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, 100 Community Place, Crownsville, Maryland on March 14, 1997.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
James J. Lombardi, Esq.
Anne C. Ogletree, Esq.
Hon. Mary Ellen T. Rinehardt
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Hon. James N. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Ms. Beth Niland
John Broderick, Esq., Office of Bar Counsel
David D. Downes, Esq., Chair, Attorney Grievance Commission

The Chairperson convened the meeting. He announced that the Vice Chairperson would be chairing the meeting, because he had to be away for part of the meeting in order to provide some information to Chief Judge Robert Bell, who was in San Diego. The Chairperson said that he hoped that all of the Rules Committee members had been invited to the upcoming Judicial Conference to be held in April.

Mr. Brault told the Committee that his wife had been on a tour

of the U.S. Supreme Court, which had been conducted by Mrs. Thurgood Marshall. There is a meeting room at the Supreme Court which is available for use by the public. It might be interesting to hold a Rules Committee meeting there. Mr. Brault said that he would be willing to work with the Reporter on this. The Reporter cautioned that holding a meeting at the Supreme Court could possibly interfere with the open meeting requirement. The Vice Chairperson commented that there may also be restrictions on holding meetings out of the State.

The Reporter said that the Chairperson had asked her to remind the Committee that the General Court Administration Subcommittee will soon be discussing the Judicial Disabilities Commission Rules. If anyone has any changes to propose, the changes should be given to the Reporter, the Chairperson, or the Vice Chairperson. The Chairperson remarked that the Subcommittee may be taking a look at the definition of the term "misconduct." This was suggested by Chief Judge Bell in light of complaints by judges and organizations. There will be a Judicial Institute on the subjects of ethics and judicial disabilities on March 20, 1997, which will give judges a chance to discuss any proposed changes to the Judicial Disabilities Commission Rules, including the definition of the term "sanctionable conduct."

The Reporter told the Committee that the 136th Report was sent to the Court of Appeals, which will consider it on April 7, 1997. The Chairperson announced that the plans for the 50th anniversary

celebration of the Rules Committee are moving forward. It appears that the celebration will take place partially funded by the Administrative Office of the Courts and partially by the Rules Committee members. It will probably be held in late April or early May.

The Vice Chairperson said that she had received a letter from an attorney from the firm of Smith, Somerville, and Case concerning Rule 2-423. This Rule was discussed a number of years ago, and the issue of physical examinations has been discussed in the context of the Attorney Discipline Rules. In lead paint cases, children are often examined by a neuropsychologist, who is not a physician. The attorney who wrote the letter said that she and other defense counsel are filing motions to allow the examinations by neuropsychologists, and the motions are being granted. In the practice of domestic law, it is routine to order examinations by professionals who are not physicians. In one case, the plaintiff's attorney refused to allow the examination by a neuropsychologist. At oral argument before the Court of Special Appeals, the panel who heard the case was concerned that neuropsychologists are not physicians, which the Rule requires.

The Vice Chairperson explained that when she and the Honorable Paul Niemeyer were writing their book, Maryland Rules Commentary, they had discussed whether the court has inherent authority to allow examinations by professionals, other than physicians. It may be a matter of policy as to whether to broaden the discovery rules. The

Chairperson commented that the opinion of the Court of Special Appeals, to which the Vice Chairperson had just referred, will be issued within the next 30 days. This can be sent out to the Rules Committee. Another problem in lead paint cases is court-ordered entry on property to conduct tests when the property has already been transferred to someone, and the case is against the former owner. The issue is whether someone can go onto the property to conduct tests.

Mr. Brault observed that the examinations by neuropsychologists in lead paint cases are the main clinical means to establish brain damage. His law firm uses neuropsychologists frequently to conduct tests to establish neurologic dysfunction and to detect which functions of the brain are affected. The Rules should allow this, since this is the way medicine is practiced. The Chairperson remarked that most circuit judges have adopted the concept of inherent authority, but not the appellate courts. The Vice Chairperson expressed the view that the Discovery Subcommittee should pursue expanding the Rule to go beyond the definition of "physician." Mr. Sykes said that if one side in a case presents expert evidence which includes an examination as part of the basis, the other side should have the option to have an examination by the same kind of person. Mr. Lombardi observed that the Rule might be broadened to include chiropractors and physical therapists. The Chairperson commented that the Rule could build in protections to avoid abuse.

