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 March 13, 1998.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Hon. John F. McAuliffe
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
Melvin J. Sykes, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Judy Barr, Rules Committee Intern
Glenn Grossman, Esq., Deputy Bar Counsel
Patricia Adams, Esq., Attorney Grievance Commission

The Chair convened the meeting. He said that Mr. Howell would introduce Agenda Item 1.

Agenda Item 1. Continued consideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys.

Mr. Howell presented Rule 16-737, Order Imposing Discipline or Inactive Status, for the Committee's consideration.

Rule 16-737. ORDER IMPOSING DISCIPLINE OR

INACTIVE STATUS

(a) Effective Date of Order

An order of the Court of Appeals that disbars or suspends the respondent from the practice of law, or reprimands the respondent, or places the respondent on inactive status, may provide that the order shall become effective immediately or on an effective date stated in the order. If no effective date is stated, the order shall take effect 30 days after the date of the order.

(b) Reprimand

Unless accompanied by a published opinion, an order that reprimands the respondent shall summarize the misconduct for which the reprimand is imposed and include specific reference to any rule or statute violated by the respondent and any condition that may be imposed upon the respondent pursuant to section (h) of this Rule.

(c) Effect of Order; Prohibited Acts

Except for performing the duties as provided in section (d) of this Rule, the respondent may not practice law, attempt to practice law, or offer to practice law in this State after the effective date of an order that disbars, suspends, or places the respondent on inactive status until such time, if ever, that the respondent is reinstated in accordance with Rule 16-738. A respondent who is subject to such an order may not practice law through an attorney, officer, director, partner, trustee, agent, or employee and shall not:

(1) Occupy, share, or use office space in which an attorney practices law;

(2) Use any business card, sign, or advertisement suggesting that the respondent is entitled to practice law or maintain, either alone or with another, an office for the

practice of law;

(3) Use any stationery, bank account, checks, or labels on which the respondent's name appears as an attorney or in connection with any office for the practice law;

(4) Solicit or procure any legal business or retainer for an attorney, whether or not for personal gain; and

(5) Share in any fees for legal services performed by another attorney following the effective date of the order, but may be compensated for the reasonable value of services rendered prior to that date.

(d) Duties of Respondent

Unless otherwise stated in the order of the court of Appeals, every order that disbars, suspends, or places a respondent on inactive status shall operate as a directive, whether or not expressly stated in the order, requiring the respondent to perform each of the following duties in a timely manner:

(1) Immediately upon notice of the order, the respondent shall not undertake any further legal matters and shall not accept any new clients.

(2) The respondent shall take such immediate action as is necessary to complete any current client matters in progress and then, within 30 days of the date of the order, withdraw from such matters.

(3) Within ten days of the date of the order, the respondent shall provide Bar Counsel or an attorney designated by Bar Counsel with a list of the attorney's clients (by name, address, and telephone number) whose legal matters have not been concluded by the respondent and identify any client matters (by name, tribunal, and docket reference) currently pending in any court or agency.

(4) Within 15 days of the date of the

order, the respondent shall mail a letter to each client whose legal matter has not been concluded, and to counsel for any other party or to any unrepresented party in a pending action or proceeding, notifying each of them of the order and the fact that the respondent will be unable to practice law after the effective date of the order.

(5) The respondent shall supply Bar Counsel or an attorney designated by Bar Counsel with copies of the letters mailed under subsection (d)(4) of this Rule.

(6) Unless suspended for a definite period of not more than six months, the respondent shall promptly request the publisher of any telephone directory or law listing to remove any listing or reference that suggests that the respondent is an attorney eligible to practice law.

(7) The respondent shall deliver promptly to all clients being represented in pending matters any papers or other property to which the clients are entitled, or shall notify the clients and any co-counsel of a suitable time and place to obtain the papers and other property, calling attention to any urgency for obtaining the papers and property.

(8) The respondent shall promptly notify the disciplinary authority in each jurisdiction in which the respondent is admitted to practice of the disciplinary sanction imposed by the Court of Appeals.

(9) Within 30 days of the effective date of the order, the respondent shall file with the Commission an affidavit that states (A) the manner and extent that the respondent has complied with the order and the other provisions of this section, (B) the names of all other state and federal jurisdictions and administrative agencies to which the respondent is admitted to practice, (C) the residence or other address of the respondent to which future communications may thereafter be directed, (D) the policy number and the name and address of each carrier with whom the respondent maintained malpractice insurance coverage during the past five years and the inclusive dates of coverage, and (E) the date and manner that a copy of the affidavit required by this subsection was served upon Bar Counsel. The affidavit shall be accompanied by copies of the list required by subsection (d)(3) of this Rule and the letters mailed under subsection (d)(4) of this Rule.

(10) The respondent shall maintain records of the various steps taken to comply with this

section and the order of the Court of Appeals, and shall make those records available to Bar Counsel on request.

(e) Duties of Clerk

On the effective date of an order that disbars, suspends, or places the respondent on inactive status, the Clerk of the Court of Appeals shall remove the name of the respondent from the register of attorneys in that Court, and shall certify that fact to the Trustees of the Clients' Security Trust Fund and the clerks of all courts in this State.

(f) Duties of Bar Counsel

Bar Counsel shall enforce the order of the Court of Appeals and the provisions of this Rule. In enforcing section (d) of this Rule, Bar Counsel may designate an attorney to monitor the respondent's compliance and to receive the list and copies of letters described in subsections (d)(3) and (d)(4) of this Rule. If Rule 16-741 is applicable, Bar Counsel may request the appointment of a conservator in accordance with that Rule. Bar Counsel shall give the notice required by section (e) of Rule 16-709.

(g) Orders for Suspension or Inactive Status

(1) Definite Period

An order of the Court of Appeals that suspends the respondent from the practice of law for a definite period of time shall specify the period of suspension and may include any specified conditions to be performed before the date that the suspension expires.

(2) Indefinite Suspension or Inactive Status

An order of the Court of Appeals that suspends the respondent from the practice of law indefinitely, or places the respondent on inactive status, may provide that the

respondent may apply for reinstatement in accordance with Rule 16-738 not earlier than a specified period of time after the effective date of the order, upon having satisfied Bar Counsel that specified conditions have been met, or may provide a combination of time and conditions. If the order does not so provide, the respondent may not petition for reinstatement until the expiration of at least two years from the effective date of the order.

(3) Temporary Suspension

An order of the Court of Appeals entered pursuant to Rules 16-721, 16-722, or 16-723 that temporarily suspends a respondent from the practice of law until the further order of that Court, unless vacated earlier, shall expire on the date when a final order is entered pursuant to section (g) of Rule 16-736.

(h) Conditions

An order of the Court of Appeals that suspends a respondent from the practice of law, either for a definite period or indefinitely, or reprimands the respondent, or places the respondent on inactive status, may impose one or more conditions to be performed by the respondent, including a condition precedent to reinstatement or a condition of probation after reinstatement, such as a requirement that the respondent

(1) Demonstrate by the report of a health care professional, or other proper evidence, that the respondent is competent, mentally and physically, to resume the practice of law.

(2) Engage an attorney upon reinstatement, satisfactory to Bar Counsel, to monitor the respondent's legal practice, including access to client files, accounting for entrusted funds, and records for any attorney trust account maintained by the respondent, such monitor to act at the respondent's expense for a stated period of time with monthly or quarterly reports to Bar Counsel as Bar Counsel

shall direct.

(3) Prove that every former client has been reimbursed for any part of fees paid in advance for legal services that were not completed.

(4) Satisfy any judgment or reimburse the Client's Security Trust Fund for any claim that arose out of the respondent's practice of law.

(5) Make full restitution to any client of any sum not substantially in dispute.

(6) Limit the nature or extent of the respondent's future practice of law.

(7) Pay all costs previously assessed by the order and any mandate of the Court of Appeals.

(8) Participate in a program, tailored to individual circumstances and to the extent specified in the order, that provides the respondent with law office management assistance, lawyer assistance or counseling, treatment for alcohol or substance abuse, psychological counseling, or specified courses in legal ethics, professional responsibility, or continuing legal education.

(9) Issue a public apology to designated individuals.

(10) Participate in any other program or take any corrective action that may be reasonable and appropriate.

(i) Responsibility of Affiliated Attorneys

No attorney shall, in connection with the practice of law, employ, share office space with, or authorize legal services to be performed by a respondent after the effective date of an order of the Court of Appeals that disbars or suspends the respondent from the practice of law or places the respondent on inactive status. An attorney who at the time of such an order is affiliated with the

respondent as a member of a law firm or shareholder of a professional corporation, upon notice of the order, shall take reasonable action to insure that the respondent complies with this Rule. The firm or corporation may give written notice to any client of the respondent of that attorney's inability to practice law and of its willingness to represent the client with the client's consent.

(j) Applicability to Non-Admitted Attorney

(1) In General

This Rule applies to the disbarment or suspension of an attorney who is not admitted by the Court of Appeals to practice law.

(2) Duties of Clerk and Bar Counsel

On the effective date of an order by the Court of Appeals that disbars or suspends a non-admitted attorney, the Clerk of the Court of Appeals shall place the name of that attorney on a list maintained in that Court of non-admitted attorneys who are excluded from exercising in any manner the privilege of practicing law in the State. The Clerk shall also forward a copy of the order to the clerks of all courts in this State and to the State Court Administrator and the Board of Law Examiners to be maintained with the docket of out-of-state attorneys who are denied special admission to practice under the Rules Governing Admission to the Bar of Maryland. Bar Counsel shall give the notice required by section (e) of Rule 16-709.

(3) Effect of Order

After the effective date of an order entered under this section, the attorney may not practice law in this State and is disqualified from admission to the practice of law in this State.

(k) Modification of Order

Upon joint stipulation filed by the

parties, or motion filed by the respondent and served on Bar Counsel, and after considering any answer, the Court of Appeals may reduce a period of suspension, waive a requirement or condition imposed by this Rule or by order, or otherwise modify a disciplinary order entered under this Rule. A motion filed under this section shall be verified, setting forth facts showing that the respondent is entitled to the specific relief sought. Relief shall be denied without a hearing unless it appears from the stipulation or from clear and convincing evidence submitted with the motion that the respondent is attempting in good faith to comply with the order but that full and exact compliance has become impossible or will result in unreasonable hardship unless the order is modified. If a judicial hearing is necessary to resolve a genuine issue of material fact, the petition may be assigned for a hearing in accordance with Rule 16-732 and findings of fact in accordance with Rule 16-735.

(l) Sanctions for Violations

(1) Ineligibility for Reinstatement

The failure of a respondent to demonstrate substantial compliance with sections (c) and (d) of this Rule and the order of the Court of Appeals, unless excused, shall be cause for dismissal without a hearing of a petition for reinstatement that may be filed pursuant to Rule 16-738.

(2) Disciplinary Action

Upon receipt of information from any source that a respondent has violated sections (c) or (d) of this Rule or the order of the Court of Appeals, and in addition to any other remedy, Bar Counsel may file a petition for disciplinary action based upon the violation in the Court of Appeals pursuant to Rule 16-731.

(3) Injunction Against Unauthorized Practice

A respondent who violates section (c)

of this Rule practices law without authority. Upon receipt of information from any source indicating such a violation, Bar Counsel shall investigate the matter and may institute or intervene in an action in any court to enjoin the respondent from practicing, attempting to practice, or offering to practice law.

(4) Constructive Contempt

For a violation of sections (c) or (d) of this Rule or the order of the Court of Appeals, if justice cannot otherwise be achieved, the Commission may initiate or cause to be initiated a proceeding for constructive contempt in accordance with the applicable provisions of Rules 15-205 and 15-206.

Source: This Rule is derived in part from former Rules 16-713 (BV13) and 16-714 (BV14) and is in part new.

Rule 16-737 was accompanied by the following Reporter's Note.

This Rule combines in a single rule the provisions of former Rule BV13, examples of conditions and requirements imposed in reported disciplinary orders of the Court of Appeals, and the duties of compliance and enforcement that are triggered by disciplinary orders. It is intended to apply comprehensively to orders that disbar and suspend an attorney (or exclude a non-admitted attorney) from the practice of law, reprimand an attorney, or place the attorney on inactive status. However, the primary focus is upon regulating attorneys who are suspended (either indefinitely or for a definite period of time) or placed on inactive status and who may be expected to return to practice of law at some future time.

Section (a) is in part derived from former Rule BV13 a 1 and is in part new. The former Rule authorized the Clerk of the Court of Appeals to remove the attorney's name when the

order "becomes effective", but neither mandated an effective date nor required the order to specify such a date. Section (a) addresses this issue at the very outset. It provides that the order shall become effective immediately or on an effective date stated in the order. See, e.g., AGC v. Garland, 345 Md. 383, 399 (1997) (attorney "forthwith" suspended); AGC v. Guida, 343 Md. 560 (1996) (order entered September 27 effective December 1); AGC v. Katz, 342 Md. 294 (1996) (order entered April 30 effective August 1). When no effective date is stated, the order takes effect 30 days after its date. The 30-day delay is designed as a transition period to enable the disciplined attorney to wind down his practice, give notices, transfer files, and perform the other duties imposed by section (c). Section (a) is patterned upon portions of A.B.A. Model Rule 27.E; District of Columbia Rule XI, §14(e), and a review of Court of Appeals precedents. See, e.g., AGC v. Awuah, 346 Md. 420, 436 (1997) (indefinite suspension effective 30 days after order filed); AGC v. Hallmon, 343 Md. 390, 410 (1996) (90-day suspension effective 30 days after order filed); AGC v. Glenn, 341 Md. 448, 491 (1996) (indefinite suspension effective 30 days after order), AGC v. Shandler, 341 Md. 287 (1996) (indefinite suspension by consent effective immediately); AGC v. Drew, 341 Md. 139, 154 (1996) (indefinite suspension effective 30 days after order); AGC v. Kandel, 341 Md. 113, 114 (1995) (30-day suspension effective two months after order); AGC v. Nelson, 340 Md. 689 (1995) (indefinite suspension by consent effective immediately); AGC v. Breschi, 340 Md. 590, 605 (1995) (6-month suspension effective 30 days after order); AGC v. Jeffries, 340 Md. 269 (1995) (indefinite suspension by consent effective 15 days after order); AGC v. Smith, 339 Md. 558 (1995) (Rule 16-721 suspension effective immediately); AGC v. Ross, 339 Md. 260 (1995) (30-day suspension effective 15 days after order); AGC v. Crawford, 338 Md. 365 (1995) (indefinite suspension by consent effective immediately); AGC v. McCourt, 337 Md. 291 (1995) (indefinite suspension by consent

effective 30 days after order).

Section (b) is new. It provides that, unless accompanied by a published opinion, an order of reprimand describe the nature of the violation and any condition imposed with the reprimand under section (h). See, e.g., AGC v. Gregory, 346 Md. 600 (1997); AGC v. Paugh, 345 Md. 692 (1997); AGC v. McLaughlin, 344 Md. 358 (1996); but see AGC v. Driscoll, 346 Md. 313 (1997) (unspecified); AGC v. Hickman, 346 Md. 244 (1997) (unspecified "violation"). This requirement conforms to other reprimand provisions in Rules 16-711 (g) and 16-719 (c)(2). Section (b) is consistent with the public nature of discipline and the goal of a reprimand to provide guidance to lawyers other than the respondent. See A.B.A. Model Rule 10.A(4).

Section (c) carries forward the concept in former Rule BV13 a 2 that an attorney may not practice law after entry of an order that disbars, suspends, or places an attorney on inactive status. In effect, it operates to enjoin that attorney from engaging in the unauthorized practice of law until the attorney is reinstated (if ever). Section (c) thus implements the prohibition on unauthorized practice set forth in Code, Business Occ. & Prof. Art., §10-601 (a). The second sentence warns against evasive violations "through an officer, director, partner, trustee, agent, or employee" who is an attorney, thus incorporating the statutory text of §10-601 (c). Section (c) is meant to avoid situations like that described in AGC v. James, 340 Md. 318 (1995), in which a suspended attorney remained in the office in which he had practiced, failed to cancel directory listings, did not notify clients of suspension, signed documents in the name of another attorney, and participated in settlement negotiations. A secondary purpose of section (c) is to remind other attorneys, in dealing with disbarred or suspended attorneys, not to "[a]ssist a person who is not a member of the bar in the performance of activity that constitutes the

unauthorized practice of law." Rule 5.5, Maryland Rules of Professional Conduct (Rule 16-812). See AGC v. Hallmon, 343 Md. 390, 397-401 (1996); AGC v. James, 340 Md. at 325-27.

