction to pursue an available and appropriate form of alternative dispute resolution, including a requirement that individuals with authority to settle be present or readily available for consultation during the alternative dispute resolution proceeding, provided that the referral or direction conforms to the limitations of Rule 2-504.1 (e);

(D) an order designating or providing for the designation of a neutral expert to be called as the court's witness;

(E) in an action involving child custody or child access, an order appointing child's counsel in accordance with Rule 9-205.1;

(F) a further scheduling conference or pretrial conference date;

(G) provisions for discovery of electronically stored information;

(H) a process by which the parties may assert claims of privilege or of protection after production;

(I) procedures and requirements the court finds necessary when any proceedings in the action will be conducted by remote electronic participation pursuant to Title 2, Chapter 800 of these Rules; and

(J) any other matter pertinent to the management of the action.

(c) Modification of Order

The scheduling order controls the subsequent course of the action but shall be modified by the court to prevent injustice.

Cross reference: See Rule 5-706 for authority of the court to appoint expert witnesses.

Source: This Rule is in part new and in part derived as follows:
Subsection (b)(2)(G) is new and is derived from the 2006 version of Fed. R. Civ. P. 16(b)(5).
Subsection (b)(2)(H) is new and is derived from the 2006 version of Fed. R. Civ. P. 16(b)(6).

REPORTER'S NOTE

A practitioner contacted the Rules Committee regarding issues with Rule 2-504. The attorney noted that current Rule 2-504 provides that scheduling orders state a date for the close of discovery. However, the close of discovery is undefined, creating arguments from attorneys in circuit court about whether the close of discovery refers to a last date to send discovery requests or a last date to respond to requests. The practitioner noted that the District of Columbia requires scheduling orders to state an end date for both requests and responses. The practitioner suggested that that Maryland Rule be amended to include similar clarifying language.

Subsection (b)(1) of Rule 2-504 lists the required components of a scheduling order. A proposed amendment to subsection (b)(1)(D) clarifies that no depositions or other discovery may be had, except by leave of court on a showing of good cause, after the discovery completion date in the scheduling order. New subsection (b)(1)(E) requires that a scheduling order include a date after which no discovery requests may be served. The date must be not less than 35 days before the date for completion of discovery. A Committee note after the new subsection highlights that the dates in the

scheduling order do not alter a party's obligation to supplement discovery responses. The subsequent subsections are re-lettered accordingly.

MARYLAND RULES OF PROCEDURE

TITLE 2 – CIVIL PROCEDURE – CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-501 by updating a reference in section (a), as follows:

Rule 2-501. MOTION FOR SUMMARY JUDGMENT

(a) Motion

Any party may file a written motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if it is (1) filed before the day on which the adverse party's initial pleading or motion is filed or (2) based on facts not contained in the record. A motion for summary judgment may not be filed: (A) after any evidence is received at trial on the merits, or (B) unless permission of the court is granted, after the deadline for dispositive motions specified in the scheduling order entered pursuant to Rule 2-504~~(b)(1)(E)~~(b)(1)(F).

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REPORTER'S NOTE

A conforming amendment is proposed to Rule 2-501 to update a reference in section (a) to Rule 2-504. Amendments are proposed to Rule 2-504 also, resulting in re-lettered subsections.

AGENDA ITEM 2

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 100 – STATE BOARD OF LAW EXAMINERS AND CHARACTER COMMITTEES

AMEND Rule 19-103 by revising provisions pertaining to payments made to a Character Committee and by requiring the State Board of Law Examiners to adopt a certain Board Rule, as follows:

RULE 19-103. CHARACTER COMMITTEES

The Court shall appoint a Character Committee for each of the seven Appellate Judicial Circuits of the State. Each Character Committee shall consist of not less than five members whose terms shall be five years each. The terms shall be staggered. Each Character Committee member shall be an attorney admitted and in good standing to practice law in Maryland. The Court shall designate the chair of each Committee and vice chair, if any. For each character questionnaire referred to a Character Committee, the Board shall ~~remit to the Committee a sum to defray some of the expense of the investigation~~ reimburse the actual expenses incurred by the Character Committee in conducting the investigation and shall remit a reasonable sum

for administrative support to the extent a Character Committee chooses to obtain such administrative support. The Board shall adopt by Board Rule policies and procedures pertaining to the authorization of payments under this Rule.

Cross reference: See Rule 19-204 for the Character Review Procedure.

Source: This Rule is derived from former Rule 17 of the Rules Governing Admission to the Bar of Maryland (2016).

REPORTER'S NOTE

At the request of the Supreme Court and the State Board of Law Examiners (the "Board"), amendments to Rule 19-103 are proposed to specify the expenditures for which a Character Committee may be reimbursed or receive payment and to require the Board to adopt by Board Rule policies and procedures pertaining to authorization of payments under the Rule.

AGENDA ITEM 3

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION REINSTATEMENT

AMEND Rule 19-751 by adding new subsection (b)(1) requiring that an attorney, as a condition precedent to reinstatement, pay all outstanding assessments and applicable late fees; by adding new subsection (c)(3) requiring an attorney to affirmatively state in the petition for reinstatement that all assessments and applicable late fees are paid; and by making stylistic changes, as follows:

RULE 19-751. REINSTATEMENT—SUSPENSION SIX MONTHS OR LESS

(a) Scope of Rule

This Rule applies to an attorney who has been suspended for a fixed period of time not exceeding six months.

(b) Reinstatement Not Automatic

(1) Condition Precedent to Reinstatement

Before an attorney may be reinstated under this Rule, the attorney shall pay all outstanding assessments, including late fees, if any, owed to the Client Protection Fund pursuant

to Rule 19-605 and the Disciplinary Fund pursuant to Rule 19-705 that accrued prior to the attorney's suspension.

(2) Order of Reinstatement Required

An attorney subject to this Rule is not automatically reinstated upon expiration of the period of suspension. An attorney is not reinstated until the Supreme Court enters an Order of Reinstatement.

(c) Petition for Reinstatement

(1) Requirement

An attorney who seeks reinstatement shall file a verified petition for reinstatement with the Clerk of the Supreme Court and serve a copy on Bar Counsel. The attorney shall be the petitioner and Bar Counsel shall be the respondent.

(2) Timing

The petition may not be filed earlier than ten days prior to the end of the period of suspension.

(3) Content

The petition shall be captioned "In the Matter of the Petition for Reinstatement of XXXX to the Bar of Maryland" and shall state the effective date of the suspension and the asserted date of its completion, certify that (A) the attorney has complied with Rule 19-741 and all requirements and conditions specified in the suspension order (B) the attorney

has paid all assessments and applicable late fees owed to the Client Protection Fund and the Disciplinary Fund as of the effective date of the attorney's suspension and ~~(B)~~ (C) to the best of the attorney's knowledge, information, and belief, no complaints or disciplinary proceedings are currently pending against the attorney. The petition shall be accompanied by (i) a copy of the Court's order imposing the suspension, (ii) any opinion that accompanied that order, and (iii) any filing fee prescribed by law.

(d) Review by Bar Counsel

Bar Counsel shall promptly review the petition and, within five days after service, shall file with the Clerk of the Supreme Court and serve on the attorney any objection to the reinstatement. The basis of the objection shall be stated with particularity.

(e) Action by Supreme Court

(1) If No Timely Objection Filed

If Bar Counsel has not filed a timely objection, the Clerk shall promptly forward to the Chief Justice or a justice of the Court designated by the Chief Justice the petition, a certificate that no objection had been filed, and a proposed Order of Reinstatement. The Chief Justice or the designee may sign and file the order on behalf of the Court.

(2) If Timely Objection Filed

If Bar Counsel files a timely objection, the Clerk shall refer the matter to the full Court for its consideration. The Court may overrule Bar Counsel's objections and enter an Order of Reinstatement or set the matter for hearing.

(f) Effective Date of Reinstatement Order

An order that reinstates the petitioner may provide that it shall become effective immediately or on a date stated in the order.

(g) Duties of Clerk

(1) Attorney Admitted to Practice

Promptly after the effective date of an order that reinstates a petitioner, the Clerk of the Supreme Court shall comply with Rule 19-761.

(2) Attorney Not Admitted to Practice

Upon receiving a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner not admitted by the Supreme Court to practice law, the Clerk of the Supreme Court shall remove the petitioner's name from the list maintained in that Court of non-admitted attorneys who are ineligible to practice law in this State, and shall certify that fact to the

Board of Law Examiners and the clerks of all courts in the State.

(h) Motion to Vacate Reinstatement

Bar Counsel may file a motion to vacate an order that reinstates the petitioner if (1) the petitioner has failed to demonstrate substantial compliance with the order, including any condition of reinstatement imposed under Rule 19-741 (e) or (2) the petition filed under section (a) of this Rule contains a false statement or omits a material fact, the petitioner knew the statement was false or the fact was omitted, and the true facts were not disclosed to Bar Counsel prior to entry of the order. The petitioner may file a verified response within 15 days after service of the motion, unless a different time is ordered. If there is a factual dispute to be resolved, the court may enter an order designating a judge in accordance with Rule 19-722 to hold a hearing. The judge shall allow reasonable time for the parties to prepare for the hearing and may authorize discovery pursuant to Rule 19-726. The applicable provisions of Rule 19-727 shall govern the hearing. The applicable provisions of Rules 19-728 and 19-740, except section (c) of Rule 19-740, shall govern any subsequent proceedings in the Supreme Court. The Court may reimpose the discipline that

was in effect when the order was entered or may impose additional or different discipline.

Source: This Rule is new.

REPORTER'S NOTE

The Clerk of the Supreme Court has requested that Rule 19-751 be amended to clarify that as a condition precedent prior to petitioning the Court for reinstatement, an attorney must pay any outstanding assessments and applicable late fees owed to the Client Protection Fund and the Disciplinary Fund that accrued prior to the attorney's suspension. In addition, the attorney must affirmatively aver in the petition that the assessments and applicable late fees are paid.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 700 – DISCIPLINE, INACTIVE STATUS, RESIGNATION REINSTATEMENT

AMEND Rule 19-752 by adding new subsection (c)(3)(D) requiring a petitioner to certify in a petition for reinstatement that all applicable assessments and late fees have been paid; by adding a provision to subsection (f)(1) requiring compliance with subsection (h)(2)(H) of this Rule; by adding new subsection (h)(2)(H)(i) requiring that a petitioner, as a condition precedent to reinstatement, must pay all applicable outstanding assessments and late fees prior to being eligible for reinstatement; and by making stylistic changes as follows:

RULE 19-752. REINSTATEMENT--OTHER SUSPENSION; DISBARMENT; DISABILITY INACTIVE STATUS; RESIGNATION

(a) Scope of Rule

This Rule applies to an attorney who has been disbarred, suspended indefinitely, suspended for a fixed period longer than six months, or transferred to disability inactive status or who has resigned from the practice of law.

