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 November 17, 2000.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Hon. James W. Dryden
Hon. Ellen M. Heller
Bayard Z. Hochberg, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Timothy F. Maloney, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Debbie L. Potter, Esq.
Larry W. Shipley, Clerk
Senator Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
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
Steve Lemmey, Commission on Judicial Disabilities
Andrea Levy, Esq., Women's Law Center of Maryland
Timothy Paulus, Esq., Office of the Attorney General
Gary Christopher, Esq., Federal Public Defender
Nancy Forster, Esq., Maryland State Office Public Defender
Mary Keating, Esq.
Stephen Schenning, Esq., U.S. Attorney's Office
Carmina Hughes, Esq., U.S. Attorney's Office
M. Peter Moser, Esq.
Hon. Martha F. Rasin, Chief Judge, District Court of Maryland
Hon. James T. Smith, Jr., Circuit Court for Baltimore County
Hon. Albert J. Matricciani, Jr., Circuit Court for Baltimore City
Elizabeth B. Veronis, Esq., Legal Officer, Administrative Office of the Courts
Ms. Shakun

The Chair convened the meeting. He announced that the Court of Appeals had appointed the Honorable G. R. Hovey Johnson as an Emeritus member of the Rules Committee.

Agenda Item 1. Reconsideration of proposed amendments to Rule 4.2 (Communication with Person Represented by Counsel) in Appendix: The Maryland Lawyers' Rules of Professional Conduct

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Mr. Brault, Chair of the Attorneys Subcommittee, presented Rule 4.2 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

APPENDIX - THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 4.2 to modify section (a) and to add new sections (b), (c), (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~~ person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) The term "represented person" in the case of a represented organization denotes an officer, director, managing agent, or any agent or employee of an organization who supervises, directs, or regularly consults with the organization's lawyers concerning the matter or whose authority, act, omission, or statement in the matter may bind the organization for civil or criminal liability.

(c) In representing a client, a lawyer may communicate about the subject of the representation with an agent or employee of the opposing organization who is not a represented person, or with a former agent or employee, without obtaining the consent of the organization's lawyer. However, prior to communicating with such agent or employee, a lawyer shall make inquiry to assure that the agent or employee is not a represented person and shall disclose to the agent or employee the lawyer’s identity and the fact that the lawyer represents a party with a claim against the organization.

(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 section (c) of this Rule are made to the government official to whom the communication is made.

Committee note: The changes in the text and comment to Rule 4.2, including substitution of the word “person” for “party” in section (a), are not intended to enlarge or restrict the extent of permissible law enforcement activities of government lawyers under applicable judicial precedent.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the

client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] This Rule does not prohibit communication with a ~~party~~ person, or an employee or agent of such a ~~party~~ person, 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 or legal authorization for communicating with ~~the other party~~ a represented person 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.~~

[3] Communications authorized by law include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings, where there is applicable judicial precedent holding either that the activity is permissible or that the Rule does not apply to the activity. When communicating with a represented criminal defendant, a government lawyer must comply with this Rule in addition to honoring the defendant's constitutional rights, except to the extent applicable judicial precedent holds otherwise.

[4] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order in exceptional circumstances. For example,

when a represented criminal defendant expresses a desire to speak to the prosecutor without the knowledge of the defendant's lawyer, the prosecutor may seek a court order appointing substitute counsel to represent the defendant with respect to the communication.

[5] This Rule applies to communications with any person, whether or not a party to a formal adjudicative proceeding, contract, or negotiation, who is represented by counsel concerning the matter to which the communication relates. The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[6] ~~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 any agent or employee of ~~the~~ an organization is not a represented person as defined in paragraph (b), but is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4 (f). In communicating with a current or former agent or employee of an organization, a lawyer must not seek to obtain information that the lawyer knows or reasonably should know is subject to an evidentiary or other privilege of the

organization. Regarding communications with former employees, see Rule 4.4 (b).

[7] The prohibition on communications with a represented person only applies, however, in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

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 the matter. Paragraph (d) does not, however, 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.

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

> Section (a) is current Rule 4.2 with two changes. First, the word "person" is substituted for "party" to clarify that the Rule applies regardless of whether a lawsuit has been filed. The Maryland and ABA Comments always aptly have said: "This Rule covers any person, whether or not a party to a formal proceeding who is represented by counsel concerning the matter in question.".
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> Section (b) is new and is derived from Rule 4.2 (c) of the District of Columbia Rules of Professional Conduct and Comment [6] of the Ethics 2000 Public Discussion Draft (2/21/00). The term "represented person" is used to describe those employees and agents of an organization who are deemed to be represented in a matter by the organization's counsel. The present description of those so deemed to be represented is in the Comment to Maryland Rule 4.2.
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> Section (c) is new and is derived from Rule 4.2 (b) of the District of Columbia Rules. Its purpose is to clarify that an opposing lawyer may communicate with an organization's employees and agents not deemed "represented persons" without the consent of the organization's counsel, but must first make inquiry and also disclose his or her representation of an opposing party.
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> Section (d) is new and is substantially the same as section (d) of the District of Columbia Rules of Professional Conduct. Comment from the D.C. Rules also has been added.

Comment 1 is substantially the same as Comment 1 of the Ethics 2000 Commission version of Rule 4.2.

Comment 2 is based on the original comment to Rule 4.2 and is derived from Comment 2 of the Ethics 2000 version of Rule 4.2 and ABA Comment 1. The Rules Committee has deleted the reference to a controversy between a government agency and a private party.

Comment 3 is derived from Comment 3 of the Ethics 2000 Rules and ABA Comment 2 with changes. The Rules Committee has added back some of the language suggested for deletion by the Ethics 2000 Commission to deal with the problem of lawyers who represent governmental entities being able to conduct investigations prior to the commencement of criminal or civil enforcement proceedings.

Comment 4 is derived from Comment 4 of the Ethics 2000 Commission with changes. The Rules Committee version of the comment more fully explains the example of a represented criminal defendant who wishes to speak to the prosecutor without the knowledge of the defendant's lawyer.

Comment 5 is substantially the same as Comment 5 of the Ethics 2000 Commission and ABA Comment 3.

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

The first paragraph of Comment 7 is substantially the same as Comment 7 of the

> Ethics 2000 Commission Rule and is derived from ABA Comment 5.
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> The second paragraph of Comment 7 is substantially the same as Comment 8 of the Ethics 2000 and present ABA Comment 6.
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> The third paragraph of Comment 7 is derived from Comment 6 and Comment 7 of Rule 4.2 in the District of Columbia.

Mr. Brault explained that the Rule had been discussed at the June 16, 2000 meeting of the Rules Committee. It had come to the Subcommittee because of litigation in the federal courts. The federal judges were divided as to the issue of attorneys interviewing former employees of organizations. An editorial had come out in The Daily Record asking what the exact rule is. The Subcommittee tried to give black letter guidance as to the rule. The Subcommittee members wanted to clarify the types of employees and former employees who cannot be interviewed without the knowledge of the organization's attorney. The discussion got into criminal prosecutions under federal statutes. Every assistant federal prosecutor is subject to the ethical rules of the state in which the prosecution takes place. There was a debate between Congress and the Department of Justice in an effort to establish national ethical rules for assistant prosecutors. At the Subcommittee meetings, members of the staff of the U.S. Attorney for Maryland expressed their concerns about the fact

that Rule 4.2 had been interpreted to mean that where there is an FBI agent working under cover investigating drug-related crimes, it is unethical for the agent to interview employees because they have an attorney representing them and because the agent is under the guidance of the federal prosecutor. The Subcommittee did not agree with this interpretation. There had been a Court of Special Appeals opinion issued by the Honorable Charles E. Moylan, Jr., In re Criminal Investigation #13, 82 Md. App. 609 (1990), which allowed prosecutors to conduct legitimate law enforcement functions even if the organization has an attorney. The Subcommittee did not intend to change that decision. The Rule was reworked at the June 2000 Rules Committee meeting. The Committee directed the Subcommittee to clarify that Rule 4.2 is not attempting to influence the ethics of criminal prosecutions.

