COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on October 16, 1998.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Robert D. Klein, Esq.
Hon. John F. McAuliffe
Hon. Mary Ellen T. Rinehardt
Sen. Norman R. Stone, Jr.
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Elizabeth B. Veronis, Esq.
D. Robert Enten, Esq., Maryland Banker's Assoc.
John Brennan, Esq.
Richard J. Ham, Esq.
Robert J. Rhudy, Esq.
Paul V. Carlin, Esq.
John Michael Conroy, Jr., Esq.
Seymour B. Stern, Esq.
Alexander Ruygrok, Esq.
Charles M. Preston, Esq.
John J. Dwyer, Esq.
Albert Winchester, Esq.
Glenn Grossman, Esq., Deputy Bar Counsel
David Katz, Rules Committee Intern
Heidi Connolly, Rules Committee Intern

The Chair convened the meeting and welcomed the guests in attendance. He asked if there were any additions or corrections to

the minutes of the September 11, 1998 Rules Committee meeting. Mr. Klein suggested that on page 104 in the first sentence of the first full paragraph, the word "plaintiff" should be changed to the word "party." The Committee agreed by consensus to this change. The Reporter suggested that on page 61, two changes should be made. In the eighth line at the end of the sentence after the language "in subsection (d)(5)", the following language should be added: ", which has been revised and relettered as subsection (f)(5) effective October 1, 1998." In the twentieth line at the end of the sentence after the language "Article 27, §616 1/2", the following language should be added: ", following section (f) of the revised Rule." The Committee agreed by consensus to these changes.

Judge Kaplan moved that the minutes be accepted as amended. The motion was seconded and passed unanimously.

The Chair said that the Court of Appeals approved the Alternative Dispute Resolution Rules. There was some last-minute drafting by the Court at the hearing on the Rules. Judge Kaplan remarked that his basic problems with the Rules had been solved. The Chair commented that the Court of Appeals had added an "opt-out" provision and a provision that mediators need not necessarily be attorneys. A person conducting an alternative dispute resolution proceeding other that mediation must either be a member of the Maryland Bar or qualify by having equivalent or specialized knowledge in dealing with the issues in dispute.

The Chair told the Committee that at the November meeting, the Juvenile Rules will be presented. The Juvenile Subcommittee met the day before today's Rules Committee meeting. The Chair credited Harry Johnson, Esq., the Subcommittee Chair, and the Subcommittee for working through most of the problems with the Juvenile Rules. The Chair announced that several law school interns were working in the Rules Committee office for the next few months. The Assistant Reporter introduced two of the interns, Heidi Connolly and David Katz, who are both students at the University of Baltimore School of Law. The Chair thanked Professor Byron Warnken for providing the interns.

Agenda Item 1. Consideration of a proposed amendment to Rule 16-602 (Definitions)

Mr. Brault presented Rule 16-602, Definitions, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 600 - ATTORNEY TRUST ACCOUNTS

AMEND Rule 16-602 to add a Committee note to section (c), as follows:

Rule 16-602. Definitions.

In these rules, the following definitions

apply, except as expressly otherwise provided or as necessary implication requires:

a. Approved Financial Institution.

"Approved financial institution" means a financial institution approved by the Commission in accordance with these Rules.

b. Attorney.

"Attorney" means any person admitted by the Court of Appeals to practice law.

c. Attorney Trust Account.

"Attorney trust account" means an account, including an escrow account, maintained in a financial institution for the deposit of funds received or held by an attorney or law firm on behalf of a client or third person.

Committee note: "Funds received or held by an attorney or law firm on behalf of a client" include funds received or held by an attorney who operates a title company.

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Rule 16-602 was accompanied by the following Reporter's Note.

There has been some controversy over the issue of whether attorneys operating title companies are required to hold their clients' trust funds in an escrow account. The Maryland State Bar Association Ethics Committee has consistently held that attorneys who engage in law-related business, such as real estate and title companies, cannot avoid the requirement that clients' trust funds must be held in an escrow account. An inquiry panel of the Attorney Grievance Commission reached the opposite conclusion in 1992. The Attorneys Subcommittee is asking for a decision on this issue by the Rules Committee.

Mr. Brault explained that there has been a problem with some private law practitioners who are doing real estate title work and retaining the interest on the clients' trust funds, but not putting them into an IOLTA (Interest on Lawyers' Trust Accounts) account. The result is a drain on the IOLTA money earned from such escrow accounts. Herbert Garten, Esq., Chair of the American Bar

Association Committee on IOLTA and Robert J. Rhudy, Esq., Director of the Maryland Legal Services Corporation, had spoken to the Attorneys Subcommittee about this issue. Mr. Garten had provided a history of the IOLTA program.

Mr. Brault said that there is another statute which came out of legislative committee work. This is known as the IOTA (Interest on Trust Accounts) law, Code, Insurance Article, §22-103. This provides that certain monies held for the benefit of a party to a real estate transaction are to be placed in an escrow account with the interest going to the Maryland Affordable Housing Trust (MAHT), and it is applicable to non-attorneys. Attorneys who are not operating title companies are at a competitive disadvantage because their interest on escrow accounts is going to IOLTA. The ethical question is whether an attorney can escape IOLTA obligations by operating a title company. The Maryland State Bar Association (MSBA) had issued an ethics opinion stating that the avoidance of IOLTA obligations is unethical. Previously, there had been a decision from an Attorney Grievance Inquiry Panel that this avoidance of IOLTA obligations by an attorney operating a title company was not unethical. Although an inquiry panel decision has no binding authority except in the case being acted upon, this particular case encouraged attorneys to operate title companies with no payments of interest to IOLTA.