Subsection (c)(1) forbids the respondent to occupy or maintain a presence in an office for the practice of law. It is derived from A.B.A. Model Rule 27.G. The text is identical to New Jersey Rule 1:20-20(b)(2). It establishes a bright line prohibition against setting the stage for a disbarred or suspended attorney to masquerade as a law clerk, paralegal or investigator so as to conceal the unauthorized practice of law. See AGC v. Hallmon, 343 Md. at 399 (indicating that paralegal work constitutes the practice of law and, unless adequately supervised, may constitute the unauthorized practice of law); AGC v. James, 340 Md. 318, 326-27 (1995). Subsection (b)(1) disapproves any permissible inference to the contrary that might be drawn from Matter of Murray, 316 Md. 303 (1989). See discussion in Matter of Murray and AGC v. James, 340 Md. at 324.

Subsection (c)(2) forbids the respondent's further use of any indicia of an attorney. It is derived from A.B.A. Model Rule 27.G, and implements the statutory prohibition against representations by title or description of services, methods or procedures that the person is authorized to practice law. Code, Business Occ. & Prof. Art., §10-602. The text is derived from New Jersey Rule 1:20-20(b)(4).

Subsection (c)(3) relates to the use of stationery, bank accounts, checks or labels on which the respondent's name appears as an attorney or in connection with a law office. It is derived from New Jersey Rule 1:20-20(b)(5).

Subsection (c)(4) forbids the respondent to solicit or procure any legal business or retainer for an attorney. It dispenses with the requirement of "personal gain" included in the barratry statute. Code, Business Occ. &

Prof. Art., §10-604(a). The text is derived from New Jersey Rule 1:20-20(b)(6).

Subsection (c)(5) forbids the respondent from sharing in fees for legal services performed after the effective date of the order, but allows compensation for services rendered prior to that date. The exception thus enables the respondent to collect and distribute accounts receivable and perform other acts necessary to conclude a law practice, as permitted by Code, Business Occ. & Prof. Art., §10-601(b). The text is derived from New Jersey Rule 1:20-20(b)(12).

Section (d) is new. It sets forth a list of duties that a respondent must discharge in obedience to an order that disbars, suspends, or places the respondent on inactive status. These duties must be performed in all such cases, whether or not stated expressly in the order, and thus constitute mandatory conditions precedent to future reinstatement. See New Jersey Rule 1:20-20, which is a catalogue of required activities to be completed by every attorney who is suspended, disbarred, or transferred to disability inactive status. Most of these requirements have been reflected, from time to time, in the disciplinary orders of the Court of Appeals. Section (d) is drafted in the belief that these requirements should be imposed uniformly.

Section (d)(1) prohibits the respondent from accepting any new clients or legal matters. It is derived from A.B.A. Model Rule 27.G. and Rule XI §14(e) of the District of Columbia Bar. Its provisions have appeared occasionally in disciplinary orders of the Court of Appeals. See, e.g., AGC v. Jeffries, 340 Md. 269 (1995) (respondent shall not accept any new clients); AGC v. Crawford, 338 Md. 365 (1995) (respondent shall undertake no further legal matters prior to effective date); AGC v. Armanas, 336 Md. 562 (1994) (same as above); AGC v. Noonan, 336 Md. 473 (1994) (same as above).

Subsection (d)(2) requires the respondent to complete matters in progress and then withdraw from such matters. It is derived in part from A.B.A. Model Rule 27.F. See Rule XI §14(b) and (e) of the District of Columbia Bar; New Jersey Rule 1:20-20(b)(10). An attorney who is disbarred, suspended, or placed on inactive status may no longer represent clients and is obligated to withdraw from their representation. Rule 1.16(a) and (d), Maryland Rules of Professional Conduct (Rule 16-812). See AGC v. Jeffries, 340 Md. 318, 327-28 (1995). The substance of this provision has appeared in reported disciplinary orders. See, e.g., AGC v. Guida, 343 Md. 560, 561 (1996) (respondent required to notify clients of suspension, and resulting inability to practice law during suspension and to advise clients that they should promptly seek counsel of their choice to take over their cases if need be and to advise them as to how and where they can obtain their files); AGC v. Joyner, 342 Md. 475 (1996) (same); AGC v. Hoff, 342 Md. 362 (1996) (same); AGC v. Silverman, 342 Md. 264 (1996) (same); AGC v. Jeffries, 340 Md. 269 (1995) (respondent shall take such action as is necessary to complete any current client matter or to withdraw from their cases and refer or transfer them to other counsel).

Subsection (d)(3) requires the respondent to provide Bar Counsel with a list of clients and to identify pending litigation matters. It is patterned on a requirement in New Jersey Rule 1:20-20(b)(14) ("an alphabetical list of the names, addresses, telephone number and file numbers of all clients whom the attorney represented on the date of discipline or transfer to disability inactive status"). The Court of Appeals has utilized similar provisions in its disciplinary orders. See, e.g., AGC v. Hallmon, 343 Md. 390, 410 (1996) (5 days to provide Bar Counsel with names and addresses of clients and to identify pending court matters); AGC v. Glenn, 341 Md. 448, 491 (1996) (5 days to provide Bar Counsel with names and addresses of clients and to identify pending court matters); AGC v. Drew, 341 Md.

139, 154 (1996) (5 days to provide Bar Counsel with names and addresses of clients and to identify pending court matters); AGC v. Jeffries, 340 Md. 269 (1995) (10 days to provide Bar Counsel with names, addresses, telephone numbers and case names for all clients whose matters are currently pending with respondent); AGC v. Crawford, 338 Md. 365 (1995) (10 days to provide Bar Counsel with list of clients by name, address, telephone number whose legal matters have not been concluded by respondent); AGC v. Armanas, 336 Md. 562 (1994) (10 days to provide Bar Counsel with list of clients by name, address, telephone number whose legal matters have not been concluded by respondent).

Section (d)(4) requires the respondent to notify by mail all clients and all counsel in pending actions. It is derived in substantial part from A.B.A. Model Rule 27.A. A similar requirement is imposed by Rule XI §14(a), (b), (c) of the District of Columbia Bar and New Jersey Rule 1:20-20(b)(10) and (11). This requirement is frequently encountered in disciplinary orders. See, e.g., AGC v. Hallmon, 343 Md. 390, 410-11 (1996) (respondent to mail letters to each client, and to counsel for any adverse party or to any unrepresented party, notifying them of 90-day suspension); AGC v. Glenn, 341 Md. 448, 491 (1996) (respondent to mail letter to each client, and to counsel for any adverse party or to unrepresented party, notifying them of indefinite suspension); AGC v. Drew, 341 Md. 139, 154 (1996) (same as above); AGC v. Ross, 339 Md. 260 (1995) (respondent to notify Maryland clients of 30-day suspension); AGC v. Crawford, 338 Md. 365 (1995) (respondent to write each client of fact that he is closing his practice on effective date of indefinite suspension); AGC v. Armanas, 336 Md. 562 (1994) (respondent to write each client of fact that he is closing his practice on effective date of indefinite suspension). Recent orders imposing suspensions have required respondents to notify clients promptly of the suspensions, the inability to practice law while suspended, and

the right of the clients to choose other counsel to take over their cases if need be. See, e.g., AGC v. Guida, 343 Md. 560 (1996); AGC v. Joyner, 342 Md. 475 (1996); AGC v. Hoff, 342 Md. 362 (1996); AGC v. Silverman, 342 Md. 264 (1996).

Subsection (d)(5) requires the respondent to supply Bar Counsel with copies of letters mailed under subsection (d)(4). A.B.A. Model Rule 27.C requires the respondent to maintain copies and make them available to Bar Counsel on request. Disciplinary orders of the Court of Appeals have imposed this requirement. See, e.g., AGC v. Hallmon, 343 Md. 390, 410 (1996) (copies of letters must be furnished to Bar Counsel within 15 days of order); AGC v. Glenn, 341 Md. 448, 491 (1996) (copies of letters must be furnished to Bar Counsel within 15 days of order); AGC v. Drew, 341 Md. 139, 154 (1996) (copies of letters must be furnished to Bar Counsel within 15 days of order); AGC v. Ross, 339 Md. 260 (1995) (copies of letters must be furnished to Bar Counsel within 15 days of order).

Subsection (d)(6) states as a condition that the respondent, unless suspended for a definite period of six months or less, may be required to request the publisher of any telephone directory, the Martindale-Hubbell Law Directory, or other law listing to remove any reference to the respondent as an attorney eligible to practice law. This provision is derived from New Jersey Rule 1:20-20(b)(7), while its exemption of six-month suspension is derived from Rule 1:20-20(C). The condition is consistent with case law. See, e.g., AGC v. James, 340 Md 318, 329 (1995) (respondent failed to cause telephone listing to be changed).

Subsection (d)(7) requires the respondent to return papers and property to the client. It is derived from A.B.A. Model Rule 27.D. The text is nearly identical to Rule XI §14(d) of the District of Columbia Bar. See also, New Jersey Rule 1:20-20(b)(10) and (11). Such a

requirement is also mandated by Rule 1.16(d), Maryland Rules of Professional Conduct (Rule 16-812).

Subsection (d)(8) requires the respondent to notify the disciplinary authority in each jurisdiction where the respondent is admitted of the disciplinary sanctions imposed by the Court of Appeals. It is derived from New Jersey Rule 1:20-20(b)(9).

Subsection (d)(9) requires the respondent to execute and file with the Commission a detailed affidavit that shows compliance with this Rule and the disciplinary order, identifies other jurisdictions in which the respondent is admitted, gives a forwarding address, provides information on malpractice coverage, and demonstrates proof of service on Bar Counsel. The affidavit must be filed within 30 days of the effective date of the disciplinary order, allowing ample time to wind up the law practice and discharge with other duties. The affidavit is filed with the Commission as permanent record, very useful in the event the respondent later petitions for reinstatement. Subsection (d)(9) is patterned on A.B.A. Model Rule 27.H, Rule XI §14(g) of the District of Columbia Bar, and New Jersey Rule 1:20-20(14).

Subsection (d)(10) requires the respondent to maintain records of the steps taken to achieve compliance with this section and the disciplinary order. It is derived from A.B.A. Model Rule 27.C. See New Jersey Rule 1:20-20(b)(13).

Section (e) is derived from former Rules BV13 a 1 and BV13 a 3, without substantial change. It requires the Clerk of the Court of Appeals to remove the name of the respondent from the register of attorneys and, as provided in former Rule BV13 a 3, to verify that fact to the Clients' Security Trust Fund and the clerks of all courts in this State. Disciplinary orders frequently recite these duties of the Clerk. See, e.g., AGC v. Zeiger, 347 Md. 107

(1997) (suspension for definite period); AGC v. Beckman, 346 Md. 370 (1997) (disbarment); AGC v. Dean, 346 Md. 243 (1997) (indefinite suspension); AGC v. Holzman, 345 Md. 348(1997) (inactive status).

Section (f) is new. It confirms Bar Counsel's primary responsibility to enforce the orders of the Court of Appeals and the provisions of this Rule. It also confirms Bar Counsel's authority to designate an attorney to monitor compliance and to receive papers from the respondent. Finally, it refers Bar Counsel to the notice requirement of Rule 16-709(e).

Section (g) is new. It is intended to govern three forms of suspension, i.e., for a definite period, an indefinite period (including all orders placing an attorney on indefinite suspension), and temporary suspension pending final discipline.

Subsection (g)(1) requires a suspension for a definite period to specify the period and any conditions imposed. This simply reflects current practice. See, e.g., AGC v. Haar, 347 Md. 108 (1997) (30 days, effective immediately); AGC v. Chang, 346 Md. 215 (1997) (six months effective June 21); AGC v. Kornblit, 345 Md. 693 (1997) (30 days, commencing on June 1, with escrow account monitoring for two years and other stated conditions); AGC v. Amos, 344 Md. 565 (1997) (six months, effective immediately, with stated conditions); AGC v. Gentile, 344 Md. 374 (1997) (30 days, commencing Dec. 31 and terminating January 31, with stated conditions).

Subsection (g)(2) provides that an order that imposes an indefinite suspension or places the respondent on inactive status may indicate a time or condition after which the respondent may apply for reinstatement. If no time or condition is stated, the respondent may apply after two years. The latter provision takes into account the lack of any conditions or time requirements in some orders imposing indefinite suspensions. See, e.g., AGC v.

Yates, 347 Md. 89 (1997) (inactive status); AGC v. Dean, 346 Md. 243 (1997) (indefinite suspension); AGC v. Gordon, 346 Md. 237 (1997) (indefinite suspension); AGC v. Mattie, 345 Md. 427 (1997) (inactive status). In most instances, of course, the order imposing an indefinite suspension reveals the time when the respondent may apply for reinstatement (although orders placing a respondent on inactive status seldom give any such indication). See, e.g., AGC v. Awuah, 346 Md. 420, 436 (1997) (respondent may "apply for reinstatement after the suspension has been in effect for 60 days"); AGC v. Sachse, 345 Md. 578, 594 (1997) ("right to reapply not less than one year from the date of the filing of this opinion"); AGC v. Garland, 345 Md. 383, 399 (1997) ("right to apply for readmission after the expiration of six months" and fulfillment of stated conditions); AGC v. Holzman, 345 Md. 348 (1997) (respondent "placed on inactive status until such time as he is able to demonstrate that he has been restored to good health and capable of engaging in the competent practice of law"). AGC v. Buttion, 345 Md. 40, 41 (1997) (respondent "placed on inactive status until such time as he is able to demonstrate that he is capable of engaging in the competent practice of law").

Subsection (g)(3) provides that a temporary suspension imposed under Rules 16-721, 16-722 or 16-723, unless vacated earlier, expires on the date when a final order is imposed under section (g) of Rule 16-736. The final order dismissing the petition or imposing discipline thus terminates the temporary suspension and controls the rights and disabilities of the respondent. See AGC v. Protokowicz, 326 Md. 714 (1992) (immediate temporary suspension imposed); id., 329 Md. 252 (1993) (ordering indefinite suspension with right to apply for reinstatement one year from date of final order).

Section (h) is new. It provides that an order that suspends a respondent or places the respondent on inactive status may impose one or

more conditions to be performed. An order of reprimand may also impose conditions. Disbarred respondents are not covered, because disbarment is an unconditional exclusion from the practice of law. An order that suspends the respondent or places the respondent on inactive status may impose two kinds of conditions. A condition precedent to reinstatement must be satisfied (unless modified, waived or excused) before a respondent may be considered for reinstatement. For example, a suspended attorney may be ordered to pay all court costs assessed by the order as a prerequisite to reinstatement. See, e.g., ACG v. Kornblit, 345 Md. 693 (1997) (prior to resumption of practice respondent shall file verified statement of compliance with terms of suspension); AGC v. Garland, 345 Md. 383, 399 (1997) (when applying for reinstatement, respondent must have met specified conditions and pay all costs as well as sums owing to the Clients' Security Trust Fund); AGC v. Chisholm, 345 Md. 347 (1997) (petition for reinstatement to be conditioned upon reinstatement in the District of Columbia); AGC v. Leishman, 345 Md. 41, 42 (1997) (payment of judgment for costs as a condition of reinstatement). A condition of probation after reinstatement is an obligation to be performed if the respondent is later successful in obtaining reinstatement, e.g., a requirement that the reinstated attorney engage a monitor to supervise any future law practice. See, e.g., AGC v. Awuah, 346 Md. 420, 436 (1997) ("respondent's reinstatement shall be conditioned upon his payment of all costs in this matter, and upon the monitoring of the financial management of his office for a period of one year"); AGC v. Gittens, 346 Md. 316, 327 (1997) (respondent's "reinstatement will be conditioned upon his compliance with the conditions set by the District of Columbia Court of Appeals"); AGC v. Kornblit, 345 Md. 693 (1997) (upon reinstatement respondent's escrow account shall be monitored for two years and he shall submit quarterly reports to Bar Counsel); AGC v. Sachse, 345 Md. 578, 594 (1997) (restitution of trust funds and

monitoring for two years).

Subsection (h)(1) states a condition to demonstrate by the report of a health care professional, or other evidence, that he or she is competent, mentally or physically, to resume the practice of law. The Court of Appeals utilizes such conditions, particularly in conjunction with orders placing a respondent on inactive status. See, e.g., AGC v. Jeffries, 340 Md. 269, 270 (1995) (as condition precedent to reinstatement after indefinite suspension, respondent shall present a report from health care professional that she is currently competent to undertake the practice of law); AGC v. Jones, 340 Md. 145 (1995) (same as above as condition precedent to reinstatement after inactive status); AGC v. Crawford, 338 Md. 365, 366 (1995) (prior to reinstatement after indefinite suspension respondent must establish that he is competent, mentally and physically, to resume the practice of law); AGC v. Armanas, 336 Md. 563 (1994) (same as above); AGC v. Noonan, 336 Md. 473 (1994) (same as above); AGC v. Brown, 332 Md. 451 (1993) (as condition precedent to reinstatement, respondent must prove that he is competent to take care of personal and business obligations); AGC v. Snowden, 331 Md. 478 (1993) (suspension to continue until respondent can demonstrate that she is capable of competently resuming the practice of law); AGC v. Johnson, 330 Md. 375 (1993) (inactive status until respondent can prove he has been restored to good health and is capable of engaging in the competent practice of law).

