STANDING COMMITTEE ON RULES
OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A of the People's Resource Center, 100 Community Place, Crownsville, Maryland, on January 5, 2001.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Hon. John F. McAuliffe
Hon. William D. Missouri
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Noreen Hathaway, Esq.
Paul V. Carlin, Esq., Maryland State Bar Association
R. Calvert Stewart
John M. Brennan, Esq.
John Michael Conroy, Esq.
Rita K. Grindle, Esq.
Michael N. Schleupner, Jr., Esq.
Winnie Borden, Esq., Maryland Volunteer Lawyers Service
James F. X. Cosgrove, Maryland Title Association
Stephen J. Nolan, Esq.
Jo B. Fogel, Esq.
Lex Ruygrok, Esq.
Emily Vaias, Esq., Linowes & Blocher
Tonna Phelps, Esq., DHCD
Bill Pitcher, Maryland Land Title Association
Sharon Goldsmith, Esq., PBRC
James F. Rosner, Esq.
John J. Dwyer, Esq.
Kevin J. Leonard, Esq., Office of the Attorney General, DHCD

D. Robert Enten, Esq.
Kathleen Murphy, Esq.

Hon. Deborah S. Eyler
Pamela J. White, Esq., Maryland State Bar Association
James M. Griffin, Esq.
Ronald Edlavitch, Esq.
David Pryal
Carol Ann Barron, Esq.
Susan Erlichman, Esq., Maryland Legal Services Corp.
Herbert S. Garten, Esq., Maryland Legal Services Corp.
Robert J. Rhudy, Esq., Maryland Legal Services Corp.
Albert "Buz" Winchester, III, Director of Legislative Relations, Maryland State Bar Association
Frank Broccolina, State Court Administrator
Rachel Wohl, Esq., Maryland Alternative Dispute Resolution
James L. Thompson, Esq.
Rhonda Lipkin, Esq., Legal Aid Bureau

The Chair convened the meeting. He welcomed the Honorable William D. Missouri of the Circuit Court for Prince George's County to his first meeting as a member of the Rules Committee. He noted that Judge Johnson will also continue to serve on the Committee as an Emeritus member.

Agenda Item 1. Consideration of certain proposed rules changes pertaining to Interest on Lawyer Trust Accounts ("IOLTA"): Proposed amendments to Rule 16-601 (Applicability) and Proposed amendments to Rule 16-608 (Interest on Funds in Attorney Trust Accounts)

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The Chair said that although Mr. Brault, chair of the Attorney's Subcommittee, had not yet arrived, the discussion would proceed. The Chair presented Rule 16-601, Applicability, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-601 to broaden the definition of an attorney trust account, as follows:

Rule 16-601. APPLICABILITY

The Rules in this Chapter apply to all trust accounts required by law to be maintained by attorneys for the deposit of funds that belong to others, including any account where the attorney has a claim or right to the interest that would be precluded under Rule 16-608 and any account for which the attorney is professionally responsible for the maintenance of the funds, except that these Rules do not apply to a fiduciary account maintained by an attorney as personal representative, trustee, guardian, custodian, receiver, or committee, or as a fiduciary under a written instrument or order of court.

Cross references: BOP, §10-301 et seq. and Rule 1.15 of the Maryland Rules of Professional Conduct.

Source: This Rule is derived from former Rule BU1.

Rule 16-601 was accompanied by the following Reporter's Note.

The Attorneys Subcommittee is suggesting an amendment to Rule 16-601 to clarify that an attorney who operates a title company has to pay the interest on the company's accounts to IOLTA (Interest on Lawyers Trust Accounts).

The Chair explained that this issue previously had been before the Committee. Mr. Conroy told the Committee that he had attended the Subcommittee meeting in November. He expressed the view that the recommendations of the Subcommittee were appropriate. He pointed out that on page 13 of the October 16, 1998 minutes of the Rules Committee, an excerpt of which was included in the meeting materials for today's meeting, it is stated that the law provides that title companies do not have to report the interest on accounts which do not earn more than $50. This is not correct -- it is accounts which earn interest of more than $50 that the companies do not have to report.

Mr. Rhudy, Executive Director of the Maryland Legal Services Corporation, commented that attorneys and title companies are expected to place deposits into IOLTA (Interest on Lawyer's Trust Accounts) accounts consistent with state law. If an attorney manages or owns a title company, the interest goes into the Maryland Affordable Housing Trust (MAHT).

Mr. Cosgrove, who was representing the Maryland Land Title Association, said that he did not receive any information about the possible change to Rule 16-601 until December 27, 2000. He inquired about the minutes of the Subcommittee meeting which took place on November 22, and the Assistant Reporter answered that no minutes of Subcommittee meetings are kept. He asked that the discussion be postponed so that the Maryland Land Title Association would have time to consider the matter. He remarked that he and other members of the

association do have grave concerns.

Mr. Dwyer, representing the Beltway Title Company, observed that when the change to Rule 16-601 was suggested, no one seemed to consider the extent that a real estate title company uses its escrow account. The deposits of a title company number in the hundreds in a given month, with a thousand or more checks per month being issued. A great deal of work is necessary to reconcile the accounts. Beltway Title Company has 11 offices. All of the accounts are administered in one office, and all of the reconciliations are handled in one office by two full-time and two part-time employees. Mr. Dwyer reiterated that this type of operation was not considered when the changes to the Rule were discussed. He said that he has some IOLTA accounts which contain interest from closings that have been settled in his name and not the name of the title company. He also has two MAHT accounts. The proposed change to the Rule does not take into consideration the type of operation of a mid-sized or large title company. He noted that he is also a minority shareholder in the title company, owning one-third of it. The Chair inquired about the situation where a lawyer is a member of an organization which also has non-lawyer members. It has not been resolved as to whether the lawyer is compelled to comply with the Rules. Mr. Dwyer responded that attorneys who are strictly employees are assumed not to be subject to the Rules.

Mr. Brennan told the Committee that he owns Brennan Title

Company, which has six offices. He said that he has several licenses including a real estate broker license, one from the Maryland Insurance Administration, and one from the National Association of Securities Dealers (NASD). He is also a member of the Maryland bar. He commented that title work is not the practice of law. Hundreds of title companies are owned and operated by non-attorneys. The interest earned by those companies is used for operations. Attorneys running title companies who would have to pay interest to IOLTA would be held to a different standard than that of their competitors who are not attorneys. None of the functions of a title company are the practice of law.

Mr. Pitcher told the Committee that he was legislative counsel to the Maryland Land Title Association. He requested that this issue be deferred for a reasonable time such as 30 days, because of the impact the change to the Rule would have on the title industry. He expressed the view that this is a very difficult issue. For years from the mid-1980's to the mid-1990's, the legislature grappled with the issues of what is the practice of law, what is a title company, which IRS rules apply, etc. The legislature dealt with the MAHT issue of interest on escrow accounts. The pending Rule change may conflict with policy decisions made by the General Assembly. A deferral of the issue would allow the Maryland Land Association time to do some research, so it could work with the Rules Committee, the legislature, and the MSBA to resolve the problems. The Chair said

that Mr. Pitcher's organization has carefully presented opposition to the change to the Rule. A "sea change" of its opinion supporting the Rule change is not likely. Whatever decision the Committee makes will go to the Court of Appeals, which will determine the important policy issues. If the Committee takes action today, it is not that its members do not want to be accommodating.

The Vice Chair commented that she was unclear as to what the proposed change in the language of Rule 16-601 is intended to mean. Mr. Bowen pointed out that the proposed language refers to "a claim or right to the interest that would be precluded under Rule 16-608." However, Rule 16-608 does not pertain to anything other than attorneys' escrow accounts and does not amend the legislation. The rule is not tied to the statute which limits the application to certain accounts. Judge Heller pointed out that in the material handed out, Code, Insurance Article, §10-125 states that a "law firm" does not include an attorney or an association of attorneys who own, operate, or share an interest in a title agency. She expressed the concern that the statutory definition may conflict with §22-103 (c), which provides that the financial institution which has the commingled account of trust money from clients or beneficial owners in connection with escrows, settlements, closings, or title indemnification, shall pay the interest earned on the account to the Maryland Affordable Housing Trust. She agreed that the proposed Rule change does not address the problem.

The Chair stated that the Subcommittee intended to accomplish something, but the Committee needs clarify as to what was intended. The Rule can be conformed and styled. The question is preliminarily the policy issue -- what to do about attorneys who structure companies in a way allowing them to say that they do not have to put their trust funds in IOLTA accounts. The battle is between attorneys who do title work as opposed to attorneys who through their businesses do not have to comply. Attorneys who choose to do title work through a corporation either do or do not have to comply. The Vice Chair remarked that the prior proposal of the Subcommittee stated that any title company operated by an attorney has to put escrowed funds into an IOLTA account. Judge Heller reiterated that the Rule may be inconsistent with the statute.

The Chair said that the problem with this conflict is inherent in the overlap as to what is and is not the practice of law. An attorney cannot avoid certain obligations. What an attorney does may be the practice of law, even though when a non-attorney performs the same task, it is not the practice of law. If an attorney has an escrow account, the attorney cannot avoid the obligation to put escrowed monies into an IOLTA account by stating that the escrow account is from a business. This is a policy question.

Mr. Pitcher commented that there is another policy question. The legislature passed the IOLTA statute and refined it. Then it passed the MAHT statute, which pertains to title companies. That

statute provides that interest on escrow accounts is a source of funds for the MAHT. The proposed change to Rule 16-601 would create a conflict between the two statutes for an attorney operating a title company. Would the attorney report to the Insurance Commission or to the court?

Mr. Conroy said that this conflict has never been a real issue. It is appropriate if attorneys running title companies put the interest in the MAHT. The point is that attorneys in law firms or title companies cannot put the interest from escrow accounts into their own pockets. Putting the interest in either IOLTA or MAHT is proper, but not pocketing the interest.