Mr. Brault thanked M. Peter Moser, Esq., an expert on attorney ethics, for his assistance. Mr. Moser, who is a member of the American Bar Association (ABA) Ethics 2000 Committee, had all the data relating to the federal argument about Rule 4.2.

Mr. Brault pointed out that the first proposed change to Rule 4.2 is in section (a). The Subcommittee is suggesting that the word “party” be changed to the word “person.” Case

decisions interpret the word “party” more broadly than simply a litigant. The ABA adopted this change so that the rule does not only apply after an indictment is filed. The Rule applies when someone is represented by an attorney about a transaction even when no lawsuit is pending. In the last line of section (a), the words “or court order” have been added to clarify that there is other authority besides statutory law and case precedent. Section (b) is new and defines the term “represented person.” The Chair asked if adding the language “present or former” before the word “officer” would clarify the meaning of the section. Mr. Brault responded that this issue is treated in another context. Section (b) only applies to current employees. Mr. Bowen pointed out that the word “denotes” in section (b) is not usually used in the Rules of Procedure. More commonly, the words “means” or “includes” are used. Mr. Moser commented that the Rules of Professional Conduct typically use the word “denotes.” It is a term of art.

Mr. Brault noted that the language of section (b) which reads “officer, director, managing agent...” are not ideas invented by the Subcommittee. The concept is in the draft of the Uniform Restatement of Laws on Lawyers, and the ABA uses it. In Camden v. Maryland, 910 F.Supp. 1115 (D.Md. 1996), decided by the Honorable Peter Messitte, the draft Uniform

Restatement of Laws definition is applied. The attorneys in that case did not approve of Judge Messitte's application of the Uniform Restatement because the draft had not yet been adopted. The Subcommittee and an attorney who had appeared in that case agreed that the Uniform Restatement of Laws approach was the better approach.

Mr. Bowen expressed the view that the word "former" should be added before the word "officer" in section (b). He had been involved in a case in Denver where there was an issue as to whether the attorney representing the plaintiff can contact former officers and directors of the organization. In Colorado the rule is that the attorney cannot contact former officers and directors. Mr. Brault responded that this concept is dealt with in Rule 4.4, pertaining to the rights of third persons. In Rule 4.2, the concept of a person represented by counsel is a current concept. The Chair noted that the problem arises the way Mr. Bowen encountered it because the former employee "spills the beans" on the organization. Section (c) refers to a "former agent or employee." If section (b) only pertains to present circumstances, what happens with a former employee? Under section (c), the person is presumptively able to be interviewed. Under section (b), the person is not a represented person unless the words "present or former" are

added before the word "officer." Mr. Brault said that the case involved a former employee who had been hired by Bowie State University to handle discrimination issues. The trial team interviewed the former employee. Judge Messitte followed the Restatement of Laws for Lawyers and found that the lawyers had obtained privileged information. Rule 4.4 provides: "In communicating with third persons, a lawyer representing a client in a matter shall not seek information relating to the matter that the lawyer knows or reasonably should know to be protected from disclosure by statute or by an established evidentiary privilege." This would include communications with former employees and covers the Camden case.

The Chair commented that this leaves open the issue of information not being privileged if it is involved in the concealment of fraud. Mr. Sykes noted that the way section (c) of Rule 4.2 is worded now there is an unqualified right to communicate with a former agent or employee. Sections (b) and (c) need to be harmonized. Mr. Moser pointed out that this is a structural issue. At the June 2000 meeting, the Committee approved a substantial change to Rule 4.4. Rule 4.2 has no reference to a former employee. The Rule itself is based on the concept of agency. A former employee or officer is not an agent of the organization. In all states, except for New York, Rule 4.2 relates solely to current employees and agents.

The Chair asked if the Rule should relate to former employees. He inquired as to whether, under Rule 4.4, information is not privileged because of concealment of a fraud. Mr. Moser responded that Rule 4.4 does not apply in the case of concealment of a fraud. The Chair remarked that by implication the argument exists that there may not be a privilege.

Mr. Bowen commented that in the case to which he previously referred, the corporate board of directors fired the executive director who then filed suit against the organization. The directors resigned, shutting down the organization. The executive director's attorney sought to contact the directors, but they were not considered to be represented persons. Mr. Bowen expressed the view that they were represented persons, and he suggested that this should be clarified in the Rule by providing that in section (b) current or former officers, directors, managing agents, etc. are represented persons. The Vice Chair remarked that she does not understand the workings of the Rule. She noted that section (c) sweeps in the former employee with its blanket permission for a lawyer to communicate with an agent or employee of the opposing organization.

Mr. Moser explained that the problem is that it is a fiction to state that the former employee is a represented

person. The definition in section (b) is based on the agency theory of a represented organization. The person is the agent of the organization, and the organization is represented. It should be clarified that Rule 4.2 does not apply when there is a former employee or agent situation, but Rule 4.4 applies. The Restatement of Laws recognizes government attorneys. Section 160 covers present employees, and section 161, the provision Judge Messitte used, applies to former officers or employees. Section 161 is similar to Maryland Rule 4.4. Mr. Brault said that the Subcommittee intended to cover former employees in Rule 4.4. The Chair pointed out that the title of Rule 4.4 is "Respect for Rights of Third Persons." The issue of former employees is not about the rights of third persons. It would be better to deal with the issue in Rule 4.2. Mr. Bowen added that section (b) pertains to the people who have the knowledge and power to control the organization. The word "former" modifying those categories of people belongs in section (b). Mr. Brault responded that the language of section (b) would have to be changed to provide that a represented person is one who was formerly represented.

Judge Heller inquired as to how a represented person can be defined as one who no longer is with an entity and is not represented by that entity. If someone leaves the employ of the organization, how is it possible to call that person

"currently represented?" The Chair answered that this would be for purposes of the right to interrogate the person. Judge Heller observed that there are policy considerations. The Rule should allow former employees and officers to be interviewed in an effort to investigate fraud. Privilege and fraud could be added to Rule 4.4. Mr. Bowen expressed the opinion that including former employees is important because they had had control of the corporation. This pertains to the right of the attorney to contact knowledgeable people without notifying the other attorney. Judge Heller noted that section (b) includes an agent or employee. She said that she did not understand why, unless there is a privilege, the attorney cannot talk to the person. Mr. Bowen responded that the problem is not talking to the person, but that the attorney has to notify opposing counsel about the interview with the former employee.

The Vice Chair commented that a former president of an organization cannot be contacted. There is a conflict between Rules 4.2 and 4.4, because the latter Rule allows a former president to be contacted unless he or she is giving privileged information. Mr. Moser explained that the reason the revisions were suggested is because the federal district judges were confused about the Rule. Making these further suggested changes will invite more confused decisions out of

the federal courts. In Maryland, Rule 4.2 has never been interpreted to apply to former employees. The Ethics 2000 Commission makes the same interpretation. The former employee situation needs to be taken into consideration. In responding to Mr. Bowen, Mr. Moser said that he did not know of a provision which prevents an attorney from interviewing a president or vice president of a company after the person left the company, except if the information is privileged. Mr. Titus remarked that he did not agree with Mr. Bowen, but he was in agreement with Mr. Moser. To communicate with people who used to work for an organization, Rule 4.4 is applicable.