The Attorneys Subcommittee considered this issue and concluded that it is unethical for an attorney who operates a title company to

evade IOLTA. The suggestion is to put in a Committee note to Rule 16-602 to clarify this. A person who "operates" a title company is not a mere stockholder who buys stock in the title company. The Rule should reach an attorney who is actively involved in the title company.

Mr. Bowen pointed out that the proposed amendment may not reach the problem it is trying to cure. The Rule itself should be amended. Mr. Brault responded that he would have no problem with that. Mr. Bowen suggested that the amended language could be "funds received or held by a title company which is operated by an attorney." The Vice Chair asked whether a Rule can be amended to control title companies. Mr. Titus questioned the meaning of the language "operated by." He posited a situation where the title company owner gives his or her spouse the money from the title company to control. Mr. Bowen noted that in that scenario, the spouse is not operating the title company.

The Vice Chair suggested that the language in the Committee note could be moved to the body of the Rule, and a different Committee note could be added which would provide that the attorney is not allowed to say that the money at issue belongs to the title company. Mr. Titus suggested that the word "operate" should be defined to avoid the ruse to which he had just referred concerning giving the money to a family member. Mr. Brault said that the guests from the MSBA could be consulted about this issue. On a daily basis,

the actions of a law firm and of a title company may not be that different. The word added to the Rule should be "operate" and not "own," or else the attorney could put the company in someone else's name. The Chair commented that if the attorney has control over the funds and has the authority to put them in place somewhere, then the attorney cannot escape his or her IOLTA obligation. Mr. Brault remarked that he agreed with the Vice Chair that the amendment should be made to the body of Rule 16-602 c. and a Committee note added which has an explanation.

The Chair asked if anyone was opposed to the suggested amendment. Robert Enten, Esq., responded that he was at the meeting representing the Maryland Bankers Association. He told the Committee that he is involved in IOLTA and IOTA issues and had appeared before the Maryland General Assembly several years ago when these issues were discussed. The banking industry is very interested in this. Mr. Enten said that he had been at the Attorneys Subcommittee meeting, and he did not remember a unanimous recommendation in favor of the proposed amendment. This issue is a slippery slope. Some of the employees of title companies are shareholders, some are attorneys, some are not. Because an attorney is an employee of a title company does not mean that he or she controls the funds. If this amendment is made, title companies will not hire attorneys because title insurance companies are under different rules if none of the employees are attorneys. Title insurance agencies are

regulated by the Insurance Article of the Annotated Code. They are licensed and bonded, and they are under the control of the Maryland Insurance Commissioner. Under the proposed amendment to Rule 16-602, the Rules of Procedure would be regulating title insurance agencies.

Mr. Enten observed that the real issue being discussed is whether operating a title insurance agency constitutes the practice of law. A business entity receives funds which are put into escrow. A real estate company receives funds which are subject to IOLTA. Where does one draw the line as far as the conduct goes? Judge McAuliffe commented that Mr. Enten seems to be making a distinction between title companies which search title and title insurance agencies. Mr. Enten responded that title insurance agencies both search the title and issue policies. How could the proposed amendment to the Rule be administered? The fact that this matter involves corporations is being ignored. The proposed amendment may be "piercing the corporate veil" by reaching the employees of corporations.

The Vice Chair pointed out that the employee of the corporation may be an attorney who is operating the title company. She expressed the view that if an attorney works for Chicago Title Company, he or she is not necessarily operating the company. However, if an attorney has an office for the practice of law, which also is tagged as "ABC Title Company" at which office the attorney conducts real estate closings, this may fall under the category of an attorney

"operating" a title company. Mr. Enten reiterated that it is difficult to draw the line.

The Chair stated that if the attorney has the power to direct the money from the company and is able to set up an IOLTA account but does not, then the attorney may be in violation of the law. It does not matter if the attorney puts forward the fiction that he or she does not have to put the money into IOLTA because the company is a corporation. What does matter is whether the individual has the power to set up the IOLTA account. Mr. Enten inquired as to who would determine if someone has this power. Under Code, Insurance Article, §10-121, Title Insurance Agents or Brokers, the attorney may not be able to set up the IOLTA account.

The Chair questioned whether every title company is a title insurance agency. Mr. Enten answered that the law refers to "agents or brokers;" the General Assembly intended a distinction between the two. Judge McAuliffe remarked that the agents are writing the policies. They have the authority to write a binder for a separate company. The attorneys have the money in hand and are conducting real estate settlements. The Subcommittee proposal does not impact a title insurance agent. It affects those persons conducting the settlement and disbursing the funds. Mr. Enten remarked that it may not be the attorney who is disbursing the funds.