Judge McAuliffe asked Mr. Conroy's position as to the situation in which an attorney controls a one-third share of a title company. Mr. Conroy replied that an attorney who is an officer, director, or shareholder of the company comes under the Rule. The definition of the operation of a title company is a grayer area. He cited the case of Attorney Grievance Commission v. Lazerow, 320 Md. 507 (1990), in which a non-practicing attorney who was a real estate developer used home purchasers' down payments to pay the expenses of his business. The real estate developer was disbarred for misappropriation of funds entrusted to his care, even though the misappropriation was committed in a non-professional capacity. Mr. Conroy also cited the case of Attorney Grievance Commission v. Shaw, 354 Md. 636 (1999), which held that an attorney is subject to discipline even though the attorney is

inactive at the time of the conduct. If an attorney violates rules, the attorney is subject to losing his or her license.

Mr. Enten told the Committee that he represented the Maryland Bankers' Association. He cited the October 16, 1998 minutes of the Rules Committee, which were included in the meeting materials for today's meeting. The minutes state on page 15 that Mr. Titus moved to have representatives of the Rules Committee go before the legislature to request a statutory amendment which would clarify that attorneys operating title companies have to pay IOLTA. Mr. Enten observed that the General Assembly passed a statute creating the MAHT, which specifically stated that law firms performing title searches are not covered by the statute, but title companies are. There is some uncertainty about this. Mr. Cosgrove noted that the General Assembly has not changed the law regarding title companies. If the Rule is changed to provide that an attorney will have to pay interest to IOLTA, regardless of whether he or she operates a title insurance company, it will be necessary to define the level of involvement of the attorney. Title insurance companies pay into IOTA (Interest on Trust Accounts) and law firms pay into IOLTA. The legislature did consider whether interest in excess of $50 is for the title company to keep. Mr. Rhudy responded that this is an issue for the Internal Revenue Service. Mr. Enten said that the banking industry is concerned about clarity in dealing with customers' accounts. If this is to be achieved, it will need to be by a bill in

the legislature.

Mr. Sykes questioned whether any member of the Subcommittee had any response to the comments heard at the meeting. From the discussion, (1) it is clear that the proposed language of the Subcommittee does not provide what it intended, and (2) it is not clear what the Subcommittee intended -- there are serious policy questions which may be suitable for the legislature. Mr. Sykes moved that the issues raised today regarding Rule 16-601 be deferred. He suggested that the Subcommittee confer with leaders of the General Assembly to work out something to solve the problems and eliminate the conflict between the Rules Committee and the legislature. The motion was seconded. Mr. Hochberg remarked that he would like the Committee to go one step further, sending the matter to the legislature because this appears to be a matter in their jurisdiction. Mr. Sykes commented that he has only heard one side of the issue, and it would be helpful to hear the Subcommittee's viewpoint. The problem may be solved by joint action by the legislature and the Committee, and the legislature may ask for the Committee's input.

Mr. Titus inquired if the Rule could provide that an attorney could not certify the deed in a real estate transaction unless all funds escrowed in connection with the transaction were placed in an IOLTA or IOTA account. The Vice Chair pointed out that a title company could send out the certifications to outside attorneys. Mr.

Cosgrove said that he hoped that the pending change does not drive attorneys out of the title business. Consumers need to be served by responsible people. Mr. Conroy agreed with Mr. Titus' suggestion. Mr. Conroy expressed the opinion that this is not a consumer issue. The concern is the ultimate question -- can attorneys "pocket" interest earned on clients' escrowed funds? Mr. Pitcher commented that the statement about attorneys pocketing the interest is not correct. His company uses computers to tie in with the bank and stop payment on checks. They need expensive technology. The service charges by the bank cost them $3000 to $6000 a month. Above these charges, any leftover interest is negligible. In the operation of Mr. Pitcher's company, a big portion of any interest goes to pay the bank's service charges, and what remains goes into the administration of accounts.

The Chair noted that referring to putting the interest in one's pocket may be characterized as unethical misappropriation, but that is not what is intended. In layman's language, the attorney who does title work may be subject to a competitive disadvantage in comparison to a non-attorney corporation who does the same work. It is an economic issue which may be a topic for the General Assembly. There are two positions -- either it is a legislative issue, or it should go back to the Subcommittee. Senator Stone remarked that the interested parties could bring up legislation. He said that nothing has happened on this issue for two years, and he knows of no pending

bills. Delegate Vallario added that either the Subcommittee, or someone else, should propose legislation now to be considered by the 2001 General Assembly.

Mr. Stewart, of the Atlantic Title Company, expressed his agreement with Mr. Pitcher. He observed that there is no reason to "half-level the playing field" for attorneys who operate title companies and attorneys who do not. This could create a competitive disadvantage for attorneys who operate title companies as opposed to non-attorneys operating title companies. The "playing field" should be level, so that the attorney is not at a competitive disadvantage. Mr. Rhudy commented that the IOTA and MAHT statutes do not address interest outside of the $50 threshold. At the request of the MSBA, the Attorneys Subcommittee tried to clarify the issue. It is impermissible for attorneys to keep the interest from private trust funds. The interest goes either to IOTA or IOLTA. It is clear that this is not an effort to change state law, but to reinforce the ethical standards of the bar.

The Chair said that the history of this is that a grievance concerning this issue had been asserted, and an Inquiry Panel had ruled. The Attorney Grievance Commission and Bar Counsel decided to refrain from action that would put the matter before the Court of Appeals for a decision. Since that time, the Subcommittee has spent many hours trying to solve the problem, and the Rules Committee has also put in many hours. The presentations on the subject have been

very good. The motion is to send the matter back to the Subcommittee. Many of the speakers have requested time to take a look at this issue in light of the comments and the minutes of previous meetings. Senator Stone and Delegate Vallario expressed an interest in examining legislation. The question is whether the cure is worse than the disease. If this goes into the legislative arena, it may mean that ground will be lost as to funds for IOLTA and IOTA. The matter can be referred to the Subcommittee with the understanding that the speakers can be invited to look at this issue in light of legislation already on the books and any pending legislation.

The Chair called the question on the motion to send the issue back to the Attorneys Subcommittee. The motion passed unanimously. Mr. Conroy commented that in conclusion, if the decision is to draft a bill for the legislature, he would be willing to join in a group to draft the legislation.

Mr. Brault presented Rule 16-608, Interest on Funds in Attorney Trust Accounts, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-608 to add a new section providing for mandatory reporting of IOLTA participation by attorneys, as follows:

Rule 16-608. INTEREST ON FUNDS IN ATTORNEY TRUST ACCOUNTS

(a) Generally

Any interest paid on funds deposited in an attorney trust account, after deducting service changes and fees of the financial institution, shall be credited and belong to the client or third person whose funds are on deposit during the period the interest is earned, except to the extent that interest is paid to the Maryland Legal Services Corporation Fund as authorized by law. The attorney or law firm shall have no right or claim to the interest.

Cross reference: See Rule 16-160 b 1(D) providing that certain fees may not be deducted from interest that otherwise would be payable to the Maryland Legal Services Corporation Fund.

(b) Duty to Report IOLTA Participation

All attorneys admitted to practice in Maryland shall report annually information concerning all IOLTA (Interest on Lawyer Trust Accounts) accounts, including name, address, location, and account number on a form approved by the [Court of Appeals] [Administrative Office of the Courts].

Cross reference: See Code, Business Occupations

and Professions Article, §10-303.

Source: This Rule is former Rule BU8.

Rule 16-608 was accompanied by the following Reporter's Note.

> The Attorneys Subcommittee is proposing that a new section be added to Rule 16-608 which would provide that attorneys must report annually information concerning their IOLTA accounts. Representatives of the Maryland Legal Services Corporation are recommending the mandatory reporting of IOLTA participation because they feel it will substantially increase the collection of IOLTA revenues. Out of 27 mandatory state IOLTA programs, 18 require attorneys to report on their IOLTA participation.

Mr. Brault explained that currently in Maryland, there is one-time reporting of IOLTA accounts. However, these accounts may change, and the Maryland Legal Services Corporation (MLSC) needs updated reports. Attorneys may change accounts or banks. The Subcommittee drafted a rule that provides for annual reporting. The form would be sent with the Clients' Security Trust Fund (CSTF) form, and filling it out would be a simple procedure. Keeping up to date on this increases the recovery of interest for the MLSC.

The Vice Chair said that she had no problem with the idea of reporting. She expressed the view that this should not be a trap for the unwary. The Bar needs a reminder that the form will be mailed to each attorney every year. The Reporter inquired as to who would receive the completed forms. The Chair noted that the choice is sending the forms to the Administrative Office of the Courts or to the Court of Appeals. He asked Mr. Broccolina, who is the State

Court Administrator, for his opinion, and Mr. Broccolina replied that either one was appropriate. The Vice Chair expressed the view that the forms should be sent to the Court of Appeals. The Chair suggested that the forms should be mailed out by the CSTF and approved by the Court of Appeals. Mr. Titus suggested that the report should be made to the trustees of the CSTF. The Chair pointed out that the reporting is not made to the CSTF. The Vice Chair suggested that this does not need to be decided now. When the form is completed, it will provide to whom it is to be sent. The Chair observed that the form is mailed by the CSTF. The Vice Chair remarked that the Rule does not have to state this; the Court of Appeals will ensure that it is mailed out. Delegate Vallario added that for convenience, everyone could be sent a pre-printed form with the attorney's account number printed on it. The Chair said that the Rule can expressly provide that sending out the form is an obligation of the CSTF. The Committee approved the Rule as amended. The Reporter pointed out that Rule 16-811, Clients' Security Fund, will need a conforming amendment.

Agenda Item 2. Consideration of certain proposed rules changes pertaining to *pro bono publico* service: Proposed new Rule 16-110 (Pro Bono Committees and Plans) and Proposed amendments to Rule 6.1 (Pro Bono Publico Service) of the Maryland Lawyers' Rules of Professional Conduct

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The Chair said that the Honorable Deborah S. Eyler had sent out a memorandum to the Rules Committee concerning the Attorneys

Subcommittee draft of Rule 6.1. Mr. Brault remarked that the Subcommittee's opinion was that before Rule 6.1 was discussed, it would be helpful to look at the revision of Rule 16-110. He presented Rule 16-110, Pro Bono Committees and Plans, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 100 - COURT ADMINISTRATIVE STRUCTURE, JUDICIAL DUTIES, ETC.

ADD new Rule 16-110, as follows:

Rule 16-110. PRO BONO COMMITTEES AND PLANS

(a) Purpose

The purpose of creating local pro bono committees and implementing local pro bono plans is to promote access to the courts by increasing the availability of pro bono legal services to the poor.