Additional Agenda Item.

The Chairperson said that the Department of Veterans Affairs (the VA) has raised an issue concerning the revised Guardianship Rules, and this is being brought before the Committee today on an emergency basis.

Judge Kaplan presented Rule 10-202, Physicians' Certificates--Requirement and Content, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 - GUARDIAN OF PERSON

AMEND Rule 10-202 to add a new section providing an alternate procedure for determining the disability of a beneficiary of the Department of Veterans Affairs when a guardianship of the person of that individual is being sought, as follows:

Rule 10-202. PHYSICIANS' CERTIFICATES--REQUIREMENT AND CONTENT

(a) To Be Attached to Petition

(1) Generally

If guardianship of the person of a disabled person is sought, the petitioner shall file with the petition signed and verified certificates of two physicians licensed to practice medicine in the United States, one of whom shall have examined the disabled person within 21 days before the filing of the

petition. Each certificate shall state the name, address, and qualifications of the physician, a brief history of the physician's involvement with the disabled person, the date of the physician's last examination of the disabled person, and the physician's opinion as to: (1) the cause, nature, extent, and probable duration of the disability, (2) whether the person requires institutional care, and (3) whether the person has sufficient mental capacity to consent to the appointment of a guardian.

(2) Veterans Administration Beneficiary

If guardianship of the person of a disabled person who is a beneficiary of the United States Department of Veterans Affairs is being sought, the petitioner shall file with the petition, in lieu of the certificates of two physicians required in subsection (1) of this section, a certificate of the Administrator of the Department of Veterans Affairs or a duly authorized representative, setting forth the fact that the person has been rated as disabled by the Administration in accordance with the laws and regulations governing the Department of Veterans Affairs. The certificate shall be prima facie evidence of the necessity for the appointment.

Cross reference: Code, Estates and Trusts Article, §13-705.

(b) Delayed Filing of Certificates

(1) After Refusal to Permit Examination

If the petition is not accompanied by the required certificate and the petition alleges that the disabled person is residing with or under the control of a person who has refused to permit examination by a physician, and that the disabled person may be at risk unless a guardian is appointed, the court shall defer issuance of a show cause order. The court shall instead issue an order requiring that the person who has refused to permit the disabled person to be examined appear personally on a date specified in the order and show cause why the disabled person should not be examined. The order shall be personally served on that person and on the disabled person.

(2) Appointment of Physicians by Court

If the court finds after a hearing that examinations are necessary, it shall appoint two physicians to conduct the examinations and file their reports with the

court. If both physicians find the person to be disabled, the court shall issue a show cause order requiring the alleged disabled person to answer the petition for guardianship and shall require the petitioner to give notice pursuant to Rule 10-203. Otherwise, the petition shall be dismissed.

Cross reference: Rule 1-341.

Source: This Rule is in part derived from former Rule R73 b 1 and b 2 and is in part new.

Rule 10-202 was accompanied by the following Reporter's Note.

The Department of Veterans Affairs is requesting that former Rule R73 b 2 be reinstated by adding it to Rule 10-202. The former provision allowed the Department to substitute its own internal procedures in place of the requirement that two physicians must certify that the person who is the subject of the guardianship petition is disabled. Counsel for the Department has written two letters indicating that the deletion of Rule R73 b 2 is creating an administrative burden because of the need to have two physicians' certificates and because Rule 10-202 requires that at least one of the physicians examine the person within 21 days before the filing of the guardianship petition. The Department maintains that it cannot comply with these requirements. The contention is that the former system under Rule R73 b 2 worked well for the Department, and its counsel, as well as two attorneys from a law firm which handles these cases, are requesting the reinstatement of that provision.

Judge Kaplan explained that copies of correspondence from the VA concerning veterans who are allegedly incompetent have been distributed today. The VA has its own board which is able to declare

these veterans to be incompetent and therefore eligible for payments from the VA. A statute in Code, Estates and Trusts Article, originally authorized this certification by the VA board. There was no need to get two physicians' certificates in order to set up a guardianship of the person. The VA set up the guardianships so there would be someone to receive the payments on behalf of the incompetent veteran to avoid dissipation of the assets. The statute was amended, leaving out the provision authorizing the VA board to make a determination of incompetency. The Court of Appeals put this provision into the former R Rules where it remained until the recent revision, when it was deleted from Rule 10-202. The VA has asked for this to be put back into the revised Fiduciary Rules.