Mr. Titus noted that there is a confluence of problems with this issue. The October 14, 1998 letter written by J. Michael

Conroy, Jr., Esq., a copy of which was handed out today, refers to the problem of title company practitioners arguing that settlements are not included within the parameters of the practice of law. (See Appendix 1). This varies from county to county. Another problem is the historic failure of the legislature to fund legal services. This resulted in the creation of the IOLTA system, which was not a happy birth. A third problem is the competitive advantage of a non-attorney as opposed to an attorney. The consequences of practicing law may be the attorney discipline system, trust accounts, and IOLTA. The issue is what constitutes the practice of law. The name is irrelevant. An attorney can get around the need to pay IOLTA. Judge McAuliffe pointed out that an attorney who is conducting business, even if not practicing law, is still subject to the disciplinary rules.

Mr. Titus noted that the law requires that in a transfer of real estate, there has to be a certification that an attorney prepared the deed. A rule could tie the escrowing of funds to this requirement. A rule or statute could provide that the attorney who prepares the deed is responsible for placing any funds escrowed in connection with the transaction in an IOLTA account.

Mr. Conroy said that Mr. Brault had told the Committee earlier about the IOTA statute. A problem is the theory which is that the IOTA law controls title companies, and the Attorney Grievance Commission has no jurisdiction over a title company. A bigger

problem is that some of the people operating title companies are not putting the interest into either IOTA or IOLTA accounts, but are retaining the interest for themselves. Some attorneys are putting the money into their pockets, and the Attorney Grievance Commission has not reached them. The money is not going to the clients, to legal services, or to the MAHT, but going into the attorneys' pockets. Attorneys who conduct real estate settlements should not be earning interest on the escrowed funds. Mr. Conroy cited the case of Attorney Grievance Commission v. Lazerow, 320 Md. 507 (1990), which involved an attorney who misused funds that should have been in escrow accounts, and he eventually lost his license to practice law.

The Chair questioned if any research has been done as to whether any states have a rule which could serve as a potential model for Maryland. Mr. Conroy answered that he did not know of any state rule on this. Maryland is on the leading edge. Mr. Brault asked Mr. Rhudy if he knew of any other state with a rule pertaining to title companies. Mr. Rhudy replied that the law of Washington State is the closest. The Supreme Court of Washington said that whoever operates a title company is practicing law. The regulation by state insurance departments varies among the states. Throughout the insurance codes, there is a flat prohibition against keeping clients' interest.

The next speaker was John Dwyer, Esq., an attorney and part owner of a title company. He told the Committee that his company does not have any accounts which draw interest that is kept by any of

the company owners. The interest on the accounts in his name goes to IOLTA, some of the interest on other company accounts goes to the MAHT, and one account does not earn interest. If Rule 16-602 is amended to include title companies operated by attorneys, Mr. Dwyer questioned whether the Rule would apply to him. He has a one-third interest in his title company. In response to Judge McAuliffe's earlier question about the difference between title companies and title insurance agencies, they are one and the same.

Mr. Dwyer said that he wished to point out that there had been assurance to the title companies that the IOLTA and MAHT programs would not affect the relationship the attorneys and title companies had with the banks. This has not proved to be accurate. His company, Beltway Title Company, had a problem. Certain expenses are not allowed to be paid out of an IOLTA account. His company has extensive service charges with the bank. A multi-office company such as Beltway Title must be able to wire money, stop checks, and see online if a check has cleared. These services come at a high price. Beltway Title Company has nine offices, and last month the service charges were about $6,000. The vast majority of lenders wire money to accounts -- this is a necessary online service. If service charges are not allowed to be paid out of the interest on money in escrow accounts, this will be burdensome for title companies, which disburse 99% of the dollars in their accounts within two or three days.

The Chair asked if the legislature had ever discussed this issue. Mr. Dwyer responded that he suspected that the legislature had never discussed this. The money is used to generate credit for service charges. Judge McAuliffe inquired as to the difference between keeping the interest on the float and using it to pay the company's service charges. The Vice Chair questioned as to where any overage would go. Mr. Dwyer replied that it would go to the title company. When the company maintains this size escrow account, it is a business of its own. His company employs two people whose job is to reconcile the account. Keeping the overage is not a windfall. Without it, title fees will go up and consumers will be hurt.

Seymour Stern, Esq., spoke to the Committee. He said that he was a past president of the MSBA. Many attorneys had disagreed with the concept of IOLTA and fought it. The legislature was not too sympathetic to the attorneys who lobbied against IOLTA. The legislation was amended to provide that part of the interest from the escrow of money on real estate closings would go to the Housing Authority. The concept was that title companies that are not controlled by attorneys would not gain the benefit of the interest on the float, which is very substantial. The money would be used to benefit society. Some of the title company people are structuring the accounts to stay within the law which provides that the companies do not have to report the interest on accounts which do not earn more than $50.

Mr. Stern continued that he had attended today's Rules Committee meeting to observe how this problem will be handled. He expressed the opinion that the Rules Committee may not be able to handle the entire problem, and he said that he hoped that the legislature will eventually come up with a solution. His practice employs four persons, and they do real estate settlement work and other types of legal work. He inquired whether an incorporated title company can conduct settlements and then maintain that because the settlement work is through the title company, the escrowed funds are not subject to IOLTA, nor are they subject to IOTA since the interest is less than $50.