(b) Reinstatement Not Automatic

An attorney subject to this Rule is not automatically reinstated upon expiration of the period of suspension. An attorney is not reinstated until the Supreme Court enters an Order of Reinstatement.

(c) Petition for Reinstatement

(1) Requirement

An attorney who seeks reinstatement under this Rule shall file a verified petition for reinstatement with the Clerk of the Supreme Court and serve a copy on Bar Counsel. The attorney shall be the petitioner. Bar Counsel shall be the respondent.

(2) Timing Following Order of Suspension or Disbarment

(A) If the attorney was suspended for a fixed period, the petition may not be filed earlier than 30 days prior to the end of the period of suspension.

(B) If the attorney was suspended for an indefinite period or disbarred, the petition may not be filed earlier than ~~(i)~~ the time specified in the order of suspension or disbarment.

(3) Content

The petition shall be captioned "In the Matter of the Petition for Reinstatement of XXXXX to the Bar of Maryland" and state or be accompanied by the following:

(A) docket references to all prior disciplinary or remedial actions, including all actions pending as of the date of the attorney's disbarment or suspension, to which the attorney was a party;

(B) a copy of the order that disbarred or suspended the attorney, placed the attorney on inactive status, or accepted the resignation of the attorney and any opinion of the Court that accompanied the order;

(C) that the attorney has complied in all respects with the provisions of Rule 19-741 or, if applicable, Rule 19-743, and with any terms or conditions stated in the disciplinary or remedial order;

(D) that the attorney has paid all assessments and applicable late fees owed to the Client Protection Fund pursuant to Rule 19-605 and the Disciplinary Fund pursuant to Rule 19-705 as of the effective date of the attorney's suspension, disbarment, transfer to disability inactive status, or resignation;

~~(D)~~ (E) a description of the conduct or circumstances leading to the order of disbarment, suspension, placement on inactive status, or acceptance of resignation;

~~(E)~~ (F) facts establishing the attorney's subsequent conduct and reformation, present character, present

qualifications and competence to practice law, and ability to satisfy the criteria set forth in section (h) of this Rule; and

~~(F)~~(G) a statement that, to the best of the attorney's knowledge, information, and belief, no complaints or disciplinary proceedings are currently pending against the attorney.

(d) Information for Bar Counsel

(1) Generally

Upon the filing of the petition, the attorney shall separately supply to Bar Counsel, in writing, the following information:

(A) the attorney's current address, e-mail address, if any, and telephone number;

(B) the information specified in subsection (c)(2) or (c)(3) of this Rule, as applicable;

(C) evidence establishing compliance with all applicable requirements set forth in section (h) of this Rule;

(D) a statement of whether the attorney has applied for reinstatement in any other jurisdiction and the current status of each such application; and

(E) any other information that the attorney believes is relevant to determining whether the attorney possesses the character and fitness necessary for reinstatement; and

(2) If Disbarred or Suspended

If the attorney has been disbarred or suspended, the information supplied to Bar Counsel shall include:

(A) the address of each residence of the attorney during the period of discipline, with inclusive dates of each residence;

(B) the name, address, e-mail address, if any, and telephone number of each employer, associate, and partner of the attorney during the period of discipline, together with (i) the inclusive dates of each employment, association, and partnership, (ii) the positions held, (iii) the names of all immediate supervisors, and (iv) if applicable, the reasons for termination of the employment, association, or partnership;

(C) the case caption, general nature, and disposition of each civil and criminal action pending during the period of discipline to which the attorney was a party or in which the attorney claimed an interest;

(D) a statement of monthly earnings and all other income during the period of discipline, including the source;

(E) copies of the attorney's state and federal income tax returns for the three years preceding the effective date of the order of disbarment or suspension and each year thereafter;

(F) a statement of the attorney's assets and financial obligations;

(G) the names and addresses of all creditors;

(H) a statement identifying all other business or occupational licenses or certificates applied for or held during the period of discipline and the current status of each application; and

(I) the name and address of each financial institution at which the attorney maintained or was signatory on any account, safe deposit box, deposit, or loan during the period of discipline and written authorization for Bar Counsel to obtain financial records pertaining to such accounts, safe deposit boxes, deposits, or loans.

(3) If Transferred to Disability Inactive Status

If the attorney was transferred to disability inactive status, the information supplied to Bar Counsel shall include:

(A) the name, address, and telephone number of each health care provider or addiction care provider and institution that examined or treated the attorney for incapacity during the period of inactive status; and

(B) a written waiver of any physician-patient privilege with respect to each psychiatrist, psychologist, or psychiatric-

mental health nursing specialist named in subsection (d)(3)(A) of this Rule.

(e) Response to Petition

(1) Generally

Within 30 days after service of the petition, Bar Counsel shall file and serve on the attorney a response. Except as provided in subsection (d)(2) of this Rule, the response shall admit or deny the averments in the petition in accordance with Rule 2-323 (c). The response may include Bar Counsel's recommendations in support of or opposition to the petition and with respect to any conditions to reinstatement.

(2) Consent

If Bar Counsel is satisfied that the attorney has complied fully with the provisions of Rule 19-741 and any requirements or conditions in the order of suspension or disbarment, and there are no known complaints or disciplinary proceedings pending against the attorney, the response may be in the form of a consent to the reinstatement.

(f) Disposition

(1) Consent by Bar Counsel

If, pursuant to subsection (e)(2) of this Rule, Bar Counsel has filed a consent to reinstatement, and if the

attorney has complied with subsection (h)(2)(H) of this Rule, the Clerk shall proceed in accordance with Rule 19-751 (e)(1).

(g) Further Proceedings

(1) Order Designating Judge

If the Court orders further proceedings pursuant to subsection (f)(2)(B) of this Rule, it shall enter an order designating a judge of any circuit court to hold a hearing.

(2) Discovery

The judge shall allow reasonable time for Bar Counsel to investigate the petition and, subject to Rule 19-726, to take depositions and complete discovery.

(3) Hearing

The applicable provisions of Rule 19-727 shall govern the hearing and the findings and conclusions of the judge, except that the attorney shall have the burden of proving the averments of the petition by clear and convincing evidence.

(4) Proceedings in Supreme Court

The applicable provisions of Rules 19-728 and 19-740 (a), (b), and (d) shall govern subsequent proceedings in the Supreme Court. The Court may (A) dismiss the petition, (B) order reinstatement, with such conditions as the Court deems appropriate, or (C) remand for further proceedings.

(h) Criteria for Reinstatement

(1) Generally

In determining whether to grant a petition for reinstatement, the Supreme Court shall consider the nature and circumstances of the attorney's conduct that led to the disciplinary or remedial order and the attorney's (A) subsequent conduct, (B) current character, and (C) current qualifications and competence to practice law.

(2) Specific Criteria

The Court may order reinstatement if the attorney meets each of the following criteria or presents sufficient reasons why reinstatement should be ordered in the absence of satisfaction of one or more of those criteria:

(A) the attorney has complied in all respects with the provisions of Rule 19-741 or, if applicable, 19-743 and with the terms and conditions of prior disciplinary or remedial orders;

. . .

(H) the attorney has complied with all financial obligations required by these Rules or by court order, including (i) payment of all outstanding assessments, including late fees, if any, owed to the Client Protection Fund pursuant to Rule 19-605 and the Disciplinary Fund pursuant to Rule 19-705 that accrued prior to the attorney's suspension, disbarment, transfer to disability inactive status, or resignation, (ii)

reimbursement of all amounts due to the attorney's former clients, ~~(ii)~~ (iii) payment of restitution which, by court order, is due to the attorney's former clients or any other person, ~~(iii)~~ (iv) reimbursement of the Client Protection Fund for all claims that arose out of the attorney's practice of law and satisfaction of all judgments arising out of such claims, and ~~(iv)~~ (v) payment of all costs assessed by court order or otherwise required by law.

(i) Subsequent Petitions

Except upon order of the Supreme Court, an attorney may not file a petition for reinstatement sooner than one year after the Court denied a prior petition for reinstatement. Absent leave of Court or the consent of Bar Counsel, an attorney may not file more than three petitions for reinstatement.

(j) Conditions to Reinstatement

An order that reinstates an attorney may include, as a condition precedent to reinstatement or as a condition of probation after reinstatement that the attorney:

(1) take the oath of attorneys required by Code, Business Occupations and Professions Article, § 10-212;

(2) pass the Uniform Bar Examination;

(3) successfully complete the Maryland Law Component required for admission to the Maryland Bar;

(4) take the Multistate Professional Responsibility Examination and earn a score that meets or exceeds the passing score in Maryland established by the Board of Law Examiners;

(5) attend a bar review course approved by Bar Counsel and submit to Bar Counsel satisfactory evidence of attendance;

(6) submit to Bar Counsel evidence of successful completion of a professional ethics course at an accredited law school;

(7) engage an attorney satisfactory to Bar Counsel to monitor the attorney's legal practice for a period stated in the order of reinstatement;

(8) limit the nature or extent of the attorney's future practice of law in the manner set forth in the order of reinstatement;

(9) participate in a program tailored to individual circumstances that provides the attorney with law office management assistance, attorney assistance or counseling, treatment for substance or gambling abuse, or psychological counseling;

(10) demonstrate, by a report of a health care professional or other evidence, that the attorney is mentally and physically competent to resume the practice of law;

(11) issue an apology to one or more persons; or

(12) take any other corrective action that the Court deems appropriate.

(k) Effective Date of Reinstatement Order

An order that reinstates the petitioner may provide that it shall become effective immediately or on a date stated in the order.