Subsection (h)(2) authorizes the order to require a respondent, upon reinstatement, to engage a monitor to oversee the respondent's practice, client files, accounts, and trust records, with periodic reports to Bar Counsel. A.B.A. Model Rule 25. It suggests, as an appropriate condition, the monitoring of a lawyer's practice for compliance with trust account rules, accounting procedures, or office management techniques. New Jersey Rule 1:20-18 imposes detailed monitoring requirements

including violation notices, weekly conferences, time records, and quarterly reports. Disciplinary orders have frequently been conditioned upon the selection of a monitor, satisfactory to Bar Counsel, to supervise the respondent's practice. See, e.g., AGC v. Awuah, 346 Md. 420, 436 (1997) (monitor approved by Bar Counsel to oversee financial management of law office for one year); AGC v. Kornblit, 345 Md. 493 (1997) (escrow account practices to be monitored for two years, with monitor to submit quarterly reports to Bar Counsel); AGC v. Sachse, 345 Md. 578 (1997) (respondent to be monitored for two years); AGC v. Hallmon, 343 Md. 390, 411 (1996) (respondent at his expense to engage a monitor acceptable to Bar Counsel to oversee his practice of law and his accounting for entrusted funds); AGC v. Glenn, 341 Md. 448, 491 (1996) (monitor to oversee accounting for funds entrusted to respondent).

Subsection (h)(3) states as a condition that every former client has been reimbursed for any fee paid for legal services that were not completed prior to the effective date of suspension. The reported disciplinary orders seldom include this condition. See, e.g., AGC v. Crawford, 338 Md. 365 (1994); AGC v. Noonan, 336 Md. 473 (1994). However, there can be no doubt that a respondent is under an obligation of "refunding any advanced payment of fee that has not been earned." Rule 1.16(d), Maryland Rules of Professional Conduct (Rule 16-812). A recent consent order required the respondent, as a condition of reinstatement, to provide verification to Bar Counsel that he had agreed to submit to some form of fee dispute arbitration in any matter where a specified client requested such arbitration. AGC v. Amos, 344 Md. 565 (1997).

Subsection (h)(4) states as a condition that the respondent must satisfy any judgment arising out of the respondent's law practice as well as any claims caused to be made against the Clients' Security Trust Fund. For a similar condition, see Rule XI §3(b) of the

District of Columbia Bar and AGC v. Armanas, 336 Md. 562, 563 (1994).

Subsection (h)(5) states as a condition that the respondent may be required to make full restitution to a client of a sum not substantially in dispute. This condition is derived from A.B.A. Model Rule 10.A(6) and Rule XI §3(b) of the District of Columbia Bar. This provision facilitates restitution to victims of misconduct when all or part of the amount of loss is conceded or stipulated. However, where the amount is in dispute or third party rights are involved, separate proceedings may be necessary. For that reason subsection (h)(5) applies only to "any sum not substantially in dispute." Such a condition has been imposed, albeit sparingly, by the Court of Appeals. See, e.g., AGC v. Gregory, 346 Md. 600 (1997) (reimbursement of $5,294); AGC v. Sachse, 345 Md. 578, 594 (1997) (restitution of trust assets); AGC v. Dietz, 331 Md. 651 (1993) (refund of $500 fees); AGC v. Brown, 332 Md. 451 (1993) (restitution of $600); AGC v. Eason, 332 Md. 139 (1993) (joint petition; condition of reinstatement that respondent pay confessed judgment note of $100,000 before filing a reinstatement petition).

Subsection (h)(6) states as a condition that the order of the Court of Appeals may limit the notice or extent of the respondents future practice of law. It is derived from A.B.A. Model Rules 10.A(8) and 25.I.

Subsection (h)(7) states as a condition that the respondent pay costs assessed by the disciplinary order and mandate of the Court of Appeals. It is derived from A.B.A. Model Rule 10.A(7). Usually, the order itself will require the respondent to pay the costs. See, e.g., AGC v. Gregory, 346 Md. 600 (1997); AGC v. Awuah, 346 Md. 420, 436 (1997); AGC v. Gittens, 346 Md. 316, 327 (1997); AGC v. Driscoll, 346 Md. 313 (1997); AGC v. Sachse, 345 Md. 577, 594 (1997). See also sections (a) and (e) of Rule 16-739. However, if costs remain unpaid in violation of an express

condition, the respondent's failure to comply will pose a bar to reinstatement under section (l)(1). See New Jersey Rule 1:20-17(e)(2) (Supreme Court will not consider reinstatement unless accompanied by certification that all assessed disciplinary costs have been paid). See AGC v. Awuah, 346 Md. at 420 (reinstatement shall be conditioned upon payment of all costs); AGC v. Garland, 345 Md. 383, 399 (1997) (reinstatement conditioned upon payment of all costs, as well as sums owed to the Clients' Security Trust Fund); AGC v. Adams, 333 Md. 322 (1994) (costs must be paid prior to any reinstatement).

Subsection (h)(8) states as a condition that the respondent participate in a program, tailored to individual circumstances, such as law office management assistance, lawyer assistance or counseling, treatment for alcohol or substance abuse, psychological counseling, or specified courses in legal ethics, professional responsibility or continuing legal education. Programs of this nature are remedial and rehabilitative and, as such, are included in probation agreements under Rule 16-716(b). Appropriate remedial conditions of this nature are endorsed by A.B.A. Model Rule 25.I (e.g., participation in continuing legal education courses; abstention from the use of drugs or alcohol; active participation in Alcoholics Anonymous or other alcohol or drug rehabilitation programs). Conditions of this nature have appeared occasionally in the disciplinary orders. See, e.g., AGC v. Garland, 345 Md. 383, 399 (1997) (respondent ordered to abstain from consumption of alcoholic beverages and participate in rehabilitative activities prescribed by Bar Counsel); AGC v. Hallmon, 343 Md. 390, 411 (1996) (respondent must register for and successfully complete courses in legal ethics and law office management); AGC v. Lekin, 339 Md. 200, 201-02 (1995) (respondent must continue to attend meetings of Alcoholics Anonymous and report for lawyer counseling); AGC v. McCourt, 337 Md. 291, 292 (1995) (respondent to remain abstinent from use of

alcohol and other mind-altering substances, participate in urinalysis and similar activities, and continue health care treatment for addiction); AGC v. Porter, 334 Md. 285 (1994) (respondent to maintain participation in Alcoholics Anonymous and other activities prescribed in lawyer counseling program).

Subsection (h)(9) states as a condition that a respondent may be required to issue a public apology to designated individuals.

Section (h)(10) permits the Court of Appeals to formulate conditions that are tailored to the particular respondent and the misconduct that is to be redressed. Specific terms and conditions may be set forth in the joint petition, as incorporated by order. See, e.g., AGC v. McLaughlin, 344 Md. 372, 373 (1996). Thus, the respondent may be required to participate in any program or take any corrective action that the Court of Appeals finds to be reasonable and appropriate.

Section (i) is new. It prohibits an attorney to employ, share office space with, or authorize legal services to be performed by a respondent after the effective date of an order that disbars or suspends the respondent (or excludes a non-admitted respondent) or places the respondent on inactive status. This provision is derived from New Jersey Rule 1:20-20(a) and (d). It is consistent with Rule 5.5(b), Maryland Rules of Professional Conduct (Rule 16-812), which forbids a lawyer to assist a non-lawyer in the performance of activity that constitutes the unauthorized practice of law. See AGC v. Hallmon, 343 Md. 390, 397-401 (1996). See also AGC v. James, 340 Md. 318, 326-27 (1995) (quoting opinion outlining the ethical problems likely to be encountered by an attorney who would hire a disbarred lawyer).

Section (j) is derived from former Rule BV13 b, with style changes and conforming modifications. Subsection (j)(1) limits the scope of this provision to a respondent "not admitted by the Court of Appeals to practice

law", which phrase is taken verbatim from former Rule BV13 b 1. The first sentence of subsection (j)(2) is derived from former Rule BV13 b 1, but applies on the "effective date" rather than "entry" to conform to section (e) of this Rule. The second sentence of subsection (2) is new and has been added to conform to current practice. See, e.g., AGC v. Marshall, 346 Md. 120 (1997) (disbarment of non-admitted attorney); AGC v. Ray, 343 Md. 254 (1996) (indefinite suspension of non-admitted attorney). The third sentence of subsection (3) is a reference to Rule 16-709 (e), requiring Bar Counsel to notify disciplinary authority in any jurisdiction where the non-admitted attorney is licensed. Subsection (j)(3) likewise refers to the "effective date" and disqualifies the respondent from gaining admission to practice. It is derived from the first sentence of former Rule BV13 b 2.

Section (k) is derived in part from former Rule BV14 and is in part new. Former Rule BV14 dealt primarily with reinstatement, but also authorized a petition to modify or terminate a suspension or inactive status (BV14 a), required it to be verified (BV14 b), served on Bar Counsel (BV14 c), and proved by clear and convincing evidence (BV14 d 4). The Court of Appeals was authorized to dismiss the petition without a hearing (BV14 d 1) or to reserve judgment until after a hearing (BV14 d 2). Section (k) embodies these concepts, but transfers the former provisions to the rule governing disciplinary orders. It contemplates that control over disciplinary orders should be vested in the Court of Appeals, where the orders originated, and that modification of the orders can be granted or denied by that Court on the basis of stipulations or motions, without further proceedings in most instances. In those rare instances in which a hearing is necessary to resolve factual issues, the Court of Appeals may assign the petition for modification to a lower court for a hearing and finding of facts on those issues in accordance with Rules 16-732 and 16-735. The new standard for modification ("the respondent is attempting

in good faith to comply with the order but that full and exact compliance has become impossible or will result in unreasonable hardship") is derived in part from A.B.A. Model Rule 26. The authority to "reduce a period of suspension" is derived from former Rule BV14 e 1.

Section (l) is new. It provides sanctions for violations of a disciplinary order of the Court of Appeals.

Subsection (l)(1) provides that the failure to substantially comply with the duties imposed by sections (c) and (d) and the order (including any stated conditions), unless excused, shall be cause for dismissal without a hearing of a petition for reinstatement filed under Rule 16-738. This provision is derived from New Jersey Rule 1:20-20(b)(14).

Subsection (l)(2) authorizes Bar Counsel to file a petition for disciplinary action pursuant to Rule 16-731 if the misconduct consists of an alleged violation of sections (c) or (d) or the disciplinary order. Although Bar Counsel must prove the alleged violation by clear and convincing evidence, it is not necessary to bring the matter before a Hearing Panel before filing a petition in the Court of Appeals.

Subsection (l)(3) implements Code, Business Occ. & Prof. Art. §10-406, which authorizes Bar Counsel to bring an action (or intervene in an action brought by the Attorney General) to enjoin an unauthorized person from practicing, attempting to practice, or offering to practice law. In the event that the unauthorized person disobeys an order of the Court in which the action is pending, Bar Counsel as a "party to the action in which [the] alleged contempt occurred", Rule 15-206 (b)(2), would be authorized by that provision to initiate a proceeding for constructive civil contempt in that court.

Subsection (l)(4) authorizes a proceeding for constructive contempt pursuant to Rules 15-

> 205 and 15-206 for violation of sections (c) and (d) or a disciplinary order of the Court of Appeals. It is derived from a statement in New Jersey Rule 1:20-20(b)(14) that such a violation "shall constitute a contempt of court" The Attorney General may institute a proceeding for constructive criminal contempt committed against the Court of Appeals. Rule 15-205 (b)(3)(A). Subsection (l)(4) thus authorizes the Commission to "cause to be initiated" such a proceeding by requesting the Attorney General to file a contempt petition, as authorized by Rule 15-205 (b)(5). Ordinarily, because of the serious nature of a contempt proceeding, and the express standing conferred upon a "party to the action", the Commission alone is authorized to initiate a civil contempt proceeding. Rule 15-206 (b)(2).

Mr. Howell explained that this Rule provides that when an attorney is disbarred or suspended from the practice of law or placed on inactive status, the order of the Court of Appeals disbarring or suspending the attorney may contain conditions and requirements imposed on the attorney. The problem is the extent to which the attorney takes seriously the obligation not to practice law. The provisions in the Rule are derived from a variety of sources, including the Amercian Bar Association (ABA) Model Rule, prior Court of Appeals decisions, and decisions in sister states. The Chair commented that there was a recent Court of Appeals case which involved this. Mr. Howell said that when an attorney who has flouted the suspension then requests reinstatement, the attorney may argue that the order suspending him or her was not clear.

Mr. Hochberg commented that subsection (c)(1) goes too far. If

a sole practitioner owns his or her office building, the attorney would not be able to go into that building. The Vice Chair agreed that subsection (c)(1) is overbroad. The Chair observed that the suspended attorney may occupy space on a floor other than that which holds the law office. Mr. Hochberg noted that there may be common space, such as a library or kitchen, into which the suspended attorney goes. Mr. Sykes stated that the suspended attorney may be working as a paralegal, and this may cause problems. The Chair said that the Rule could provide that the suspended attorney cannot be an employee of another law firm or attorney. Judge Kaplan observed that the suspended attorney may be an independent contractor.

Mr. Howell explained that the intention of the Subcommittee was that the scope of subsection (c)(1) was narrower. The phrase "office for the practice of law" is a term of art. The subsection could be reworded to use that term. The idea is that the suspended attorney should not be performing services for another attorney in any capacity. The suspended attorney is not being monitored. Judge Vaughan remarked that the suspension of the attorney anticipates rehabilitation. For a substance abuse situation, the suspension provides an opportunity to establish that the suspended attorney is ready to reassume his or her duties. It would be better to have the suspended attorney working under the supervision of other attorneys. Mr. Howell cautioned about the unauthorized practice of law. The Chair commented that unless the Court of Appeals orders to the

contrary, there may be situations where the Court would not object if the suspended attorney would be in his or her office to talk to people about prior cases.

Mr. Howell pointed out that section (a) refers to the effective date of the order. The attorney could assist clients to take steps to find representation for the clients before the effective date of the order suspending the attorney. Mr. Sykes observed that if an attorney is suspended for 60 days, the attorney probably will not cancel the lease on his or her office or take out the books and desks. Mr. Howell remarked that it is clearly a violation, even during a short suspension, to engage in any form of the practice of law. The Subcommittee had considered providing for a suspension of not less than six months, because a 30-day suspension is very difficult to enforce, but the Subcommittee decided not to include the six-month requirement.

Judge McAuliffe asked if the suspended attorney is able to do what other non-lawyers do. Mr. Howell answered in the negative. Mr. Hochberg added that non-lawyers serve subpoenas and do law clerk work. Judge McAuliffe inquired if a suspended attorney can search titles, and Mr. Howell responded that the Rule does not answer this question. Judge McAuliffe questioned as to how far in a constitutional sense the Rule can go in taking away a suspended or disbarred attorney's right to earn a livelihood. Why should a disbarred attorney not be able to do what a non-attorney can do?

Judge McAuliffe said that he recognizes there would be a temptation on the part of the suspended or disbarred attorney to practice law.

Mr. Hochberg suggested that subsection (c)(1) could be revised to clarify that the attorney cannot share or use office space for the purpose of practicing law. Mr. Howell cautioned about the appearance that the attorney is practicing law. Judge McAuliffe remarked that he knows disbarred attorneys who do title searches and legal research. Mr. Sykes expressed the opinion that these activities are proper as long as Bar Counsel knows about this and is able to monitor the suspended or disbarred attorney. The Chair said that after disbarment, a basis of readmission could be the attorney's good work as a paralegal. The Rule is trying to prevent an attorney from earning money for doing work as a lawyer as opposed to doing work as a legal assistant. Mr. Howell noted that there have been decisions by the Court of Appeals concerning a legal assistant engaged in the practice of law. One case is AGC v. Hallmon, 343 Md. 390 (1996), which held that paralegal work is the practice of law, and without adequate supervision may constitute the unauthorized practice of law. Judge McAuliffe commented that there is no certification process for paralegals, and anyone can become a paralegal for a law firm. Mr. Howell said that there are accepted parameters of what a paralegal can do. Being a self-employed paralegal may constitute the unauthorized practice of law since an attorney has to supervise a paralegal.

Judge Vaughan remarked that working as a paralegal is the best way to rehabilitate the attorney, since the supervising attorney can determine if the problem with the suspended or disbarred attorney has ended. Mr. Howell explained that after a six-month suspension, the attorney can apply for readmission, demonstrating his or her rehabilitation. A suspension may be accompanied by a requirement of attendance in a program dealing with substance abuse. The hope is that the Rule gives the Court of Appeals the tools to tailor each situation.