The Chair pointed out that insofar as there is a notice requirement, when the former employee does not like the former employer, notifying the employer will not stop the former employee from telling everything he or she knows. Mr. Brault noted that the attorney would have to obtain the consent of the other attorney. The Chair stated that this is a policy question. One position is that one does not interview former employees without complying with the Rule. The other position is that the former employee is fair game for anyone. Mr. Brault commented that the rule in the District of Columbia does not recognize the Camden problem. The Chair asked if former employees are fair game, and Mr. Titus answered that this depends on the subject matter.

Mr. Brault said that the debate has centered on talking to managing agents, officers, and directors. The Rule pertains to any employee or agent, the statement of whom may result in civil liability for the attorney. Bar Counsel does not prosecute attorneys in larger firms handling discrimination cases, accidents, or personal injury cases within a corporate enterprise. A lower level employee may have plenty of information to give out. Should their testimony be eliminated? Mr. Titus remarked that former employees may not be represented persons, and the Rule is trying to protect them.

The Chair stated that the reason the Rule is back before the Committee is to handle by rule the problem in Camden and other cases. Mr. Brault commented that he would need to look at the minutes of the June Rules Committee meeting to refresh his memory, but he thought that the Rule was back today to solve the problem in criminal cases of undercover agents working in cases where attorneys are involved for the principal defendant. Mr. Titus remarked that this is not a big problem. The plaintiff's attorney can tell the organizational president not to disclose anything that is an attorney-client communication. Mr. Hochberg noted that the interview may be factual. Mr. Brault said that this is more than attorney-client privilege. It is any kind of evidentiary

privilege, trade secrets, or employee confidentiality agreements.

The Chair pointed out that some representatives of the U.S. Attorney's Office were present. Mr. Schenning, an Assistant U.S. Attorney, told the Committee that he had come to the Subcommittee meetings several times. He said that the people in his office were concerned that the change from the word "party" to the word "person" in section (a) of Rule 4.2 has the potential to prevent federal law enforcement from conducting the business it does every day. They prefer the word "party." The present draft of the Rule, which contains the Committee note and changes to the Comment addressing both civil and criminal enforcement agencies, is acceptable.

Tim Paulis, an attorney in the Department of Health and Mental Hygiene, said that civil enforcement has been construed to mean administrative enforcement. Some cases which are civil are not administrative. The Chair suggested that this distinction could be explained in a Committee note. Mr. Moser said that the term "civil enforcement" should cover this. Mr. Paulis suggested that the language of the Comment could be "civil, criminal, or administrative enforcement." Mr. Moser expressed the view that the courts can decide the meaning of the term "civil enforcement." Mr. Brault stated that the minutes will reflect that the term "civil enforcement"

includes administrative enforcement.

Mr. Christopher of the Federal Public Defender's Office, remarked that Mr. Moser had said that through case law, a number of states view persons as protected whether or not the person is a party to the litigation. No court has held that this prevents traditional undercover operations. Mr. Schenning pointed out that an Oregon court had stopped all undercover investigations pursuant to a finding of a violation of Rule 3.3, an attorney engaging in misrepresentation and fraud.

Ms. Keating commented that she handles employment discrimination cases from the plaintiff's side. Mr. Moser had pointed out that the Ethics Committee's view was that former and low level employees are fair game for attorneys. In the Camden case, the former EEO officer had a boxload of documents to give the plaintiff's attorney. Ms. Keating expressed the opinion that this problem does not come up very often. The Chair responded that he had been told the problem is frequent. In a recent symposium of federal judges, the judges expressed concern about the problem, because it results in battles over confidential and privileged information. The goal is a rule-type solution which will help and hurt in certain cases. It is not an insignificant problem in terms of judicial and client resources. Ms. Keating said that the change to Rule

4.2 is appropriate. She noted that she may interview 45 people, which becomes her work product and does not want to tell the other side about it.

Mr. Titus told the Committee that at a recent MICPEL course, a speaker said that it is important to clarify that Judge Messite's view under the Camden case is appropriate. There is mild disagreement on the federal bench. The Chair commented that with respect to the Camden case, the issue is if the former employee in that case is prepared to say that he or she decided with the attorneys in the case that there had been fraud. Since the employee quit the organization, none of the information given is privileged. The problem is that one does not know what is privileged until one knows what the information is. This can be handled by rule. The Vice Chair remarked that if she were the attorney interviewing the former employee, and the former employee said "I met with an attorney," she would stop the interview immediately, fearing an ethical violation. The Chair asked why an attorney who acquires information is disqualified. The attorney can say that there is evidence of fraud and deceit, and the information is not privileged. If it is presumptively privileged, the Camden problem has not been solved.

Mr. Brault noted that there is a common misconception about attorney-client privilege. The privilege is limited to

communication between the client and attorney involving legal advice. He cited the comparable situation of statutory privilege for quality control and peer review in hospitals. What is said in peer review committee is privileged. In an investigation of high mortality rates in operating rooms, what goes on in the committee hearing is privileged, but what the witnesses know from being in the operating room is not privileged. Just because someone gives a statement to an attorney does not make the witness' knowledge privileged. The Chair stated that if the attorney has to stop the interview, a point made earlier by the Vice Chair, there would be no opportunity to determine whether or not the information is privileged. Attorneys do not know what to do. If one chooses to go further, it is a trial issue, not an ethical issue.

The Vice Chair moved to delete the language "or with a former agent or employee" from section (c) of Rule 4.2 in order to bring the policy issue to a decision. This deletion would mean that section (c) only deals with persons currently represented by counsel. The motion was seconded, and it carried with one opposed.

The Vice Chair referred to the second sentence of section (c), and she asked if the word "party" should be changed to the word "person" to be consistent with the remainder of the Rule. Mr. Brault answered that the word was intended to be

"person," and this was an oversight.

Ms. Potter inquired if, under section (c), a lawyer has to obtain consent before talking to agents or employees of the opposing organization, such as co-employees of the lawyer's client about a slip-and-fall accident. The Chair responded in the affirmative. Judge McAuliffe added that these persons are not represented. The Chair noted that the second sentence of section (c) provides that prior to communicating with the agent or employee, the lawyer shall make inquiry to assure that the agent or employee is not a represented person. Ms. Potter remarked that without the consent, the small practitioner would not have a case. Mr. Sykes noted that section (c) permits interviewing without the organization's lawyer's consent.

The Vice Chair said that the term "represented person" is defined very broadly. She questioned as to what kinds of binding statements can be made -- do they have to be only in the scope of employment? Mr. Titus pointed out that an existing sentence in the Comment, which is proposed to be deleted, reads as follows:

> 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.

Mr. Brault said that the employee's statement is not binding and is subject to a credibility determination. Mr. Titus asked why the word "statement" is included in section (b) and suggested that the word "statement" could be deleted. The Chair commented that if someone wants to investigate, he or she may talk to an employee. One's duty under the second sentence of section (c) beginning with the word "however" is to see if the employee is a represented person under one of the categories in section (b). For example, a store clerk may have made an admission pursuant to subsection (b)(1) of Rule 5-803, Hearsay Exceptions -- Prior Statements by Witnesses.

Mr. Brault pointed out that section (c) provides that a lawyer may communicate. It is not couched as a prohibition. Mr. Titus remarked that a statement can be made contemporaneously with an occurrence or at a later time. Mr. Brault reiterated that the statement is not binding. Mr. Moser explained that the word "statement" is not in the current Maryland rule and it is not in the ABA model rule. It is found in the District of Columbia's rule. It could be removed from the proposed rule. The Vice Chair moved to

delete the word “statement” from section (b) of Rule 4.2. The motion was seconded, and it passed with one opposed.