(b) Standing Committee on Pro Bono Legal Service

(1) Appointment

The Chief Judge of the Court of Appeals shall appoint a Standing Committee on the Donation of Legal Services to the Poor ("Standing Committee"). The Standing Committee shall be composed of:

(A) six members of the Maryland State Bar Association, including one member of the Young Lawyers Section;

(B) one District Court judge, one circuit court judge, and one appellate judge;

(C) three representatives of civil legal services providers; and

(D) one court personnel representative.

(2) Term

For the first year in which the Standing Committee is appointed, terms shall be staggered with one year, two year, and three year terms of service. Thereafter, each appointment shall be for a three-year term to allow for staggered rotation.

(3) Responsibilities

The Standing Committee shall:

(A) develop standardized forms for local pro bono committees to use in reporting the results of their plans each year;

(B) review and evaluate local pro bono plans;

(C) review and evaluate reports received annually from local pro bono committees submitted on the standardized forms developed by the Standing Committee;

(D) beginning in the first year in which individual attorney pro bono reports are due (in compliance with revised Rule 6.1), submit an annual report on the effects of the local pro bono plans to the Maryland Judicial Conference;

(E) present to the [Executive Committee of the Maryland Judicial Conference] [Judicial Council] any suggested modifications to the pro bono rules; and

(F) study and make recommendations about means to increase and facilitate lawyer participation in pro bono services.

(c) Circuit Court Pro Bono Committees

(1) Generally

There shall be one local pro bono committee in each circuit court. The circuit court administrative judge shall appoint and convene the initial local pro bono committee. That judge shall either serve as the chairperson of the committee or appoint another circuit court judge in the administrative judge's county to do so. The chairperson shall serve for a minimum of two years. Thereafter, the members of the local pro bono committee may appoint the chairperson who must be a judge of that circuit court.

(2) Composition

Each committee shall be composed of no more than 13 members. Those members shall include:

(A) the judge designated by the circuit court administrative judge to be the chairperson;

(B) if the court has a family division, a judge in that division;

(C) to the extent feasible, one or more representatives from pro bono referral organizations and legal services provider organizations, which representatives shall be nominated by those organizations;

(D) at least one officer of the local bar association, which representative(s) shall be nominated by the association;

(E) one or more court personnel, including, where applicable, a family support services coordinator, pro se assistance staff person, and court clerk;

(F) at least one public member (in addition to any public member appointed from another category); and

(G) at least one additional attorney.

(3) Governance

Except with respect to the appointment of the initial committee chairperson, each committee shall determine governance and terms of service. Replacement and succeeding members shall be appointed by the circuit court administrative judge or designee upon nomination by the local bar association, the pro bono referral or legal services provider organization, or the committee, as the case may be, as deemed appropriate or necessary to ensure an active pro bono committee in each court.

(4) Responsibilities

Each committee shall:

(A) establish a baseline to determine indigency in the county;

(B) assess the legal needs of the indigent community in its jurisdiction, including consideration of non-English speaking, minority, and isolated populations;

(C) determine the scope and extent of available free or low-cost legal services, both staff and volunteer;

(D) establish priorities for serving the indigent population in that community;

(E) establish goals to address the priority legal needs;

(F) prepare in written form a local pro bono plan for that jurisdiction;

(G) implement the local pro bono plan and monitor its results;

(H) submit an annual report to the Standing Committee; and

(I) to the extent possible, use current legal services and pro bono providers in each jurisdiction to implement and operate pro bono plans and to assist in coordination and administrative support.

(d) District Court Pro Bono Committees

(1) Generally

There shall be one local pro bono committee in the District Court in each county. In counties in which there is but one District Court judge, that judge shall appoint and convene the initial local pro bono committee. The judge shall serve as the chairperson of the committee. In counties in which there is more than one District Court judge, the administrative judge and the judges of that county together shall appoint and convene the initial local pro bono committee. The chairperson of the committee shall be a member of the District Court for that jurisdiction. In either case, the chairperson shall serve for a minimum of two years. Thereafter, the members of the local pro bono committee may appoint the chairperson.

(2) Composition

Each local pro bono committee shall be composed of no more than 13 members. Those members shall include:

(A) the judge designated to be the chairperson;

(B) to the extent feasible, one or more representatives from pro bono referral organizations and legal services provider organizations, which representatives shall be nominated by those organizations;

(C) at least one officer of the local bar association, which representative(s) shall be nominated by the association;

(D) one or more court personnel,

including, where applicable, a family support services coordinator, pro se assistance staff person, and court clerk; and

(E) at least one public member (in addition to any public member appointed from another category); and

(F) at least one additional attorney.

(3) Governance

Except with respect to the appointment of the initial committee chairperson, each committee shall determine governance and terms of service. Replacement and succeeding members shall be appointed by the District Court administrative judge or designee upon nomination by the local bar association, the pro bono referral or legal services provider organization, or the committee, as the case may be, as deemed appropriate or necessary to ensure an active pro bono committee in each court.

(4) Responsibilities

The responsibilities of the Committee shall be as set forth in subsection (c)(4).

(e) Joint Circuit and District Court Local Pro Bono Committees

(1) Generally

Where feasible, the circuit court and District Court in a county may establish a single local pro bono committee. The decision whether to establish a single committee shall be made jointly and unanimously by the circuit court administrative judge and the District Court administrative judge. If a single local pro bono committee is to be formed, the circuit court administrative judge shall serve as the chairperson of the committee or appoint another judge in that circuit court or District Court to do so. The chairperson shall serve for a minimum of two years. Thereafter, the members

of the local pro bono committee may appoint the chairperson. The chairperson must be a judge of that circuit court or District Court for the county.

(2) Composition

A single circuit court/District Court local pro bono committee shall consist of no more than 15 members. Those members shall include:

(A) the judge who is the chairperson;

(B) in addition to the chairperson, at least one District Court judge and at least one circuit court judge;

(C) if the circuit court in that jurisdiction has a family division, a judge in that division;

(D) to the extent feasible, one or more representatives from pro bono referral organizations and legal services provider organizations, which representatives shall be nominated by those organizations;

(E) at least one officer of the local bar association, which representative(s) shall be nominated by the association;

(F) one or more court personnel, including, where applicable, a family support services coordinator, pro se assistance staff person, and court clerk;

(G) at least one public member (in addition to any public member appointed from another category); and

(H) at least one additional attorney.

(3) Governance

The governance and responsibilities of a single circuit court/District Court local pro bono committee shall be as set forth above.

(f) Local Pro Bono Plans

(1) Development of a Plan

Each local pro bono committee shall be responsible for developing a pro bono plan tailored to the particular needs of its jurisdiction. Each plan should provide for and/or identify support and educational services for participating pro bono attorneys. To the extent possible, those services should include court-based systems for:

(A) screening litigants who may need pro bono representation and referring them to appropriate referral sources or panels of attorney volunteers and for allowing volunteer attorneys to assist in the screening and intake process as part of their pro bono service;

(B) establishing or expanding provider attorney referral panels;

(C) providing quality intake, screening, and referral of prospective clients;

(D) matching cases with individual attorney expertise, including establishing specialized panels;

(E) providing litigation resources and out-of-pocket expenses for pro bono cases;

(F) offering legal education and training for pro bono attorneys in specialized areas of the law relevant to pro bono legal service;

(G) providing consultation services with attorneys who have expertise in areas of law in which volunteer lawyers are providing pro bono legal service;

(H) establishing procedures to ensure adequate monitoring and follow-up for assigned cases and to measure client satisfaction;

(I) coordinating with the local bar associations to provide opportunities for

judges to encourage members of the bar to discharge their pro bono obligations; and

(J) establishing programs for recognizing pro bono legal service provided by members of the bar.

(2) Communication with the Bar

The pro bono plan shall address means by which members of the judiciary may communicate with attorneys practicing in the court about their professional responsibility under Rule 6.1, encourage lawyers to meet the suggested guidelines, and provide lawyers with information about opportunities for pro bono work, training, and support services.

(3) Pro Bono Opportunities

The following are pro bono service opportunities that should be considered for inclusion in each plan:

(A) representation of clients through case referral;

(B) interviewing of prospective clients;

(C) participation in pro se clinics and other clinics in which lawyers provide advice and counsel;

(D) acting as co-counsel on cases or matters with legal service providers or other volunteer lawyers;

(E) providing consultation to legal service providers for case reviews and evaluations;

(F) providing training to other volunteer attorneys or staff lawyers affiliated with a legal service provider;

(G) engaging in legal research and writing; and

(H) serving as mediators or arbitrators at no fee to a client eligible party.

(4) Collaboration on Plans

District and circuit courts in the same county that are not acting through a joint committee should, to the extent feasible and necessary, collaborate in developing their plans.

To the extent feasible and necessary, in developing local pro bono plans, courts should collaborate with courts in adjoining jurisdictions.

(5) Timing and Development of Plans

The local pro bono committees shall develop their plans within one year of the adoption of this Rule. Each plan shall identify the tasks that will be undertaken to implement it, the time frames for completing the tasks, and the identities of those assigned to each task.

(g) Appellate Pro Bono Committees and Plans

(1) Appointment

There shall be one pro bono committee for each appellate court. The Chief Judge of each appellate court shall appoint its committee members and chairperson. The committee for the Court of Appeals shall consist of three members of the Court of Appeals. The committee of the Court of Special Appeals shall consist of three members of the Court of Special Appeals.

(2) Responsibilities

Each appellate court pro bono committee shall:

(A) evaluate the need for pro bono representation of litigants in its court and develop a plan to address those needs, where

appropriate;

(B) recommend ways in which appellate judges can participate in encouraging lawyers to perform pro bono legal service, which may include:

(i) encouraging newly admitted attorneys to engage in pro bono legal work upon being sworn in or at other ceremonies or programs for new attorneys,

(ii) writing to attorneys to encourage involvement in pro bono work,

(iii) assisting with pro bono attorney training, and

(iv) recognizing pro bono attorneys at award ceremonies; and

(C) submit its plan in writing to the Standing Committee on an annual basis.

Source: This Rule is new.