(l) Duties of Clerk

(1) Attorney Admitted to Practice

Promptly after the effective date of an order that reinstates a petitioner, the Clerk of the Supreme Court shall comply with Rule 19-761.

(2) Attorney Not Admitted to Practice

Upon receiving a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner not admitted by the Supreme Court to practice law, the Clerk of the Supreme Court shall remove the petitioner's name from the list maintained in that Court of non-admitted attorneys who are ineligible to practice law in this State, and shall certify that fact to the Board of Law Examiners and the clerks of all courts in the State.

(m) Motion to Vacate Reinstatement

Bar Counsel may file a motion to vacate an order that reinstates the petitioner if (1) the petitioner has failed to demonstrate substantial compliance with the order, including any condition of reinstatement imposed under Rule 19-741 (e) or section (j) of this Rule or (2) the petition filed under section (a) of this Rule contains a false statement or omits a material fact, the petitioner knew the statement was false or the fact was omitted, and the true facts were not disclosed to Bar Counsel prior to entry of the order. The petitioner may file a verified response within 15 days after service of the motion, unless a different time is ordered. If there is a factual dispute to be resolved, the court may enter an order designating a judge in accordance with Rule 19-722 to hold a hearing. The judge shall allow reasonable time for the parties to prepare for the hearing and may authorize discovery pursuant to Rule 19-726. The applicable provisions of Rule 19-727 shall govern the hearing. The applicable provisions of Rules 19-728 and 19-740, except section (c) of Rule 19-740, shall govern any subsequent proceedings in the Supreme Court. The Court may reimpose the discipline that was in effect when the order was entered or may impose additional or different discipline.

Source: This Rule is derived from former Rule 16-781 (2016).

REPORTER'S NOTE

The Clerk of the Supreme Court has requested that Rule 19-752 be amended to clarify that as a condition precedent prior to petitioning the Court for reinstatement, an attorney must pay any outstanding assessments and applicable late fees owed to the Client Protection Fund and the Disciplinary Fund that accrued prior to the attorney's suspension, disbarment, transfer to disability inactive status, or resignation. In addition, the attorney must affirmatively aver in the petition that the assessments and applicable late fees are paid.

AGENDA ITEM 4

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 19-304.4 by adding new section (c) about information from third parties, by adding a Committee note and a cross reference following section (c), and by adding new Comment [4], as follows:

Rule 19-304.4. RESPECT FOR RIGHTS OF THIRD PERSONS (4.4)

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

(b) An attorney who receives a document, electronically stored information, or other property relating to the representation of the attorney's client and knows or reasonably should know that the document, electronically stored information, or other property was inadvertently sent shall promptly notify the sender.

(c) In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an

established evidentiary privilege, unless the protection has been waived. An attorney who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to the person entitled to enforce the protection against disclosure.

Committee note: If the person entitled to enforce the protection against disclosure is represented by an attorney, the notice required by this Rule shall be given to the person's attorney. See Rules 1-331 and 19-304.2 (4.2).

Cross reference: To compare generally the duties of a party who receives inadvertently sent materials during discovery in a civil action in a circuit court, see Rule 2-402. See also Rules 2-510 and 2-510.1 to compare the duties of a party who receives inadvertently sent materials in answer to a subpoena.

COMMENT

...

[4] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. An attorney may not knowingly seek to obtain confidential information from a person who the attorney knows or reasonably should know has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 19-304.2 (4.2).

Model Rules Comparison - Sections (a) and (b) of Rule 19-304.4 ~~is~~ are substantially similar to the language of Model Rule 4.4 of the Ethics 2000 amendments to the ABA Model Rules of Professional Conduct. Section (c) substantially restores to the Rule Maryland language as it existed prior to a 2017 amendment, with slight modification.

REPORTER'S NOTE

Amendments to Rule 19-304.4, effective April 1, 2017, conformed the Rule to ABA Model Rule 4.4 after the Ethics 2000 amendments to the Model Rules of Professional Conduct. The amendments deleted language from former section (b) that addressed certain responsibilities of an attorney when obtaining information from third persons, without adding comparable language elsewhere.

Proposed amendments to Rule 19-304.4 were transmitted to the Supreme Court in the 194th and 195th Reports. The amendments proposed in the earlier Reports substantially restored the deleted language by adding new section (c), a Committee note following section (c), and Comment [4]. Additionally, a cross reference to Rules 2-402, 2-510, and 2-510.1 was added following the Committee note.

After an open meeting on the 195th Report, the proposed amendments were withdrawn for further consideration by the Rules Committee. Upon further consideration by the Attorneys and Judges Subcommittee, restoration of language in section (c) is still recommended, but with slight modification regarding the responsibilities of an attorney upon receipt of protected information from a third party. An attorney is no longer required to notify the tribunal of a disclosure. In addition, the proposed language in Comment [4] has been amended to add an attorney's knowledge requirement concerning the right of a third party to waive privilege.

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 19-304.2 by adding new language to and updating a reference in Comment [6], as follows:

Rule 19-304.2. COMMUNICATIONS WITH PERSONS REPRESENTED BY AN ATTORNEY (4.2)

...

COMMENT

[6] If an agent or employee of a represented person that is an organization is represented in the matter by his or her own attorney, the consent by that attorney to a communication will be sufficient for purposes of this Rule. Compare Rule 19-303.4 (f) (3.4). In communicating with a current agent or employee of an organization, an attorney must not seek to obtain information that the attorney knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Consent of the organization's attorney is not required for communication with a former employee. Regarding communications with former employees, see Rule 19-304.4 ~~(b)~~ (c) (4.4).

...

REPORTER'S NOTE

An amendment to Comment [6] is proposed to directly address the inapplicability of Rule 19-304.2 to communications with former employees of a represented organization. The proposed additional language is taken from Comment [7] of Rule 4.2 of the American Bar Association Model Rules of Professional Conduct and

is consistent with the approach taken by neighboring jurisdictions, including the District of Columbia.

A proposed amendment also corrects the section of Rule 19-304.4 referenced in Comment [6]. The addition of a section (c) to Rule 19-304.4 has been proposed.

THE SUPREME COURT OF MARYLAND
STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Hon. ALAN M. WILNER, Chair
Hon. DOUGLAS R.M. NAZARIAN, Vice Chair
SANDRA F. HAINES, Reporter
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MEMORANDUM

TO : Members of the Attorneys & Judges Subcommittee

FROM : Meredith Drummond, Esq., Assistant Reporter

DATE : April 13, 2023

SUBJECT : Rules 19-304.2 & 19-304.4 On Remand from 194th and 195th Reports

Background

The Rules Committee transmitted proposed amendments to Rules 19-304.2 and 19-304.4 to the Supreme Court of Maryland [formerly the Court of Appeals][1] in the Committee's 194th Report. The October 10, 2017 Rules Order pertaining to the 194th Report deferred action on the proposed amendments to the two Rules pending further study by the Committee. Proposed amendments to Rule 19-304.4 were again transmitted to the Court in the 195th Report of the Committee. In its April 9, 2018 Rules Order, the Court again remanded the proposed amendments to Rule 19-304.4 to the Rules Committee for further study.

[1] For ease of reference, throughout this memorandum, the Court will be referred to as the "Supreme Court," regardless of the name of the Court at the time an event occurred.

An earlier version of this memorandum and proposed amendments were included as Agenda Item 3 of the August 13, 2020 meeting of the Attorneys and Judges Subcommittee. The Subcommittee took no action at that time. The matter is now before the Subcommittee again for further consideration as directed by the Rules Orders from the 194th and 195th Reports.

The Maryland Attorneys' Rules of Professional Conduct address, *inter alia*, communications of an attorney with represented and unrepresented persons. Certain communications with counsel and third parties, such as inadvertent disclosures during discovery, are also addressed. Draft amendments to Rules 19-304.2 and 19-304.4 have been prepared for consideration by the Subcommittee. The principal issues are:

- Under what circumstances may an attorney contact a former employee of a represented organization without the consent of the organization's attorney? How can the Rules be amended to provide better guidance to attorneys?

- What are an attorney's obligations upon receipt of an inadvertent disclosure of information during discovery?

This memorandum sets forth (a) the history of the relevant Rules, (b) comparisons with the Model Rules, and (c) comparisons with the rules of nearby jurisdictions.

(a) History of Relevant Rules

(1) Rule 19-304.2 (4.2)

On April 15, 1986, the Supreme Court adopted the Maryland Attorneys' Rules of Professional Conduct, including Rule 4.2, now known as Rule 19-304.2. The initial version of the Maryland Rule mirrored the current text of Model Rule 4.2, with only a few exceptions. The initial Maryland Rule provided:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

A Comment addressed communications with employees of a represented organization, explaining:

> [T]his Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission of the party of the organization.

Proposed amendments to Rule 4.2 were discussed at a Rules Committee meeting on October 16, 1998. At this meeting, several amendments were suggested to mirror the rule in use by the District of Columbia. The proposed amendments separated the Rule into four sections, more like the modern-day version of the Rule:

> (a) In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

> (b) In representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.
>
> (c) For purposes of this Rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.
>
> (d) This Rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

Although former employees were not specifically mentioned in the Comments at this time, a Comment concerning communication with employees generally provided:

> This Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing.

A Reporter's note further explained: "In a recent federal case, the court held that communications with a party's former employee did not violate Rule 4.2. The Court pointed out that Rule 4.2 is unclear as to when communications with a former

employee are prohibited. The Subcommittee is recommending that Rule 4.2 be amended to follow the parallel rule in the District of Columbia."

At the October 1998 Rules Committee meeting, the case of *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996) was addressed. In *Camden*, U.S. District Court Judge Peter J. Messite held:

> [A] lawyer representing a client in a matter may not, subject to few exceptions, have *ex parte* contact with the former employee of another party interested in the matter when the lawyer knows or should know that the former employee has been extensively exposed to confidential client information of the other interested party. As a rule, such *ex parte* contact may occur only with the consent of the other interested party's lawyer or approval of the court. *Id.* at 1116.

In addition to referencing *Camden*, the discussion of the Committee highlighted the benefits of having a Maryland Rule similar to the Rule in D.C., including convenience for attorneys practicing in both jurisdictions.