The Chair commented that the issue applies most directly to title companies, but it could apply to criminal defense work. He posed the hypothetical of the ABC Private Investigating Company which is operated by an attorney and puts money in escrow. This could lead to the same issue as to whether the interest belongs to IOLTA.

Mr. Brault remarked that no one at the Subcommittee meeting represented the title companies. He said that he appreciated Mr. Dwyer's comments. He asked Mr. Dwyer if the other two owners of his company are attorneys, and Mr. Dwyer answered that they are not. There are nine different offices, and closings are held at all nine. Attorneys and non-attorneys conduct settlements -- they are licensed and bonded. There has been a new wave of controlled business arrangements which have been renamed "affiliated business

arrangements." Title companies can form affiliations which meet the criteria of the federal Real Estate Settlement Procedures Act (RESPA), 12 U.S.C., §§2601 - 2617. They are subject to requirements pertaining to title insurers.

Mr. Howell noted that the reason this issue arose was because of a 1992 Inquiry Panel decision, which was not reported. The problem is the subterfuge of title companies which allow attorneys to evade their obligations. Rather than amending the Rule, the Subcommittee opted for a Committee note. Mr. Bowen commented that the problem with the Committee note is that it does not solve the problem of money escrowed by a title company where the interest is neither IOLTA nor IOTA. The issue should be left to the legislature to handle. He moved to leave the Rule unchanged. The motion was seconded.

The Vice Chair expressed the view that the Subcommittee's amended language is broad enough. The Chair asked if this same issue was considered when the statute was enacted. Senator Stone replied that it was considered. Mr. Titus remarked that there is no guarantee that the legislature definitely will take action. At the least, the Committee should express its concern to the legislature about the inequities of the situation. The Court of Appeals does have authority over the practice of law. He reiterated his suggestion that Rule 16-604 could provide that an attorney may not prepare a deed unless funds escrowed in connection with the real

estate transaction are place in an IOLTA account.

Mr. Brault told the Committee that he frequently defends attorneys in front of the Attorney Grievance Commission. He expressed the concern that many attorneys interpret the Attorney Trust Account Rules as not applying to them if they are running a title company. The Rules may need to be more explicit. A defense argument could be made that the Rules do not govern title companies. His preference is that the Rules should not remain as they are now. One possibility is to send Rule 16-602 back to the Attorneys Subcommittee to draft a better rule. The Chair commented that the Rule could be tabled until the legislative session, or it could be sent to Subcommittee to monitor the legislation coming out of the 1999 session. Senator Stone agreed with the idea of the Rules Committee presenting the issue to the legislature. Mr. Brault said that he had another concern about going before the legislature -- would that create a risk of the IOLTA and IOTA statutes being amended or repealed? Senator Stone answered that that will not happen. Mr. Enten pointed out that the legislature enhanced the Maryland Legal Services Fund by providing for an increase in court filing fees to enhance the Fund's revenues. This had passed overwhelmingly.

Mr. Titus moved to amend the motion on the floor 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. The Subcommittee would monitor the legislative activities. Mr. Bowen, who made the original motion, and the Vice Chair, who had seconded it, accepted the amendment.

Mr. Conroy said that he had a final comment. Last spring, it came to light that the Legal Services Corporation is in dire need of funds. If an attorney goes from a law practice to a title company, less money will go to IOLTA. This may happen more and more. What would be the point of staying in a practice, when one could have carte blanche in retaining interest by operating a title company? The position of the Attorney Grievance Commission panel is directly contrary to the decision of the Court of Appeals in the Lazerow case and others. Many attorneys are trying to do the right thing. The 1992 panel decision should be disregarded.

The Chair called the question on the amended motion to present the problem to the legislature at its 1999 session. The motion passed unanimously. The Chair thanked the guests who attended the meeting to discuss Agenda Item 1.

Agenda Item 5. Consideration of a policy issue concerning service of process on governmental entities other than the State of Maryland (See Appendix 2.)

The Chair stated that the next agenda item would be Item 5, because Mr. Titus has to leave the meeting early. Mr. Titus explained that no service rule deals adequately with service of

process on officers or agencies of the State of Maryland. It is clear from the Rules of Procedure how to serve individuals. Mr. Titus had a client, the Montgomery County Board of Education, which nearly was found in contempt because a clerk of the Board had received a notice of garnishment and had thrown it away. The service problem needs to be addressed. Mr. Titus' suggestion was that local entities should designate a resident agent under a procedure set forth in the Maryland Rules or under a procedure of the State Department of Assessments and Taxation (SDAT). If no such person has been designated, then service would be upon the Chief Executive Officer or upon the highest ranking elected official.

Mr. Titus moved that the General Court Administration Subcommittee work with representatives of the General Assembly to prepare appropriate legislation which would authorize or require the designation of a resident agent. A parallel rule could be drafted which would contain the hierarchy of service. The motion was seconded.

The Vice Chair questioned whether it is necessary to go to the legislature to accomplish this. Mr. Titus replied that the memorandum in the meeting materials from George B. Riggin, Jr., the State Court Administrator, indicates that the Administrative Office of the Courts would prefer that this matter be handled by the SDAT, and the people there are willing to do it. If the legislature takes no action, Mr. Titus said that he would then suggest a rule on the

subject.