Judge Smith noted that the language in section (c) which reads “or with a former agent or employee” was deleted by the Committee. The definition of “represented person” should note that it is a current officer, director, managing agent, etc. Otherwise, it may construed to apply to a former employee. Mr. Titus expressed the opinion that the language of the Rule is correct. He suggested that a cross reference be added which would provide “for former employees, see Rule 4.4.” Mr. Moser pointed out that there is a sentence in the Comment at the end of paragraph [6] which provides: “Regarding communications with former employees, see Rule 4.4 (b). The Chair suggested that the word “current” could be added before the word “officer” in section (b). The Vice Chair suggested that the word “current” could be placed in front of the word “authority” in section (b). Mr. Titus moved that the word “current” should be placed in front of the word “officer.” The motion was seconded, and it carried with one opposed.

Mr. Bowen pointed out that the Rule creates a definition in section (b) which is only used in the negative in section (c). The Chair said that the Style Subcommittee can consider this and can look at the name of the Rule as well. Rule 4.2 was approved as amended.

Agenda Item 3. Consideration of proposed amendments to: Rule 3-326 (Improper Venue, Inconvenience – Dismissal or Transfer of Action) and Rule 2-327 (Transfer of Action)

Ms. Ogletree presented Rules 3-326 (Improper Venue, Inconvenience -- Dismissal or Transfer of Action) and 2-327 (Transfer of Action) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE -- DISTRICT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 3-326 to allow the District Court to transfer a domestic violence action to a circuit court under certain circumstances, as follows:

Rule 3-326. IMPROPER VENUE, INCONVENIENCE, DOMESTIC VIOLENCE – DISMISSAL OR TRANSFER OF ACTION

(a) Improper Venue

A defense of improper venue may be raised by motion before or at commencement of trial. If a court on motion or on its own initiative determines that venue is improper, it may dismiss the action or, if it determines that in the interest of justice the action should not be dismissed, it may transfer the action to any county in which it could have been brought.

(b) Convenience of the Parties and Witnesses

On motion of any party, the court may transfer any action to any other county

where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice.

(c) Domestic Violence Action

After it enters a temporary order granting *ex parte* relief in an action under Code, Family Law Article, Title 4, Subtitle 5, the District Court on its own initiative may transfer the action to a circuit court for the protective order hearing if, after inquiry, the District Court finds that there is an action in the circuit court involving one or more of the parties in which there is an existing order or request for relief similar to that being sought and in the interest of substantial justice [and effective administration of justice?], the action should be heard in the circuit court. In determining the interest of substantial justice, the Court may consider (1) the safety of each person eligible for relief, (2) the convenience of the parties, (3) the pendency of other actions involving the parties or children of the parties in one of the courts, (4) the avoidance of undue delay in resolving the action, (5) the services that may be available in or through each court, and (6) the efficient operation of the courts. The consent of the parties is not required for a transfer under this section. After the action is transferred and before the protective order hearing is held, the District Court retains jurisdiction for the purposes of enforcing and extending the temporary *ex parte* order as allowed by law.

Cross reference: See Code, Family Law Article, §4-505 (c) concerning the duration and extension of a temporary *ex parte* order.

Source: This Rule is derived as follows:
Section (a) is derived from former M.D.R.

317.

Section (b) is derived from U.S.C. Title 28 §1404 (a).

Section (c) is new.

Rule 3-326 was accompanied by the following Reporter's Note.

At the request of the Conference of Circuit judges and the District Court Administrative Judges Committee, the Family/Domestic Subcommittee proposes amendments to Rule 3-326 and 2-327 to allow the transfer of domestic violence actions from the District Court to a circuit court, or vice versa, to allow a consolidation of proceedings and avoid the potential for conflicting orders.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE--CIRCUIT COURT

CHAPTER 300 - PLEADINGS AND MOTIONS

AMEND Rule 2-327 to allow a circuit court to transfer a domestic violence action to the District Court under certain circumstances, as follows:

Rule 2-327. TRANSFER OF ACTION

(a) Transfer to District Court

(1) If Circuit Court Lacks Jurisdiction

If an action within the exclusive jurisdiction of the District Court is filed in the circuit court but the court determines that in the interest of justice the action should not be dismissed, the court may transfer the action to the District Court sitting in the same county.

(2) If Circuit Court Has Jurisdiction

(A) Generally

Except as otherwise provided in subsection (a)(2)(B) of this Rule, ~~The~~ the court may transfer an action within its jurisdiction to the District Court sitting in the same county if all parties to the action ~~(A)~~ (i) consent to the transfer, ~~(B)~~ (ii) waive any right to a jury trial they currently may have and any right they may have to a jury trial following transfer to the District Court, including on appeal from any judgment entered, and ~~(C)~~ (iii) make any amendments to the pleadings necessary to bring the action within the jurisdiction of the District Court.

(B) Domestic Violence Action

After it enters a temporary order granting *ex parte* relief in an action under Code, Family Law Article, Title 4, Subtitle 5, a circuit court on its own initiative may transfer the action to the District Court for the protective order hearing if, after inquiry, the court finds that (i) there is no other action between the parties pending in the circuit court, (ii) the respondent has sought relief under Code, Family Law Article, Title 5, Subtitle 4, in the District Court, and (iii) in the interest of substantial justice and effective administration of justice, the action should be heard in the District Court. In determining the interest of substantial justice, the court may consider (i) the safety of each person eligible for relief, (ii) the convenience of the

parties, (iii) the pendency of other actions involving the parties or children of the parties in one of the courts, (iv) the avoidance of undue delay in resolving the action, (v) the services that may be available in or through each court and (vi) the efficient operation of the courts. The consent of the parties is not required for a transfer under this subsection. After the action is transferred and before the protective order hearing is held, the circuit court retains jurisdiction for the purposes of enforcing and extending the temporary *ex parte* order as allowed by law.

Cross reference: See Code, Family Law Article, §4-505 (c) concerning the duration and extension of a temporary *ex parte* order.

(b) Improper Venue

If a court sustains a defense of improper venue but determines that in the interest of justice the action should not be dismissed, it may transfer the action to any county in which it could have been brought.

(c) Convenience of the Parties and Witnesses

On motion of any party, the court may transfer any action to any other circuit court where the action might have been brought if the transfer is for the convenience of the parties and witnesses and serves the interests of justice.

(d) Actions Involving Common Questions of Law or Fact

(1) If civil actions involving one or more common questions of law or fact are pending in more than one judicial circuit, the actions or any claims or issues in the actions may be transferred in accordance

with this section for consolidated pretrial proceedings or trial to a circuit court in which (A) the actions to be transferred might have been brought, and (B) similar actions are pending.

(2) A transfer under this section may be made on motion of a party or on the transferor court's own initiative. When transfer is being considered on the court's own initiative, the circuit administrative judge having administrative authority over the court shall enter an order directing the parties to show cause on or before a date specified in the order why the action, claim, or issue should not be transferred for consolidated proceedings. Whether the issue arises from a motion or a show cause order, on the written request of any party the circuit administrative judge shall conduct a hearing.

(3) A transfer under this section shall not be made except upon (A) a finding by the circuit administrative judge having administrative authority over the transferor court that the requirements of subsection (d)(1) of this Rule are satisfied and that the transfer will promote the just and efficient conduct of the actions to be consolidated and not unduly inconvenience the parties and witnesses in the actions subject to the proposed transfer; and (B) acceptance of the transfer by the circuit administrative judge having administrative authority over the court to which the actions, claims, or issues will be transferred.