Members of the Rules Committee also addressed notice at the October 1998 meeting, explaining that an attorney may plan to speak with former high-ranking employees of an organization within the confines of the Rule if the attorney notifies opposing counsel. By providing notice, the organization's attorney may seek a protective order, if applicable, to prevent the communication. The notice provision provides protection for organizations if former employees possess privileged

information. The Committee members discussed how the Rule should identify the persons with whom an attorney is entitled to speak and acknowledged that there was no clear definition of the term "party." Overall, the matter was remanded to the Subcommittee to review and redraft the proposed Rule.

Rule 4.2 was next addressed at the Rules Committee meeting on June 16, 2000. The Rule presented was similar to the Rule discussed at the prior meeting, containing four sections. In section (a), the term "party" was replaced with "person." In addition, the section added that a lawyer may be authorized by court order to communicate. While section (d) remained unchanged, sections (b) and (c) were replaced as follows:

> (b) The term "represented person" in the case of a represented organization denotes an officer, director, managing agent, or any agent or employee of an organization who supervises, directs, or regularly consults with the organization's lawyers concerning the matter or whose authority, act, omission, or statement in the matter may bind the organization for civil or criminal liability.
>
> (c) In representing a client, a lawyer may communicate about the subject of the representation with an agent or employee of the opposing organization who is not a represented person, or with a former agent or employee, without obtaining the consent of the organization's lawyer. However, prior to communicating with such agent or employee, a lawyer shall make inquiry to assure that the agent or employee is not a represented person and shall disclose to the agent or employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the organization.

Furthermore, the prior proposed Comment regarding communication with employees was altered. The Comment presented at the June

2000 meeting provided: "In communicating with a current or former agent or employee of an organization, a lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the organization. Regarding communications with former employees, see Rule 4.4 (b)." A Reporter's Note still indicated that many sections mirrored the D.C. Rule.

At the June 2000 meeting, it was acknowledged that several new opinions from U.S. District Court judges concerning Rule 4.2 were entered since the last meeting in 1998.[2] According to the minutes of the Rules Committee, "The matter came to the Attorneys Subcommittee for the purpose of solving the problem of attorneys interviewing former employees of original parties in civil cases. Other issues arose, including the problem of the Rule interfering with the federal prosecution of drug crime rings." The Subcommittee reported that, because former employees are not represented, attorneys should look to Rule 4.4 when evaluating communications with former employees. One additional issue before the Committee was whether prosecutors should be exempted from the Rule when prosecuting federal

[2] Although only *Camden v. State*, 910 F. Supp. 1115 (D. Md. 1996) and *Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. 956 (D. Md. 1997) were directly referenced at the meeting, other relevant cases issued during this time included *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997), *aff'd on other grounds*, 141 F.3d 1162 (4th Cir. 1998), *Plan Comm. In Driggs Reorganization Case v. Driggs*, 217 B.R. 67 (D. Md. 1998), and *Sharpe v. Leonard Stulman Enterprises Ltd. Partnership*, 12 F. Supp. 2d 502 (D. Md. 1998).

crimes. Over opposition by the defense bar, the Subcommittee added a provision to the Rule exempting federal and state prosecutors. At the end of the discussion, it was determined that the Subcommittee would redraft the Rule to incorporate suggestions from the meeting.

Rule 4.2 was addressed again at a Rules Committee meeting on November 17, 2000. In the version proposed at this meeting, the sections of the Rule remained unchanged. Comment 6 to the Rule still provided, "Regarding communications with former employees, see Rule 4.4 (b)." New paragraphs, however, were added to the Reporter's note to address the various comments. A portion of the note explained:

> Comment 6 is derived from Ethics 2000 Comment and ABA Comment 3. Part of the Ethics 2000 comment appears in section (b) of the Maryland Rule. The Rules Committee has modified the language at the end of the comment to specifically discourage a lawyer from trying to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege.

Mr. Brault, the Chair of the Attorneys Subcommittee, presented the proposed changes to the Rule at the November 2000 meeting. He highlighted that section (b) defined the term "represented person." When asked whether the phrase "present or former" should be added to the section, Mr. Brault clarified that section (b) applies only to current employees. Although other members of the Committee opined that former officers and directors should be included in the definition, Mr. Brault

explained that communication with former officers and directors is addressed in a separate rule regarding the legal rights of an organization. To encourage a decision on the appropriate policy for the Rule, a motion was made and carried, with one opposed, to delete "or with a former agent or employee" from section (c), confirming that section (c) deals only with currently represented individuals. Similarly, a motion was made and carried, with one opposed, to add the word "current" before "officer" in the Rule. Considering the presence of opposition to the motion, it is clear that there have been ample concerns regarding whether former employees should be included in Rule 4.2.

On April 11, 2001, the changes approved at the November Rules Committee meeting were transmitted in the 149th Report. The Rules Committee submitted a restyled version of Rule 4.2 in the Report:

> (a) Except as provided in paragraph (b), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so. If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to

> ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.
>
> (b) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to redress the grievances of the lawyer's client and the lawyer first makes the disclosure specified in paragraph (a). (internal editing marks omitted)

In this manner, the four sections discussed at the Rules Committee meeting were streamlined and combined into just two sections. The proposed reference to former employees in Comment 6, however, was retained from the version presented at the Rules Committee meeting. Regarding the proposed amendments, the Report explained:

> The amendments [to Rules 4.2 and 4.4] provide increased specificity as to a lawyer's conduct in communicating with persons represented by counsel, current agents and employees of a represented organization, former agents and employees of an organization, and third parties who have information that is protected from disclosure by statute or by an established evidentiary privilege.

Pursuant to the Report, Rules 4.2 and 4.4 were intended to together provide clarity as to communications with employees, both current and former, of an organization. On November 1, 2001, the Supreme Court adopted the proposed amendments by Rules Order.

The next activity involving Rule 4.2 occurred on February 8, 2005. The Supreme Court appointed a Select Committee to Study the Ethics 2000 Amendments to the ABA Model Rules of

Professional Conduct. The Select Committee recommended adoption of the Ethics 2000 Amendments. A Rules Order adopted the proposed revised Rule 4.2. The amended Rule maintained the same language as the prior version of the Rule, but was separated into three, instead of two, sections.

At a Rules Committee meeting on May 3, 2013, no substantive changes to the Rule were made, but re-numbering was proposed. The numbering made clear which Model Rule served as the basis for the Maryland Rule. In addition, other stylistic amendments changed the term "lawyer" to "attorney" throughout the Rule. These changes were presented as part of the 178th Report and became effective on July 1, 2016.

(2) Rule 19-304.4

Because many of the changes made to Rule 19-304.4 were in tandem with amendments to Rule 19-304.2, the histories of the Rules are very similar. Maryland Rule 19-304.4, initially known as Rule 4.4, was adopted after consideration of a Report prepared by the Select Committee of the Court of Appeals to Study the ABA Model Rules of Professional Conduct. On April 22, 1985, the Rules Committee submitted a memorandum to the Supreme Court in response to the Select Committee's Report. In an Explanatory Note, the Rules Committee, "suggest[ed] that the words 'the lawyer knows' be inserted before the verb 'violate'

in Rule 4.4 to assure that an attorney acting in good faith when obtaining evidence is not subject to discipline if the evidence is subsequently challenged and held inadmissible on the grounds that it was obtained in violation of a person's legal rights." Rule 4.4, with the recommended addition, was adopted as part of the Maryland Rules of Professional Conduct by Rules Order dated April 15, 1986. The original language provided:

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

The sole Comment to the Rule stated:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

After adoption, Rule 4.4 was briefly considered at a Rules Committee Meeting on October 16, 1998. The discussion at this meeting primarily concerned the knowledge of the attorney receiving information in violation of a party's legal rights.

Amendments to the Rule were introduced at the June 16, 2000 meeting of the Rules Committee. A new section (b) was added to the Maryland Rule to explain that, when interviewing a former employee as a third party, an attorney should not seek protected information:

> (b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege. If the lawyer nevertheless receives such information, the lawyer shall immediately terminate the communication. If the person entitled to enforce the protection is represented by counsel in the matter, the lawyer shall advise such counsel of the disclosure and also shall advise any tribunal before which the matter is pending.

An added Comment further addressed the receipt of privileged information, specifically referencing former employees and attempting to provide more guidance for attorneys:

> Third persons may possess information that is confidential under an evidentiary privilege of another person or under a law providing specific confidentiality protection to another person, such as trademark copyright or patent law. For example, present or former organizational employees or agents may have information protected by the attorney-client privilege or the work product doctrine of the organization itself. A lawyer must not knowingly seek to obtain such confidential information from a person who has no authority to waive the privilege. Regarding present employees of a represented organization, see also Rule 4.2 Comment.

Discussion addressed *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996). In *Camden*, Judge Messitte applied the draft language of the Restatement of Law Relating to Lawyers and held that attorneys conducting *ex parte* interviews with former employees violated the rights of the corporate defendant.

The 149th Report was submitted to the Supreme Court on April 11, 2001. In the Report, the new Comment and section (b) were included, with some modifications:

> (b) In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The lawyer who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

The proposed amendments were adopted by Rules Order dated November 1, 2001.

The next activity involving Rule 4.4 occurred on February 8, 2005, when the Supreme Court issued a Rules Order based on the recommendations of the Select Committee to Study the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct. No substantive changes were made to Rule 4.4.

The Rule was next discussed at a Rules Committee meeting on May 3, 2013. The meeting did not address substantive changes, instead proposing to give each Rule a Maryland Rules number consistent with the numbering system of the American Bar Association. A Rules Order adopting the proposed changes was dated June 1, 2016.

Additional changes to Rule 19-304.4 were proposed in the 191st Report. In this Report, issues concerning communications with former employees were not directly addressed. In fact, the Report proposed deletion of the following language in Comment 2 mentioning former employees:

> Third persons may possess information that is confidential to another person under an evidentiary privileged or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as a work-product. An attorney may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 19-304.2 (4.2).