The Vice Chair pointed out that the Reporter's note to subsection (c)(1) indicates that the provision is new. She suggested that it be deleted as unnecessary. Mr. Bowen commented that clients are very loyal to disbarred attorneys, and if that provision is removed, it would open the door to the possibility of many violations. It would be a mistake to take subsection (c)(1) out. Mr. Brault noted that an alternative could be crafted, similar to the position of a certified medical assistant which position is provided for by statute. The certified medical assistant is parallel to the true paralegal; however, there is no certification process for paralegals. Physicians hire certified medical assistants, and the physicians prepare work plans which define what the medical assistant is to do. The assistant's conduct is supervised by the physician. As part of the certification process, the assistant's work plan is approved. Mr. Brault suggested that as a middle ground in the

current situation, notice could be given to Bar Counsel of the permitted work plan and the supervision method of the disbarred or suspended attorney.

The Chair said that there are situations where it is appropriate to allow the attorney to work as a paralegal. He suggested that the following language, which is in section (d): "[u]nless otherwise stated in the order of the court," should be put into section (c) also. In its order, the Court of Appeals can address the issue of whether the attorney may serve as a paralegal.

Mr. Hochberg asked if subsection (c)(1) is to stay in the Rule. The Chair answered affirmatively. Mr. Hochberg expressed his opposition to that provision. He pointed out that a disbarred attorney may want to start an insurance business in the attorney's own building. The Chair said that there should be a common sense approach to subsection (c)(1). A broad reading would mean that an attorney who is charged with a crime cannot go to one of his or her former partners for legal advice. Mr. Howell asked if the word "regularly" should be added to subsection (c)(1). Mr. Bowen remarked that if a suspended attorney sees another attorney because of an auto accident, the suspended attorney is not occupying, sharing, or using office space. Mr. Brault commented that an attorney who has been disbarred for alcoholism may be doing legal research and writing memoranda. The attorney does not occupy his or her former office,

but is in the library every day researching and writing. The Rule does not preclude this. Mr. Sykes questioned whether the Rule should preclude this. Judge Rinehardt said that the attorney is not holding himself or herself out to the public as an attorney. Mr. Brault noted that the Rule does not provide that the suspended or disbarred attorney cannot visit his or her former office. Mr. Hochberg asked why each situation needs to be defined. It is preferable to add the phrase "for the practice of law" in subsection (c)(1). Mr. Brault observed that an attorney cannot practice law after disbarment, and language could be added to the Rule to clarify this.

Mr. Grossman pointed out that the Reporter's note refers to the case of Matter of Murray, 316 Md. 303 (1989). The note states that subsection (c)(1) disapproves any permissible inference to the contrary that might be drawn from the Murray case. The proposed Rule would not allow such cases. Mr. Grossman said that he has no opposition to a disbarred or suspended attorney working as a paralegal. The Chair commented that there could be a reason to prohibit this, but the Court of Appeals can make the decision and tailor the order accordingly. The Court knew that Mr. Murray was working as a paralegal.

Mr. Grossman commented that he liked the Chair's suggestion to add the language from section (d) which reads "[u]nless otherwise stated in the order of the Court of Appeals" into section (c). The Chair said that the language could go at the beginning of the last

sentence before the list in section (c). Mr. Klein suggested that the added language go after the word "and" and before the word "shall". The Committee agreed with these suggestions by consensus.

Turning to section (d), the Chair asked if the time limits are realistic, such as the 10-day time limit in subsection (d)(3). Mr. Howell replied that the time limits are drawn from the universe of sources he previously cited, including prior Court of Appeals orders. The Chair inquired if subsection (d)(2) is sufficient to require a formal withdrawal of an attorney's appearance. Mr. Howell answered that it is. Mr. Sykes remarked that when there is a short suspension, often nothing happens in the case, and the attorney reenters practice at the end of the suspension. Mr. Howell said that the Court of Appeals can and does delay the effective date of the suspension. The Chair commented that in a specially set case, which is complicated and governed by differentiated case management, the trial date may be one-and-a-half years away, while the attorney is only suspended for 90 days. Does the attorney withdraw his or her appearance then reenter appearance? Judge McAuliffe responded that the attorney does do that. This provides a signal to the client.

Turning to section (e), the Chair noted that this is similar to existing Rule 16-713. The formality of striking the name of the suspended or disbarred attorney from the register of attorneys is always done in every Court of Appeals order.

The Chair drew the Committee's attention to section (f). He

explained that Bar Counsel ensures compliance with the court orders. Bar Counsel may request appointment of a conservator later in the proceedings. The idea is that the disbarment is effective immediately. The attorney may have no further duty to the court and walks away leaving the case in a mess.

Mr. Howell pointed out that in section (g), the orders are related to the types of suspension of which there are three: (1) definite, (2) indefinite, which was the type being discussed earlier concerning rehabilitation and courses, and (3) temporary, where the attorney is convicted of a crime, the court has ordered a suspension during the pendency of an appeal, and the conviction is reversed. The Chair asked about the last sentence of subsection (g)(2). Mr. Howell answered that this is new and was added to impose a two-year period before the attorney who has received an indefinite suspension is able to apply for reinstatement unless the order provides to the contrary. Mr. Grossman remarked that this is consistent with Court of Appeals practice. He noted that an indefinite suspension without a date by which the attorney can reapply is only slightly less severe than disbarment. Mr. Howell added that some attorneys may feel ready to reapply two weeks after the suspension begins, and this provision is designed to avoid that situation. The Chair asked if a disbarred attorney can apply two years after the disbarment. Mr. Howell replied that the practice has been that the disbarred attorney does not apply until five years has elapsed. Other states have a five-

year requirement.

Mr. Howell drew the Committee's attention to section (h). He explained that this covers the conditions which the Court of Appeals may impose. The conditions may be tailored to the individual situation. Subsection (h)(10) is a catchall. The idea is to give the Court the maximum ability to correct the attorney's past, enabling the attorney to reform and be rehabilitated by changing his or her habits. Mr. Johnson questioned whether the public apology in subsection (h)(9) has taken place in Maryland. Mr. Howell answered that it has not happened in Maryland. The idea was discussed in the Subcommittee, and the Honorable Alan M. Wilner, who was then Rules Committee Chair, thought it might solve some of the problems. Judge Kaplan observed that there is a public apology available in the Judicial Disabilities Rules. The Chair commented that appropriate situations for a public apology might be after an attorney makes disparaging remarks about a judge, a jury, or the police. Providing for the public apology might tone down the rhetoric.

Mr. Howell drew the Committee's attention to section (i). He said that this provision is new and is derived from a rule in New Jersey. It prohibits an attorney not being disciplined from employing, sharing office space with, or authorizing legal services to be performed by a suspended or disbarred attorney. This provision is consistent with section (b) of Rule 5.5 of the Rules of Professional Conduct, Unauthorized Practice of Law, which forbids an

attorney from assisting a person, who is not a member of the bar, in the practice of law. Mr. Sykes pointed out that the same question arises as was discussed earlier -- the meaning of the term "legal services." The Chair suggested that the language "in connection with the practice of law, employ" be deleted, and the language "a respondent to practice law" be substituted for the language "legal services to be performed by a respondent." Mr. Grossman commented that this is already prohibited by the Rules of Professional Conduct. The Chair responded that it is better to have this language in the Rule.

Mr. Howell suggested that there be a cross reference to Rule 5.5 in section (i). Mr. Brault suggested that the language in the beginning of section (i) could read "or authorize legal services to be performed as a lawyer." Mr. Sykes pointed out that the suspended or disbarred attorney would answer this by saying he or she was not an attorney. It would not be clear as to what services are being prevented. Judge Vaughan asked if searching title is a legal service. Judge Rinehardt answered that if a person researches or searches title for another attorney, it is permissible, but this service cannot be performed directly for a client. Judge Vaughan commented that a broad interpretation of the term "legal services" could include title searching.

Mr. Howell expressed the view that the term "legal services" should not be left as a mystery. The intent is to prohibit an

attorney from authorizing or assisting a suspended or disbarred attorney in the practice of law. Mr. Klein suggested that this could be tied to the order in section (c). Mr. Howell suggested that section (i) begin as follows: "After the effective date of an order of the Court of Appeals that disbars or suspends the respondent from the practice of law or places the respondent on inactive status, no attorney shall assist the respondent in any activity that constitutes the practice of law or in any activity prohibited under section (c) of this Rule." This would take the place of the first sentence currently in section (i). The Committee agreed by consensus to this change.

Mr. Johnson remarked that this Rule applies to someone who works for a law firm, but attorneys can also be in-house counsel to a bank or general counsel to a corporation. Judge Kaplan said that the Rule means that one cannot work as general counsel. Mr. Howell added that one cannot work as general counsel within the practice of law. The only purpose served by the second and third sentences is to place the affirmative obligation on entities to assist disbarred or suspended attorneys in exiting the practice of law. This is referring to a law firm, so that the obligation to ensure compliance does not fall entirely on Bar Counsel. Mr. Johnson observed that co-counsel in a criminal case may not be from the same firm. He asked if this Rule would apply to that situation. Mr. Howell responded that it would not apply, but the suspended attorney may be co-counsel

in many cases. The Rule is referring to an attorney who is part of a law firm, day in and day out. Others in the firm see to the compliance of the attorney. The duty is spread around. It is difficult to draw a bright line, so the Rule is kept narrow.

The Chair commented that to insure compliance with the rule, others as well as the respondent have to comply. Mr. Sykes noted that short suspensions are a problem. The law firm would have to deface or throw out its stationery. The Chair said that the firm would have to take reasonable action which the Court would take into consideration. Mr. Brault suggested that the second sentence be changed to read "An attorney who at the time of such an order is affiliated with the respondent as a member of a law firm or shareholder of a professional corporation, upon notice of the order, shall take reasonable action to insure compliance with the Rule." The Committee agreed by consensus to this change. Mr. Hochberg remarked that there is a continuing obligation by the firm as long as the respondent is still a shareholder. Mr. Howell said that to be clear, this duty is supposed to refer to the period before an effective date. Compliance with the Rule is not ongoing.

Mr. Howell drew the Committee's attention to section (j.) He explained that this covers the out-of-state attorney. It brings together all the provisions in the existing rules in one place. Mr. Brault remarked that this is broader than the pro hac vice rule. He referred to the case of Attorney Grievance Commission v. Hyatt, 302

Md. 683 (1985), which held that an attorney can intentionally mislead the Maryland population through conduct in Ohio (the conduct was advertising.) Mr. Grossman observed that the supervising Maryland attorneys are the subject of the Rule. Mr. Sykes inquired as to how one would know that a non-admitted attorney has been disbarred or never barred. Mr. Grossman answered that the state where the attorney was barred takes reciprocal action. Under Rule 8.5, this fulfills the conditions. Mr. Brault noted that this Rule was created after the Hyatt case. Maryland may have been the first state to do this, and other states copied the rule.

Turning to section (k), Mr. Howell explained that this provision affords flexibility to the parties and the Court of Appeals. It is activated by a joint stipulation by the suspended attorney and Bar Counsel, who agree that the condition which was initially imposed is not necessary any more, or that the suspension should be reduced. There may have been an unforeseen situation which could not have been anticipated by the Court of Appeals, and this allows the conditions to be modified.

The Chair suggested that the first sentence of section (k) could begin with language indicating that the Court of Appeals may want to modify the order on its own motion. Mr. Howell said that he was not sure he agreed with this suggestion. The Court basically frowns on motions. The idea of the Rule is that Bar Counsel would be willing to modify the order. If not, Bar Counsel would make a

showing resisting the motion. The Rule should not encourage frequent motions. This provision is used when the attorney is trying to perform requirements that are no longer possible to perform, such as having been required to take a course which is no longer offered. The Chair noted that there are a series of cases which give the Court the right to do on its own anything that a party can request of the Court. The Rule appears to take this option away. Mr. Howell stated that the way he prefers is that the Court need not be bothered unless Bar Counsel and the attorney do not agree. Otherwise, it creates a burden on the Court. The Chair said that the provision could be shortened. Mr. Sykes remarked that the Style Subcommittee will take care of modifying section (k).

Mr. Howell drew the Committee's attention to section (l). He explained that this provision contains a possible list of sanctions for violations. Mr. Sykes noted that subsection (l)(1) puts the cart before the horse. There should be an opportunity to contest whether the respondent has demonstrated substantial compliance. Mr. Howell commented that the petitioner has the burden to aver substantial compliance in the petition for reinstatement. He suggested that the language "without a hearing" be deleted. The Court has the clear authority to dismiss the petition if the petitioner cannot demonstrate compliance. The Committee agreed by consensus to this suggestion.

Mr. Howell told the Committee that subsection (l)(2) gives Bar

Counsel the right to go to the Court of Appeals without going to an Inquiry Panel. This provides a quick strike if the suspended or disbarred attorney is practicing law. Subsection (l)(3) provides for an injunction. Subsection (l)(4) provides for a contempt proceeding. The Chair suggested that the word "constructive" be taken out. Mr. Howell agreed to this, and the Committee agreed to this deletion by consensus. Mr. Sykes asked about the language "if justice cannot otherwise be achieved." He noted that determining whether justice cannot otherwise be achieved or whether there is a less restrictive alternative would be a litigable issue. The Chair suggested that this language be deleted, and the Committee agreed by consensus to his suggestion.

Judge Kaplan moved to approve the Rule as it was amended at today's meeting. The motion was seconded and passed unanimously.

Judge McAuliffe expressed his concern at the concept discussed earlier which is that paralegals may practice law under the supervision of an attorney. His feeling has been that that is not true. Rule 5.3 which provides for nonlawyer assistants does not mean that a secretary has a license to practice law under the supervision of an attorney. The Chair stated that providing legal services is not the equivalent of the practice of law. A paralegal does not practice law. Judge McAuliffe pointed out that a paralegal cannot give advice to a client. Paralegals cannot practice law, but can assist attorneys. Mr. Brault remarked that it is difficult to define

the practice of law. Mr. Sykes inquired if a disbarred attorney can be a paralegal. The Reporter said that the decision was that the Court of Appeals has to approve this in the order. The Vice Chair asked if the Committee has to decide if a disbarred or suspended attorney can be a paralegal. This is being prohibited by the language of the Rule. It is not within the province of the Rules Committee to decide this.

The Chair stated that Rule 5.5 (b) does not prohibit an attorney from employing a disbarred or suspended attorney as a paralegal. Rule 16-737 is consistent with this. The Vice Chair observed that the Reporter's note to subsection (c)(1) indicates that paralegal work is the practice of law. Mr. Howell suggested that that portion of the Reporter's note be deleted, and the Committee agreed with this suggestion by consensus. The Vice Chair remarked that the existing Rule does not prohibit a disbarred attorney from being a paralegal. The Chair commented that it is difficult to police this when an attorney is given a short suspension. Mr. Bowen had observed that if there is any ambiguity in the Rule, attorneys will jump through the gap. The addition of the language "unless ordered by the Court of Appeals" will take care of this problem. Mr. Sykes noted that there are short suspensions, long suspensions, and disbarments. An attorney suspended for 60 days cannot be a paralegal. The Chair clarified that the attorney can be a paralegal, but he or she cannot go to the office. Judge Rinehardt remarked that

a suspended attorney cannot be supervised if the attorney does not go to the office.

Mr. Bowen suggested that the order prohibit attorneys from acting as paralegals. The Vice Chair questioned if this is in the order, and then six months later, the attorney wants to be a paralegal, the attorney could file a motion to change the order. Mr. Howell pointed out that if the prohibition is put into the orders, there will be an increase in motions to modify. Mr. Brault said that the suspended or disbarred attorney has to play a lesser role than the supervising attorney. A disbarred attorney could hire a young lawyer who just passed the bar, the disbarred attorney effectively practicing law through the young attorney. This should be precluded. The Chair stated that Rule 16-737 does not permit this.

Judge Kaplan moved to adopt the Rule as amended, the motion was seconded, and it carried unanimously.

Mr. Howell presented Rule 16-738, Reinstatement, for the Committee's consideration.

Rule 16-738. REINSTATEMENT

(a) Petition

A petition for reinstatement to the practice of law shall be filed in the Court of Appeals. It shall be verified, include a docket reference to all prior disciplinary actions to which the petitioner was a party, and append a copy of the order that disbarred, suspended, or excluded the petitioner from the practice of law, placed the petitioner on

inactive status, or accepted the petitioner's resignation. The petition shall certify that the petitioner has complied in all respects with the provisions of Rule 16-737 and with the terms and conditions of the disciplinary order. In addition, except as provided in section (e) of this Rule, the petition shall allege facts describing the petitioner's original misconduct, subsequent conduct and reformation, present character, present qualifications and competence to practice law, and ability to satisfy the criteria specified in section (g) of this Rule.

(b) Restriction As To Disbarred Petitioner

A former attorney who was disbarred by order of the Court of Appeals may not petition for reinstatement until the expiration of at least five years from the effective date of the order.

(c) Processing Fee

At the time of filing a petition for reinstatement under this Rule, and in addition to any filing fee or costs prescribed by law, the petitioner shall deposit with the Clerk of the Court of Appeals a non-refundable processing fee in the amount of $1,000 payable to the Disciplinary Fund to cover the reasonable administrative costs of processing the petition. The fee required by this section shall not apply to a petition filed in accordance with section (e) of this Rule.