Mr. Sykes observed that the VA has its own physicians and questioned as to how burdensome it would be for the VA to meet the requirement of two recent examinations by physicians. The Chairperson said that when the guardianship rules were in the process of being revised, the Assistant Reporter had called the VA to ask about their procedures. The Assistant Reporter added that this was done about 10 years ago, and at the time of the call, she had been apprised that the VA board certification process was an internal procedure which was not a part of the law. The Vice Chairperson inquired if other states have a similar procedure. Mr. Sykes remarked that guardianship is a state matter, and it is difficult to have uniformity.

Judge Kaplan pointed out that someone who has been declared incompetent by a VA board can appear before the board to get his or her status changed. The VA ruling of incompetency allows the VA to pay a substantial amount of money on behalf of the veterans. Mr. Brault remarked that state rules may have no authority to overrule the federal procedure. Mr. Lombardi commented that he had no problem with the VA board making the finding of incompetency and appointment of a federal fiduciary when state jurisdiction has not been invoked. However, the VA would like to go beyond this and have the court in Maryland appoint a guardian in some cases based on the VA board finding. Some representatives of the VA had discussed this with the Chairperson at a meeting earlier this week. Mr. Lombardi said that he had been unable to attend the meeting, but he was interested to know why the VA could not comply with the requirement of having a fresh certificate issued within 21 days of the examination of the veteran. The Assistant Reporter responded that at the meeting with the Chairperson, the VA representatives had stated that it is very difficult to reach some of these veterans to do an examination within 21 days of the issuance of the certificate.

The Chairperson noted that there are less than 300 cases a year where the VA files in circuit court. The VA would also like the hearing requirement in Rule 10-205, Hearing, to be waived, as it was in former Rule R77. He asked the Rules Committee if it wanted to require the VA to follow the Maryland Rules, or if the VA system can

be left as it had been up until January 1, 1997. Is there a valid reason to expose the VA to the problems they are having under the new system? Not exposing the veterans to these problems may also save the time of the circuit courts. Judge Kaplan pointed out that he has never had a problem with the former R Rules, and has never heard a complaint from a veteran or a representative of a veteran about the VA process.

The Chairperson noted that in the package of materials which had been distributed that day, there was a letter from Charles S. Winner, Esq., of the firm of Fisher and Winner. (See Appendix 1). Mr. Winner had attended the meeting with the Chairperson earlier in the week. Mr. Winner had pointed out that banks are no longer willing to take these cases, and because of this the VA had hired Mr. Winner's law firm to handle the cases. Mr. Winner's firm is also interested in having the changes made to Rules 10-202 and 10-205 which have been requested by the VA.

Judge Kaplan moved to put the provisions of former Rule R73 b 2 back into Rule 10-202. The motion was seconded, and it passed on a vote of eight in favor, three opposed. Mr. Howell noted that the Rule needs to be styled to remove the reference to "the Administration."

Judge Kaplan presented Rule 10-205, Hearing, for the Committee's consideration.

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 - GUARDIAN OF PERSON

AMEND Rule 10-205 to add a new section which would circumvent the requirement of a jury trial when a guardianship of the person is being sought for a beneficiary of the Department of Veterans Affairs, as follows:

Rule 10-205. HEARING

(a) Guardianship of the Person of a Minor

(1) No Response to Show Cause Order

If no response to the show cause order is filed and the court is satisfied that the petitioner has complied with the provisions of Rule 10-203, the court may rule on the petition summarily.

(2) Response to Show Cause Order

If a response to the show cause order objects to the relief requested, the court shall set the matter for trial, and shall give notice of the time and place of trial to all persons who have responded.

Cross reference: Code, Estates and Trusts Article, §13-702.

(b) Guardianship of Alleged Disabled Person

(1) Generally

When the petition is for guardianship of the person of an alleged disabled person, the court shall set the matter for jury trial. The alleged disabled person or the attorney representing the person may waive a jury trial at any time before trial. If a jury trial is held, the jury shall return a special verdict

pursuant to Rule 2-522 (c) as to any alleged disability. A physician's certificate is admissible as substantive evidence without the presence or testimony of the physician unless, not later than 10 days before trial, an interested person who is not an individual under a disability, or the attorney for the alleged disabled person, files a request that the physician appear.