In addition to removing guidance as to communications with former employees, the Report focused on the issue of inadvertent disclosure of privileged information during discovery. Specifically, the 191st Report highlighted that changes to Rules 2-510 and 2-510.1 regarding inadvertent disclosures in discovery necessitated amendments to bring the ethical rule into alignment:

> In drafting the necessary changes, the Committee has endeavored to clarify the proper procedure to be followed, both in Rule 2-402 and in Rules 2-510, 2-510.1, and 19-304.4. There is, at the outset, a reciprocal obligation. The sending party who subsequently realizes that information that is subject to protection was inadvertently sent must notify the receiving party of that claim and the basis for it. That is in current Rules 2-402 (e) and 2-510 (k)(2). Added to both of those Rules and to Rule 19-304.4 is the duty of a party who receives information that the party knows or should know was inadvertently sent to notify the sending party. Either party may file a motion under seal to determine the validity of a claim of protection, and, if such a motion is filed, the parties must preserve the item until the claim is resolved. The proposed changes to Rule 19-304.4 will conform that Rule to ABA Model Rule 4.4.

The Reporter's note explains that the Rules Committee sought to have Model Rule 4.4 substituted for Rule 19-304.4,

with some stylistic changes, to make Rule 19-304.4 more compatible with the current discovery rules and obligations. In response to these policy goals, amended section (b) read:

> (b) An attorney who receives a document, electronically stored information, or other property relating to the representation of the attorney's client and knows or reasonably should know that the document, electronically stored information, or other property was inadvertently sent shall promptly notify the sender.

The Report proposed deletion of the prior language of section (b). A new version of Comment 2 and the addition of a Comment 3 cemented the change:

> [2] Section (b) recognizes that attorneys sometimes receive a document, electronically stored information, or other property that was inadvertently sent or produced by opposing parties or their attorneys. A document, electronically stored information, or other property is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document, electronically stored information, or other property is accidentally included with information that was intentionally transmitted. If an attorney knows or reasonably should know that such a document, electronically stored information, or other property was sent inadvertently, this Rule requires the attorney promptly to notify the sender in order to permit that person to take protective measures. Whether the attorney is required to take additional steps, such as returning the document, electronically stored information, or other property, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document, electronically stored information, or other property has been waived. Similarly, this Rule does not address the legal duties of an attorney who receives a document, electronically stored information, or other property that the attorney knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document, electronically stored information, or other property" includes, in addition to paper documents, email and other forms of electronically

> stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving attorney knows or reasonably should know that the metadata was inadvertently sent to the receiving attorney.
>
> [3] Some attorneys may choose to return a document or delete electronically stored information unread, for example, when the attorney learns before receiving it that it was inadvertently sent. Where an attorney is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the attorney. See Rules 19-301.2 and 19-301.4.

The proposed amendments were adopted by Rules Order on December 13, 2016.

(3) Recent Rules History

Amendments to Rules 19-304.2 and 19-304.4 were recently proposed in the 194th Report. The Report explained that the Rules Committee sought to return language to Rule 19-304.4 that was deleted by a previous Rules Order:

> Prior to April 1, 2017, Rule 19-304.4 (Respect for Rights of Third Persons) contained a provision that, in communicating with third persons, an attorney representing a client in a matter shall not seek information that the attorney knows or should know is protected from disclosure unless the protection has been waived. In its 191st Report, the Committee proposed amendments to the Rule dealing with other matters to bring it in closer alignment with the American Bar Association's Ethics 2000 recommendations and, in the course of doing so, proposed the deletion of that language. The Court adopted the recommendation. The Committee has since been informed that several cases have referred to that language and that it has significance. The Committee proposed to restore it and to make a conforming amendment to Rule 19-304.2.

The 194th Report acknowledged the importance of language concerning a prohibition on seeking protected information from third persons. Although not specifically referenced by the Report, the proposed amendment also included a provision detailing the appropriate actions of an attorney upon a protected disclosure. The proposed amendments would have restored to the Rule section (b) as it existed prior to the 191st Report, adding it as new section (c):

> In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. An attorney who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

In addition, the restoration of a previously deleted Comment was recommended:

> [4] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. An attorney may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 19-304.2 (4.2).

The proposed change to Rule 19-304.2 was a conforming amendment, changing a reference in Comment 6 from Rule 19.304.4

(b) to new section (c). On October 10, 2017, the Supreme Court deferred action on the proposed amendments, directing further study by the Rules Committee.

The Rules Committee reconsidered the amendments to Rule 19-304.4 at a meeting on January 5, 2018. The amendments were presented to the Committee, with an explanation that the proposed new section was inadvertently deleted from the Rule when the Committee added language regarding how an attorney responds to unintended communication. The deleted language addressed certain responsibilities of an attorney when obtaining information from third persons, and it needed to be restored. In addition, after considering the Court's concerns about the relation between discovery rules and Rule 19-304.4, a new cross reference was drafted.

After the Rule was considered at the Rules Committee meeting on January 5, 2018, proposed amendments were again presented in the 195th Report. The Report added a cross reference to the discovery rules, but otherwise included the same proposals as in the 194th Report, recommending that provisions deleted in the 191st Report be restored to the Rule. The proposed new cross reference, inserted after the proposed restored section, would have provided: "To compare generally the duties of a party who receives inadvertently sent materials during discovery in a civil action in a circuit court, see Rule

2-402. See also Rules 2-510 and 2-510.1 to compare the duties of a party who receives inadvertently sent materials in answer to a subpoena." The 195th Report also stated that the Rules Committee has further examined the issues and recommends restoring the deleted provision.

At the open meeting before the Supreme Court on the 195th Report, the Court questioned the return of section (c) to Rule 19-304.4. Although the Court was informed that the language was previously in the Rule, several judges expressed concern, with one noting that the section may be misused, and another questioning the portion of the Rule requiring an attorney to give notice of disclosures to any tribunal in which the relevant matter is pending. The Court also highlighted that the proposed language differed from the Model Rule. The Chair withdrew the proposed amendments and directed the Reporter to return the Rule to the Committee for further consideration. Accordingly, the subsequent Rules Order remanded the proposed amendments to Rule 19-304.4 for further study.

(b) Comparisons to ABA Model Rules

The Supreme Court has declined to adopt the entirety of the ABA Model Rules, instead approving Maryland-specific amendments to the Model Rules. Although many of the Maryland Rules

parallel the Model Rules, there are some substantial differences.

(1) Rule 19-304.2

Rule 19-304.2 has some clear deviations from the Model Rule. ABA Model Rule 4.2 is only one sentence and is not separated into separate sections:

> 4.2 Communication with Person Represented by Counsel
> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Maryland incorporates this Model Rule almost verbatim into section (a) of Rule 19-304.2. However, the Maryland Rule also contains two additional sections. In section (b), the Maryland Rule addresses communications when the represented person is an organization. Section (c) provides specific instructions for communications with government officials.

Overall, the increased specificity in the Maryland Rule suggests that the Supreme Court aimed to provide more guidance to attorneys concerning communications with represented persons. Despite this increased detail, the Rule still provides little insight into communications with former employees. As in Model Rule 4.2, the only direct reference to former employees in Rule 19-304.2 is found in the Comments. The Model Rule, however, includes slightly more information about contacting former

attorneys in Comment 7. The additional language, not found in the Maryland Rule, advises:

> Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

In this manner, the Model Rule explicitly states that communications with former employees are not contemplated by Rule 4.2. The Maryland Rule's direct reference to former employees proves much shorter, only providing, "Regarding communications with former employees, see Rule 19-304.4 (b) (4.4)." The Subcommittee may consider whether additional information in the Comments, such as seen in Comment 7 to the Model Rule, may prove beneficial.

(2) Rule 19-304.4

Maryland Rule 19-304.4 mirrors the Model Rule, except for stylistic changes. The Model Rule provides:

> 4.4 Respect for Rights of Third Persons
>
> (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
>
> (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that

> the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Maryland Rule 19-304.4 uses the same language, except for replacing the term "lawyer" with "attorney." In addition, section (b) of the Maryland Rule is more expansive, referring to the receipt of "other property" as well.

The Comments associated with Maryland Rule 19-304.4 mirror the Comments to the Model Rules. Like the changes in the text of the Rule, the Comments to the Maryland Rule substitute "inadvertently" for "mistakenly," and reference "other property." The Maryland Rule therefore remains similar to the Model Rule and does not include increased specificity. There are currently no additional references to former employees and no Maryland-specific requirements concerning receipt of inadvertently disclosed material.

(c) Comparisons to Other Jurisdictions

Maryland attorneys are sometimes licensed to practice in the nearby jurisdictions of Virginia and the District of Columbia. Accordingly, consideration of the professional rules of these states proves useful when considering amendments in Maryland. Consistent rules throughout the geographic area make it easier for attorneys to practice in multiple jurisdictions without fear of violating their professional responsibilities.

(1) Virginia

In Virginia, Rule of Professional Conduct 4.2 concerns communication with represented persons. The text of the Rule is identical to Model Rule 4.2. However, not all Comments associated with the ABA Rule have been adopted. Regarding communication with employees, Virginia details the appropriate approaches for attorneys in its own Comment 7:

> [7] In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Like the Model Rule, Virginia explicitly states that the prohibition against communication is not applicable to former employees. The Maryland Comments do not explicitly state that the prohibition is inapplicable to former employees. Virginia Rule 4.2 also adopts the "control group" test to determine whether an attorney may communicate with employees without the

consent of opposing counsel. Maryland adopts a similar approach, but does not explicitly cite the "control group" test.

In Rule of Professional Conduct 4.4, Respect for Rights of Third Persons, Virginia again primarily mirrors the Model Rule. However, section (b) varies considerably, altering the required actions of an attorney upon receipt of inadvertent disclosures:

> A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knowns or reasonably should know that the document or electronically stored information is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Changes to the Comments also clarify the required approach for inadvertent disclosures in Virginia:

> [2]... If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently and is privileged, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures and to abide by any instructions to return or destroy the document or information that was inadvertently sent. Regardless of whether it is obvious that the document or electronically stored information was inadvertently sent, the receiving lawyer knows or reasonably should know that the document or information was inadvertently sent if the sender promptly notifies the receiving lawyer of the mistake. If the receiving lawyer lacks actual or constructive knowledge that the document or electronically stored information was inadvertently sent, then paragraph (b) does not apply. Similarly, the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule.
> ...