(4) The transfer shall be pursuant to an order entered by the circuit administrative judge having administrative authority over the transferor court. The order shall specify (A) the basis for the judge's finding under subsection (d)(3) of this Rule, (B) the actions subject to the order, (C) whether the entire action is

transferred, and if not, which claims or issues are being transferred, (D) the effective date of the transfer, (E) the nature of the proceedings to be conducted by the transferee court, (F) the papers, or copies thereof, to be transferred, and (G) any other provisions deemed necessary or desirable to implement the transfer. The transferor court may amend the order from time to time as justice requires.

(5) (A) If, at the conclusion of proceedings in the transferee court pursuant to the order of transfer, the transferred action has been terminated by entry of judgment, it shall not be remanded but the clerk of the transferee court shall notify the clerk of the transferor court of the entry of the judgment.

(B) If, at the conclusion of proceedings in the transferee court pursuant to the order of transfer, the transferred action has not been terminated by entry of judgment and further proceedings are necessary,

(i) within 30 days after the entry of an order concluding the proceeding, any party may file in the transferee court a motion to reconsider or revise any order or ruling entered by the transferee court,

(ii) if such a motion is filed, the transferee court shall consider and decide the motion, and

(iii) following the expiration of the 30-day period or, if a timely motion for reconsideration is filed, upon disposition of the motion, the circuit administrative judge having administrative authority over the transferee court shall enter an order remanding the action to the transferor court. Notwithstanding any other Rule or law, the rulings, decisions, and orders made or entered by the transferee

court shall be binding upon the transferor and the transferee courts.

Source: This Rule is derived as follows:
Section (a) is derived in part from the last phrase of former Rule 515 a and is in part new.
Section (b) is derived from former Rule 317.
Section (c) is derived from U.S.C. Title 28, §1404 (a).
Section (d) is new.

Rule 2-327 was accompanied by the following Reporter's Note.

See the Reporter's Note to the proposed amendment to Rule 3-326.

Ms. Ogletree explained that the changes to the Rules allow the transfer of a domestic violence action from the District Court to a circuit court and vice-versa to avoid game-playing. Rule 3-326 allows the District Court to transfer a domestic violence action to a circuit court under certain circumstances which are listed in section (c). Rule 2-327 is the comparable rule for the circuit courts. The Subcommittee was in favor of this change because it will help the administration of justice. Judge Vaughan asked for an example of a case which a circuit court transfers to the District Court. Ms. Ogletree answered that there could be a domestic violence case with related assault charges. The Honorable Albert Matricciani, of the Circuit Court for

Baltimore City, remarked that this is not the usual case. If the parties are already known in District Court and there is no other case pending in the circuit court, the case may be transferred to the District Court.

The Chair asked whether in subsection (a)(2)(B)(ii) of Rule 2-327, the language should be "either party has sought relief...". He questioned as to why this is limited to the respondent. The Honorable Martha Rasin, Chief Judge of the District Court, said that the Rule is intended to avoid conflicting court orders in the situation where the petitioner has filed in the circuit court and the respondent has filed in the District Court. The Chair commented that the petitioner may have previously sought relief in the District Court. He suggested that the Rule be changed.

The Reporter questioned whether this would apply in an active case, as opposed to an historic one. Judge Matricciani answered that this would apply in an active case. Judge McAuliffe expressed the concern that the District Court could become a dumping ground. The Reporter suggested that subsection (a)(2)(B)(ii) could provide that the respondent is seeking relief in an active pending case. Mr. Maloney asked about the language in the third line of subsection (a)(2)(B) which provides that the circuit court may transfer the action "on its own initiative." He noted that a party may be aware

of something requiring a transfer. The Chair suggested deleting the language "on its own initiative" from subsection (a)(2)(B). Mr. Maloney suggested that the language in the third line of subsection (a)(2)(B) could read: "on motion of either party or on the court's own initiative ...".

The Vice Chair remarked that there could be an appellate case if the Rule does not provide that the court, on motion of a party, may transfer the action. The Reporter responded that this probably would never happen. The petitioner chooses the court in which the *ex parte* action is filed, and during the *ex parte* phase there is no one on the other side to make a motion to transfer the case. The Chair commented that although the court can transfer the case anyway by doing so on its own initiative, it is preferable to expressly allow a motion in the Rule.

The Vice Chair asked if there had been any discussion about the possibility of putting the transfer provision in Rules 2-503 and 3-503, Consolidation; Separate Trials. Judge Matricciani replied that the trial judge may not know whether consolidation is appropriate until the domestic violence case gets to court. There are reasons not to consolidate. Judge Vaughan observed that the proposed change to the Rule is for the speedy administration of justice. To avoid people bouncing back and forth between courts, there has to be some

communication between the courts. Judge Matricciani responded that he anticipates some communication. The family divisions have developed informal protocols around the state and wanted to make them formal.

Judge Rasin stated that the purpose of the change to the Rules is so that people do not get conflicting orders, which does occur sometimes currently. Since many courts are already transferring cases, the Rule will formally recognize the practice. There is an effort among the clerks in both courts to communicate. The District Court is teaching the circuit court clerks how to check the data base to find out if there is a District Court case pending. Mr. Shipley commented that in Carroll County, they are trying to work this out. He said that he is bothered that the transfer is made before the *ex parte* hearing. There may be a pending order giving custody to one parent. The other parent goes to District Court to get custody. There has to be communication between courts before the hearing. The Chair commented that the court could award interim relief, and if the judge gets information about another case pending, the judge can deny relief. Judge Matricciani said that the judge could enter relief as to a charge of physical violence without touching the custody issue. Judge Heller remarked that she was impressed with the way the system has worked, especially in Baltimore City.

The Chair noted that if one party does not get the relief he or she wants, the person may go to another court. He reiterated that part (ii) of the first sentence of subsection (a)(2)(B) should not be limited to the respondent. Senator Stone commented that ideally, jurisdiction over these cases should be limited to one court or the other. The District Court is the more accessible, but it is a problem in rural counties which do not have a District Court judge sitting every day. The Reporter added that it is also a problem if there is an adversary proceeding already pending in the circuit court, and one of the parties filed for *ex parte* relief in the District Court. Ms. Ogletree observed that this rule change will cut down on forum-shopping.

Judge Vaughan inquired as to whether the proposed change covers cases which are transferred from one county to another. The Chair answered that this is covered in section (c) of Rule 2-327 and section (b) of Rule 3-326. Judge Vaughan said that if there were a pending divorce case in Anne Arundel County with a custody order, and one party in Howard County who is alleging abuse wants a "stay away" order, he would sign the *ex parte* order because of the safety issue. He asked whether he could then transfer the case to Anne Arundel County. Judge Smith responded that he has had a case in which a custody issue was before him while the District Court in

Charles County was handling a domestic violence case with the same parties. Currently, there is no way to transfer these kind of cases. The Rule as proposed for amendment will allow the District Court in Charles County to transfer the case to Baltimore County.

Andrea Levy, Esq. of the Women's Law Center commented that both Baltimore City and Montgomery County are transferring cases in the manner reflected in the proposed changes to the Rules, and the transfers are working well.

Judge Matricciani said that in section (c) of Rule 3-326, the bracketed language should be deleted. The Committee agreed by consensus to this change. The last sentence of the new language in each Rule pertains to jurisdiction during the transfer process. The Chair remarked that he liked the last sentences. Ms. Ogletree observed that the Subcommittee really wanted it to be clear to litigants that they will be protected in the interim before the case is transferred. The Vice Chair commented that without the last sentences, one would not expect anything to happen in the District Court after an action has been transferred to the circuit court. Judge Rasin noted that after the case has been transferred, the receiving judge can issue an order extending the protective order in order to get service. Even if there is service, there may be other reasons to extend the protective order. She remarked

that this may be confusing. Ordinarily, one files with the court that has the case. Judge Smith commented that the Rule has to clarify who is to enforce the order. It is awkward if the referring jurisdiction is responsible, since the file may be gone. The Chair noted that the file may be in transit. People have to have someplace to go when there is a *pendente lite* order. Mr. Shipley analogized that when a jury trial is prayed, the District Court loses jurisdiction. The Chair responded that this is not necessarily so. Bail may be entered in the District Court. Judge Rasin suggested that Rules 3-326 and 2-327 provide that the receiving Court may enforce or extend the *ex parte* order.