The Chair called the question on Mr. Titus' motion, and the motion carried unanimously.

Agenda Item 2. Consideration of a proposed amendment to Appendix: The Maryland Lawyers' Rules of Professional Conduct, Rule 1.5 (Fees)

Mr. Brault presented Rule 1.5, Fees, for the Committee's consideration.

AMEND Rule 1.5 to add a Committee note, as follows:

Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of

the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee agreement shall by paragraph (d) or other law. The terms of a contingent fee agreement shall be communicated to the client in writing. The communication shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter, and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or custody of a child or upon the amount of alimony or support or property settlement, or upon the amount of an award pursuant to Sections 8-201 through 213 of Family Law Article, Annotated Code of Maryland; or

(2) a contingent fee for representing a defendant in a criminal matter.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Committee note: Although the Preamble indicates that these Rules do not establish a cause of action, they nevertheless evidence public policy and, to that extent, may be relevant as to whether a contract violates public policy. See Post v. Bregman, 349 Md. 142, 707 A2d 806 (1998) and Son v. Margolius, 349 Md. 441, 709 A2d 112 (1998).

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Rule 1.5 was accompanied by the following Reporter's Note.

The recent Court of Appeals cases of Post v. Bregman, 349 Md. 142, 707 A2d 806 (1998) and Son v. Margolius 349 Md. 441, 709 A2d 112 (1998), both pertaining to the issue of fee-splitting by attorneys, seem to be somewhat inconsistent with the Preamble to the Maryland Rules of Professional Conduct which provides that "[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." In an attempt to bring the decisions in line with the Preamble, the Subcommittee is suggesting the addition of a Committee note to Rule 1.5 which makes clear that the Rules evidence public policy and may be relevant in deciding whether a contract violates public policy.

Mr. Brault explained that the Court of Appeals has held that to some extent, the Rules of Professional Conduct are statements of the public policy of Maryland. This can be seen in the cases of Post v. Bregman, 349 Md. 142 (1998) and Son v. Margolius, 349 Md. 441 (1998),

both pertaining to the issue of fee-splitting by attorneys. The Preamble to the Rules of Professional Conduct contains language which provides that a violation of one of the Rules should not give rise to a cause of action. The Post and Son cases now call into question the continued applicability of this language. The Subcommittee felt that the Court of Appeals may wish to consider amendments that reconcile the cases with the Preamble. In the Post and Son cases, Judge Howard S. Chasanow dissented because he believes that the decisions violate the policy of the Rules of Professional Conduct. Mr. Brault noted that at the Subcommittee meeting, his suggestion was to strike the inapplicable phrase from the Preamble. Mr. Titus had argued that the language should remain, but a Committee note should be added pointing out the two cases.

Judge McAuliffe questioned fixing this problem by adding a Committee note. Mr. Brault responded that a note provides some recognition of the problem. The Vice Chair expressed the opinion that a change should be made to the Preamble. Mr. Brault argued that no one reads the Preamble. He said that he wants attorneys to know about this problem. The decisions in the two cases bear directly on the writing of a fee contract. An attorney should be cautious as to how the fee is split. Judge McAuliffe remarked that the Committee note is a better red flag. He added that if the substance of the decisions were incorporated into the Rule itself, it would be more difficult for the Court to revise its approach to the issue later.

Mr. Brault moved that the proposed Committee note be added to Rule 1.5. The motion was seconded, and it passed unanimously.

Agenda Item 4. Consideration of a proposed amendment to Appendix: The Maryland Lawyers' Rules of Professional Conduct, Rule 4.2 (Communication With Person Represented by Counsel)

Mr. Brault presented Rule 4.2, Communication With Person Represented by Counsel, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 4.2 to add new sections (b), (c), and (d), as follows:

Rule 4.2. Communication With Person Represented by Counsel.

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

(b) In representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of the opposing party without obtaining the consent of that party's lawyer. However, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer.

(c) For purposes of this Rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates.

(d) This Rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

COMMENT

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f).

This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

The Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding

the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2 (b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

This Rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this Rule require.

Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer making such a communication without the prior consent of the lawyer representing the government must make the kinds of disclosures that are required by paragraph (b) in the case of communications with non-party employees.

Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of

disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

This Rule is not intended to enlarge or restrict the law enforcement activities of the State of Maryland which are authorized and permissible under the Constitution and law of the United State or Maryland. The "authorized by law" proviso to Rule 4.2 (a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

Code Comparison.-- This Rule is substantially identical to DR 7-104 (A)(1).

Rule 4.2 was accompanied by the following Reporter's Note.

In a recent federal case, the court held that communications with a party's former employee did not violate Rule 4.2. The Court pointed out that Rule 4.2 is unclear as to when communications with a former employee are prohibited. The Subcommittee is recommending that Rule 4.2 be amended to follow the parallel rule in the District of Columbia.