> [3] Preservation of lawyer-client confidences is such a vital aspect of the legal system that it is appropriate to require that lawyers not take advantage of a mistake or inadvertent disclosure by opposing counsel to case an undue advantage... This means that the lawyer is prohibited from informing the lawyer's client of relevant, though inadvertently disclosed, information, and that the lawyer is prevented from using information that is of great significance to the client's case. In such cases, paragraph (b) overrides the lawyer's communication duty under Rule 1.4. As stated in Comment [1], diligent representation of the client's interests does not authorize or warrant intrusions into privileged communications.

In this manner, the Comments to the Virginia Rule state clear policy concerns for the required response to inadvertent disclosure and require more affirmative action by the receiving attorney. Virginia's approach to inadvertent disclosure therefore differs from both the Maryland Rules and the Model Rules by limiting the ability of the receiving attorney to take advantage of privileged information that was mistakenly provided. The Subcommittee may consider whether Maryland attorneys should be required to take similar actions to the actions required of Virginia attorneys.

(2) District of Columbia

As noted in the history of Maryland Rule 19-304.2, several amendments to the Maryland Rules were based on provisions of the D.C. Rules of Professional Conduct. D.C. Rule 4.2 is separated into four sections. Section (a) follows the language of the

Model Rule. The main difference between the D.C. Rule and Maryland Rule 19-304.2 is seen in section (b) of D.C. Rule 4.2:

> (b) During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization's lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party that is adverse to the employee's employer.

Several Comments concerning communications with employees also differ from the Maryland Rules and the Model Rules. Comment 6 to D.C. Rule 4.2 directly addresses communication with former employees:

> [6] Consent of the organization's lawyer is not required where a lawyer seeks to communicate with a former constituent of an organization. In making such contact, however, the lawyer may not seek to obtain information that is otherwise protected.

Like the Model Rule and its Virginia counterpart, D.C. Rule 4.2 expressly indicates in the Comments that the prohibition on communication does not apply to former employees. The Comments to Maryland Rule 19-304.2 do not include an explicit statement on this issue.

D.C. Rule 4.4 addresses the rights of third persons. While the Model Rule and the Maryland Rule only require the receiving attorney to notify the sender of an inadvertent disclosure, D.C. requires attorneys to take additional action:

> (b) A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.

The Comments to the D.C. Rule provide further guidance to attorneys:

> [2]... As the D.C. Legal Ethics Committee noted in Opinion 256, this problem is "an unfortunate (but not uncommon) consequence of an increasingly electronic world, as when a facsimile or electronic mail transmission is mistakenly made to an unintended recipient." Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstance, and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.
>
> [3] On the other hand, where writings containing client secrets or confidences are inadvertently delivered to an adversary lawyer, and the receiving lawyer in good faith reviews the materials before the lawyer knows that they were inadvertently sent, the receiving lawyer commits no ethical violation by retaining and using those materials.

Like the Rule in Virginia, the D.C. Rule requires the receiving attorney to take more affirmative action upon receipt of information that was mistakenly sent. Maryland Rule 19-304.4, like the Model Rule, currently requires only that the receiving attorney notify the sender.

(d) Analysis

(1) Regarding Communication with Former Employees

To determine what communication with former employees is permissible under the Rules, attorneys must look to both Rule 19-304.2 and Rule 19-304.4. In comparison to the Model Rule, Rule 19-304.2 provides more detail regarding communications with represented organizations and employees. Rule 19-304.2 contains two additional sections not in the Model Rule that clarify when the prohibition on communication extends to employees of an organization.

However, pursuant to section (b), the prohibition against communication with employees of a represented organization extends only to "(1) *current* officers, directors, and managing agents and (2) *current* agents or employees who supervise, direct, or regularly communicate with the organization's attorneys concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability." (emphasis added). Rule 19-304.2 briefly acknowledges former employees in Comment 6, advising: "Regarding communications with former employees, see Rule 19-304.4 (b) (4.4)." Considering that the text of the Rule references only "current" employees and Comment 6 directs attorneys to another Rule for communication with former employees, it should be clear that Rule 19-304.2 is not intended to address communication with former employees. However, the Maryland Rule does not include a specific statement that Rule 19-304.2 does not apply to former

employees. Other jurisdictions have included additional information in Comments to the Rule, often explicitly stating that Rule 19-304.2 is not used to evaluate communications with former employees.

Without an explicit statement that the provisions of Rule 19-304.2 are not applicable to correspondence with former employees, attorneys may be faced with ethical dilemmas if an organization's counsel incorrectly asserts that he or she represents all employees, both former and current, of the organization. Even if an attorney is permitted to communicate with an employee under the Rule, he or she may rightly decide to proceed with caution due to the warnings of opposing counsel.

The Rule provides that even represented persons may be communicated with if the person's counsel provides permission. However, opposing counsel may not always grant such a request. To ensure that no request for disqualification or ethical complaint may be raised, an attorney may err on the side of caution and file a petition with the court requesting permission before conducting informal interviews with former employees. This approach, however, may be cost prohibitive for some plaintiffs attempting to investigate the validity of a potential claim. Formal discovery, including preparing for and scheduling depositions, is expensive and may be a cumbersome process. However, if the individual to be questioned is a third party,

informal discovery often may be conducted, and the attorney may more easily gain valuable information to form his or her case. Accordingly, it appears that a specific statement as to the applicability of Rule 19-304.2 would be consistent with the text of the current Rule and make the issue clear to all attorneys.

When reviewing Rule 19-304.2, the Subcommittee also may consider whether 19-304.2 applies to criminal or civil investigations of a represented organization. This issue has been raised during previous discussions concerning the Rule, including when the Subcommittee considered adding a provision to the Rule exempting federal and state prosecutors. When the issue was addressed at the November 17, 2000 Rules Committee meeting, the minutes reflect, "The Committee directed the Subcommittee to clarify that Rule 4.2 is not attempting to influence the ethics of criminal prosecutions." Ultimately, the Rules Committee addressed the issue in a Comment to Rule 19-304.2:

> [3] Communications authorized by law include communications in the course of investigative activities of attorneys representing governmental entities, directly or through investigative agents, before the commencement of criminal or civil enforcement proceedings if there is applicable judicial precedent holding either that the activity is permissible or that the Rule does not apply to the activity. The term "civil enforcement proceedings" includes administrative enforcement proceedings. Except to the extent applicable judicial precedent holds otherwise, a

> government attorney who communicates with a represented criminal defendant must comply with this Rule.

A Committee note also explains that, by use of the word "person" instead of "party," the "Rule is not intended to enlarge or restrict the extent of permissible law enforcement activities of government attorneys under applicable judicial precedent."

Case law appears to support the conclusion that certain investigation activities may be authorized by law and are not reviewed pursuant to Rule 19-304.2. In *In re Criminal Investigation No. 13 in Circuit Court for Dorchester Cty.*, 82 Md. App. 609 (1990), a corporation facing investigation by the Environmental Crimes Unit of the Attorney General's Office attempted to prevent opposing counsel from interviewing non-managerial employees. Although amendments were made to Rule 19-304.2 after issuance of the decision, the rationale of the Appellate Court in declining to issue an injunction remains applicable:

> If the law were as the appellant urges it upon us, there could be little effective investigation of any sophisticated and organized criminal enterprise. A successful case, for instance, against insider trading on Wall Street may depend upon hundreds of confidential interviews of employees, many of whom will insist upon anonymity. It would be difficult to maintain anonymity if the boss's lawyer were present at the interview. It is inconceivable that undercover investigators could ever subtly ingratiate themselves into the confidence of Mafia "soldiers" if the consigliere for the Family could insist upon being present at those "interviews." Indeed,

> under such constraint, one could never "spin" or "turn" an underling into an informant without the consigliere 's being guilty of shameful malpractice.
>
> No FBI "mole," spending months or years in the painstaking infiltration of the Communist Party or the Ku Klux Klan, could even talk to his unsuspecting targets. The investigations of Watergate, Teapot Dome and Credit Mobilier would have been dead in the water before they were underway. Notwithstanding their protestations of offended outrage, this is the company in which investigative targets find themselves as society contemplates the investigative process. The ultimate authority against the appellant's thesis is the realization that it is self-evidently absurd. *Id.* at 616-17.

Federal courts appear to follow a similar approach, typically permitting undercover communications prior to indictment. *United States v. Marcus*, 849 F. Supp. 417, 421 (D. Md. 1994) ("[W]ith the exception of *Hammad*, federal appellate case law is virtually unanimous in holding that preindictment under cover operations against represented targets are not contrary to the Rules of Professional Conduct."). The Subcommittee may consider whether any further clarification is needed in the Comments to Rule 19-304.2 as to this issue.

Maryland Rule 19-304.4 may next be evaluated to determine whether attorneys are provided enough guidance about communications with former employees. The main concern raised at Rules Committee meetings was the potential for former employees to still possess privileged information. During Committee discussions, this concern raised the question of whether such former employees should be included in the

prohibition of Rule 19-304.2. However, the Rules Committee declined to suggest inclusion of former employees in Rule 19-304.2. Instead, amendments to Rule 19-304.4 can alleviate valid concerns regarding former employees and the potential disclosure of privileged information. The changes previously proposed in the 195th Report help make an attorney's obligations when communicating with former employees clear. The Reporter's Note indicates that the following language, addressing an attorney's responsibilities when obtaining information from third persons was removed in previous amendments, but should be restored:

> (c) In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. An attorney who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

This proposed section (c) clarifies that, even though an attorney may be permitted to communicate with former employees, he or she may not seek to obtain privileged information. Similarly, a restored Comment [4] specifically references former employees and considerations when corresponding with third persons who may possess privileged information:

> [4] Third persons may possess information that is confidential to another person under an evidentiary privilege or under a law providing specific confidentiality

protection, such as trademark, copyright, or patent law. For example, present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. An attorney may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 19-304.2 (4.2).

Overall, restoring the deleted language to Rule 19-304.4 clearly addresses communications with employees, including former employees, and provides more insight into what privileged information an employee may possess. If the Subcommittee believes that further clarification would be beneficial, additions to the Comments could provide further direction to attorneys unsure of how to approach third persons possessing privileged information.[3] However, considering the sufficient information included in proposed amendments to Rule 19-304.4 in the 195th Report, it appears that no further additions are needed.