The Chair asked Judge Eyler to explain the context of the Rules being presented today. Judge Eyler explained that in 1988, the issue of pro bono representation was discussed, and the discussion produced the same problems as are present today concerning lack of access by poor people to courts. The Pro Bono Resource Center was established to spur pro bono representation. Recently, the Honorable Robert M. Bell, Chief Judge of the Court of Appeals, set up the Maryland Judicial Commission on Pro Bono, which spent more than one year studying the problem of lack of access to the courts. The Commission came up with 19 recommendations. The recommendations of the Commission concerning Rules 16-110 and 6.1 are intertwined. One

suggestion was to use the court system as a structure to promote the culture of pro bono practice. The Commission is recommending forming local pro bono committees to devise pro bono plans in the hopes of increasing the pool of attorneys and the availability of pro bono services to the poor. Florida and three other states have court plans and have made changes to their versions of Rule 6.1. Another group of recommendations is a menu of options for local pro bono committees concerning scheduling preferences and attorney panels, the nuts and bolts of encouraging pro bono participation by attorneys. The hope is to avoid having litigants come to court on the day of trial with no attorney.

Judge Eyler said that another component of the Commission recommendations is target goals to which attorneys can aspire, including the number of hours of pro bono service annually. The Commission suggests defining pro bono practice more particularly than it is now and setting a numerical monetary figure for contributions. Another recommendation is the required reporting of pro bono hours and service. The Commission feels strongly that Rules 6.1 and 16-110 should be considered together. The research from studying other states revealed that a synergy exists when the two Rules are adopted together.

Judge Eyler noted that the Subcommittee did not make any substantive changes to the Commission's draft of Rule 16-110. The Rule establishes court committees and specifies their composition,

how they are set up, and the responsibilities with which they are charged. Maryland has the benefit of being a small state. In Florida and Indiana, the structure of pro bono arrangements is circuit committees, because the states are large. In Maryland, each court can have its own plan. The more locally oriented the plan, the better it is. Some jurisdictions may wish to have one plan which includes both its District and circuit courts. Some jurisdictions will wish to collaborate with neighboring jurisdictions. The Rule recognizes that some resources, such as those of legal services organizations, will overlap. Under Rule 16-110, the statewide standing committee, which will handle long-range planning, receives annual reports from the local committees and reports of the attorneys as to their pro bono hours in order to study long-range issues. The MSBA has endorsed the plan. Some of the local bar associations have endorsed it, and some have not.

Judge McAuliffe commented that he has a conceptual problem. Rule 16-110 defines pro bono practice narrowly in terms of promoting access to the courts. Rule 6.1 is a much broader concept, including service rendered and activities for the improvement of the law. Why should the definition be narrowed in Rule 16-110? Judge Eyler responded that the purpose of Rule 16-110 (a) is more narrow, but it could be broadened. The focus is access to justice for litigants in a court-based system. Judge McAuliffe noted that a responsibility of the statewide and local pro bono committees is to encourage attorneys

to provide more pro bono service. The Vice Chair suggested that section (a) of Rule 16-110 could be changed to provide also that a purpose of the local pro bono committees is to promote pro bono legal services. The Chair suggested that the new language could be "to promote compliance with Rule 6.1." Mr. Johnson remarked that the purpose clause of Rule 16-110, section (a), is not consistent with section (b). That section should be in a separate rule.

The Vice Chair suggested that the word "local" be deleted from section (c). Mr. Hochberg noted that no one was present at today's meeting from the Eastern Shore of Maryland, and he inquired whether the Rule was drafted taking into consideration the court structure on the Eastern Shore. Judge Eyler replied in the affirmative, explaining that the Honorable Karen Murphy Jensen, the only circuit court judge in Caroline County, was on the Commission. This is why subsection (f)(4), pertaining to collaboration between courts of adjoining jurisdictions, was drafted. Judge Dryden inquired if subsection (f)(4) means that there can be one plan for both jurisdictions. Judge Eyler replied that that is the meaning, and she asked if this is clear from the language of the Rule. Mr. Hochberg expressed the opinion that the provision is not clear. The Chair stated that courts in adjoining jurisdictions may combine into one plan. Judge Eyler commented that there can be both horizontal and vertical collaboration. There is one circuit court per county. Every circuit court has its own plan, except if the court

collaborates with the District Court or with other circuit courts. She suggested that in subsection (e)(1), the word "county" should be added before the word "circuit" where it appears in the fourth line.

The Vice Chair commented that Rule 16-110 appears to be very long. Judge Eyler said that portions of the Rule could be consolidated. Mr. Titus pointed out that in section (a), the language "pro bono publico service" should be added in after the word "promote" and a reference added to Rule 6.1. In subsection (b)(1), the language which reads, "the Donation of Legal Services to the Poor" should be changed to "Pro Bono Publico Service." The Committee agreed by consensus to these suggestions. Mr. Titus expressed his concern about the committee structure. The idea of a statewide committee to be used as a clearinghouse is a good idea and so is the formal involvement of the court. The problem is the huge number of local committees. He said that something simpler might be better. Some jurisdictions already have advanced pro bono committees which may or may not involve judicial participation. With the approval of the statewide committee, the local administrative judge should be allowed to certify a very advanced pro bono operation which is run by a bar association with some involvement of judges. The Rule does not need "heavy machinery." Diversity should be encouraged. It would not be helpful to ruin an existing program. The Rule could be far shorter, also.

Judge Eyler expressed her disagreement that the Rule contains

heavy machinery noting that the Rule is a "bare bones" structure. Mr. Titus responded that for committees that are not joint, a 13-member committee is recommended, even in the smallest county. The Vice Chair noted that the Rule states in subsection (c)(2) that the committees should consist of "no more than 13 members." Judge Eyler added that there could be less members. Certain members were specified for inclusion reasons. The Commission did not want existing programs to be displaced or supplanted. The Rule is designed for flexibility for adding people at the local level. It is unwise to provide no guidance as to the composition of the committees. It could end up that there is no involvement of those who are the most involved. The Rule provides leeway for local plans both in terms of substance and composition. This does not negatively impact those plans in existence, but it will bring others into the fold.

Judge Heller questioned as to how the Montgomery County pro bono program would know from the Rule that it is not being supplanted. She expressed the opinion that the Rule should ensure basic pro bono services, but it should not undo viable programs. Mr. Titus suggested that a catchall provision could be added which would allow the county administrative judge to certify a pro bono center in lieu of the alternate arrangement provided for by the Rule. The Chair commented that if the Rule gives the administrative judge any control, this would provide the potential for the administrative

judge to say that he or she does not like a particular pro bono organization. Nothing in the Rule suggests this currently. An administrative judge would not ignore the good work of a pro bono organization. Nothing requires a change to be made. The Rule requires that members of pro bono organizations be part of the pro bono committee to the extent practicable.

Ms. Fogel told the Committee she was attending the meeting on behalf of John Kudel, Esq., President, Montgomery County Bar Association. Mr. Kudel had sent in some correspondence to the Subcommittee. In Montgomery County, the Honorable Paul H. Weinstein, County Administrative Judge for the Circuit Court, has identified landlord-tenant and domestic relations as areas in which help is needed. The Vice Chair asked if it would hurt the Montgomery Court Bar Association's pro bono activities if a local pro bono committee were set up in Montgomery County. Ms. Fogel replied that the Bar Association has concerns about the proposed rule changes. Judge Weinstein has said that he does not necessarily want more responsibility in assigning attorneys to pro bono cases. He has concerns about the mechanics of the implementation rule and the minimum donation of one week of services by attorneys who are already participating in pro bono committees. Judge McAuliffe inquired if Montgomery County has paid pro bono organization staff members. Ms. Fogel replied in the affirmative.

Ms. Barber said that she was a former managing attorney of the

Montgomery County pro bono center. Judge Weinstein had asked her to attend the meeting. Judge McAuliffe pointed out that the Montgomery County Bar Association has a separate bar foundation that receives contributions. The pro bono program is established and has funds to keep running. The proposed Rule may envelop the established program. It provides for someone other than the one funding it to run the program. Judge Eyler noted that the Commission's vision is that in any county where there already is an active pro bono group, that group is part of pro bono participation in that county. The Commission's view is that when there is court involvement, it is easier to target at an earlier stage who needs pro bono representation and determine what judges may do to increase the pool of attorneys. Mr. Thompson remarked that the Rule could provide that to the extent practicable, existing pro bono programs should be maintained. Mr. Titus suggested that the following statement could be put at the end of subsection (c)(2)(G) as a paragraph with no letter before it: "With the approval of the Standing Committee on Pro Bono Legal Service, the county administrative judge may approve existing pro bono programs." This would allay the concerns of Montgomery County.

Mr. Brault pointed out an experience in a parallel activity. Montgomery County was the first jurisdiction to have a continuing legal education institute in Maryland. It was the Montgomery-Prince George's County Continuing Legal Education Institute. When the

Maryland Institute for the Continuing Legal Education of Lawyers (MICPEL) was formed, there was some debate as to whether the two institutes could co-exist in a parallel form. Eventually the Montgomery-Prince George's institute ceased its existence. Mr. Brault expressed the opinion that the Rule should be drafted so as not to drive people out of the business of pro bono service. The Chair said that Mr. Titus' proposal would allow the Standing Committee to disenfranchise an organization already in existence, and this is a danger. Mr. Titus explained that his suggestion would not be to disenfranchise any program; rather it would be that with the approval of the Standing Committee, the county administrative judge can substitute a local program in lieu of the local standing committee.

Judge Vaughan commented that he is concerned by Judge Weinstein's remarks about landlord-tenant cases in the circuit court, because this has been a District Court function. Eighteen years ago, there were 1000 landlord-tenant cases in Howard County; today there are 13,000 to 15,000 cases. His preference would be for the local bar associations to handle pro bono services with more involvement by judges. Judge Eyler responded that this is the heart of the policy question. The Pro Bono Commission was charged with looking into the involvement of the judiciary and courts in promoting pro bono legal services. This Rule is the embodiment of the Commission's study. Judge Eyler remarked that she does not want to negatively affect

existing attorney-based pro bono programs. Under Mr. Titus' proposal, if the Montgomery County program were accepted, no judges would be involved, and the court system would not be arranging for an attorney to "piggyback" a fee-paying case on a pro bono case when the two cases are scheduled for hearings or trials. The Commission is interested in court-based plans.