Mr. Brault explained that in the case of Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996), an employment discrimination case against Bowie State University, the Honorable Peter Messitte, U.S. District Court Judge, had disqualified a law firm because one of its

lawyers had interviewed a former officer of the university who had quit his job for other reasons. The former officer gave the lawyer information to help prosecute the case against the school. The school filed a motion to disqualify the law firm, and Judge Messitte was very critical of the firm and granted the motion. The District of Columbia had changed its rule to be more liberal. Several of the U.S. District Court judges in Baltimore in other cases did not agree with Judge Messitte. The D.C. version of the Rule is before the Rules Committee today. The Reporter's note to Rule 4.2 refers to former employees.

Judge McAuliffe questioned whether the issue includes both current and former employees. Mr. Brault responded that it is clear that former employees provide a good source of information. As with the trust accounts rule, it would be beneficial to have a rule in Maryland which is similar to the D.C. rule, since many attorneys practice law in both jurisdictions. It is often unclear as to which set of Rules of Professional Conduct the attorney is subject.

Mr. Klein said that the previous Friday he had attended a federal bench-bar conference which discussed the issue of communication with former employees. Several opinions were expressed, but the point was made that a lawyer is on thin ice, when he or she communicates with a former employee, if the lawyer knew or should have known the employee was giving privileged information. The attorney runs the risk of becoming disqualified, especially if he

or she has not alerted the other side about talking to the former employee. How often will one side get consent for this from the other side? Mr. Klein noted that the D.C. Rule does not cover talking to someone who reveals privileged information or talking to former employees. Mr. Brault responded that the Rule can be changed to cover both issues.

The Chair commented that the Rule does not pertain to a nonparty employee or a former employee who is represented by counsel. Mr. Brault noted that the word "party" is defined in section (c). The Vice Chair suggested that the definition should be in section (a). She asked if under section (b), one is allowed to communicate with someone who is not included in the definition of a party, such as a former employee. Mr. Brault said that all nonparty employees are grouped together. The Vice Chair inquired if one could talk to a former director. Mr. Brault responded that in a hospital situation, the prohibition would be against talking to the person who makes the rules. The Chair pointed out that the key is notice. One can talk to the former president of a corporation, as long as the other side is notified. The other side can then go to court and get a protective order to prevent privileged information from being communicated.

Judge Vaughan questioned as to how long a former employee is considered a former employee. The Chair answered that one is a former employee forever. Mr. Brault remarked that the former

employee should have a relationship which bears on the litigation. Mr. Bowen commented that this is a public policy matter. Attorneys get an unfair advantage by sneaking around. The proposed Rule would be a major policy change under the guise of correcting a problem. The Chair said that the notice component is the real protection for corporations being sued. The Vice Chair inquired if one could talk to anyone as long as one gives notice to the other side. The Chair replied that one can only talk to persons within the group as defined in the Rule.

Mr. Brault hypothesized that if he represented a corporation, and a former employee of that corporation gave damaging testimony, the Rule is designed to prevent that testimony from being admitted in the case. Mr. Bowen noted that the Rule seems to allow this testimony. Mr. Brault responded that many people feel that it is appropriate to speak with a former employee, unless the person falls within the true definition of a party. This is an ethical consideration of privilege. If it is barred, this will perpetuate confusion, and it may be declared unconstitutional.

The Chair pointed out that in a hypothetical case similar to the Bowie State College case, the plaintiff's attorney may have notified the other side that he or she is going to talk to a former vice president of the college, but the college attorney claims that this is privileged information. The college attorney could then go to court and obtain a protective order. The judge's ruling protects

both the plaintiff and the defendant. Mr. Brault commented that one of the federal judges held that the Rule needs to clarify to whom attorneys can speak. The Chair said that the Rule should identify the people with whom the attorney is able to speak once notice is given and require the attorney who talks to people to give the witnesses the information up front as to the attorney's role in the matter.

Mr. Bowen asked who is the party employee and who is the non-party employee. The attorney has to notify the other side if he or she talks to any employee. Why is the plaintiff's attorney making the decision as to who is a party or non-party employee of the defendant? The Chair noted that it could be the defendant's attorney speaking to the former employee. Mr. Brault said that his experience is with medical privilege. Usually a hospital or physician has been sued. The person claiming the injury waives the medical privilege, once that person puts his or her health at issue. In two recent D.C. cases, the medical privilege was waived, because the plaintiff put his or her health at issue. In one of the cases, the judge stated that no party to the litigation has the right to control the witnesses, who should be made available to both sides. When Rule 4.2 is used to prevent someone from talking to witnesses, it is wrong. Judge McAuliffe noted that in the criminal area, defense attorneys go to witnesses and police, asking questions. It is improper for the prosecutor to tell the defense attorney not to speak to the

witnesses.

Mr. Brault suggested that the Rule could be reworked. The Vice Chair remarked that if someone is not in a higher echelon of a company, it would be appropriate to contact that person. The problem is that it is not clear what the definition of a "party" is. It may depend on what community the person is in, or it may depend on the relationship of a job to the organization. It is not a bright line test. One way to change the Rule is to use the language from Rule 2-402, Scope of Discovery. The Chair pointed out that this could be looked at in the context of section (a) of Rule 5-803, Hearsay Exceptions: Unavailability of Declarant Not Required. If an admission of a person could come into evidence against the employer under section (a) of that Rule, that person would be considered a "party" under Rule 4.2 (b). The Vice Chair inquired as to how someone could know that a statement is admissible before the witness is interviewed. Judge Vaughan observed that a person could not know this.