In tandem, the proposed amendments to Rules 19-304.2 and 19-304.2 would help guide attorneys who are considering communications with former employees. Proposed amendments to

[3] For example, an additional Comment could incorporate the following language from *Snider v. Superior Court*, 7 Cal. Rptr. 3d 119, 137 (2003), with modifications to refer to former employees: "[T]o avoid potential violations of the attorney-client privilege, an attorney contacting an employee of a represented organization should question the employee at the beginning of the conversation, before discussing substantive matters, about the employee's status at that organization, whether the employee is represented by counsel, and whether the employee has spoken to the organization's counsel concerning the matter at issue. If a question arises concerning whether the employee would be [represented by counsel] or is in possession of privileged information, the communication should be terminated."

Rules 19-304.2 and 19-304.4 have been prepared for consideration.

(2) Regarding Inadvertent Disclosure

In addition to addressing communications with employees, the Maryland Attorneys' Rules of Professional Responsibility direct an attorney's actions upon receipt of inadvertently disclosed privileged material. Rule 19-304.4 provides guidance for attorneys on this issue. The current version of the Rule requires recipients of inadvertently sent material to "promptly notify the sender." No further remedial action is required of the receiving attorney. The Comments recognize that whether an attorney must take additional steps and whether privilege has been waived are issues beyond the Rule's scope. In this manner, the Rules leave a lot open for attorneys to consider. Some attorneys may read the text of the Rule and believe that they can still use the privileged document if the sender is notified of the disclosure. Accordingly, although the Rule currently provides clear immediate instruction for receiving attorneys, it remains unclear whether an attorney should take additional action as a professional, ethical courtesy.

The responsibilities of an attorney should be consistent throughout the Rules. Other Rules regarding discovery address appropriate procedures upon the inadvertent release of

privileged material during discovery. For example, Maryland Rule 2-402 (e)(2) requires the recipient of privileged material to take the same action required by Rule 19-304.4: "A party who receives a document, electronically stored information, or other property that the party knows or reasonably should know was inadvertently sent shall promptly notify the sender." However, Rule 2-402 goes a step further by noting that, if the sender raises a claim of privilege, "[the] receiving party may not use or disclose the information until the claim is resolved and shall take reasonable steps to retrieve any information the receiving party disclosed before being notified." The Rule also contains a cross reference to Rule 19-304.4 (b).

Rules 2-510 (k) and 2-510.1 (l) are consistent with this approach, requiring prompt notice to the sender upon receipt of privileged information and restraint from use of the information unless the claim is resolved by the court. Cross references to Rule 19-304.4 (b) are also included in these discovery rules. In this manner, it appears that the ethical requirements of an attorney receiving an inadvertent disclosure are consistent with the requirements of attorneys mistakenly receiving privileged information in discovery.

The proposed amendments to Rule 19-304.4 from the 195th Report do not alter the ethical obligations of an attorney upon receipt of an inadvertent disclosure from opposing counsel. A

proposed cross reference, however, cites to Rules 2-402, 2-510, and 2-510.1. The additional cross reference appears appropriate considering how the Rules are related, so the Subcommittee may continue to recommend its addition.

Accordingly, the question facing the Subcommittee is whether any additional ethical obligation should be placed on an attorney receiving inadvertently disclosed material. Any change to the Rule requires consideration of policy issues. Maryland's Rule is currently similar to the ABA Model Rule, suggesting that it is viewed as an acceptable approach by a large portion of the legal community. However, both Virginia and D.C. have more detailed requirements for the recipient of an inadvertent disclosure. For example, in Virginia, an attorney must "immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information." This approach is supported in the Comments by the assertion that, "Preservation of lawyer-client confidences is such a vital aspect of the legal system that it is appropriate to require that lawyers not take advantage of a mistake or inadvertent disclosure by opposing counsel to gain an undue advantage." The relevant D.C. Rule contains a similar provision, providing that the recipient of an inadvertent disclosure, "shall not examine

the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing." In a Comment, the D.C. Rule references the ABA Model Rule before noting, "Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more."

The Subcommittee may consider whether additional requirements should be added for the receiving attorney in Rule 19-304.4 (b). As noted in Comments to the Virginia Rule, the protection of the attorney-client privilege is highly valued. Federal and state court have addressed the importance of the privilege. For example, in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), the Supreme Court noted, "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." (internal citations omitted).

Despite the importance of preserving the attorney-client privilege, the ABA has retreated from its previous requirements for attorneys receiving inadvertent disclosures and instead

requires only that the recipient notify the sender. The Maryland Rules are consistent with this approach by the ABA. However, if the Subcommittee is concerned that the current version of Rule 19-304.4 does not adequately protect privileged information, amendments similar to the language in D.C. may be considered. In addition to requiring the recipient to notify the sender, Rule 19-404.4 (b) could affirmatively state that the attorney should cease review of the document. In this manner, the ethical rule would better protect against further disclosure of privileged information but would not place an undue burden on the receiving attorney to take affirmative action. A limited amendment of this nature would remain consistent with the current requirements of a recipient of inadvertently disclosed privileged information in discovery. Accordingly, a potential proposed amendment has been prepared for consideration.

In the alternative, the Subcommittee may determine that section (b) should not be altered. The process set forth in the discovery rules to address the inadvertent disclosure of material may prove a better remedy than creating an ethical obligation. Only requiring notice to the sender places minimal burden on the recipient. Once the sender is notified, he or she can seek appropriate relief, such as a protective order, in court. In other words, the sender, not the recipient, would need to take affirmative action to correct the error. The

problem of inadvertent dissemination of privileged information is the result of the actions of the sender, not the recipient. Keeping the Rule in its current form may remind attorneys that they are responsible for their own communications and need to be careful with privileged information. In summary, while consideration of other jurisdictions suggests that further ethical requirements may be considered when an attorney inadvertently receives privileged information, the Subcommittee may instead refrain from drafting additional language until there is a comparable modification by the ABA.

In addition to potential amendments to section (b), the Subcommittee may reconsider the addition of section (c) as proposed by the 195th Report. As discussed in the analysis concerning communications with former employees, section (c) contains important information about communications with third parties possessing privileged information. As noted above, the language of section (c) should likely be added back to Rule 19-304.4. However, brief discussion of the Rule at the open meeting on the 195th Report suggested that the reintroduction of this language is more than a simple housekeeping matter. Even if the 191st Report inadvertently removed this language from the Rule, the Supreme Court adopted the Rule in that form, with the assertion that the amendments paralleled the Model Rule. Even if the deletion was inadvertent, it was clearly delineated in

the copy of the Rule attached to the Rules Order. The 191st Report indicated in a Reporter's Note that the amended Rule, deleting the language now proposed to be added, conformed it to the ABA Model Rules. The language proposed to be added back to the Rule does not conform with the Model Rule. Accordingly, the proposed language should be scrutinized and considered anew.

The description in the 194th Report indicated that the language regarding protected information from third persons was important and referred to in cases. However, the relevance of the provision regarding the actions that an attorney must take if privileged information is disclosed was not directly addressed in the Report. Therefore, it appears that the main goals of the 194th and 195th Report, to return significant language to the Rule concerning prohibited information from third parties, may be met by adding the first portion of former section (b) back to the Rule. However, in light of concerns elicited at the open meeting on the 195th Report, the Subcommittee may reconsider the second portion of the provision, concerning the action taken by an attorney upon receiving information protected by disclosure.

The second sentence of section (c) proposed in the 195th Report provided, "An attorney who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any

tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure." In other versions of this rule, neither the Model Rules nor neighboring jurisdictions require giving notice to a tribunal in which the matter is pending or to the person entitled to enforce the privilege. Even the Maryland discovery rules only require notice to the sender when a privileged document is received, although the tribunal may get involved upon disputes over privilege claims. The requirement to notify the tribunal appears cumbersome and unnecessary. Furthermore, there may not be a pending action at the time of the disclosure. For example, the disclosure may have occurred during informal discovery or settlement discussions and there may be no "tribunal" to notify. Eliminating required notice to the tribunal and requiring only notification to the person entitled to enforce the protection should be sufficient and mirrors the action of (b) (i.e. the sender of the privileged information is likely the person entitled to enforce the privilege). The person entitled to enforce the protection may then determine whether any action, such as a protective order, should be sought in court.

Overall, Maryland Rules 19-304.2 and 19-304.4 have often prompted extensive discussion. Review of the Model Rules and other jurisdictions suggest that the Maryland Rules could provide clearer guidance to attorneys on the issues of

communications with former employees of a represented organization and obligations upon receipt of inadvertently disclosed protected information.

AGENDA ITEM 5

MARYLAND RULES OF PROCEDURE

TITLE 19 – ATTORNEYS

CHAPTER 300 – MARYLAND ATTORNEYS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 19-301.7 by adding a provision to comment [5] pertaining to conflicts of interest arising from unforeseeable developments in the midst of a representation, as follows:

RULE 19-301.7. CONFLICT OF INTEREST—GENERAL RULE (1.7)

(a) Except as provided in section (b) of this Rule, an attorney shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the attorney's responsibilities to another client, a former client or a third person or by a personal interest of the attorney.

(b) Notwithstanding the existence of a conflict of interest under section (a) of this Rule, an attorney may represent a client if:

(1) the attorney reasonably believes that the attorney will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the attorney in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

COMMENT

General Principles--[1] Loyalty and independent judgment are essential elements in the attorney's relationship to a client. Conflicts of interest can arise from the attorney's responsibilities to another client, a former client or a third person or from the attorney's own interests. For specific Rules regarding certain conflicts of interest, see Rule 19-301.8 (1.8). For former client conflicts of interest, see Rule 19-301.9 (1.9). For conflicts of interest involving prospective clients, see Rule 19-301.18 (1.18). For definitions of "informed consent" and "confirmed in writing," see Rule 19-301.0 (f) and (b) (1.0).

[2] Resolution of a conflict of interest problem under this Rule requires the attorney to: (1) clearly identify the client or clients; (2) determine whether a conflict of interest exists; (3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and (4) if so, consult with the clients affected under section (a) of this Rule and obtain their informed consent, confirmed in writing. The clients affected under section (a) of this Rule include both of the clients referred to in subsection (a)(1) of this Rule and the one or more clients whose representation might be materially limited under subsection (a)(2) of this Rule.