Mr. Titus said that he believes that judges are involved in the Montgomery County program. Judge Kaplan suggested that the Rule could state that the Standing Committee shall consider for certification existing pro bono programs. Judge Eyler explained that the problem is not that these programs would not be included, but that the Rule would not be broad enough. The needs cannot be accomplished by an attorney-based group. The Chair suggested that the Rule could provide that nothing in these Rules affects programs currently in place in the circuit or District courts. The Vice Chair observed that the plan could be whatever it needs to be, and if it does not meet all needs, whatever is needed could be added.

Mr. Klein expressed his concern that when the local committee is gathering information, those who participate in pro bono services will have their names in the computer. If the attorney practices in more than one county, the reporting could be a nightmare. He asked if the Commission envisioned a reporting form from the court. Judge Eyler answered that the Commission did not discuss or contemplate this because the committees would include members of local bar

associations. The Vice Chair suggested that the Rule could be modified. Delegate Vallario questioned whether authority is being delegated to the local committees so that they can issue an order to an attorney to appear the next day to handle a pro bono case. Many attorneys have their own forms of pro bono service that they perform, and Delegate Vallario stated that he did not wish to keep books on this. There are already so many other forms that have to be filed. He stated that he was under the impression that Maryland is in the forefront of pro bono practice and providing legal services to the poor. The legislature gave money to the Maryland Legal Services Corporation, and it is trying to increase salaries for the public defenders. Delegate Vallario said that he is not in favor of the local committees.

Judge Missouri commented that Prince George's County has a successful program in which its bar foundation is staffed with employed and volunteer attorneys. Some of the family division money from the legislature goes to the bar foundation for pro bono programs. He has faith in the judgment of the administrative judges and does not foresee any problems with the local committees who involve bar foundations in giving pro bono service. He added that he does not think that 13 members of the circuit court pro bono committees is a workable number because it will result in long and inefficient meetings.

Mr. Thompson told the Committee that the state of Florida

demonstrates how a good system works. He spoke with the president of the Florida Bar Association and the head of pro bono services in Dade County, which is the equivalent in Florida of Montgomery County, Maryland. Out of 13,000 attorneys, 7,000 signed up to participate in pro bono legal service. When the idea of court-based pro bono service was suggested, the attorneys were concerned that this type of system would damage their already-existing pro bono programs. However, once the programs went into effect, pro bono service was enhanced. Edith Osmond, Florida Bar Association President, had said that the Bar Association of Florida had opposed mandatory pro bono representation, changes to Rule 6.1, and mandatory reporting. The Supreme Court of Florida moved ahead with these, and six years later, the system is working with no problems, and no complaints from attorneys. The people reached by pro bono service have more than doubled, and the access problem has been solved.

Ms. Lipkin, Deputy Director of the Legal Aid Bureau, said that she has two amendments to suggest, both of which have been approved by Judge Eyler. One amendment is to delete the language in subsection (c)(2)(C) which reads "to the extent feasible." The other is to insert in the first paragraph of subsection (f)(1) after the word "systems" and before the word "for" the following language: "in coordination with existing pro bono referral and legal services organizations."

The Chair commented that similar language could be added to the

first sentence of subsection (f)(1) regarding the committee developing a plan. Ms. Lipkin noted that it appears that all of the services are court-based, which is not necessarily correct. The Vice Chair asked which services are court-based. Judge Eyler answered that under the broad rubric the Commission used, the efforts were concentrated within the courthouse itself in terms of scheduling ("piggybacking"), matching of attorneys and pro bono pro se litigants at an early stage, etc. The idea is to get information from the courts to find out who needs representation which can then come from pro bono organizations and legal service organizations.

The Chair suggested that the language "court-based systems for" should be deleted from the third sentence of subsection (f)(1). The Vice Chair pointed out that if this change were made, Ms. Lipkin's suggested change to the same subsection would not be necessary. Ms. Lipkin expressed the view that the language "court-based" should remain in this subsection. The Chair commented that to ensure that current pro bono and legal services organizations are used, the Rule could provide that "the plan shall be developed in coordination with existing pro bono referral and legal services organizations." This language can be added in the second sentence of subsection (f)(1). Judge Eyler noted that this will also ensure that the committee is not acting at cross purposes with existing organizations that have their own intake and matching methods. Ms. Lipkin added that the second piece of this is that services do not have to be provided by

the court if they already are available. This includes not only planning but other services, such as screening litigants. Judge Eyler remarked that this is an attempt to eliminate the role of the court using its own data. She disagreed with this view to the extent that the committee is not simply delegating its function to outside organizations. There is data available at the courthouse which can be very useful. Ms. Lipkin stated that she is taking the more concrete view that the court needs someone to screen the cases and make the determination. This is not the court using its own resources.

The Chair suggested that the Rule could provide that the plan shall provide for the continuation of existing legal services provided by pro bono and legal services organizations. An express direction must appear in each plan, so that there is no danger of abolishing existing plans. The Committee agreed by consensus to this suggestion.

Mr. Rhudy told the Committee that the Maryland Legal Services Corporation funds bar foundations in Montgomery, Prince George's, and Harford Counties. About 15% of the funds were given by the General Assembly. On a per capita basis, Harford County is the most active in pro bono services. The other two counties are also doing well. The pro bono organization in Anne Arundel County is out of existence. A local plan is essential to the provision of pro bono services in all counties.

Mr. Titus remarked that if the committee in a jurisdiction such as Montgomery or Harford County wants a good relationship with the local pro bono provider, subsection (c)(4)(G) could be revised to read as follows: "implement or monitor the implementation of the local pro bono plan and monitor its results." Judge Eyler argued that this implies that every function of the local committee is undertaken by an independent legal services or pro bono organization. Some of the aspects of this can only be handled by the court, such as scheduling. Mr. Johnson suggested that this could be addressed in a comment. The Chair said that it is better to include it in the Rrule. The court will do the implementation or it will do the monitoring. It causes no harm and authorizes both, but does not prohibit either. Judge Dryden expressed the opinion that implementation includes monitoring, so it is not necessary to include the word "monitor." The Chair responded that it does not hurt to express this. The Chair asked Ms. Barber if Montgomery County's concerns about the Rule would be solved by the addition of language providing for the continuance of existing services. Ms. Barber replied that the court and the Montgomery County Bar Association have a good relationship. The concern is the effect of the Standing Committee overseeing and mandating the relationship. The certification procedure should not be within the realm of the Standing Committee. The Chair commented that the certification process may be unwieldy, but if it includes the approval of existing

legal services, no damage is done.

Mr. Titus suggested that the Rule could be modified to add language providing that an individual member of the judiciary may not communicate with an individual member of the bar. The Chair responded that this would be in conflict with Rule 6.2. Mr. Bowen commented that Rule 6.2 could be repealed. Mr. Titus said that he was not sure that Rule 6.2 embraces the language he suggested for Rule 6.1.

The Chair suggested that the word "Legal" be deleted from the tagline to section (b). The Committee agreed by consensus to this suggestion. The Chair suggested that in subsection (c)(1), language should be added to clarify that each county circuit court has a local pro bono committee. Judge Heller suggested that in place of the language in subsection (c)(1) which reads "circuit court administrative judge", the language "county administrative judge" should be substituted. The Committee agreed by consensus to these suggestions. Mr. Hochberg asked about Ms. Lipkin's suggestion to delete the language "to the extent feasible" from subsection (c)(2)(C). The Committee agreed by consensus to this deletion. In subsection (c)(4)(G), the Chair noted that there was a suggestion to change the language to "implement or monitor the local pro bono plan and monitor its results," and the Committee agreed by consensus to this. The Chair pointed out that another suggestion was to add language to subsection (f)(1) which would read as follows: "to be

developed in coordination with existing pro bono referral and legal services organizations." The second sentence of subsection (f)(1) would read as follows: "The plan shall be developed in coordination with existing pro bono and legal service organizations and provide for and/or identify support and educational services for participating pro bono attorneys." The Committee agreed by consensus to this change. Judge McAuliffe commented that in subsection (f)(2), there is a reference to the "suggested guidelines." However, there are no suggested guidelines. The Chair suggested that the language be changed to "to meet whatever guidelines are proposed." Judge McAuliffe suggested the following language: "to meet that obligation," and the Committee agreed by consensus to this change. A suggestion was made to add language to subsection (f)(4) which would clarify that adjoining counties can collaborate and develop a single plan. The Committee agreed by consensus to this suggestion.

Mr. Titus moved to add language to Rule 16-110 providing that individual judges may not communicate with individual attorneys about pro bono service. There was no second to the motion.

The Chair asked if Rule 16-110 was approved as amended, and the Committee agreed by consensus to approve it as amended.

After lunch, Mr. Brault presented Rule 6.1, Pro Bono Publico Service, for the Committee's consideration.

REPORT OF THE ATTORNEYS SUBCOMMITTEE

The Attorneys Subcommittee has had two extensive meetings relating to the request of the *Pro Bono* Commission for changes in Rule 6.1 re: *pro bono* services. The Subcommittee reports as follows:

1. The Attorneys Subcommittee reserves the right to reconsider the Rule in light of the final version of amendments to Rule 16-110 that may be recommended by the full Committee. It may be that Rule 16-110 is sufficiently pervasive that no change in Rule 6.1 is necessary.

2. Assuming that some change in Rule 6.1 is desired, the Subcommittee is of the view that it would be unwise to adopt a Rule of Professional Responsibility that carries within its text that it will not be enforced. Accordingly, the Subcommittee's first and preferred recommendation is that the current Rule remain as written, but that the commentary set forth in Alternative A be added thereto.

3. Assuming that the Court of Appeals prefers that the text of the Rule be changed to conform with the requests of the *Pro Bono* Commission, the Attorneys Subcommittee presents Alternative B, without recommendation for its adoption.

January 2, 2001

Alternative A

MARYLAND RULES OF PROCEDURE

APPENDIX: RULES OF PROFESSIONAL CONDUCT

PUBLIC SERVICE

AMEND Rule 6.1, as follows:

Rule 6.1. PRO BONO PUBLICO SERVICE

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, or by financial support for organizations that provide legal services to persons of limited means.

COMMENT

"Public interest legal service" means legal services rendered without fee or expectation of a fee, or at a reduced fee, to:

(1) persons of limited means;

(2) charitable, religious, civic, community, or educational organizations in matters which are designed primarily to address the needs of persons of limited means;

(3) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or

(4) charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.