Mr. Brault suggested that section (c) could read as follows: "For purposes of this Rule, the term "party" includes any person, including an employee of a party organization, who has the authority to bind a party organization under Rule 5-803 (a) or has privileged communication as to the representation to which the communication relates." Mr. Bowen suggested that the words "or had" be added after the word "has."

The Chair suggested that the Subcommittee take another look at this Rule and redraft it. Mr. Brault remarked that based on Mr. Klein's comments, it would be appropriate for the Subcommittee to alert the federal judges as to possible changes to Rule 4.2. The Reporter noted that some of the language in the commentary has been added, and this language should be shaded to indicate that it is new. The Committee agreed by consensus to send the Rule back to the Subcommittee.

Agenda Item 3. Consideration of a proposed amendment to Appendix: The Maryland Lawyers' Rules of Professional Conduct, Rule 1.10 (Imputed Disqualification: General Rule)

Mr. Howell presented Rule 1.10, Imputed Disqualification: General Rule, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 1.10 to permit screening to prevent disqualification when a lawyer changes firms, as follows:

Rule 1.10. Imputed Disqualification: General rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8 (c), 1.9, or 2.2.

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person ~~and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9 (b) that is material to the matter~~ unless:

(1) the newly associated lawyer has acquired from the former client no information protected by Rules 1.6 and 1.9 (b) that is material to the matter; or

(2) the newly associated lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9 (b) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) For purposes of subsection (b)(2) of this Rule, a lawyer in a firm will be deemed to have been screened from any participation in the matter if:

(1) the lawyer has been isolated from confidences, secrets, and material knowledge

concerning the matter;

(2) the lawyer has been isolated from all contact with the client or any agent, officer or employee of the client and any witnesses for or against the client;

(3) the lawyer and the firm have been precluded from discussing the matter with each other; and

(4) the firm has taken affirmative steps to accomplish the foregoing.

COMMENT

Definition of "firm".-- For the purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm, and lawyers employed in the legal department of a corporation or other organization, or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by one lawyer is attributed to another.

With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. However, there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11 (a) and (b); where a lawyer represents the government after having served private clients, the situation is governed by Rule 1.11 (c)(1). The individual lawyer involved is bound by the Rules generally, including Rules 1.6, 1.7, and 1.9.

Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer between a private firm and the government. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6, 1.9, and 1.11. However, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider

circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.

Principles of Imputed Disqualification.-- The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraphs (b) and (c).

Lawyers moving between firms.-- When lawyers have been associated in a firm but then end their association, however, the problem is more complicated. The fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed

disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of clients to change counsel.

Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek per se rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Maryland Code of Professional Responsibility. This rubric has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

A rule based on a functional analysis is more appropriate for determining the question

of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client. The provisions for screening address both functions; they are necessary to prevent the disqualification rule from imposing too severe a deterrent against moving between private firms, so long as the newly associated lawyer does not participate in the adverse presentation and the confidentiality of protected information acquired by that lawyer is preserved.

Confidentiality.-- Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Paragraphs (b) and (c) operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6 and 1.9 (b) and has not been screened in accordance with paragraphs (b)(2) and (e). Thus, if a lawyer (including a partner) while with one firm acquired no actual

knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.

Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9.

Adverse Positions.-- The second aspect of loyalty to client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in substantially related matters. This obligation requires abstention from adverse representation by the individual lawyer involved, but does not properly entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by Rule 1.9 (a). Thus, if a lawyer left one firm for another, the new affiliation would not preclude the firms involved from continuing to represent clients with adverse interest in the same or related matters, so long as the conditions of Rule 1.10 (b) and (c) concerning confidentiality have been met.

Code Comparison.-- DR 5-105 (D) provides that "If a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or affiliate with him or his firm, may accept or continue such employment.

Rule 1.10 was accompanied by the following Reporter's Note.

Rule 1.10 (b) is amended by reorganizing the text and adding subsections (1) and (2). Illinois, Michigan, Pennsylvania and Washington have incorporated similar screening provisions into their versions of Rule 1.10 (b). Oregon

> also permits screening to avoid disqualification in the private-firm to private-firm employment switch context.
>
> Subsection (1) is derived in part from the former text of Rule 1.10 (b) and in part from Illinois Rule 1.10 (b)(1).
>
> Subsection (2) is derived in part from Rule 1.11 (a)(1) and Rule 1.12 (c)(1) and in part from Illinois Rule 1.10 (b)(2).
>
> The complete text of Rule 1.10 (b), as amended, is identical to the present text of Illinois Rule 1.10 (b), with minor changes in style.
>
> Rule 1.10 (e) is new. It is derived, with style changes, from Illinois Rule 1.10 (e).