(d) Service Of Petition

The petition shall be served upon Bar Counsel and upon any other person designated by order of the Court of Appeals on request of Bar Counsel.

(e) Consent To Immediate Reinstatement

Upon the expiration of a suspension for a definite period, specified in the order of the Court of Appeals, if the suspended attorney

files and serves a petition in compliance with sections (a) and (d) of this Rule, Bar Counsel may consent to reinstatement by written notice to the Clerk of the Court of Appeals that Bar Counsel is satisfied that the attorney has complied in all respects with the provisions of Rule 16-737 and with the terms and conditions of the order imposing the suspension. Upon receipt of Bar Counsel's consent, the Clerk shall proceed in accordance with the applicable provisions of section (l) of this Rule. If there is no consent to reinstatement, Bar Counsel shall respond to the petition in accordance with section (f) of this Rule.

(f) Response To Petition

Within 30 days after being served with the petition, unless a different time is ordered, Bar Counsel shall file in the Court of Appeals a response to the petition and serve a copy on the petitioner. The response shall admit or deny the averments of the petition in accordance with section (c) of Rule 2-323 and may include a statement of Bar Counsel's recommendations and reasons for supporting or opposing the petition. If Bar Counsel did not consent to a petition filed in accordance with section (e) of this Rule, the response shall state the particular grounds for withholding consent.

(g) Criteria For Reinstatement

The Court of Appeals may order reinstatement to the practice of law for a petitioner who meets each of the following criteria or, if not, presents sufficient reasons why the petitioner should nonetheless be reinstated:

(1) The petitioner has complied in all respects with the provisions of Rule 16-737 and with the terms and conditions of all prior disciplinary orders, except as modified;

(2) The petitioner has not engaged nor attempted nor offered to engage in the

unauthorized practice of law and has not engaged in any other professional misconduct during the period of suspension, disbarment, exclusion, or inactive status;

(3) If the petitioner was placed on inactive status, the incapacity or infirmity (including alcohol or drug abuse) does not now exist and is not reasonably likely to recur in the future;

(4) If the petitioner was disbarred, suspended, or excluded, the petitioner recognizes the wrongfulness and seriousness of the professional misconduct for which discipline was imposed;

(5) The petitioner at present has the requisite honesty and integrity to practice law;

(6) The petitioner has kept informed about recent developments in the law and is competent to practice law;

(7) The petitioner has paid all costs previously assessed by the order of the Court of Appeals; and

(8) The petitioner has paid to the Disciplinary Fund the processing fee required by section (c) of this Rule.

Committee note: This is a new provision setting out criteria for reinstatement of an attorney to the practice of law.

(h) Disposition

Upon review of the petition and Bar Counsel's response, the Court of Appeals may order (1) dismissal of the petition without a hearing, (2) reinstatement, if recommended in Bar Counsel's response, or (3) further proceedings in accordance with section (i) of this Rule.

(i) Further Proceedings

If the Court of Appeals orders further proceedings, the petition shall be assigned for a judicial hearing in accordance with Rule 16-732. The court to which the petition is assigned shall allow reasonable time for Bar Counsel to investigate the petition and, subject to Rule 16-734, take depositions and complete discovery. The applicable provisions of Rules 16-735 shall govern the hearing, including the requirement that the petitioner shall have the burden of proving the averments of the petition by clear and convincing evidence. The applicable provisions of Rule 16-736, except section (g) of that Rule, shall govern any subsequent proceeding in the Court of Appeals, which may order (1) reinstatement, (2) dismissal of the petition, or (3) remand for further proceedings.

(j) Conditions Of Reinstatement

An order of the Court of Appeals that reinstates a petitioner to the practice of law may impose one or more conditions to be performed by the petitioner, either as a condition precedent to reinstatement or as a condition of probation after reinstatement, including any requirement set forth in section (h) of Rule 16-737 and may also require the petitioner to:

(1) Take in open court the oath of attorneys required by Code, Business Occupations and Professions Article, §10-212.

(2) Take a bar review course, approved by Bar Counsel, and submit to Bar Counsel evidence, reasonably satisfactory to Bar Counsel, of attendance at the approved course.

(3) Successfully complete a professional ethics course at an accredited law school.

(4) Attend the professionalism course offered by the Maryland State Bar Association, Inc. and required for newly-admitted attorneys.

(5) Pass either the regular comprehensive

Maryland bar examination or an attorney examination as prescribed and administered by the Board of Law Examiners.

(6) Pay all costs of investigation and other proceedings on the petition, including the costs of physical and mental examinations, transcripts, and other actual expenses incurred by Bar Counsel that were reasonably necessary to evaluate the petition.

(k) Effective Date Of Reinstatement Order

An order of the Court of Appeals that reinstates the petitioner to the practice of law may provide that it shall become effective immediately or on an effective date stated in the order. If no effective date is stated, the order shall take effect on the date that Bar Counsel gives written notice to the Clerk of the Court of Appeals that the petitioner has complied with all conditions precedent to reinstatement set forth in the order.

(l) Duties of Clerk

(1) Attorney Admitted to Practice

Upon receipt of a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner admitted by the Court of Appeals to the practice of law, the Clerk of the Court of Appeals shall place the name of the petitioner on the register of attorneys in that Court, and shall certify that fact to the Trustees of the Clients' Security Trust Fund, and to clerks of all courts in the State.

(2) Attorney Not Admitted to Practice

Upon receipt of a reinstatement notice authorized by section (e) of this Rule, or on the effective date of an order or notice that reinstates a petitioner not admitted by the Court of Appeals to practice law, the Clerk of the Court of Appeals shall remove the petitioner's name from the list maintained in

that Court of non-admitted attorneys who are excluded from exercising the privilege of practicing law in this State, and shall certify that fact to the Board of Law Examiners, the clerks of all courts in the State, and, upon request of Bar Counsel, the disciplinary authority of any other jurisdiction in which the petitioner may be admitted to practice.

(m) Duty of Bar Counsel

Promptly after the effective date of an order that reinstates a petitioner, Bar Counsel shall give any notice required by section (e) of Rule 16-709.

(n) Motion to Vacate Reinstatement

On motion of Bar counsel filed after the effective date of an order that reinstates the petitioner to the practice of law, the Court of Appeals may vacate the order and reimpose the discipline that was in effect when the order was entered or impose additional or different discipline upon the petitioner for any of the following reasons:

(1) The petitioner has failed to demonstrate substantial compliance with the order, including any condition of reinstatement imposed under section (j) of this Rule.

(2) The petition filed under section (a) of this Rule contains a false statement or omission of material fact made knowingly by the petitioner and the true facts were not disclosed to Bar Counsel prior to entry of the order.

Source: This Rule is in part derived from former Rules 16-713 (a) (2) (BV13 a 2) and 16-714 (BV14) and in part new.

Rule 16-738 was accompanied by the following Reporter's Note.

This Rule governs the procedures for reinstatement of an attorney who has been disbarred, suspended, excluded from the practice of law, placed on inactive status, or whose resignation has been accepted by order of the Court of Appeals. It does not govern temporary suspensions under Rules 16-721, 16-722, or 16-723, which expire upon entry of a final order under Rule 16-736 (g), as provided in Rule 16-737.

Section (a) requires a petition for reinstatement to be filed in the Court of Appeals. This provision is derived, with style changes, from former Rule BV14 a. The petition must be verified, include a docket reference to prior disciplinary actions, and append a copy of the disciplinary order. The requirements of verification and docket reference are derived from Rule BV14 b. The additional requirement, appending a copy of the order, is new. The third sentence of section (a) is new. It requires the petition to certify that the petitioner has complied in all respects with the provisions of Rule 16-737 and with the terms and conditions of the disciplinary order. This concept was embodied in former Rules BV13 a 2 and BV13 b 2, with respect to definite periods of suspension, but is now applicable to all petitions for reinstatement. Except for attorneys suspended for a definite term, who may proceed under section (e) with an abbreviated petition, petitions must provide details of what the Court of Appeals has identified, respectively, as "the essential factors to be considered in any reinstatement proceeding which are: (1) the nature and circumstances of the petitioner's original misconduct; (2) the petitioner's subsequent conduct and reformation; (3) the petitioner's present character; and (4) the petitioner's present qualifications and competence to practice law." Matter of Keehan, 342 Md. 121, 125 (1996); Matter of Wyatt, 342 Md. 117, 118 (1996); Matter of Clinton, 338 Md. 481, 483 (1995); Matter of Blondes, 335 Md. 456, 457 (1994); Matter of McManus, 335 Md. 19 (1994); Matter of Kahn, 328 Md. 698, 699 (1992); AGC v.

Reamer, 328 Md. 32, 33 (1992); Matter of Murray, 316 Md. 303, 305 (1989); In re Braverman, 271 Md. 196, 199-200 (1974). Because the Court of Appeals evaluates these essential factors, the Subcommittee believes that all four factors should be alleged in the petition. Section (a) now requires such obligations. That requirement supersedes the vague provision in former Rule BV14 b for a petition to set forth facts showing that the petitioner is rehabilitated and is otherwise entitled to the relief sought. In addition to the four factors, section (a) requires the petition to allege facts describing the petitioner's ability to satisfy the new criteria specified in section (g).

Section (b) is new. It provides that a disbarred attorney may not be considered for reinstatement until at least five years after the effective date of disbarment. See Commentary to A.B.A. Model Rule 25. This provision has been adopted in Rule XI §16(a) of the District of Columbia Bar. This reflects the usual practice although exceptions have been allowed. See, e.g., Matter of McManus, 335 Md. 19 (1994) (granting petition filed 35 months after disbarment).

Section (c) is new. It requires the petitioner to deposit a non-refundable processing fee in the amount of $1000 payable to the Disciplinary Fund to cover the reasonable administrative costs of processing the petition. It applies to all petitions for reinstatement, except those filed under section (e) of attorneys suspended for a definite period. Section (c) is derived from New Jersey Rule 1:20-21(d).

Section (d) is derived from former Rule BV14 c. It requires the petition to be served upon Bar Counsel and any other person designated by order of the Court of Appeals on request of Bar Counsel. The former reference to service "in the manner the Court of Appeals directs upon the party who filed the charges" is deleted as obsolete. On request of Bar Counsel, of course, the order may direct service of the petition upon any complainant or interested person. However, section (d) does not adopt any requirement prevailing in some jurisdictions requiring the petitioner to publish notice of the petition in a bar journal or newspaper and invite public comment, pro and con. See A.B.A. Model Rule 25.D; New Jersey Rule 1:20-21(e).

Section (e) provides an exception to the detailed petition requirements of section (a) for an attorney who was suspended for a definite period. Upon expiration of that period, the attorney may file in the Court of Appeals a petition that complies with all but the final sentence of section (a) -- including a verified statement of compliance with Rule 16-737 and the disciplinary order. Bar Counsel may then consent to reinstatement by written notice to the Clerk of the Court of Appeals that Bar Counsel is satisfied with the attorney's compliance. Upon receipt of the notice, the Clerk performs the duties set forth in section (l). That much of this section is derived from the second sentence of former Rule BV13 a 2, but with two changes. First, the attorney no longer files a verified statement with Bar Counsel, but files a verified petition

with the Clerk and serves Bar counsel. Second, a new sentence is added to cover the contingency that Bar Counsel is not satisfied with compliance and withholds consent. See, e.g., AGC v. James, 340 Md. 318, 320-21 (1995). Section (e) thus assures (as did former Rule BV13 a 2) that a suspension for a definite period will not terminate automatically at the end of the period. The attorney must aver compliance under oath and, unless Bar Counsel is satisfied, must bear the burden of proving compliance. AGC v. James, 340 Md. at 328. See, e.g., AGC v. Kandel, 341 Md. 113, 114 (1995) (express provision in order for a verified statement of compliance, as required by former Rule BV13 a 2); AGC v. Carmody, 336 Md. 99, 100 (1994) (same).

Section (f) is new. It requires Bar Counsel to file a response to a petition within 30 days of service. The response shall admit or deny the averments and may state Bar Counsel's recommendations and reasons for supporting or opposing the petition. Bar Counsel's response may assist the Court in evaluating the petition and deciding it promptly. See, e.g, New Jersey Rule 1:20-21(g). Bar Counsel should not hesitate to alert the Court to any false statements or material omissions in the petition, as would warrant a summary denial of the petition without a hearing and constitute violations of Rule 8.1 of the Maryland Rules of Professional Conduct (Rule 16-812).

Section (g) is new. It prescribes, for the first time, minimum requirements for reinstatement that must either be satisfied or modified. Subsections (g)(1) through (6) are adaptations of A.B.A. Model Rule 25.3. The two additional subsections, (g)(7) and (g)(8), are derived from Rule XI §16(f) of the District of Columbia Bar and New Jersey Rule 1:20-21(d) and (i)(B).

Section (h) is derived in substantial part from former Rule BV14 d 1. It permits the Court of Appeals to (1) dismiss the petition

without a hearing, e.g, where the petition on its face fails to show entitlement for relief, (2) grant reinstatement, provided that Bar Counsel has recommended it, or (3) order further proceedings under section (i). The provision for reinstatement without a hearing is new and is reserved for the rare case in which Bar counsel not only concurs but there are no unresolved factual issues was would necessitate a hearing. Section (h) eliminates the provision for the Court of Appeals to "consider any written evidence submitted with the petition and to prior proceedings with respect to the charges", as stated in former Rule BV14 d 1, as an unnecessary burden on the Court at the initial pleading stage.

Section (i) is derived in part from former Rule BV14 d 2, d 3, and d 4. The provisions of former Rule BV14 d 5 are omitted because of their inclusion in section (e) of Rule 16-721. The major change undertaken by section (i) is elimination of the requirement that, if further proceedings are ordered, Bar Counsel shall refer the petition or hearing by a Hearing Panel of the Inquiry Committee, followed by review by the Review Board. That portion of former Rule BV14 d 2 is abolished. Instead, the petition may be assigned for a judicial hearing under Rule 16-732 without intervention of a Hearing Panel or the Review Board. This change may serve to reduce delay occasioned by multiple and inconclusive layers of review. See, e.g., Matter of Keehan, 342 Md. 121 (1996) (reinstatement ordered 47 months after petition was filed; Court rejected report of Review Board); Matter of Wyatt, 342 Md. 117 (1996) (reinstatement ordered three years after petition was filed; Court rejected unanimous report of Review Board); Matter of Clinton, 338 Md. 481 (1995) (three years; Court rejected Review Board report); Matter of Blondes, 335 Md. 456 (1994) (two years; Court rejected reports of Review Board and Inquiry Panel); Matter of Kahn, 328 Md. 698 (1992) (four years, ten months; Court rejected Review Board report); AGC v. Reamer, 328 Md. 32 (1992) (two years; Court rejected Review Board report).

However, provision is made in section (i) for Bar Counsel to have "reasonable time" to investigate the petition and complete any discovery.

Section (j) authorizes the Court of Appeals, in granting reinstatement, to impose one or more conditions to be performed by the petitioner before or after the effective date. It is derived in concept from A.B.A. Model Rule 25.I and the corresponding provision in section (h) of Rule 16-737. As a matter of practice, reinstatement is usually conditioned on taking the attorney's oath in open court, completing the professionalism course, and paying the costs of reinstatement proceedings. See, e.g., Matter of Wyatt, 342 Md. 117, 119 (1996); Matter of Clinton, 338 Md. 481, 483 (1995); Matter of McManus, 335 Md. 14, 20 (1994); Matter of Kahn, 328 Md. 698, 700 (1992); AGC v. Reamer, 328 Md. 32, 34 (1992). These conditions are now covered by subsections (j)(1), (4), and (6). The remaining conditions authorized by section (j) are encountered less frequently but do appear, from time to time, in unreported orders. See Matter of Keehan, 342 Md. 121, 126 (1996) (respondent required to take and pass the regular comprehensive Maryland bar examination).

Section (k) is new. It is similar to its counterpart in section (a) of Rule 16-737. It is intended to assist the Clerk in acting upon reinstatement orders that do not specify an effective date, but do set forth conditions precedent to be performed before the petitioner is reinstated and resumes the practice of law. In the latter instance, reinstatement takes effect only upon notice by Bar Counsel that the petitioner has complied with all conditions precedent.

Section (l) describes the parallel duties of the Clerk of the Court of Appeals upon reinstatement of attorneys (1) admitted by the court of Appeals to the practice of law and (2) not admitted to the practice of law. Subsection (l)(1) combines the provisions of

former Rules BV13 a 3 and BV14 e 1 and the first sentence of BV14 e 3. Subsection (l)(2) similarly combines the provisions applicable to non-admitted attorneys contained in former Rule BV13 b 3 and BV14 e 2 and the second sentence of BV14 e 3.

Section (m) is new. It requires Bar Counsel to give the notices to the authorities specified in section (e) of Rule 16-709.