The number of hours of professional services rendered, or the amount of financial

support provided by a lawyer in the discharge of the responsibility under this Rule, will vary widely depending upon the individual circumstances of the lawyer involved. Bar Associations and Local Pro Bono Committees may be expected to make recommendations concerning the number of hours an attorney should aspire to devote to public interest legal services, or concerning possible monetary donations when the furnishing of legal services is not feasible. The furnishing of public interest legal services is preferred, but in limited circumstances, a financial contribution to organizations that provide legal services to persons of limited means, consistent with the lawyer's ability to pay, may be appropriate. This Rule is aspirational in nature, and no disciplinary action based upon a failure to comply with this Rule is appropriate. In order to encourage compliance with the goals of this Rule, the annual dues billing of the Clients' Security Trust Fund of the Bar of Maryland shall include a provision whereby every member of the Bar will be requested to state whether the lawyer has (a) provided public interest legal service, (b) provided a financial contribution, or (c) both.

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Code Comparison.--There is no counterpart of Rule 6.1 in the Disciplinary Rules of the Code. EC 2-25 states that "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer ... . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." EC 8-9 states that "The advancement of our legal system is of vital importance in maintaining the rule of law ... and lawyers should encourage, and should aid in making needed changes and improvements." EC 8-3 states that "Those persons unable to pay for legal services should be provided needed services."

Alternative B

MARYLAND RULES OF PROCEDURE

APPENDIX: RULES OF PROFESSIONAL CONDUCT

PUBLIC SERVICE

AMEND Rule 6.1, as follows:

Rule 6.1. PRO BONO PUBLICO SERVICE

~~A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, or by financial support for organizations that provide legal services to persons of limited means.~~

(a) A lawyer should aspire to:

(1) participate in activities for improving the law, the legal system, or the legal profession or

(2) render pro bono publico legal services without fee or expectation of fee, or at a reduced fee, to

(A) persons of limited means;

(B) charitable, religious, civic, community, or educational organizations in matters which are designed primarily to address the needs of persons of limited means;

(C) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or

(D) charitable, religious, civic, community, governmental, and educational

organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; or

(3) make voluntary contributions to one or more organizations, of the lawyer's choice, that provide legal services to persons of limited means.

(b) A lawyer should report pro bono publico service rendered by the lawyer [at such times and in such form as the Court of Appeals may direct] [on a form sent to the lawyer with the annual dues mailing of the Clients' Security Trust Fund of the Bar of Maryland.

(c) Except as follows, reports that are submitted under section (b) of this Rule are confidential and are protected from inspection under Code, State Government Article, §10-615 (2)(iii). The reports may be disclosed to and inspected by members of the Standing Committee on the Donation of Legal Services to the Poor and its staff and members of the Maryland Judicial Conference. Non-identifying information and data contained in the reports are not confidential.

(d) The professional responsibility to render pro bono publico legal service is aspirational, not mandatory.

(e) No disciplinary action shall be taken against a lawyer for failure to comply with this Rule.

COMMENT

The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable

organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through disciplinary process.

The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Code Comparison.-- There is no counterpart of Rule 6.1 in the Disciplinary Rules of the Code. EC 2-25 states that "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer ... . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged." EC 8-9 states that

"The advancement of our legal system is of vital importance in maintaining the rule of law ... and lawyers should encourage, and should aid in making needed changes and improvements." EC 8-3 states that "Those persons unable to pay for legal services should be provided needed services."

In addition, proposed amendments to Rule 6.1 drafted by the Maryland Judicial Commission on Pro Bono were distributed to each member of the Committee. The proposal reads as follows:

MARYLAND RULES OF PROCEDURE

APPENDIX: RULES OF PROFESSIONAL CONDUCT

PUBLIC SERVICE

AMEND Rule 6.1, as follows:

Rule 6.1. PRO BONO PUBLICO SERVICE

~~A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, or by financial support for organizations that provide legal services to persons of limited means.~~

(a) A lawyer should aspire to:

(1) participate in activities for improving the law, the legal system, or the legal profession and

(2) either:

(A) render at least 50 hours of pro bono publico legal services per year without fee or expectation of fee, or at a substantially reduced fee, to

(i) persons of limited means;

(ii) charitable, religious, civic, community, or educational organizations in matters which are designed primarily to address the need of persons of limited means;

(iii) individuals, groups, or organizations seeking to secure or protect civil rights, civil liberties, or public rights; or

(iv) charitable, religious, civic, community, governmental, and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; or

(B) make voluntary contributions totaling at least $350 per year to one or more of the organizations, of the lawyer's choice, that provide legal services to persons of limited means.

(b) The professional responsibility to render pro bono publico legal service is aspirational, not mandatory. No disciplinary action based upon noncompliance with section (a) of this Rule shall be taken against a lawyer who chooses not to comply with that section.

(c) A lawyer shall report pro bono publico service rendered by the lawyer at such times and in such form as the Court of Appeals may direct.

(d) Except as follows, reports that are submitted under section (c) of this Rule are confidential and are protected from inspection under Section 10-615 (2)(iii) of the State

> Government Article of the Maryland Code. The reports may be disclosed to and inspected by members of the Standing Committee on the Donation of Legal Services to the Poor and its staff and members of the Maryland Judicial Conference. Non-identifying information and data contained in the reports is not confidential.
>
> (e) No primary disciplinary action shall be taken against a lawyer for failure to comply with section (c) of this Rule.
>
> . . .

Mr. Brault explained that this Rule had been considered twice by the Subcommittee. Judge Eyler and some other interested people came to the Subcommittee meeting for the discussion. The Subcommittee viewed the Rule that was drafted by the Commission as close to mandatory pro bono participation, and the Subcommittee did not favor that approach. A review of the minutes of the Rules Committee meeting in 1989 at which the issue of pro bono service was presented showed that some of the interested persons then were the same as they are today, and the Subcommittee's view was the same. Mr. Thompson and Mr. Titus, who was MSBA president at the time, had diametrically opposing views. In 1989, the MSBA was in opposition to the Cardin Commission proposals. The MSBA was opposed to amending Rule 6.1 and the concept of disciplinary action based on that Rule. The Attorneys Subcommittee is fully in favor of doing whatever it can to help pro bono programs, but the muscle should not be in Rule 6.1. The Subcommittee's view is that it is opposed to mandatory pro bono

participation whether it is overt or covert. The Subcommittee dislikes changing the text of Rule 6.1 to state that pro bono participation is not enforced, because it is not a good idea to state in a disciplinary rule that a requirement is not to be enforced. There are other ways to assist the goals of the Commission short of an involvement with Rule 6.1.

Mr. Brault said that the Subcommittee had discussed the cases of Post v. Bregman, 349 Md. 142 (1998) and Son v. Margolius, 349 Md. 441 (1998). The Court of Appeals had stated in the Preamble to the Rules of Professional Conduct that violations of the Rules are not to give rise to a cause of action nor create any presumption that a legal duty has been breached. The Court also stated that the Rules are designed to provide guidance to lawyers. However, in Post, the Court held that the Rules constitute an expression of public policy having the force of law and allowed a violation of the Rules to form the basis of an equitable defense to the validity and enforceability of a contract. Son involved a suit by a client against an attorney. The Court allowed a cause of action against an attorney for violating ethical rules relating to employment agreements. The Subcommittee, noting that these cases have affected where the line is drawn between ethical rules and public policy, was uneasy about the aspirational goals of the Commission's draft of Rule 6.1.

Mr. Brault referred to the Commission's draft of Rule 6.1 and to the memorandum of January 3, 2001 written by Judge Eyler in

opposition to the Attorneys Subcommittee's recommendations. See Appendix 1. The Commission's draft provides in section (b) that "The professional responsibility to render pro bono publico legal service is aspirational, not mandatory. No disciplinary action based upon noncompliance with section (a) of this Rule shall be taken against a lawyer who chooses not to comply with that section." Section (e) states: "No primary disciplinary action shall be taken against a lawyer for failure to comply with section (c) of this Rule." Mr. Brault said that he had defended attorneys in legal malpractice and grievance cases, and he was not sure what the language "no primary disciplinary action shall be taken" means. He asked if it means that if an attorney is charged with another violation, then a second count can be added. Judge Eyler replied that this is correct. Mr. Brault remarked that it is not uncommon for Bar Counsel to get a complaint, such as an attorney not answering telephone calls, and after an investigation charge the attorney with neglect and being out of trust. Then the neglect charge is dropped. A similar situation could arise with violation of Rule 6.1 as an added second count.

Mr. Brault continued that the goals of the pro bono program are laudatory, but he has a problem with the enforcement power being in Rule 6.1. The Subcommittee encountered a similar situation when it considered the report and recommendations of the Foster Care Court Improvement Project concerning standards for attorneys who represent minors in Child in Need of Assistance and Related Termination of

Parental Rights and Adoption Proceedings. The report included a recommendation that the standards be incorporated into Rule 1.14, Client Under a Disability. The Subcommittee felt that it was not a good idea to put the standards into Rule 1.14, and for similar reasons it is opposed to changing Rule 6.1. In addressing the Foster Care Court Improvement Project's proposals, the Subcommittee recommended changing the word "standards" to "guidelines" and adding to the commentary to Rule 1.14 a reference to the Guidelines. The Rules Committee agreed with this, and the Rule is now before the Court of Appeals. Similarly, in considering the changes to Rule 6.1, the Subcommittee is not in favor of black letter law requiring 50 hours of pro bono practice, mandatory pro bono representation, or any hint of disciplinary action in the Rule.

Mr. Titus commented that this is "deja vu all over again." When he was the President of the MSBA in 1989, he tried to come up with an idea better than mandatory pro bono practice. The wheels were set in motion for the Pro Bono Resource Center to increase the level of pro bono participation. Mr. Titus said that he is proud of the pro bono activity of the past 12 years, but it has not gone far enough. The MSBA and state and local government can do more to encourage it. He endorses increased involvement of the judiciary, as long as individual judges do not order individual attorneys to take a pro bono case. He expressed his concern with the number of hours (50) of pro bono work annually and the contribution of $350, both of

which are included in the Commission's version of the Rule. Fifty hours of pro bono work annually may be too much, or it may be too little. The way the Rule is structured, a member of the Rules Committee would get little credit for Rules Committee participation. Mr. Titus remarked that he is not afraid to do pro bono work. However, his preference is not to tamper with the text of Rule 6.1. He has suggested, with assistance by Judge McAuliffe, a version of the Rule with language added to the commentary. There have been many letters opposing the Commission's draft of Rule 6.1. The Rules Committee is trying to be sensitive to all points of view.