Mr. Howell explained that this Rule pertains to imputed disqualification. If an attorney leaves one firm and joins another, he or she runs the risk of disqualifying the entire new firm because the attorney had some exposure to a client of the former firm who is adverse to a client of the new firm. This is a practical problem when there is multi-party litigation, and it can be a deterrent to movement by attorneys between law firms because of the possibility of disqualification. The new firm may be reluctant to take on a new person. The Subcommittee is recommending that Rule 1.10 be modified to redress this problem. Mr. Howell pointed out that the Subcommittee added new language to section (b) of the Rule to provide that if the new lawyer has acquired no information from the former client or the new lawyer is screened from participation in the matter involving the former client, the lawyer's new firm does not have to

be disqualified when the interests of a client of the firm are adverse to a former client of the new lawyer. Under the current Rule, the partners are presumed to have knowledge of the secrets of all the other partners. The primary use of the Rule is by an adversary who is attempting to disqualify a law firm. It is almost never a matter of a violation looked into by the Attorney Grievance Commission. The problem is addressed by most law firms by the establishment of screening mechanisms. This is not an entire panacea. Rule 1.10 currently contains no screening mechanism, although Rules 1.11 and 1.12 have such mechanisms. Ethics opinions in Maryland are ambivalent on the efficacy of screening. It is desirable to bring this issue out into the open and prevent an artificial situation. The modified version is a redraft of the rule in Illinois.

The Chair inquired if there have been any problems in Illinois. Mr. Howell said that the annotations of cases are at the end of the Illinois rule. This Rule is helpful where there is a doubt as to whether the new attorney has confidential information. The screening protects the firm from being second-guessed later on. Mr. Klein commented that he is sympathetic to the purpose of the modification, but his view is that the screen should be expanded. He said that he is involved in a case with a Pennsylvania attorney who did some work for Mr. Klein's client and then joined another firm. Later on, the new firm took on some litigation against Mr. Klein's client, the

other attorney's former client. Mr. Klein said his problem was the definition of the term "screen." Subsection (e)(3) does not clearly prevent the Pennsylvania attorney from telling his new law firm what he had heard at his old law firm about his former client. However, Rule 1.6 does provide that this is not proper. Mr. Klein suggested that subsection (e)(3) should be changed as follows: "the lawyer and the firm have been precluded from discussing with each other the matter and any information protected by Rules 1.6 and 1.9." Mr. Howell noted that this is consistent with the other proposed amendments. He moved that subsection (e)(3) should read as follows: "the lawyer and the firm have been precluded from discussing with each other the matter and any information acquired from the former client that is protected by Rules 1.6 and 1.9 and is material to the matter." The motion was seconded.

Mr. Grossman remarked that he personally was in support of amending Rule 1.10, but he observed that an unintended consequence of the amendment would be that large law firms would be permitted to expand to be even larger. The amendment would make it easier for large firms to take over large firms. Mr. Howell commented that this may be an actual benefit. It will facilitate the movement which is already occurring.

The Vice Chair suggested that at the end of subsection (b)(1), the word "or" should be changed to the word "and." Mr. Howell strongly objected to the suggestion, noting that it would create

another obstacle and destroy the purpose of the amendments. The Vice Chair remarked that the Rule permits the lead litigator in a firm that had represented a client in many cases to join a law firm which is suing the client, if the litigator had nothing to do with the cases. Mr. Howell commented that the Rule is not a guarantee nor an absolute defense. Mr. Bowen expressed the view that the conjunction in section (b) should be "and." He said that his law firm would apply the Rule using the "and." It would be upsetting for a litigant to see his former attorney at the counsel table in the courtroom representing the other side.

Mr. Howell moved that section (b) should be accepted as it was presented in the meeting materials, the motion was seconded, and it carried unanimously.

Special Agenda Item

Judge Johnson presented Rule 4-343, Sentencing -- Procedure in Capital Cases, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 300 - TRIAL AND SENTENCING

AMEND Rule 4-343 (i) to clarify that certain advice of the judge is given when a sentence of death is imposed and to add a requirement that the defendant receive certain advice when a sentence of life imprisonment is imposed, as follows:

Rule 4-343. SENTENCING -- PROCEDURE IN CAPITAL CASES

. . .

(i) Advice of the Judge

At the time of imposing a sentence of death, the judge shall advise the defendant that the determination of guilt and the sentence will be reviewed automatically by the Court of Appeals, and that the sentence will be stayed pending that review. At the time of imposing a sentence of life imprisonment, the court shall cause the defendant to be advised in accordance with Rule 4-342 (h).

. . .

Rule 4-343 was accompanied by the following Reporter's Note.

The proposed amendments to section (i) of this Rule (1) make clear that the judge's advice concerning the automatic review by the Court of Appeals and stay of sentence is given only when a sentence of death is imposed and (2) add a requirement that the court cause the defendant to be advised in accordance with Rule 4-342 (h) when a sentence of life imprisonment is imposed.

Judge Johnson explained that an amended version of Rule 4-343 and a letter from the Honorable Pamela L. North, Circuit Court Judge for Anne Arundel County, were distributed at the meeting today. Judge North had pointed out that current section (i) of the Rule, Advice of the Judge, only applies when a death sentence is being imposed, but the Rule does not clearly provide this. The Criminal Subcommittee recommends modifying the Rule to make it clear that the

automatic review by the Court of Appeals of the determination of guilt and the sentence applies only when a sentence of death has been imposed. When a sentence of life imprisonment is imposed, the defendant is to be advised in accordance with Rule 4-342 (h).

Judge Kaplan moved to accept the Rule as presented. The motion was seconded, and it passed unanimously.

The Chair adjourned the meeting.