Section (n) is new. It recognizes the inherent authority of the Court of Appeals to revoke an order of reinstatement for fraud or noncompliance. See AGC v. James, 340 Md. 318 (1995) (respondent who practiced law during one-year suspension was denied reinstatement and ordered to begin anew to serve that suspension); AGC v. Larsen, 324 Md. 114 (1991) (violation of condition of reinstatement order was conduct that warranted vacating that order and reimposing the indefinite suspension previously in effect).

Mr. Howell told the Committee that the Rule brings together provisions which were scattered in the existing rules. The third sentence of section (a) is new. Mr. Sykes asked about the word "excluded" in the second sentence of section (a). The previous rule contains an exclusion order. Judge Vaughan suggested that this go back into Rule 16-737. Mr. Howell said that the terms "disbarment" and "suspension" pick up the concept of exclusion. "Disbarment" is defined in Rule 16-701 as "...the unconditional exclusion from the admission to or the exercise of any privilege to practice law in this State." Mr. Sykes inquired as to why the word "excluded" is necessary in Rule 16-738 when the definition of "disbarment" covers it. The Chair suggested that the words "or excluded" be deleted from

section (a), and the Committee agreed by consensus to this change.

Mr. Howell drew the Committee's attention to section (b). This provides for a five-year minimum time period for a disbarred attorney to petition for reinstatement. Mr. Sykes commented that this provision could cause a problem. If a disbarred attorney has taken an appeal, the appeal may take three years before it is decided. Then an order is passed making the disbarment final. Would it require five more years after that for the attorney to petition for reinstatement? It might be better if the Rule provided that the five years is from the date the attorney was barred from practicing law. The Vice Chair remarked that the order is effective during the period of the appeal unless there is a stay. The Chair cited the case of Attorney Grievance Commission v. Bereano, 338 Md. 480 (1995), explaining that if Mr. Bereano had been disbarred pending the appeal of his criminal case, it could take years to get through the Fourth Circuit, which would mean five years from the order of disbarment. Why should there be a rule which restricts the time period when an attorney wishes to be reinstated? Mr. Sykes said that the rule of thumb in the Court of Appeals is five years. Mr. Grossman remarked that section (b) acts as an invitation to disbarred attorneys to petition for reinstatement. It converts the disbarment to a five-year suspension and is inconsistent with the permanency concept in the definition of "disbarment." He expressed the view that this should come out of the Rule.

The Chair asked what the shortest time period has been for reinstatement. Mr. Howell said that in the case Matter of McManus, 335 Md. 19, (1994) it took 35 months from the order to the petition for reinstatement. The Chair added that it was ten years from the conduct for which Mr. McManus was disbarred, and the Court of Appeals took this fact into consideration. Mr. Howell noted that there are several reasons to have this provision. One is that the District of Columbia has a similar provision. The second is that while it may be construed as an invitation to file, it also discourages premature petitions and adds uniformity. Further, it provides a public statement in the Rule that disbarment means a minimum of five years out of practice.

Mr. Sykes moved to take section (b) out of the Rule. The motion was seconded, and it carried unanimously. Judge Vaughan commented that in a particular case, if there is something out of the ordinary, the attorney can petition for modification.

Mr. Howell drew the Committee's attention to section (c). The Vice Chair expressed the view that section (c) seems punitive. She asked what the $1000 fee covers. Mr. Grossman replied that the Court of Appeals is already requiring a deposit of $800. Mr. Sykes inquired if this is refundable. Mr. Grossman answered that it is not refundable, and that it does not cover all the costs. The Vice Chair questioned as to what the costs are. Mr. Sykes responded that the costs of the investigation have to be paid, and these come to more

than $1000. The Vice Chair questioned as to whether the disbarred attorney has to pay any costs. Mr. Sykes replied that the disbarred attorney does not have to pay costs. Mr. Grossman noted that some of the costs are transcript costs for the Panel hearing and costs made in the course of investigation.

The Chair observed that this costs provision is in the criteria for reinstatement in section (g). Mr. Howell said that this an advance. Mr. Sykes remarked that the provision is not offensive. Mr. Hochberg asked how much money goes into the Disciplinary Fund now. Mr. Grossman remarked that the $800 fee is causing the State was to lose money. The Vice Chair commented that the attorney is not charged money even if there is opposition to the reinstatement after a definite period of suspension. Mr. Grossman explained that no investigation is required, so the attorney is not charged. The Vice Chair pointed out that the fee required in section (c) does not apply to the petition provided for in section (e), which applies only to the expiration of a suspension for a definite period. Mr. Grossman remarked that in the past, a verified statement had to be submitted, and Bar Counsel had to approve the statement. There have been occasions in which Bar Counsel believed that a person violated the terms of the suspension, and Bar Counsel informed the Court of Appeals at a hearing. Section (e) codifies this. Mr. Howell said that the procedure in section (e) is expedited. It speeds up the reinstatement as long as Bar Counsel ensures that the attorney has

complied with the provisions of Rule 16-737 and with the terms and conditions of the order imposing the suspension. The Vice Chair commented that if Bar Counsel feels the attorney has violated the terms and conditions, the attorney does not pay the processing fee. Mr. Howell responded that Bar Counsel may be wrong.

Turning to section (f), Mr. Howell said that this provides for Bar Counsel to respond to the petition for reinstatement. Bar Counsel has to give reasons if he or she opposes the petition. Mr. Sykes questioned as to whether Bar Counsel could support the petition if Bar Counsel refused to consent to the reinstatement. Mr. Howell answered that Bar Counsel may partially support the petition. Section (f) applies if Bar Counsel does not oppose the petition. Section (e) applies only if the reinstatement is to occur upon the expiration of a suspension for a definite period.

Mr. Howell drew the Committee's attention to section (g). Judge Rinehardt inquired if anyone ever has to take the bar examination again. Mr. Howell replied that sometimes an attorney has been out of the loop for 10 or 15 years, and some assurance of present competence is necessary. Mr. Grossman observed that subsection (g)(8) is a problem. It mandates that the petitioner pay the processing fee required by section (c) before the petitioner can be reinstated. However, the reinstatement may be in accordance with section (e), in which case the processing fee would not be required. Mr. Howell suggested that in place of the language in subsection

(g)(8) which reads "required by section (c)" the following language should be substituted: "if applicable under section (c)." The Committee agreed by consensus to this change.

Mr. Hochberg asked why the petition has to be verified, when the response does not. Mr. Howell said that the verification requirement is being carried forward from the existing Rule. Mr. Sykes inquired why section (g) has a different linguistic formulation than the one the Court of Appeals uses now. Mr. Howell answered that there was no intention to change the law. Mr. Sykes suggested that it would be worthwhile to use the traditional language. Judge McAuliffe said that this would go into the first paragraph of section (g). Mr. Howell pointed out that the Reporter's note has the traditional criteria for consideration by the Court. These are: (1) the nature and circumstances of the petitioner's original misconduct, (2) the petitioner's subsequent conduct and reformation, (3) the petitioner's present character, and (4) the petitioner's present qualifications and competence to practice law. The Chair suggested that the first paragraph of section (g) provide: "The Court of Appeals shall consider the nature and circumstances of the petitioner's original misconduct....", with all four of the criteria listed. The Committee agreed by consensus to this addition.

Mr. Grossman pointed out that subsection (g)(4) uses the word "excluded", and the Chair said that it would be deleted as it was in section (a).

There was no discussion of section (h). Turning to section (i), Mr. Howell explained that the mechanics are the same as existing Rule 16-714, but there is a change. Currently, the petition is assigned to an Inquiry Panel, then to the Review Board, then there is a ruling by the Court of Appeals. Since the procedures have been streamlined, the Court of Appeals refers the petition to a judge, bypassing the Inquiry Panel. This provides a more prompt disposition, and in the past, the Court of Appeals has rejected the recommendation of the Review Board in almost all cases, so this has not been a productive source of adjudication. Mr. Howell drew the Committee's attention to section (j). He explained that this section is drawn from actual orders of the Court of Appeals. Mr. Sykes suggested that the language in the beginning of section (j) which reads: "including any requirement set forth in section (h) of Rule 16-737 and may also require the petitioner to" should be put earlier in the Rule after the word "petitioner" and before the word "either." The Committee agreed by consensus to this change.

Mr. Grossman suggested that in subsection (j)(2), there should be language added indicating that the attorney has to complete the bar review course. Mr. Brault said that the language "reasonably satisfactory to Bar Counsel" will ensure that the course is completed. The Vice Chair asked if the $1000 processing fee referred to in section (c) is credited as a cost listed in subsection (j)(6). Mr. Howell answered that it is. The Vice Chair asked if the $1000

goes to cover salaries, and Mr. Howell answered that it goes to pay for transcripts. Judge McAuliffe inquired if the investigators' time is included as one of the costs. Mr. Grossman replied that he did not know. Mr. Sykes commented that the policy decision which would make a disbarred attorney pay the actual costs of the case may not be unfair, since the attorney's behavior burdened the system. Mr. Brault suggested that this could be included as a condition of reinstatement. The Chair pointed out that it would be very difficult to figure out how much money had been expended in a case.

Mr. Brault said that Mr. Sykes had made the point that costs and expenses could be defined in the cost rule. Judge McAuliffe observed that the Rule could be rewritten to clarify that not all administrative costs are included, but investigators' costs would be included. Mr. Johnson asked why taking the Bar Review course is a condition of reinstatement. The Reporter's note does not cite any cases in which an attorney who has petitioned for reinstatement was ordered to take the Bar Review course. The Chair said that he knew of one attorney who had been required to take the course. Judge McAuliffe suggested that subsection (j)(6) be conformed to the existing practice. Mr. Grossman stated that he would find out the existing practice.

Mr. Howell drew the Committee's attention to section (l). He explained that there was no change from the existing rule except for style changes.

Turning to section (m), Mr. Howell pointed out that this is new. It provides that Bar Counsel is to notify the other jurisdictions, who had been previously told of the attorney's suspension or disbarment, of the petitioner's reinstatement. Mr. Grossman questioned as to why the reinstated attorney cannot do the notifying. Mr. Howell remarked that it could be that no one would believe him or her. Mr. Sykes said that it should be Bar Counsel who notifies the other jurisdictions. Judge Vaughan inquired if there is a central list in the country pertaining to disciplined attorneys. Mr. Grossman responded that there is a National Discipline Data Bank. The problem is that some jurisdictions do not apprise the Office of Bar Counsel of the discipline of attorneys who are licensed in Maryland and in those jurisdictions. If there is no knowledge about a particular attorney, there is no reason to check the data bank. Mr. Howell commented that the Clerk of the Court of Appeals would have no way to know to give out this information. Bar Counsel has to request its dissemination. The Chair suggested that the Rule could provide that, upon request, the information is disseminated by of either the Clerk or Bar Counsel. Mr. Howell said that if section (l) is read in conjunction with section (m), Bar Counsel must give notice, but the Clerk has no duty until he or she is informed by Bar Counsel. The Chair asked why the attorney cannot request the dissemination of the information. Judge McAuliffe responded that initially Bar Counsel had to notify the data bank and the other

disciplinary authorities about the suspension or disbarment, so Bar Counsel already has the information about the other jurisdictions available. It is not a burden for Bar Counsel to give this notice. The Chair commented that it seems to be a duplication of work for the Clerk of the Court of Appeals as well as Bar Counsel to give this notice. Mr. Howell explained that Bar Counsel notifies, and the Clerk gives out the official certification. Bar Counsel informs the Clerk and tells him or her where to send the information. This duty should be Bar Counsel's and not the individual petitioner's, since Bar Counsel has the necessary information.

Mr. Sykes noted that section (e) of Rule 16-709 provides that Bar Counsel notifies the National Discipline Data Bank and the appropriate disciplinary authorities of an attorney's reinstatement. He asked why it is necessary to repeat this in section (l) of Rule 16-738. The Chair suggested that a period be added after the word "State" in section (l). Mr. Howell said that the Clerk does certify as a matter of course, but need not certify to any other court outside the State of Maryland unless Bar Counsel so requests. Mr. Sykes pointed out that there is also an obligation to request the clerk to send certification to any state which requires it. The Chair suggested that language to this effect be added to section (m), which would read as follows: "Promptly after the effective date of an order that reinstates a petitioner, Bar Counsel shall give any notice required by section (e) of Rule 16-709 and shall request the

Clerk of the Court of Appeals to notify the disciplinary authority of any other jurisdiction in which the petitioner may be admitted to practice." The Committee agreed by consensus to these changes to section (l) and to section (m.)

Mr. Howell drew the Committee's attention to section (n). He explained that this provides a mechanism to vacate a reinstatement which is based on fraud. For example, a reinstatement may be conditional and based on performance of duties which are not performed. Mr. Sykes commented that section (n) does not provide how this procedure is to be handled. If someone is reinstated, but lied in his or her application or committed fraud, a new grievance will be filed. On the motion to vacate, a hearing will be conducted. Mr. Howell suggested that the mechanisms of Rules 16-732, 16-733, 16-734, and 16-735 be incorporated into section (n) of Rule 16-738, and the Committee agreed by consensus with this suggestion.

Mr. Johnson inquired if the Subcommittee had considered whether the attorney has to go through this procedure if an attorney, who is disciplined in Maryland and then in another jurisdiction due to reciprocal discipline, is reinstated in the other jurisdiction. Judge McAuliffe answered that the attorney does have to go through the reinstatement process in Maryland, because the disposition may be different. The Chair added that the court can take an individual look at each case. Mr. Howell remarked that even if the disposition is the same in Maryland, it is important that the attorney go through

the process in Maryland to ensure compliance with the order.

Judge Kaplan moved to adopt Rule 16-738 as it was amended, the motion was seconded, and it carried unanimously.

The Chair asked if there were any changes or corrections to the minutes of the February 13, 1998 Rules Committee meeting. There being none, the minutes were approved as presented. The Chair announced that a new Rules Committee member, Timothy Maloney, had been appointed to take Judge James Lombardi's place.

After the lunch break, Mr. Howell presented Rule 16-739, Costs, for the Committee's consideration.

Rule 16-739. COSTS

(a) Allowance And Allocation

Except as provided in section (b) of this Rule, all court costs in disciplinary proceedings under this Chapter shall be paid by the prevailing party unless the Court of Appeals orders otherwise. The Court, by order, may allocate costs among the parties.

Committee note: This provision abolishes the previous requirement that costs be paid by the State unless otherwise ordered.

(b) Reinstatement Proceedings

In proceedings for reinstatement under Rule 16-738, all court costs and fees shall be paid by the petitioner, except to the extent that the Court of Appeals orders otherwise.

(c) Judgment

Costs of proceedings under this Chapter, including the costs of all transcripts, shall

be taxed by the Clerk of the Court of Appeals and included in the order as a judgment. The action of the Clerk may be reviewed by the Court on motion

(d) Bad Faith -- Unjustified Proceeding

The provisions of Rule 1-341 apply to proceedings under this Chapter.

(e) Enforcement

The provisions of Rule 8-611 apply to proceedings under this Chapter.

Source: This Rule is in part derived from former Rule 16-715 (BV15) and in part new.

Rule 16-739 was accompanied by the following Reporter's Note.

Section (a) is derived from former Rule BV15 a, but abolishes the previous requirement that costs be paid by the State unless otherwise ordered. Instead, the first sentence of subsection (a) adopts the general standard of Rule 8-607 (a) providing that "the prevailing party is entitled to costs." This reflects the current practice of awarding costs against an attorney who is disciplined by order of the Court of Appeals. The second sentence of section (a) is derived, without change, from the second sentence of Rule 8-607 (a).

Section (b) is derived, with changes in style, from former Rule BV15 b. The word "fees" is added to "court costs" to reflect the reinstatement processing fee being created by section (c) of Rule 16-738.

Section (c) is derived, with style changes, from former Rule BV15c. The "costs of all transcripts" is added so as to reflect the express mention of such costs in orders of the Court of Appeals. See, e.g., AGC v. Awuah, 346 Md. 420, 436 (1997); AGC v. Gittens, 346 Md.

316, 327 (1997); AGC v. Sachse, 345 Md. 578, 594 (1997); AGC v. Garland, 345 Md. 383, 400 (1997); AGC v. Hallmon, 343 Md. 340, 411 (1996); AGC v. Glenn, 341 Md. 448, 492 (19996); AGC v. Drew, 341 Md. 139, 155 (1996); AGC v. James, 340 Md. 318, 333 (1995).

Section (d) is derived, with style changes, from former Rule BV15 d.

Section (e) is new. It adopts the enforcement provisions of Rule 8-611.

Mr. Klein pointed out that sections (d) and (e) do not pertain to costs. The Chair questioned as to how Rule 1-341, to which section (d) refers, applies to costs. Mr. Sykes observed that when there is an issue of bad faith, reasonable expenses, including attorney's fees, could be awarded, but this is the same in other types of cases. Mr. Klein commented that the bad faith rule would apply to the entire chapter, not just the costs rule. The Vice Chair added that all of Title 1 applies to the Attorney Discipline Rules. Mr. Howell agreed that section (d) was not necessary, and he suggested that it be deleted. The Committee agreed by consensus with his suggestion.