Judge McAuliffe commented that he agreed with the statements of Mr. Brault and Mr. Titus. One of the major goals in defining pro bono service is to keep it sufficiently broad as it has been. Alternative A as proposed by the Subcommittee does not change the text of Rule 6.1, but broadens the comment. A comment to an ethical rule is very strong and is close to black letter law. Judge McAuliffe expressed his opposition to the 50-hour time period which he feels is too much for most people. It may be difficult for the number of hours to be uniform depending on the county in which one practices. The substitute payment of $350 does not match with the suggested amount of time of 50 hours of pro bono work. If a suggested amount to time is to be set, it might be preferable to have a local determination of the amount. Judge McAuliffe recommended Alternative A, which has the strong comment. If the Rule itself has

to be changed, he is in favor of Alternative B, drafted by the Subcommittee.

Mr. Thompson told the Committee that there have been many changes to the legal profession since pro bono participation was considered in 1988. At that time, there were very few pro se cases; currently, 50% of divorce cases are pro se. The average citizen cannot afford legal services. There have been efforts in the legislature to abolish funding of legal services for the poor and cut the budget for the Maryland Legal Services Corporation. The need for legal services is increasing, and access to the courts is a major issue. It is critical for judges around the state if courtrooms are filled with pro se litigants. Some people are not able to get a case to trial. The Pro Bono Commission spent one year looking at alternatives to solve these problems. The MSBA has changed its stance since 1988. Citing the minutes of the Rules Committee, October 7/8, 1988, Mr. Thompson pointed out the following passage:

> Mr. Sykes asked the Bar Association's position on a mandatory reporting system. Mr. Titus responded that the proposal is the official position but that it is his personal position that the Court of Appeals issue an order requiring the attorneys to return the questionnaire. Mr. Donohue stated that it needed to be resolved if it is an order or a request. Mr. Titus stated that it was up to the Court.

Mr. Thompson said that he agreed that this is a fundamental public policy question.

Mr. Thompson stated that he did not like Alternative A or B as

drafted by the Subcommittee. Only 20 to 25% of those people in need of legal services are being reached. The number is 30% in Montgomery County. The number of attorneys who participate in pro bono service is diminishing. How can this trend be reversed?

The language in Rule 6.1 sets no standards. The Pro Bono Committee's proposal sets forth five key elements, the lack of which in Alternatives A and B indicates that those drafts are flawed. The first element is the importance of setting aspirational goals. All fund-raising groups set an amount as a goal. The goals of money and the number of hours of pro bono service in Florida led to significant increases in pro bono participation. In that state, 11 to 12 % more attorneys paid money, attorneys increased their participation by 76%, and 112% more dollars were put into the pro bono funding. The second element is the focus on persons of limited means and their problem of access to legal services. The third element is checkbook pro bono financial contributions. The fourth and most important element is mandatory reporting. This is not mandatory pro bono service. In an office, people usually organize their work in piles labeled "must do," "ought to do," and "nice to do." Under Alternative A, one does not even get to "nice to do." The effect of reporting spurred on the attorneys in Florida, who doubled their pro bono effort. The fifth element is collecting

reliable data. This results from mandatory reporting. The Subcommittee drafts of Rule 6.1 contain no mechanism to determine

facts and figures.

The five factors are essential to a system of good pro bono participation. Whether the Pro Bono Commission's specific suggestions are to be adopted is a matter of public policy, and it will be up to the Court of Appeals to decide. The Commission's draft is supported by the MSBA. The key to it is the attorney looking into a mirror, so the person can reflect as to what he or she is doing about pro bono participation. In Florida, there have been almost no adverse consequences from their pro bono policies. This is a fundamental judicial policy which Maryland must address, and the Rules Committee should consider the matter in this light.

Mr. Nolan told the Committee that he was a member of the Maryland Judicial Commission on Pro Bono. The Commission studied various pro bono plans and looked at the history of pro bono delivery. In 1988, there was a meeting of a special committee on pro bono which was responding to the Cardin Commission Report on the same subject. The special committee was of the opinion that the use of the word "shall" in Rule 6.1 was not what the MSBA wanted, and neither did pro bono delivery and legal service providers. Since 1988, there has been a commitment to voluntary pro bono service. Existing Rule 6.1 does not encourage participation by attorneys in pro bono service and is not working. Mr. Nolan said that in 1988 he chaired a pro bono commission and was the first president of the People's Pro Bono Action Center. He also chaired other

organizations, all of which tried to increase the level of voluntary participation attorneys. Rule 6.1 does not provide enough guidance. Mr. Nolan remarked that he was pleased when Judge Bell informed him that the Maryland Judicial Commission on Pro Bono had been formed. The Commission's draft of Rule 6.1 is attorney-friendly and very workable. In 1993, the ABA redrafted Model Rule 6.1, which Maryland did not adopt. Eight years later, Maryland is embracing revisions which are attorney-friendly and will benefit the public by encouraging attorneys to do more pro bono work. The spirit of the drafts of the Rules written by the Attorneys Subcommittee is well-meaning, but the drafts do not go far enough.

Mr. Klein inquired if the Commission's version of Rule 6.1 is taken directly from the Florida rule. Mr. Thompson answered in the negative. Mr. Klein asked if there would be more support for the Commission's rule if subsections (a)(1) and (a)(2) were formulated in the disjunctive, rather than the conjunctive. The Vice Chair commented that this would be a major change. Mr. Nolan noted that this change would defeat the purpose of the Rule as proposed by the Commission. Mr. Klein asked how the Rule in Florida is worded, and Mr. Thompson replied that it is worded in the conjunctive. He suggested that the amount of time of pro bono work annually could be 20 hours. In the alternative, an attorney could donate $350 annually to the Legal Aid Bureau or other similar provider. Mr. Nolan pointed out that the March, 2000 Report of the Maryland Judicial Commission

on Pro Bono suggested that the amount of time annually to do pro bono service should be 50 hours. The majority of that time is geared towards legal services to indigent citizens. If section (a) is couched in the disjunctive, it would allow attorneys to opt out. The Vice Chair responded that she did not agree. She said that she only has so many hours in her day, and she devotes 60 to 100 hours per year to the Rules Committee. That is a significant contribution.

The Chair stated that there are several ways to approach this. One is to design a questionnaire asking the Court of Appeals to explain what they are looking for in terms of the number of hours annually for pro bono work, the dollar amount for contribution, whether section (a) should be in the disjunctive or conjunctive, whether there should be mandatory reporting, whether there should be disciplinary action for noncompliance, etc. Each person seems to have a different idea of the appropriate amounts. The Court of Appeals can be given the Commission's draft of Rule 6.1 as well as the two drafts of the Subcommittee. The Court can be given the minutes of the meeting today. It is important to present the Court of Appeals with a Rule, so the Court does not have to write one.

The Vice Chair commented that, on the other hand, it would be beneficial to reach consensus. It is possible that if section (a) is changed to the disjunctive, the number of hours is reduced from 50, and an appropriate monetary contribution is set, an agreement could be reached. Mr. Brault remarked that this is wishful thinking. The

message from the Commission is that they would like the Rule as they drafted it. The Rules Committee can write a rule based on what the Court of Appeals would like. Mr. Brault expressed his agreement with the Chair about asking the Court of Appeals for its preferences. He noted that the state of Florida is different from Maryland in many respects. Mr. Sykes expressed his concern that there should be no primary discipline from noncompliance with the Rule. If the Rule has no disciplinary consequences, it should so state, and it should be clearly aspirational. Mr. Thompson pointed out that secondary disciplinary action would result from not complying with the reporting requirement. It is not based on whether or not the attorney performs pro bono service. The need for reporting information is great. The Florida Supreme Court, which is equivalent to the Maryland Court of Appeals, was concerned with the idea of mandatory pro bono service. The Florida rule was an effort by the legal community to deflect mandatory representation. Florida is in the forefront of pro bono participation.

Mr. Brault commented that as many as one-half of Florida attorneys are retired and have the time to contribute substantial amounts of pro bono service. Mr. Sykes observed that a public relations problem exists with the proposed Rule because the aspirations are not mandatory. A tension in the Rule is created. Mr. Titus said that when he was MSBA President, he met with the president of the Florida bar. He recently called him, and he called

the executive director of the Florida bar. A Floridian is president of the ABA. The proposal in Florida deflected a mandatory pro bono plan. The Florida rule has 20 hours of pro bono service, and the Florida Supreme Court rejected local pro bono committees. Judge Eyler pointed out that there are local committees in Florida. Mr. Titus remarked that it is difficult to plug in a set amount of money to be contributed, because it depends on the lawyer. Alternative A contains proposed new language in the commentary which covers this point.

Mr. Thompson referred to the 20-hour time provision for providing pro bono services in Florida. He stated that pro bono participation is the professional responsibility of every attorney. Diminishing the number of hours set forth in the Rule would not be deleterious. The circumstances of the case give a frame of reference. Mr. Sykes responded that regarding this frame of reference, there are serious equal protection problems on the upper end. The Commission's draft of the Rule provides for 50 hours or $350. A senior law partner makes $200 to $400 an hour. This is being equated with $350 for a thriving law practice. On its face, there is no relationship between the hours and the amount.

Judge McAuliffe said that whether everyone agrees that pro bono representation is the responsibility of the legal profession depends on the definition of pro bono -- to help poor people or for the public good. The former is society's responsibility. Pro bono

service is a responsibility of the profession, but it should be what the attorney feels he or she can give, and not a conscription. The Committee does not have to send up the Rule that the Commission has proposed, and this should not simply become a drafting exercise. The principal function of the Rules committee is to be a deliberative, legislative body and send its recommendation to the Court. Judge McAuliffe suggested that Alternative 1 should be tried, and see how it works.

The Chair responded that the Commission was appointed to study the situation, and the Rules Committee is to take action. The Committee can tell the Court that this is how the Committee believes the action should best be taken. The Committee can send alternatives to the Court for its consideration. The Court may agree that the present Rule is appropriate with an expanded commentary. It is preferable that there be only one hearing on the Rule.