Ms. Ogletree explained that the concern of the Subcommittee is enforcement of the *ex parte* order. Judge Vaughan noted that in Baltimore City, the District Court clerks set a date for the protective order hearing in the case that is being transferred. What works for Baltimore City may not work in Howard County where the judges believe there is no legal authority for the District Court to set circuit court dates. There must be a way to educate the clerks as to how to accomplish the transfer. Judge Vaughan said that if he enters an *ex parte* order in a case that should be heard in circuit court in seven days, he cannot set the hearing date. Ms.

Ogletree pointed out that if the changes to the Rule were in place, the judge could call over to the other court and get a date. Judge Rasin told the Committee that there will be clerical manuals in both the District and circuit courts, and the communication will get worked out. It would be cumbersome to write these procedures into the Rules.

The Vice Chair asked whether subsection (a)(2)(B) of Rule 2-327 will be changed to state: "...a circuit court on motion of either party or on the court's own initiative may transfer...".

Ms. Ogletree agreed with the change, and the Committee agreed by consensus to the change. The Vice Chair pointed out that the Reporter's note to Rule 3-326 provides that the purpose of the changes to the Rules is to allow a consolidation of proceedings. However, it was stated today that consolidation of cases may not always be appropriate. Ms. Ogletree suggested that the Reporter's note add in the language "or other appropriate relief" after the language "consolidation of proceedings." The Reporter said that she would change the Reporter's Note.

The Reporter inquired as to whether the first sentence of subsection (a)(2)(B) of Rule 2-327 is to be changed to add the words "the petitioner or" before the word "respondent" in part (ii). Ms. Ogletree answered that it was not changed. Mr.

Brault suggested that the wording be: “the petitioner or respondent is seeking relief...”. Judge Smith expressed the view that the language should remain as “has sought relief,” since this would cover both past and present. The matter may have been initiated in the District Court and after it goes to the circuit court, the judge determines that it should go back to the District Court. Judge Rasin commented that if the petitioner files in District Court, and the case is transferred to circuit court, if the circuit court judge finds the matter had failed in District Court, the judge should dismiss the case. If the case is sent back to District Court, it could go to another District Court judge. The Chair pointed out that if the party is entitled to more relief, the judge can grant an interim order and send the case back. Judge Smith observed that if the District Court denied the petition and three days later, the party contends that something else has happened, the case is better off back in the District Court.

Judge Matricciani commented that an expansive reading of the Rule is that if one party is in District Court and one in circuit court, if there is any history in District Court, the case should be sent back there. The Chair responded that the judge does not have to send the case back. The Rule permits it to be sent back. However, the way it is written now, the

Rule does not permit this with respect to the petitioner. Ms. Ogletree noted that the Subcommittee did not want circuit court judges sending cases back, except for the narrowest of reasons. The "cross-warrant" situation is a narrow window. There is some concern that the way to get rid of these cases in circuit court is to send them all to the District Court. This was not intended. Judge Smith said that the judges on either bench are not indiscriminately avoiding domestic violence petitions. Ms. Ogletree remarked that it is not that the judges take it lightly. The perception is that the circuit court may think that all of these cases are better dealt with in District Court. Some cases may be transferred unnecessarily.

The Vice Chair pointed out that if the law provides jurisdiction in both courts, the rules cannot limit jurisdiction. If one case is filed in District Court, and then two weeks later another is filed in circuit court, as long as the circuit court has jurisdiction, the case cannot be transferred to the District Court. The Chair said that that theory is consent of the parties. The Vice Chair responded that other rules allow transfer without consent of the parties. Judge Vaughan inquired as to why a case should be transferred back to District Court if a case was filed *ex parte* there and was denied, then the person filed in circuit

court. The Chair answered that if the considerations in the Rule are followed, there is no reason not to approve the Rules.

The Chair inquired about the addition of the language "petitioner or" before the word "respondent" in the first sentence of subsection (a)(2)(B) of Rule 2-327. Ms. Ogletree asked about the wording "the petitioner or the respondent is seeking...". The Chair replied that it should be "has sought." The Vice Chair commented that one of the grounds at which the court looks is whether the petitioner ever sought relief in the District Court. Judge Rasin commented that this situation is the most likely case to go back to District Court. If the petitioner comes in on September 30 and asks for *ex parte* relief in District Court which is denied, and then the petitioner goes to circuit court on October 15, the circuit court has the authority to send the case back to the District Court. Judge Dryden remarked that the circuit court judge would not necessarily send the case back. Judge Matricciani added that if the case went back, it is unlikely that the same judge would get the case. Judge Dryden noted that if an order is issued which expires in one year, and five days after the expiration the petitioner is asking for another order based on a new event, it would not be unreasonable to send the case back to District Court. Even if it is not the

same judge, it is not harmful. Judge Rasin observed that the purpose of the amendments is to prevent confusion. The Vice Chair expressed the concern that these changes will give judges an irreversible discretion to "dump" cases, with no relief available to the parties.

Mr. Sykes inquired if the transferee court can bounce the case back. The Rules do not address this. The Vice Chair expressed the concern that someone could continue to be a victim of domestic violence while the case is bouncing between courts. Judge Smith remarked that a significant amount of misuse of domestic violence actions occur such as when a petitioner files a false allegation of domestic violence in order to gain an advantage in a subsequent divorce case. He opined that if a lack of credibility is suspected, the case should go to the court that had made the original credibility determination.

The Chair asked whether the last sentence of Rule 3-326 (c) and Rule 2-327 (a)(2)(A) should be changed so that it is the receiving court, rather than the transferring court, that may enforce or extend the *ex parte* order. Ms. Ogletree suggested that it should be the receiving court. The Committee agreed by consensus to this change.

Mr. Hochberg moved that in part (ii) of the first sentence of Rule 2-327 (a)(2)(B), the words "petitioner or"

should be added in before the word "respondent." The motion was seconded, and it passed on a vote of twelve in favor, five opposed.

Mr. Sykes questioned as to what happens if the transfer is declined. Judge Rasin answered that the circuit court cannot send the case to the District Court if there is already a pending case in circuit court. The District Court cannot send it unless there is a pending case in circuit court. There are not too many round-trip opportunities. The Chair stated that it is unlikely that transfer decisions will be challenged. The Rule was approved as amended.

Agenda Item 2. Reconsideration of proposed amendments to Rule 16-813, Maryland Code of Judicial Conduct, Canon 4E (Compensation and Expense Reimbursement) – proposed revised Canon 4H (Compensation and Reimbursement) (See Appendix 1).

The Chair presented Canon 4H of the Code of Judicial Conduct. (See Appendix 1). He said that when the Committee considered the Code of Judicial Conduct, the Honorable Charlotte Cooksey, a consultant to the General Court Administration Subcommittee, and the Chairperson of the Judicial Ethics Committee, had stated that judges cannot accept honoraria because under the state Ethics Law, judges are public officials. Some people were surprised at this

comment. Mr. Bowen had suggested that the Code should contain an express reference to the applicable statute. This proposal is before the Committee today. The Chair commented that he does not read the statute to provide that judges cannot accept honoraria. It is clear that a judge cannot go to Las Vegas to accept $50,000, but they can accept honoraria within the statutory guidelines. This is consistent with the draft language in the Comment to Canon 4H.