The Vice Chair noted that costs were discussed in Rule 16-738, and she inquired as to how this comports with section (b). Mr. Grossman answered that this is not the same issue. He had ascertained that the costs of investigators are included in the costs to which Rule 16-738 refers. The Vice Chair questioned how Rule 16-739 (b) and Rule 16-738 interrelate. The Chair suggested that Rule

16-739 (b) could state that except as provided in Rule 16-738, all costs are paid by the petitioner. The Vice Chair commented that it is not really a matter of "except as." Mr. Sykes suggested that all of the reinstatement costs should go under the same heading. The Chair asked if the costs from the reinstatement rule should go into Rule 16-739.

Mr. Sykes inquired if anything in Rule 16-739 is different from Rule 16-738. The Chair pointed out that section (a) of Rule 16-739 is different, because it provides that the prevailing party pays the costs. The Vice Chair remarked that the language is different, because the term "all court costs" is narrowly defined, and it excludes the cost of deposition transcriptions. Mr. Howell questioned as to what the harm is in having the rule on costs cover all court proceedings. Mr. Sykes observed that if a cross reference were added as well as an exception clause, it would take care of the situation. The Chair pointed out that the payment of costs in section (j) of Rule 16-738 is a condition of reinstatement, and Mr. Howell added that it is optional for the Court to require it. The Vice Chair observed that Rule 16-738 is not a costs rule. Mr. Howell asked if section (b) of Rule 16-739 should be moved to Rule 16-738. The Vice Chair expressed the view that it should not be moved.

Judge Rinehardt observed that court costs are different than investigative costs. Mr. Howell agreed, stating that the court imposes the costs, including the administrative costs incurred by Bar

Counsel. In section (b), the language "and fees" is confusing. Mr. Grossman remarked that it is not just court costs that must be paid. The Vice Chair pointed out that court costs are defined in Rule 2-603. Mr. Sykes suggested that in subsection (g)(7) of Rule 16-738, the word "costs" should be changed to the word "sums," and a cross reference to Rule 16-739 (b) should be added. The Committee agreed by consensus with Mr. Sykes' suggestion. The Reporter observed that the costs in Rule 16-739 (b) must be paid whether or not the attorney is reinstated.

The Vice Chair asked about subsection (j)(6) of Rule 16-738. Mr. Grossman replied that this provision is only applicable to reinstated attorneys. Mr Sykes reiterated that it is optional. Judge McAuliffe said that the costs for reinstatement are different than the costs of disciplinary proceedings. The Vice Chair suggested that the language of Rule 16-738 (j)(6), which enumerates the kinds of costs, should be put in section (b) of Rule 16-739. The Chair noted that the costs and fees in a proceeding for reinstatement are governed by Rule 16-738. The Vice Chair commented that Rule 16-739 provides that if one is reinstated, one pays, or if one loses, one still pays. All the costs of reinstatement are paid by the petitioner, unless the court orders otherwise.

Mr. Brault expressed the view that the word "fees" in section (b) of Rule 16-739 is redundant. Rule 2-603 defines "costs" as fees. In addition, the charges for transcripts ordered by the court are

defined as part of "costs." The court may assess some or all of the expenses as costs. The Vice Chair suggested that the reference should be to "costs" and not to "court costs." Mr. Howell responded that this was taken verbatim from the existing rule.

Judge McAuliffe agreed with the Vice Chair that the list of costs from subsection (j)(6) of Rule 16-738 should be added to section (b) of Rule 16-739. The Committee agreed to this suggestion by consensus. The Chair questioned whether there is an inconsistency in the two provisions, because Rule 16-738 (j)(6) provides that the Court of Appeals may impose costs, while Rule 16-739 (b) provides that the Court shall impose costs. Mr. Grossman added that in the latter provision, the Court can provide otherwise. Mr. Howell said that an attorney is not reinstated until he or she pays costs. The Chair added that this is a condition of reinstatement, which is not automatically required. Mr. Brault observed that subsection (j)(6) of Rule
16-738 is a payment, while section (b) of Rule 16-739 is an assessment. Mr. Sykes noted that section (b) provides that "court costs and fees shall be paid by the petitioner," indicating that the responsibility is on the petitioner. In Rule 16-738, someone is not reinstated unless he or she pays. The Vice Chair said that if the order for reinstatement is silent, this provision could control. Mr. Brault commented that the word "paid" may be wrong, and Mr. Sykes suggested that the word "assessed" is preferable. The Vice Chair

stated that the Style Subcommittee can look at this issue.

Mr. Brault pointed out that Rule 16-739 (a) provides that the prevailing party pays the costs. In Rule 16-738, the costs are assessed and paid as a condition of reinstatement. If a disbarred or suspended attorney moves to be reinstated and loses, he or she is assessed the costs. Mr. Klein remarked that there is no provision for credit. The $1000 non-refundable processing fee pursuant to Rule 16-738 (c) should be able to be a credit against costs assessed under Rule 16-739 (b), and the Rule should clarify this. Mr. Brault noted that Rule 2-603 provides that the prevailing party is entitled to costs. The Vice Chair suggested that Rule 16-739 be conformed to Rule 2-603. The Chair asked about the purpose of section (a), and Mr. Brault responded that it should be that the prevailing party recovers the cost. Judge McAuliffe observed that section (a) provides just the opposite. The Reporter suggested that section (a) use the language of Rule 2-603 which is, as follows: "Unless otherwise provided by rule, law, or order of court, the prevailing party is entitled to costs." Mr. Brault agreed that section (a) should be conformed to Rule 2-603, and the Committee agreed by consensus. Mr. Bowen added that there still has to be an exclusion for section (b).

The Vice Chair noted that section (c) provides that all of the costs allocated under sections (a) and (b) are included in a judgment. She asked if this is a change. Mr. Howell replied that

this is verbatim from the current rule, except for the inclusion of the costs of transcripts. The Vice Chair inquired whether section (c) has to cover costs, since they are covered in sections (a) and (b). She suggested that the term "court costs" in section (a) should be defined. The Rules may be mixing up the definition of costs with what happens once they are assessed. Mr. Howell said that section (a) was taken from existing Rule 16-715. The Chair commented that the existing rule should be changed. The Vice Chair noted that it had already been decided to add into section (b) the list of costs from section (j)(6) of Rule 16-738.

Judge Kaplan moved to adopt Rule 16-739 as it was amended at today's meeting. The motion was seconded, and it passed unanimously.

Mr. Howell presented Rule 16-741, Conservator of Client Matters, for the Committee's consideration.

Rule 16-741. CONSERVATOR OF CLIENT MATTERS

(a) Appointment; When Authorized

If an attorney dies, disappears or has been disbarred, suspended or placed on inactive status, or has abandoned the practice of law, and no personal representative, partner or other responsible party capable of conducting the former attorney's affairs is known to exist, Bar Counsel may request the appointment of a conservator to inventory the attorney's files, and to take such action as seems indicated to protect the attorney's clients.

(b) Petition And Order

A petition to appoint a conservator

shall be filed in any court in the county in which the former attorney last maintained an office for the practice of law. Upon such proof of the facts as the court may require, the court may enter an order appointing an attorney designated by Bar Counsel to serve as conservator subject to further order of the court.

(c) Inventory

Upon accepting the appointment, the conservator shall promptly take possession of the former attorney's files, take control of the attorney's trust and business accounts, review the files and accounts, identify open matters, note those matters requiring action, and prepare an inventory of the files.

(d) Disposition of Files

After consulting each client, the conservator may refer that client's open matters to attorneys willing to handle such matters, may assist the client in finding new counsel or, with the written consent of the client, may assume responsibility for specific matters. In all other matters, the conservator shall return the client's files to the client.

(e) Compensation

The conservator shall be entitled to reimbursement from the attorney's assets or estate for actual expenses, including reasonable hourly attorney's fees, necessarily incurred by the conservator in carrying out the order of employment. Upon verified motion served upon the attorney at the attorney's last known address or, if the attorney is deceased, upon the personal representative of the attorney, the court may enter final judgment against the attorney or personal representative for the reasonable fees and expenses of the conservator. If the conservator is unable to obtain full payment within one year after entry of judgment, the Commission in its sole discretion may authorize payment from the

Disciplinary Fund in an amount not exceeding the amount of the judgment that remains unsatisfied.

(f) Confidentiality

A conservator shall not disclose any information contained in a client file without the consent of the client to whom the file relates, except as necessary to carry out the order of appointment.

Source: This Rule is in part derived from former Rule 16-717 (BV17) and in part new.

Rule 16-741 was accompanied by the following Reporter's Note.

Section (a) is derived in part from former Rule BV17 a and includes an attorney who has abandoned the practice of law within its scope. See New Jersey Rule 1:20-19(a). The purpose of requesting a conservator, as stated in section (a) is derived from the second section of Rule BV17 b.

Section (b) is derived from former Rule BV17 b without substantial change, except that Bar Counsel is no longer eligible for appointment as conservator. Instead, the court appoints an attorney designated by Bar Counsel.

Section (c) is new. It is derived in part from Rule XI §15(a) of the District of Columbia Bar and New Jersey Rule 1:20-19(a).

Section (d) is new. It is derived from Rule XI §15(h) and (i).

Section (e) is new. The first two sentences contemplate reimbursement from the attorney's assets or estate and, to that extent, are derived from New Jersey Rule 1:20-19(f). The final sentence of section (e) confers a contingent right upon the conservator to apply to the Commission for a discretionary

payment from the Disciplinary Fund for any sum that remains unsatisfied.

Section (f) is derived, with changes in style, from former Rule BV17 c.

Mr. Howell explained that this Rule provides for the appointment of a conservator if the attorney disappears or dies. The petition is filed in the county in which the attorney's office was located. The conservator takes possession of the client files, and either completes the work on them or finds someone else to do the work. Mr. Bowen asked if the petitions are ever filed in courts other than the circuit court. Mr. Grossman replied that they are never filed in any court except for the circuit court. Mr. Bowen suggested that section (b) provide that the petition is to be filed "in the circuit court in any county in which the former attorney last maintained an office for the practice of law." Judge McAuliffe pointed out that the petitioner may not know which was the last office. He suggested that the word "last" be deleted. The Committee agreed by consensus to these changes.

Judge Vaughan questioned whether that the attorney's personal representative is presumed to be an attorney or if not, then to have retained counsel. Mr. Bowen noted that the court appoints the conservator. The Vice Chair said that section (a) provides that the person appointed is "capable of conducting the former attorney's affairs." Judge Vaughan remarked that the attorney's personal representative could handle this if he or she were an attorney.

Mr. Hochberg asked if the client whose case is being referred consents to the referral. The Chair responded that section (d) provides that the client will be consulted. Judge Rinehardt inquired if the consent has to be written. Mr. Sykes remarked that the intent of the Rule is that the client will consent. Mr. Howell commented that the situation the Rule is designed to handle may be chaotic. No list of clients may be available, and someone may need immediate access to the files. Mr. Sykes noted that section (d) requires that the client be consulted. Mr. Howell pointed out that section (f) provides for confidentiality even if the review of the files is unauthorized. The client is protected from information in the files being divulged. The Chair added that the conservator may not have the time to consult the client. The statute of limitations may be running. The Vice Chair observed that if the client cannot be found, the Rule will be violated. Mr. Howell suggested that the standard of "whenever practical" be added to the Rule.

Mr. Grossman asked if the court were to designate someone to complete the file, could the attorney turn down this designation. Section (b) provides that Bar Counsel designates the conservator. The Chair suggested that the designation by Bar Counsel be deleted. Mr. Brault commented that it should be in Bar Counsel's hands. The Vice Chair said that Bar Counsel can always suggest the conservator. Judge McAuliffe suggested that the language could be "recommended by Bar Counsel," but the Vice Chair argued that that is not any

different in meaning. Mr. Hochberg pointed out that the Rule provides that "the court may enter an order," indicating that the court can change the decision. The Vice Chair pointed out that if the person whom the court would like to be the conservator is not recommended by Bar Counsel, that person cannot be appointed. Judge McAuliffe said that there has to be some faith in the ability of the person selected by Bar Counsel to do the job. The Vice Chair remarked that the court could refuse the entry of an order, but if it does enter the order, the person has to be the one recommended by Bar Counsel. Judge McAuliffe suggested that the word "designated" be changed to the word "approved," and the Committee agreed to this change by consensus.

Mr. Howell drew the Committee's attention to section (d). Mr. Sykes pointed out the consultation problem that exists in this provision. The Chair suggested that the first sentence of section (d) be changed to read as follows: "The conservator may refer that client's open matters to attorneys willing to handle such matters, may assist the client in finding new counsel, or may assume responsibility for specific matters." The Vice Chair remarked that she found it odd that the Rule would not provide that one would try to reach the client for consent when this could be accomplished in the ordinary course. Mr. Brault commented that his office had a conservatorship case with 300 client files, and getting all of the clients' consents would have been impossible. The Chair suggested

that section (d) could begin with the following language: "With the consent of the client or the approval of the court, the conservator may refer...". The Committee agreed by consensus with the Chair's suggested language.

Mr. Sykes said that there is an obligation on the attorney's part to communicate with a client. Judge Vaughan observed that legal ethics already exist to deal with this. Mr. Brault pointed out that Maryland Rule of Professional Conduct 1.4 (b) provides that a "lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Mr. Grossman pointed out that the clients are not the clients of the conservator. The Vice Chair observed that the client can take his or her own file to someone else. The Chair noted that the Rule protects the attorney who has to take quick action with another attorney's files. Mr. Brault remarked that if the conservator gets the file, he or she may not be able to fulfill the responsibility to complete the matter. The Vice Chair commented that each conservator can divide up the cases. There is no need to write the Rule for the emergency situation; in the usual course, the attorney will be able to go through the files. The Chair said that with his suggested language providing that the client consents or the court approves, there does not need to be a written consent requirement.

Mr. Sykes referred to the language in the second sentence of section (d) which reads "all other matters." He questioned whether

this means matters which are not open. The Chair suggested that the word "open" could be added after the word "other." Mr. Howell suggested that the sentence be deleted from section (d), and the Committee agreed by consensus with this suggestion.

Turning to section (e), Mr. Klein pointed out that in the first sentence, the word "employment" should be the word "appointment." The Committee agreed with this change. The Vice Chair remarked that the conservatorship process may last a long time. The procedure provides for only one motion and then a judgment. Mr. Howell said that in the second sentence, the phrase which reads "enter final judgment" could be changed to "enter orders." Mr. Brault commented that all of it would be a final and appealable judgment. Judge McAuliffe suggested that it be a final judgment to execute for the fees and expenses. The Chair added that it could be reduced to judgment. Mr. Bowen expressed the view that the language should be left as it is.

The Vice Chair asked if the conservator is allowed to pay himself or herself without a motion. Mr. Howell answered that the conservator would file a verified motion. Judge McAuliffe questioned whether anyone approves the request for payment. The Vice Chair noted that under the Receivership Rules, the receiver must file an application to get paid. Mr. Bowen pointed out that a receiver takes title to property, but the conservator does not and has to bill someone. The Vice Chair inquired if the conservator takes control of

bank accounts as well as the files. The Chair said that there is no payment unless the court so orders. The Vice Chair observed that Mr. Bowen's reading of the Rule is that the conservator has to submit a bill. Mr. Bowen commented that the conservator would have to go to court to enforce payment.

The Vice Chair questioned whether the disbarred attorney has a say in the payment to the conservator. Mr. Brault replied in the negative. The Chair suggested that the second sentence begin as follows: "Upon verified motion served upon the attorney at the attorney's last known address or, if the attorney is deceased, upon the personal representative of the attorney, the court may order payment to the conservator." Mr. Bowen suggested that the following language be added on to the end of the second sentence: "and may enter final judgment against the attorney or personal representative for the reasonable fees and expenses of the conservator." The Committee agreed by consensus to these two suggestions.

Mr. Sykes commented that there may be multiple applications. It appears that the conservator would wait until the end of the case when his or her services have been finished, and then the court would enter final judgment. Mr. Bowen suggested that the word "final" be deleted from the end of the second sentence of section (e). The Committee agreed by consensus with Mr. Bowen's suggestions.

The Chair said that the Rule needs to clarify that this is an ongoing procedure. Mr. Sykes suggested that the word "periodic" be

added after the word "to" and before the word "reimbursement" in the beginning of the first sentence of section (e). The Committee agreed by consensus with this suggestion.