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the attorney obtains the informed consent of each client under the conditions of section (b) of this Rule. To determine whether a conflict of interest exists, an attorney should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 19-305.1 (5.1). Ignorance caused by a failure to institute such procedures will not excuse an attorney's violation of this Rule. As to whether a client-attorney relationship exists or, having once been established, is continuing, see Comment to Rule 19-301.3 (1.3) and Scope.

[4] If a conflict arises after representation has been undertaken, the attorney ordinarily must withdraw from the representation, unless the attorney has obtained the informed consent of the client under the conditions of section (b) of this Rule. See Rule 19-301.16 (1.16). Where more than one client is involved, whether the attorney may continue to represent any of the clients is determined both by the attorney's ability to comply with duties owed to the former client and by the attorney's ability to represent adequately the remaining client or clients, given the attorney's duties to the former client. See Rule 19-301.9 (1.9). See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create apparent conflicts in the midst of a representation, as when a company sued by the attorney on behalf of one client is bought by another client represented by the attorney in an unrelated matter. Depending on the circumstances, the attorney may have the option to withdraw from one of the representations in order to avoid ~~the conflict~~ a conflict under section (a) of this Rule, but the attorney may avoid withdrawal from the affected matter, if and only if each conflicted client provides a signed waiver of conflict after having been provided informed consent confirmed in writing. The attorney must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 19-301.16 (1.16). The attorney must continue to protect the confidences of the client from whose representation the attorney has withdrawn. See Rule 19-301.9 (c) (1.9).

Identifying Conflicts of Interest: Directly Adverse--[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, an attorney may not act as an advocate in one matter against a person the attorney represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-attorney relationship is likely to impair the attorney's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the attorney will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the attorney's interest in retaining the current client. Similarly, a directly adverse conflict may arise when an attorney is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if an attorney is asked to represent the seller of a business in negotiations with a buyer represented by the attorney, not in the same transaction but in another, unrelated matter, the attorney could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation--[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that an attorney's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the attorney's other responsibilities or interests. For example, an attorney asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the attorney's ability to recommend or advocate all possible positions that each might take because of the attorney's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not

itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the attorney's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Attorney's Responsibilities to Former Clients and Other Third Persons--[9] In addition to conflicts with other current clients, an attorney's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 19-301.9 (1.9) or by the attorney's responsibilities to other persons, such as fiduciary duties arising from an attorney's service as a trustee, executor or corporate director.

Personal Interest Conflicts--[10] The attorney's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of an attorney's own conduct in a transaction is in serious question, it may be difficult or impossible for the attorney to give a client detached advice. Similarly, when an attorney has discussions concerning possible employment with an opponent of the attorney's client, or with a law firm representing the opponent, such discussions could materially limit the attorney's representation of the client. In addition, an attorney may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the attorney has an undisclosed financial interest. See Rule 19-301.8 (1.8) for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 19-301.10 (1.10) (personal interest conflicts under Rule 19-301.7 (1.7) ordinarily are not imputed to other attorneys in a law firm).

[11] When attorneys representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the attorney's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the attorneys before the attorney agrees to undertake the representation. Thus, an attorney related to another attorney, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that attorney is representing another party, unless each client gives

informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the attorneys are associated. See Rule 19-301.10 (1.10).

[12] A sexual relationship with a client, whether or not in violation of criminal law, will create an impermissible conflict between the interests of the client and those of the attorney if (1) the representation of the client would be materially limited by the sexual relationship and (2) it is unreasonable for the attorney to believe the attorney can provide competent and diligent representation. Under those circumstances, informed consent by the client is ineffective. See also Rule 19-308.4 (8.4).

Interest of Person Paying for an Attorney's Service--[13] An attorney may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the attorney's duty of loyalty or independent judgment to the client. See Rule 19-301.8 (f) (1.8). If acceptance of the payment from any other source presents a significant risk that the attorney's representation of the client will be materially limited by the attorney's own interest in accommodating the person paying the attorney's fee or by the attorney's responsibilities to a payer who is also a co-client, then the attorney must comply with the requirements of section (b) of this Rule before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations--[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in section (b) of this Rule, some conflicts are nonconsentable, meaning that the attorney involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the attorney is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under subsection (b)(1) of this Rule, representation is

prohibited if in the circumstances the attorney cannot reasonably conclude that the attorney will be able to provide competent and diligent representation. See Rule 19-301.1 (1.1) (Competence) and Rule 19-301.3 (1.3) (Diligence).

[16] Subsection (b)(2) of this Rule describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same attorney may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government attorney are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Subsection (b)(3) of this Rule describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this subsection requires examination of the context of the proceeding. Although this subsection does not preclude an attorney's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 19-301.0 (o) (1.0)), such representation may be precluded by subsection (b)(1) of this Rule.

Informed Consent--[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 19-301.0 (f) (1.0) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when

the attorney represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the attorney cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing--[20] Section (b) of this Rule requires the attorney to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the attorney promptly records and transmits to the client following an oral consent. See Rule 19-301.0 (b) (1.0). See also Rule 19-301.0 (p) (1.0) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the attorney must obtain or transmit it within a reasonable time thereafter. See Rule 19-301.0 (b) (1.0). The requirement of a writing does not supplant the need in most cases for the attorney to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent--[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the attorney's representation at any time. Whether revoking consent to the client's own representation precludes the attorney from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the attorney would result.

Consent to Future Conflict--[22] Whether an attorney may properly request a client to waive conflicts that might arise in

the future is subject to the test of section (b) of this Rule. The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by another attorney in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under section (b).

Conflicts in Litigation--[23] Subsection (b)(3) of this Rule prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by subsection (a)(2) of this Rule. A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily an attorney should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of section (b) of this Rule are met.

[24] Ordinarily an attorney may take inconsistent legal positions in different tribunals at different times on behalf of

different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the attorney in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that an attorney's action on behalf of one client will materially limit the attorney's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the attorney. If there is significant risk of material limitation, then absent informed consent of the affected clients, the attorney must refuse one of the representations or withdraw from one or both matters.

[25] When an attorney represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the attorney for purposes of applying subsection (a)(1) of this Rule. Thus, the attorney does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, an attorney seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the attorney represents in an unrelated matter.

Nonlitigation Conflicts--[26] Conflicts of interest under subsections (a)(1) and (a)(2) of this Rule arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the attorney's relationship with the client or clients involved, the functions being performed by the attorney, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. An attorney may be called

upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the attorney should make clear the attorney's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, an attorney may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, an attorney may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The attorney seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the attorney act for all of them.

Special Considerations in Common Representation--[29] In considering whether to represent multiple clients in the same matter, an attorney should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the attorney will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, an attorney cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the attorney is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties

has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the attorney subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[29.1] Rule 19-301.7 (1.7) may not apply to an attorney appointed by a court to serve as a Child's Best Interest Attorney in the same way that it applies to other attorneys. For example, because the Child's Best Interest Attorney is not bound to advocate a client's objective, siblings with conflicting views may not pose a conflict of interest for a Child's Best Interest Attorney, provided that the attorney determines the siblings' best interests to be consistent. A Child's Best Interest Attorney should advocate for the children's best interests and ensure that each child's position is made a part of the record, even if that position is different from the position that the attorney advocates. See Md. Rule 9-205.1 and Appendix to the Maryland Rules: Maryland Guidelines for Practice for Court-appointed Attorneys Representing Children in Cases Involving Child Custody or Child Access.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-attorney confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the attorney not to disclose to the other client information relevant to the common representation. This is so because the attorney has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the attorney will use that information to that client's benefit. See Rule 19-301.4 (1.4). The attorney should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the attorney will have to withdraw if

one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the attorney to proceed with the representation when the clients have agreed, after being properly informed, that the attorney will keep certain information confidential. For example, the attorney may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the attorney should make clear that the attorney's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 19-301.2 (c) (1.2).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 19-301.9 (1.9) concerning the obligations to a former client. The client also has the right to discharge the attorney as stated in Rule 19-301.16 (1.16).

Organizational Clients--[34] An attorney who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 19-301.13 (a) (1.13). Thus, the attorney for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the attorney, there is an understanding between the attorney and the organizational client that the attorney will avoid representation adverse to the client's affiliates, or the attorney's obligations to either the organizational client or the new client are likely to limit materially the attorney's representation of the other client.

[35] An attorney for a corporation or other organization who is also a member of its board of directors should determine

whether the responsibilities of the two roles may conflict. The attorney may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the attorney's resignation from the board and the possibility of the corporation's obtaining legal advice from another attorney in such situations. If there is material risk that the dual role will compromise the attorney's independence of professional judgment, the attorney should not serve as a director or should cease to act as the corporation's attorney when conflicts of interest arise. The attorney should advise the other members of the board that in some circumstances matters discussed at board meetings while the attorney is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the attorney's recusal as a director or might require the attorney and the attorney's firm to decline representation of the corporation in a matter.

Model Rules Comparison: Rule 19-301.7 (1.7) is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct except for omitting the word "concurrent" in Rule 19-301.7 (1.7) (a) and (b) and Comment [1], and retaining most of existing Maryland language in Comment [12].

REPORTER'S NOTE

An unforeseeable concurrent client conflict occurs when there is "a conflict between two or more clients that: 1) did not exist at the time the representation commenced, but arose only during the ongoing representation of both clients, where 2) the conflict was not reasonably foreseeable at the outset of the representation, 3) the conflict arose through no fault of the lawyer, and 4) the conflict is of a type that is capable of being waived … but one of the clients will not consent to the dual representation" (*Ass'n of the Bar of the City of N.Y. Comm. On Prof'l and Judicial Ethics, Formal Op. 2005-05*).

The concept of unforeseeable concurrent client conflict is addressed in DC R RPC 1.7, but it not expressly addressed in ABA Model Rule 1.7 or in Maryland Rule 19-301.7, which follows Model Rule 1.7. The Attorney and Judges Subcommittee proposes revisions to Comment [5] of Rule 19-301.7 to provide additional clarification to a practitioner who discovers that the

practitioner is faced with an unforeseeable concurrent client conflict. Specifically, under section (a) of this Rule, an attorney is required to withdraw from one or both representations involving conflicted clients unless each affected client gives informed consent, confirmed in writing as contemplated in subsection (b)(4).