Judge Heller expressed the view that the opinion of the Ethics Committee permits honoraria under certain circumstances. The Chair said that this depends on the meaning of the term "honoraria." By complying with the Code of Judicial Conduct, the judge complies with the statute at the same time. Mr. Moser remarked that he did not attend the Rules Committee meeting on October 20, 2000 at which this Rule was discussed. He noted that the problem is that the Ethics Committee opinion is more restrictive than the Code of Judicial Conduct. He said that he was not sure if the opinion was right or wrong. Reasonable compensation includes honoraria as long as it does not exceed a reasonable amount. Mr. Moser had been chair of the ethics commission handling executive branch employees, and their rule was honoraria of insignificant value of $50 or less was appropriate. This would not apply to judges. The amount is reasonable

compensation which comes from extrapolating the Code language. Judges are bound by the Code which refers to the statute.

The Vice Chair commented that she was not arguing either position. She said that she found the State Ethics Law to be confusing. Code, State Government Article, §15-505 (d) applies to honoraria. The Chair pointed out that subsection (d)(2) provides that an official or employee may accept an honorarium if it is limited to reasonable expenses for the official's meals, travel, and lodging and reasonable expenses for care of a child or dependent adult. The Vice Chair remarked that one can get back out-of-pocket expenses. The Chair expressed the opinion that this language is inconsistent with the language in Canon 4H. Mr. Moser stated that under subsection (c)(2)(ii), ceremonial gifts and awards are within the definition of "honoraria." The Vice Chair commented that although the Code of Judicial Ethics in Canon 4H (a) allows reasonable compensation, the State Ethics Law seems to prohibit it. Mr. Moser agreed with this statement. He noted that honoraria which may be accepted are limited to reasonable expenses for the meals, travel, and lodging. Under section (c), one may accept ceremonial gifts or awards and unsolicited gifts of nominal value. The Vice Chair commented that the subject of the Ethics opinion was payments of $500 and above. Mr. Moser said that it is better to incorporate the State

Ethics Law which is governed by the word “reasonable.”

The Vice Chair pointed out that section (a) of Canon 4H allows a judge to receive reasonable compensation. The definition of “honorarium” in Code, State Government Article, §15-102 (r) defines the term as the payment of money. Canon 4H allows reasonable compensation. Under state law, a judge can recoup expenses and nominal gifts. The Vice Chair noted that she read the law to allow a judge to accept no more than $500 even if the judge is speaking all day. Mr. Moser commented that the Canon does not use the word “honoraria.” This is different than compensation. He remarked that he was not sure about whether a judge can be compensated for teaching at a law school.

The Chair told the Committee that Steven Lemmey, Esq., Investigative Counsel for the Judicial Disabilities Commission, had left him a note requesting that the Comment as drafted be included. This would provide judges with notice to look at the State Ethics Law in combination with Canon 4H. The Vice Chair noted that Mr. Lemmey had said that it is better to include a reference to the State Ethics Law because a new judge may not be aware of its details. Mr. Lemmey appeared to be concerned that Canon 4H provides that a judge may accept compensation. The Vice Chair asked if the Canon should go back to the Subcommittee for further study. Judge

Heller pointed out that extra-judicial activities are permitted by the Code. The Vice Chair stated that the State Ethics Law expressly applies to the judiciary. Senator Stone remarked that legislative ethics are different than what is provided for in the statute. The legislature sets legislative ethics by rule passed on the first day of the legislative session. Mr. Brault pointed out that there are substantial penalties for judges who are prosecuted.

Mr. Moser suggested that to solve the problem, the following language could be put at the beginning of Canon 4H: "Except as otherwise prohibited by law...". The word "compensation" is broader than the word "honoraria," and it is appropriate for judges to receive compensation for teaching law. The Vice Chair asked whether it matters if the judge is teaching at a "for profit" institution. Mr. Moser replied that he did not know whether that would make any difference. Judge Smith pointed out that many judges teach bar review courses. Mr. Moser responded that the teaching is not limited to an institution, but the judge has to avoid the appearance of impropriety.

The Chair stated that Mr. Moser had suggested that Canon 4H should begin as follows: "Except as otherwise prohibited by law, a judge may...". Judge Vaughan suggested that there should be a reference to Opinion No. 128 (February 2, 2000) of

the Judicial Ethics Committee, and the Rules Committee agreed by consensus to these suggestions.

After the lunch break, the Chair told the Committee that the Court of Appeals had adopted the revised Attorney Disciplinary Rules which had been drafted by a Court of Appeals committee with the assitance of the Reporter. The Rules Order provided that certain rules were to go into effect immediately and others later. The Reporter noted that the rule that allows substituted service on the Clients' Security Trust Fund and the rule providing for the composition of the Attorney Grievance Commission are to go into effect on January 1, 2001. Two new members will be added to the Commission and there will be staggered three-year terms. This is in preparation for most of the new Attorney Disciplinary Rules, which go into effect on July 1, 2001. Anything then pending before an Inquiry Panel or above stays in the old system. The Chair said that the work of many Rules Committee members, including Albert D. Brault, Esq., H. Thomas Howell, Esq., and Roger W. Titus, Esq., resulted in an excellent set of rules.

Agenda Item 4. Consideration of proposed amendments to Rule 2-501 (Motion for Summary Judgment)

Mr. Johnson presented Rule 2-501, Motion for Summary Judgment) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE - CIRCUIT COURT

CHAPTER 500 - TRIAL

AMEND Rule 2-501 to allow the court to strike an affidavit in opposition to a motion for summary judgment under certain circumstances, as follows:

Rule 2-501. MOTION FOR SUMMARY JUDGMENT

(a) Motion

Any party may file at any time a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law. The motion shall be supported by affidavit if filed before the day on which the adverse party's initial pleading or motion is filed.

(b) Response

(1) Generally

The response to a motion for summary judgment shall identify with particularity the material facts that are disputed. When a motion for summary judgment is supported by an affidavit or other statement under oath, an opposing party who desires to controvert any fact contained in it may not rest solely upon allegations contained in the pleadings, but shall support the response by an affidavit or other written statement under oath.

(2) Striking of Affidavit in Opposition

An affidavit in opposition to a motion for summary judgment that is filed after the deadline for discovery set by a scheduling order and that contradicts that affiant's previous affidavit or sworn testimony may be stricken by the court in the absence of an explanation for the contradiction that the court finds to be credible.

(c) Form of Affidavit

An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

(d) Affidavit of Defense Not Available

If the court is satisfied from the affidavit of a party opposing a motion for summary judgment that the facts essential to justify the opposition cannot be set forth for reasons stated in the affidavit, the court may deny the motion or may order a continuance to permit affidavits to be obtained or discovery to be conducted or may enter any other order that justice requires.

(e) Entry of Judgment

The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law. By order pursuant to Rule 2-602 (b), the court may direct entry of judgment (1) for or against one or more but less than all of the parties to the action, (2) upon one or more but less than all of the claims presented by a party to the action,

or (3) for some but less than all of the amount requested when the claim for relief is for money only and the court reserves disposition of the balance of the amount requested. If the judgment is entered against a party in default for failure to appear in the action, the clerk promptly shall send a copy of the judgment to that party at the party's last known address appearing in the court file.

Cross references: Section 200 of the Soldiers' and Sailors' Relief Act of 1940, 50 U.S.C. Appendix, §520, imposes specific requirements that must be fulfilled before a default judgment may be entered.