The Vice Chair asked if all three drafts would be sent to the Court of Appeals, and the Chair replied in the affirmative. The Vice Chair suggested that the Committee vote as to whether Alternative A is its first choice. The Chair inquired if the Committee wants to send only Alternative A to the Court, and Mr. Brault answered that all three drafts should be sent. Mr. Titus suggested that Alternative A should be the recommendation of the Committee, but Alternative B and the Commission's draft of Rule 6.1 should go to the Court as well. Mr. Klein suggested that with

respect to the Commission proposal, the word "or" should be placed at the end of subsection (a)(1) in lieu of the word "andJudge Johnson questioned as to whether any consideration was given to a formula for the number of hours of pro bono participation to include the equivalent of the charges for billable hours. Without this, the burden is on the junior attorney who does not earn as much as older attorneys. Mr. Brault noted that the burden is on a small law firm who may have to put in 500 hours, which at $200 an hour would cost the firm $100,000. Some firms cannot handle this.

Delegate Vallario remarked that he cannot vote for a specific amount of hours and money. This is a form of taxation. It takes legislation to tax attorneys. He also expressed his opposition to filling out reporting forms. Ms. Wohl, Executive Director of the Alternative Dispute Resolution Commission, explained that mandatory reporting is the keystone to the pro bono system. Any attorney who reports no hours and no money contributed should be ashamed of himself or herself.

Mr. Sykes shared with the Committee an excerpt from an article that he had read which has the opposite point of view:

> Until recently, compulsory community service was reserved for criminal defendants who had been convicted or who had pleaded nolo contendere successfully. The idea of extending it to citizens who have not yet been convicted or required to plead, based solely on their choice of business occupation, is innovative. If the idea is truly to benefit the poor, the burden should first be imposed on plumbers and television repairmen, whose services would be

more beneficial to the poor and are more difficult to obtain.

Referring to the proposed requirement that every lawyer provide a certain number of hours of free legal services to the poor as "pro bono" is a misnomer. The full term — pro bono publico — as used in current Rule 6.1 of the Maryland Lawyers' Rules of Professional Conduct, refers to any service for the public good and the Rule is advisory, not mandatory. If a lawyer gives the proposed minimum number of hours to the poor, is that in full satisfaction of Rule 6.1? Or is he expected to give other hours to other pro bono activities?

If this sounds more emotional than logical, it is because of the nature of the issue. The proposal is based on emotion, not logic, and logical arguments against it are useless. For example, those who support it state that lawyers are members of a "profession" who have "obligations to the poor." The practice of law may have been a profession at one time, but that was many years ago at a time when a criminal conviction would bar one from practice and advertising for clients was prohibited. As to the poor, lawyers have no obligations not shared equally by other members of society. Lawyers as a group are not responsible for the existence of the poor; they are better known for taking from the rich. Making the poor poorer is left to the State Lottery.

Mr. Thompson reiterated that only the reporting would be mandatory. If an attorney decides that 50 hours is too much time, he or she can write down whatever time he contributed, and there is no adverse consequence. The aspirational goal is voluntary. The number of hours can be changed to 20 instead of 50 in the Commission draft of Rule 6.1. The amount of $350 for a contribution is no more than

the amount for four people to go out to dinner.

Judge Heller observed that the Committee does not seem to support the Commission proposal. She asked if the consensus could be Alternative B of the Subcommittee. The Vice Chair agreed, but she suggested that in section (b), the word "should" should be changed to the word "shall." Ms. Knox agreed that Alternative B is excellent and addresses most of the concerns expressed. Judge Missouri asked if members of the judiciary are required to report their pro bono participation. Judge Eyler answered that the way the Rule is drafted, a judge could not perform pro bono services, except to improve the law. Mr. Thompson added that the Florida rule excludes the judiciary.

Mr. Dean commented that Rule 6.1 seems to include publicly paid attorneys. Judge Eyler said that all attorneys are responsible for pro bono work, but government service by its nature means that an attorney cannot perform pro bono work, except for activities to improve the law. In Florida, groups of government attorneys put together a plan to participate in pro bono service. Mr. Dean said that he was speaking on behalf of prosecutors. His concern is the taxpayer. To meet the goal as it exists or is proposed, the 65 government attorneys in Prince George's County would take away 3000 hours of work paid for by the taxpayers. He also expressed the concern that a prosecutor would be expected to handle cases in rent court or family court.

Judge Eyler responded that any attorney who specializes cannot perform the pro bono work that is most needed. The hope is that there will more pervasive training programs. The Department of Justice has the biggest pro bono group among public service attorneys. Judge Heller noted that the Office of the Attorney General in Baltimore City has a training program for mediators to participate in voluntary civil settlement programs. This is not mandatory, but it is noteworthy. She said that she recognizes that different attorneys may not be able to meet the aspirational goals, including government attorneys, part-time attorneys, attorneys who are "of counsel," and retired attorneys. However, they could be encouraged to participate in pro bono service. The Vice Chair remarked that even though this is not mandatory, in her office, they do not have the resources to cover 50 hours of pro bono work by each attorney.

In addressing Mr. Dean's concerns, Mr. Thompson pointed out that government attorneys may be constitutionally prohibited from performing pro bono service. Public attorneys who are excluded can still participate in voluntary programs.

Judge McAuliffe suggested taking a non-binding vote as to whether the Committee prefers Alternative A or Alternative B. Ms. White, President-elect of the MSBA, expressed her opposition to Alternative B which she feels eviscerates Rule 6.1. She noted that sections (d) and (e) of Alternative B are a public relations

disaster. She expressed the opinion that this is worse than current Rule 6.1. The Chair noted that this may result in less pro bono participation than exists now. Ms. White remarked that it is a "free pass." The Chair pointed out that under current Rule 6.1, it is already a "free pass." People who participate in pro bono work now will not stop participating. Current Rule 6.1 provides no disciplinary action for violating the Rule. Judge Kaplan suggested that the Committee recommend Alternative A, with an amendment, similar to the language of the Florida rule, that indicates that the Rule is not intended to apply to judges, prosecutors, and other government employees.

Judge Eyler said that she would like to address the points made in the discussion today. She reiterated Mr. Thompson's statement that pro bono participation is not mandatory. In 1989, a proposal was made that it be mandatory, and this was defeated. The Commission is not in favor of mandatory pro bono service.

The attorney is not being taxed. No one is required to write a check.

There is nothing new about the proposed Rule. In 18 states and the District of Columbia, similar rules have caused no problems, and the amount of pro bono service has increased. There has been no down side to this.

The target goal has been changed to an aspirational goal. The only way the Rule can be meaningful is with a numerical goal in it.

Attorneys will look at the number and try to meet the goal. That is how the level of pro bono participation is raised. The Subcommittee's Alternatives A and B have no benchmark, and this is critical. The Court of Appeals thinks that it is a good idea to add a target to the Rule.

After the Commission's report was issued, there were several revisions to the Rule. The hope is to increase the number of attorneys donating their time to pro bono service. As to the comment about whether the word "and" or "or" should be used at the end of subsection (a)(1), the Rule could be divided into the two types of pro bono. There could be participation in a certain number of hours for improving the law and at least a certain number of hours for representing the poor. There must be an aspirational goal that targets service to the poor, because that is the area in which service is needed — the "hard-core" pro bono work.

The Vice Chair said that this would not address the problem. Judge Eyler stated that the Rule could set an aspirational goal of a total of 50 hours, of which a substantial portion is devoted to representing the poor. There would be a specific numerical goal -- less than 50 hours -- that targets service to the poor. It is unacceptable to change the "and" to "or" at the end of subsection (a)(1) and eliminate the target goal. The Vice Chair suggested that the "and" be changed to "or," and the target goal be left in. She noted that a consensus will not be reached today.

The Chair said he would take a straw vote as to whether or not to recommend to the Court of Appeals that there not be any hourly requirement. Eight members voted against any hourly goal, and nine voted for an hourly goal under some circumstances and in some amount which is less than 50 hours.

The Vice Chair commented that the definition of "public interest legal service" in the comment of Alternative A is too narrow. She suggested that the word "means" should be changed to the word "includes." The Committee agreed by consensus to this change.

The Chair asked if Alternative A as redrafted, with the Florida language about the exclusion of judges and government workers, would be acceptable. Eight members voted in favor of this, and six were opposed. He stated that Alternative A would be submitted as the first choice of the Committee.

Mr. Titus said that Alternative B could be the alternate. The Chair asked if Alternative B would be acceptable, if the Court of Appeals rejects Alternative A. Judge Kaplan added that Alternative B will be changed to contain the judicial and government employee exception. The Vice Chair pointed out that the comment provides that reporting is mandatory. Judge Heller added that although it is mandatory, there is no disciplinary action for noncompliance. Judge McAuliffe remarked that this is inherently inconsistent, which the Subcommittee tried to avoid. The Chair suggested that if there is no discipline, the reporting should not be mandatory. Judge Eyler

commented that a reporting form has been sent with the Clients' Security Trust Fund form by the Chief Judge of the Court of Appeals since 1993. There has been a seven percent response to this form. The filing of the form should be mandatory.

The Chair asked if Alternative B, with the addition of the Florida language about judges and government employees and the word "should" pertaining to reporting remaining in section (b), would suffice as a backup recommendation to Alternative A. Ten members voted in favor of this, and four were opposed.

Judge Johnson expressed the opinion that the Committee should approve some form of the Commission's draft of Rule 6.1. Ms. Knox remarked that she could endorse the Commission's draft if the number of hours of service were reduced. Mr. Klein commented that he could support the Commission's proposed Rule if the word "and" were changed to the word "or" at the end of subsection (a)(1). The Vice Chair said that a mixture of Alternative B and the Commission's draft would be preferable. Judge Heller noted that she supported the goals of the Commission, but she felt that subsection (a)(1) should be in the disjunctive. Judge Vaughan agreed with Judge Heller. Judge Missouri noted that he would support the Commission's draft if the number of hours and the monetary contribution amount were reduced and if excluded judges and government employees were excluded. Mr. Klein expressed his agreement with concrete aspirational targets. No consensus was reached as to suggested changes to the Commission's

draft of proposed amendments to Rule 6.1.

The Chair adjourned the meeting.