Mr. Hochberg commented that if the attorney disappears, the Rules contain a broadened substitute service. Mr. Grossman added that Rule 16-708 has already been approved. The Vice Chair pointed out that Rule 16-741 allows periodic motions and a judgment. This violates the judgment scheme of the Rules of Procedure. Rule 13-303 of the Receivership Rules provides that the court approves the application of the receiver for compensation and expenses to be paid from a bank account. The Vice Chair suggested that any judgment that is satisfied by payment from the Disciplinary Fund be combined with an assignment for the benefit of the Disciplinary Fund. A sentence could be added to the end of section (e) which would read as follows: "If payment is made from the Disciplinary Fund, the conservator shall assign the judgment to the Commission for the benefit of the Disciplinary Fund." The Committee agreed by consensus to the addition of this sentence. Judge McAuliffe remarked that this is similar to a seriatim judgment for arrearages in a domestic case.

Mr. Howell drew the Committee's attention to section (f). Mr. Sykes observed that the exception should be changed to "except as permitted by this Rule." If the conservator refers the matter to another attorney, there should not be arguments as to what is or is not necessary. The Chair added that the exception should also

include the approval of the court. Mr. Howell suggested that the exception should be "except as permitted by the order of appointment and this Rule." The order might have special provisions, such as emergency powers. Mr. Sykes noted that that would permit the court to broaden confidentiality beyond the Rule. He suggested that the wording of the exception be: "except as permitted by order of the court or this Rule." The Committee agreed by consensus to this change. Judge Vaughan moved to adopt the Rule as it was amended, the motion was seconded, and it passed unanimously.

Mr. Howell presented Rule 16-742, Audit of Attorney Accounts and Records, for the Committee's consideration.

> Rule 16-742. AUDIT OF ATTORNEY ACCOUNTS AND RECORDS
>
> (a) Action For Audit
>
> Bar Counsel or the Clients' Security Trust Fund may commence an action to request an audit of the accounts and records of an attorney that the attorney is required by law or Rule to maintain by filing a petition against the attorney in any court in the county where the attorney resides or has an office for the practice of law.
>
> (b) Petition
>
> The petition shall state the facts showing that an audit is necessary and shall request the appointment of a certified public accountant to conduct the audit. The petition shall be sealed and stamped "confidential" at the time of filing and shall not divulge the name or otherwise identify the attorney against whom the petition is filed.

(c) Caption

The petition and all subsequent pleadings and papers filed in the action shall contain a caption, "In re: Application for Audit of an Attorney's Accounts and Records."

(d) Show Cause Order; Service

Upon filing of a petition under this Rule, the court shall enter an order giving notice of the action and directing the attorney to show cause why an audit should not be conducted as requested. The order and the petition shall be served in such manner as the court may direct so as to preserve the confidentiality of the action.

(e) Response To Petition

The attorney shall file a response to the petition and show cause order on the date stated in the order or, if no date is stated, within five days of being served.

(f) Order Directing Audit

After considering the petition and any response, and upon a showing of good cause, the court may order any of the accounts and records of the attorney required by law or Rule to be maintained by the attorney to be audited by a certified public accountant designated by the order. The order directing the audit shall expressly require that the audit be conducted and a report be made in such manner as to preserve the confidentiality of the proceedings and the attorney's confidential relation with the clients of the attorney.

(g) Finality of Order

An order granting or denying a petition for an audit is a final order.

(h) Duty Of Clerk To Preserve Confidentiality

The clerk shall maintain a separate docket with an index for proceedings under this Rule. Pleadings and other papers filed in the proceedings shall be sealed at the time they are filed in accordance with section (b) of Rule 16-709. The docket, index, and papers in the proceedings shall not be open to inspection by any person, including the parties, except upon an order of court after reasonable notice and for good cause shown.

(i) Cost Of Audit

Upon completion of the audit, the court may order all or part of the costs of the audit and of the proceeding to be paid by any party to the proceeding, but costs shall not be assessed against an attorney where the audit fails to disclose any irregularity.

(j) Remedy Not Exclusive

Nothing in this Rule or proceeding under this Rule shall preclude any person having an interest in property or funds held by an attorney from pursuing any remedy or cause of action pending the audit.

Source: This Rule is in part derived from former Rule 16-718 (BV18) and in part new.

Rule 16-742 was accompanied by the following Reporter's Note.

Section (a) is derived from former Rule BV18 a, with changes in style. An attorney may be required by law or Rule to maintain accounts and records that are subject to verification. See, e.g., Code, Business Occ. & Prof. Art., §§10-302, 10-303, 10-304; Rule 16-603; Rule 1.15, Maryland Rules of Professional Conduct.

Section (b) is new insofar as it requires the petition to "state the facts showing that an audit is necessary." This is deliberately broad because the causes for an audit may

appear in indefinite variety. Evidence that one account of an attorney has not been properly maintained or that the funds of one client have been handled improperly should constitute cause for verifying all of the accounts containing the funds of any client maintained by the lawyer. Examples of cause warranting an audit include a dishonored check drawn on a client trust account, failure to timely distribute funds to a client, commingling of funds, or a violation of the rules governing attorney trust accounts (Rules 16-601 to 16-612). See Commentary to A.B.A. Model Rule 30. Section (b) also requires the petition to be stamped "confidential" at the time it is filed, in conformity with the confidentiality provisions in section (b) of Rule 16-709. In other respects, section (b) is derived from former Rules BV18 a and BV18 b 2.

Section (c) is derived, with style changes, from former Rule BV18 b 2.

Section (d) combines the notice concept in former Rule BV18 a with the text of former Rule BV18 b 3.

Section (e) is new. It requires a response on a date specified in the show cause order or, if none is stated, within five days of service.

Section (f) authorizes the court to order an audit upon a showing of good cause, the standard prescribed in former Rule BV18 a. Good cause appears upon a showing that an audit is necessary to insure the integrity of the accounts and records. See notes to section (f). The final sentence of section (f) is derived from former Rule BV18 d.

Section (g) is derived, with a minor change in style, from former Rule BV18 f.

Section (h) is derived, with style changes, from former Rule BV18 c.

Section (i) is derived, with style

changes, from former Rule BV18 e.

Section (j) is derived, with changes in style, from former Rule BV18 g.

Mr. Bowen pointed out that in section (a), the same change will be made as it was made in Rule 16-741 as to where the petition is filed. The Vice Chair asked what else besides trust accounts must be maintained by attorneys. Mr. Brault answered that client records must be kept for five years. Mr. Grossman added that an attorney has to keep records of client property. The Vice Chair questioned whether the Rule is limited to auditing trust accounts. Mr. Grossman said that this Rule is used infrequently. Now Bar Counsel has tools which he did not have when Rule BV 18, the predecessor rule, was promulgated. The main example is the subpoena, which is very useful in checking on records. Although most of the audits are conducted in-house, the Rule contemplates the use of an outside accountant. If something is found to be wrong, the respondent pays for the audit.

Judge McAuliffe commented that there are no criteria against which the circuit court must measure the allegations that something was inappropriate. How can the exercise of the judge's discretion be measured? The Chair responded that it is probable cause to believe that the trust account is out of trust. Mr. Grossman remarked that if the Office of Bar Counsel gets a complaint about settlement monies that the client should have received, the complaint may trigger the need to see the trust account. If the attorney refuses to show it

and Bar Counsel goes to court, Bar Counsel probably will prevail. This is not the same as "out of trust." The Chair said that it is a good cause standard. Mr. Grossman pointed out that there are already some limitations placed on Bar Counsel, and he said that he felt hesitant about putting criteria in the Rule. Judge McAuliffe stated that he would withdraw his comment, but he would bring it up again if the Rule is subject to abuse. The Vice Chair remarked that with the subpoena power, the Rule is not necessary. The Chair said that Bar Counsel may want to audit something other than a trust account.

Mr. Klein asked if section (b) means that none of the papers filed contain the name of the attorney or if the restriction is limited to the petition. Judge McAuliffe responded that the name is not in the caption in the petition. Mr. Howell added that subsequent pleadings and papers do not contain the name of the attorney. Mr. Klein questioned if a "court order" is a paper. Judge McAuliffe answered that it is. Mr. Sykes pointed out that the court cannot decide a petition without a name on it. The Chair suggested that the second sentence of section (b) be changed to read as follows: "Proceedings under this Rule shall be sealed and stamped `confidential' at the time of filing, and the docket entries shall not divulge the name or otherwise identify the attorney against whom the petition is filed." The Committee agreed by consensus to this change.

The Reporter said that she had a note from the October, 1996

Rules Committee meeting in which the Committee had asked the question of to what extent should Rule 16-742 apply to pro hac vice attorneys. Mr. Howell answered that the definition of "attorney" for purposes of this Rule excludes a lawyer who has not been admitted in this State.

Mr. Bowen commented that in section (j), the language "pending the audit" should be deleted, because with that language the provision means that someone cannot pursue any remedy or cause of action earlier that the time the audit is completed. He suggested that section (j) read as follows: "Neither this Rule nor any proceeding under this Rule shall preclude....". Mr. Sykes expressed the opinion that this change is not broad enough. He suggested that section (j) read "Neither this Rule nor any proceeding under this Rule shall preclude any other remedy or cause of action." The Chair said that the Style Subcommittee could rework the language.

Mr. Bowen moved to adopt the Rule as amended, the motion was seconded, and passed unanimously.

Mr. Howell presented Rule 16-743, Immunity From Civil Liability, for the Committee's consideration.

Rule 16-743. IMMUNITY FROM CIVIL LIABILITY

(a) Official Conduct

Members of the Commission, of the Inquiry Committee, of the Review Board, Bar Counsel and their employees and designees (including monitors, auditors, and conservators) shall be absolutely immune from suit and civil liability for any conduct or

communication in the course of their official duties.

(b) Communications With Disciplinary Authorities

Communications with the Commission, the Inquiry Committee, Inquiry Panels, the Review Board, Bar Counsel, and their employees and designees (including monitors, auditors, and conservators) relating to alleged professional misconduct or incapacity, including testimony or statements given in a disciplinary action, proceeding, or investigation, shall be absolutely privileged, and no claim or action predicated thereon shall be instituted or maintained. A complainant or witness shall be immune from suit and civil liability for any communication that is privileged under this section.

Source: This Rule is new.

Rule 16-743 was accompanied by the following Reporter's Note.

This Rule is patterned upon A.B.A. Model Rule 12.A, which confers immunity from civil liability for official conduct of disciplinary personnel and for communications (including testimony) relating to attorney misconduct. The A.B.A. model has been adopted in other jurisdictions. See, e.g., Rule XI §19(a), Rules of the District of Columbia Bar; New Jersey Rule §1:20-7 (e), (f). A spot-check of sources discloses that rules of absolute immunity similar to the A.B.A. Model Rule have been adopted in Arizona, Colorado, South Carolina, Tennessee, Texas, and West Virginia. Constitutional objections to these judicially-adopted rules of absolute immunity have not been successful. See e.g., Jarvis v. Drake, 830 P.2d 23, 28-28 (Kan. 1992); Edelstein v. Wilentz, 812 F.2d 128, 132-33 (3rd Cir. 1987) (New Jersey rule).

The question has been raised whether absolute immunity for complainants and other participants in the attorney disciplinary system is a subject that should be reserved for legislation. In fact, statutes enacted in some jurisdictions prescribe merely a qualified privilege, conditioned on good faith, for communications relevant to attorney discipline proceedings. However, these statutes have been held to create an impermissible conflict with the exclusive judicial authority to regulate and discipline attorneys. See, e.g., Hecht v. Levin, 613 N.E.2d 585, 589-90 (Ohio 1993); Ramstead v. Morgan, 347 P.2d 594, 610-02 (Ore. 1959).

In Maryland, the Court of Appeals has complete jurisdiction over disciplinary proceedings. AGC v. Garland, 345 Md. 383, 392 (1997); AGC v. Kent, 337 Md. 361, 371 (1995); AGC v. Joehl, 335 Md. 83, 88 (1994); Maryland State Bar Ass'n. v. Boone, 255 Md. 420, 431 (1969) ("the exclusive jurisdiction of the judicial department of control of membership in the Bar"). "The superintending power of courts over their bars is deeply ingrained in the system of law which we inherited from our forbearers at the time of the American Revolution. It has continued to this day." AGC v. Kerpelman, 288 Md. 341, 375 (1980). It is within "the inherent and fundamental power" of the Court of Appeals to act in attorney disciplinary matters. ACG v. Reamer, 281 Md. 323, 331 (1977). "The exercise of that power is judicial in character and permits the Court to protect itself, the legal profession and the public." Id. See Attorney General v. Waldon, 289 Md. 683, 692 (1981).

Attorney disciplinary proceedings thus are fitting candidates for the broad judicial privilege that exists at common law: "Maryland has long recognized the existence of an absolute privilege for defamation, utterances made during the course of judicial proceedings or contained in documents directly related to such proceedings. This protects the judge, the witnesses, the parties, and, to a more limited

degree, the attorneys involved in the judicial proceeding in which the defamation statement occurs. Where the absolute privilege applies, it protects persons publishing the defamatory statement from liability even where their motives are malicious and made with the knowledge of the state's falsity." Caldor, Inc. v. Bowden, 330 Md. 620, 648 (1993) (Citations omitted). "Surely the Court of Appeals may codify this application of absolute immunity in Rule 16-743." 82 Opinions of the Attorney General 6 (1997). "Similarly, the Court may include in the rule another well-established basis for absolute immunity: prosecutorial immunity." Id. In the same opinion, the Attorney General decided that because "the Court of Appeals has the inherent power to discipline attorneys, it would be lawful for the Court, through its rulemaking power, to grant what it deems to be sufficient immunity to those persons who assist the Court in carrying out its role to discipline attorneys." Id. at 7.

There is some question regarding the extent that the absolute privilege applies to quasi-judicial administrative proceedings. Compare, Miner v. Novotny, 304 Md. 164 (1985) (citizen's complaint against deputy sheriff under Law Enforcement Officers' Bill of Rights entitled to absolute privilege), with Gersh v. Ambrose, 291 Md. 188 (1981) (statement at public hearing conducted by Community Relations Commission not protected by absolute immunity). However, that question is not implicated here because those cases involved "non-judicial" proceedings. See Odyniec v. Schneider, 322 Md. 520, 531 (1991). In contrast, all proceedings under this Subtitle are inherently judicial in nature. Thus, a letter of complaint to an attorney grievance committee has been held to be absolutely privileged as initiating a judicial proceeding. Kerpelman v. Bricker, 23 Md.App. 628, 634 (1974). Many other cases draw the same conclusion. See Annot/ 77 A.L.R.2d 493 (1959), as supplemented. See, e.g., Weaver v. Grafio, 595 A.2d 983, 988 (D.C.App. 1991).

> At present, members of a lawyer counseling committee who evaluate and assist attorneys in need of treatment and rehabilitation in conjunction with a disciplinary proceeding may enjoy some limited degree of statutory immunity conditioned upon acting in good faith. See Code, Business, Occ. & Prof. Art., §10-502 (c). Courts & Jud. Proc. Art., §5-347. The Rule is intended to extend absolute judicial immunity to all participants in disciplinary actions, proceedings, and investigations.
>
> This Rule does not adopt A.B.A. Model Rule 12.B., which would authorize a court on application by Bar Counsel to grant immunity from criminal prosecution to a witness in a disciplinary proceeding. See New Jersey Rule §1:20-7(g).

Mr. Howell told the Committee that Delegate Vallario had requested an opinion from the Attorney General as to whether this Rule is constitutional. The Attorney General had responded that the Rule is constitutional. This Rule provides absolute immunity from internal or external communications to and from grievance machinery, preventing defamation suits. The Vice Chair noted that the grievance machinery is an arm of the court, as a receivership is. Mr. Bowen remarked that a conservator who takes over a case as an attorney has entered into an attorney-client relationship. Mr. Sykes asked about a conservator who lets the statute of limitations run and is derelict in his or her duties. Mr. Howell answered that this Rule protects someone in the course of his or her official duties as a conservator. Judge McAuliffe pointed out that someone who takes over as an attorney is not protected by immunity. The Chair suggested that a

Committee note to that effect could be added, and the Committee agreed by consensus.

Mr. Howell directed the Committee's attention to section (b). The Chair commented that there is an absolute privilege to slander an attorney when a complainant does so in a complaint to the Attorney Grievance Commission. Mr. Howell said that this was the holding in the case of Kerpelman v. Bricker, 23 Md. App. 628 (1974). The Chair asked if the Rule changes the law. Mr. Brault replied existing case law only pertains to communications with the Attorney Grievance Commission. Mr. Grossman asked if someone is immune if he or she sent the same communications to the newpapers and television stations. Mr. Bowen answered that only the communications to the Commission are protected; the ones to the press are not. The Reporter suggested that a Committee note on this issue be added. Mr. Hochberg moved that the note be added, the motion was seconded, and it carried unanimously.

Judge Vaughan moved that Rule 16-743 be adopted as amended. The motion was seconded, and it carried unanimously.

The Chair complimented the Subcommittee on its good work. Mr. Brault said that as the chair of the Subcommittee, he thanked Mr. Howell for his work in drafting the Rules and the Reporter's notes.

The Chair adjourned the meeting.