(f) Order Specifying Issues or Facts Not in Dispute

When a ruling upon a motion for summary judgment does not dispose of the entire action and a trial is necessary, the court, on the basis of the pleadings, depositions, answers to interrogatories, admissions, and affidavits and, if necessary, after interrogating counsel on the record, may enter an order specifying the issues or facts that are not in genuine dispute. The order controls the subsequent course of the action but may be modified by the court to prevent manifest injustice.

Source: This Rule is derived as follows:
Section (a) is derived from former Rule 610 a 1 and 3.
Section (b) is new.
Section (c) is derived from former Rule 610 b.
Section (d) is derived from former Rule 610 d 2.
Section (e) is derived in part from former Rules 610 d 1 and 611 and is, in part, new.
Section (f) is derived from former Rule 610 d 4.

Rule 2-501 was accompanied by the following Reporter's Note.

> This amendment to Rule 2-501 is proposed in light of the 4-3 decision in Pittman v. Atlantic Realty, 359 Md. 513 (2000). The amendment allows a circuit court to strike an affidavit in opposition to a motion for summary judgment filed after the discovery deadline if the affidavit contradicts the affiant's previous affidavit or sworn testimony and there is no credible explanation for the contradiction.

Mr. Johnson explained that the suggested changes to Rule 2-501 resulted from the decision in Pittman v. Atlantic Realty, 359 Md. 513 (2000). The Honorable Lawrence Rodowsky, recently retired judge of the Court of Appeals, wrote the opinion in the case and suggested changes to the Rule. The decision reversed the Court of Special Appeals. The Court of Appeals declined to adopt the "sham affidavit rule" which is applied by some federal courts. In the Pittman case, the trial judge made the decision to strike affidavits that contradicted prior testimony of the affiants. Under Maryland law, summary judgment does not involve a credibility determination, but under federal law credibility can be determined under the "sham affidavit rule." Without the wholesale adoption of that rule, proposed changes to Rule 2-501 allow a court to strike an affidavit that contradicts the affiant's previous affidavit or sworn testimony and is filed

after the discovery deadline.

The Chair said that Judge Heller had to leave the meeting, but she had proposed a change to subsection (b)(2) of Rule 2-501. She suggested taking out the phrase "that is filed after the deadline for discovery set by a scheduling order and" after the word "judgment," adding the language "good cause" after the phrase "by the court in the absence of," and deleting the phrase "an explanation for the contradiction that the court finds to be credible." This would be a "good cause" feature, rather than a credible explanation. Mr. Brault commented that the federal approach does not relate to discovery deadlines. Under the federal cases, one cannot create a material fact issue by recanting one's own testimony. Mr. Brault remarked that he did not like a "good cause" standard.

Mr. Brault asked if the Rule should provide that the court may not use the affidavits, rather than provide that they are stricken. Mr. Titus remarked that this is similar to an affidavit not made on personal knowledge. Mr. Johnson noted that the court can make the determination to strike, but the affidavits are not automatically out. The Chair added that people do make honest mistakes. The Vice Chair observed that someone may not have understood the question.

The Chair said that the Pittman case involved a 180

degree recantation that was difficult to believe. Mr. Maloney commented that people have a right to say that their recollection has been refreshed. The issue of credibility is decided at the trial. The problem is that if the affidavit corrects prior testimony or amends an answer to interrogatories, it could be subject to being stricken. The Chair suggested that subsection (b)(2) begin with the language, “The court has discretion to strike an affidavit in opposition to a motion for summary judgment ... that contradicts...”. This would clarify that the court has discretion. Mr. Titus inquired as to what would be the factors motivating the exercise of discretion. The Chair responded that this should be left up to the discretion of the trial judge.

Ms. Potter questioned whether part of the affidavit could be stricken. The Chair answered that the Rule could provide that all or part of the affidavit could be stricken. Ms. Potter remarked that there should be a material contradiction. The Chair added that summary judgment cannot be granted if there is a material dispute.

The Vice Chair inquired as to whether the federal approach provides that the affidavit is to be stricken. Mr. Titus replied that the affidavit is disregarded, but it is not stricken. Mr. Bowen noted that according to the Pittman case

(359 Md. at 526) federal case law provides that "a party may not defeat summary judgment by offering an affidavit which contradicts unambiguous testimony previously elicited during a deposition." The Vice Chair pointed out that this does not say what happens to the affidavit. Mr. Maloney commented that it would be useful to look at the rules pertaining to depositions and corrections to deposition testimony in conjunction with this matter.

Mr. Johnson reiterated that Judge Rodowsky had requested the change to the Rule. Mr. Johnson remarked that the discovery rules are being reviewed, and he agreed with Mr. Maloney that the deposition rules should be considered. The Chair pointed out that the court has discretion in this matter. Mr. Maloney noted that the rules do not provide guidance as to how the discretion is exercised. Ms. Potter inquired if this is an issue for the jury to determine. Mr. Brault remarked that a direct contradiction rises above impeachment and is incredible as a matter of law. Mr. Maloney suggested that since the discovery rules are being reviewed with respect to the correction of deposition testimony, the matter of amending Rule 2-501 could be postponed. The Reporter responded that the revision will not be completed for some time.

Judge McAuliffe commented that on page 542 of the Pittman

opinion, Judge Rodowsky stated that if the need develops for a sham affidavit rule, the Rules Committee can recommend the appropriate adjustment. The trial judge could be given the discretion to strike a sham affidavit. The Chair said that there has been a suggestion to defer this subject. Mr. Brault expressed the view that this should be decided now. Mr. Titus added that an interim measure could be adopted. The Chair commented that this could be considered as a stopgap measure adding a provision that the judge has discretion to disregard the sham affidavit. Mr. Brault suggested that the Rule could provide that a party may not defeat summary judgment by offering an affidavit that contradicts previous testimony.

Mr. Johnson said that on page 525 of the Pittman opinion, footnote 5 states that Fed.R.Civ.P. 30 (e) allows the deponent, after reviewing the deposition transcript, to make changes in form or substance. The Chair commented that nothing in the Rules prevents someone from stating that he or she made a mistake. One can supplement discovery and ask the judge to rule *in limine*. He expressed the opinion that the footnote in the Pittman case is misleading. Mr. Brault remarked that it is not advisable for a party to supplement depositions. Ethically, one cannot advise someone of a significant change in testimony. Judge McAuliffe noted that there could be a mechanism in the Rules for someone to change

deposition testimony before the judge strikes the testimony. There is a federal rule which allows this. Mr. Brault added that the party could have 30 days to change the testimony; if it is not changed, the transcript is accepted as accurate. The Chair said that there could be an opportunity until the close of discovery for someone to come in with corrective language. Judge McAuliffe suggested that the other Rules of Procedure be reviewed to see if any need to be amended. The Chair observed that the Discovery Subcommittee can pick up on the work done by the Trial Subcommittee.

The Chair stated that Rule 2-501 will be remanded to the Discovery Subcommittee to see which discovery issues impact the Rule. Mr. Titus remarked that there are broader issues than in the Pittman case. Rule 2-501 requires more study to see if the Rule can be changed to be more like the operation of summary judgment in the federal system. A well-prepared motion for summary judgment has a much greater chance of success in federal court than in State court. The Chair noted that in the Fourth Circuit, there has been some abuse of summary judgment. Mr. Titus said that notwithstanding the Fourth Circuit, summary judgment is more likely to be taken seriously in federal court. Frivolous cases should be able to be weeded out by summary judgment. This is an appropriate subject for the Rules Committee to make a serious analysis of

summary judgment jurisprudence, comparing Maryland and federal cases. Summary judgment in Maryland needs to be taken more seriously. The Chair stated that the Management of Litigation Subcommittee will take a look at this in the hopes of tightening up summary judgment jurisprudence.

The Chair adjourned the meeting.