(2) Department of Veterans Affairs Beneficiaries

In cases involving a beneficiary of the Department of Veterans Affairs, if no objection to the guardianship is made, a hearing shall not be held unless the Court finds that extraordinary circumstances exist which would require a hearing.

Source: This Rule is in part derived from former Rule R77 and is in part new.

Rule 10-205 was accompanied by the following Reporter's Note.

The Department of Veterans Affairs is requesting that former Rule R77 b 2 be reinstated by adding it to Rule 10-205. The former provision waived the requirement that a hearing must be held in a guardianship of the person proceeding when a beneficiary of the Department was the subject of the proceeding, unless extraordinary circumstances existed. The Department would like that provision back in the guardianship rules as a means of easing some of their administrative burdens in setting up these guardianships.

Judge Kaplan explained that the VA would like the hearing requirement in Rule 10-205 waived as it was in Rule R77 b 3, the predecessor to Rule 10-205. Judge Kaplan moved to add back into Rule

10-205 the provisions of former Rule R77 b 3. The motion was seconded.

Mr. Titus commented that he was surprised at the concept of having no hearing at all for VA veterans. The Rule as proposed would preclude the court from holding a hearing except under extraordinary circumstances. Mr. Bowen noted that this procedure has always worked well, and there is no compelling reason to change it. The motion passed on a vote of nine in favor, four opposed.

The Chairperson asked if there were any additions or corrections to the minutes of the February 7, 1997 Rules Committee meeting. Mr. Klein answered that he had several proposed changes. On page 19 in the second full paragraph, the third sentence should read as follows: "Mr. Klein remarked that the state-of-the-art issues in asbestos litigation involve medical literature dating back as far as the late 1800's." On page 24 four lines up from the bottom of the page at the end of the sentence which begins "Mr. Klein commented...", the words "preparing for" should be added in after the word "for" and before the word "the." On page 26, seven lines up from the bottom of the page, the sentence which reads "The linkage regulates the rates." should be changed to: "The linkage between the rate for deposition preparation time and the rate for the deposition itself would regulate the rates." On page 27, in the first full sentence on the page, the reference to Rule 11 needs to be clarified, since this is not referring to Federal Rule of Civil Procedure 11,

but rather to a local federal rule.

Mr. Klein moved that his proposed changes be made, the motion was seconded, and it carried unanimously. The Vice Chairperson stated that the minutes were approved as amended.

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

Mr. Howell said that the Reporter had called attention to the fact that the Committee, in considering some of the early Attorney Discipline Rules, had deleted the opening statements of some of the Rules, such as "There is a Disciplinary Fund.", and "There is an Inquiry Committee." The Reporter had expressed her concern that since these bodies are not constitutionally recognized nor created by statute, it would be preferable to have a creation clause. The Judicial Disabilities Commission is constitutionally created and the Clients' Security Trust Fund as well as the Rules Committee are created by statute. Since the Attorney Grievance Commission and its integral parts are not created by the Constitution or by statute, the deletion of the creation clauses should be looked at again. Mr. Zarnoch pointed out that there may be consequences for agencies not being established properly.

Mr. Klein moved to add the creation clauses back into Rules 16-702, Attorney Grievance Commission; 16-705, Inquiry Committee; and 16-706, Review Board. The motion was seconded and passed

unanimously.

Mr. Howell handed out a revised version of Rule 16-717, Hearing Procedures, and presented it for the Committee's consideration.

Rule 16-717. HEARING PROCEDURES

(a) Procedural Rights of Attorney

The attorney who is the subject of the statement of charges has the right to a fair and impartial hearing of the charges, to be represented by counsel, to the issuance of a subpoena for the attendance of witnesses and for the production of designated documents and other tangible things, to present evidence and argument, and to examine and cross-examine witnesses.

(b) Prehearing Review

Upon appointment to a Hearing Panel, the Panel members shall review the statement of charges and any response. If the Panel concludes that the statement of charges alleges facts which, if true, constitute professional misconduct or incapacity, the Panel shall schedule a hearing on the charges. Otherwise, the Panel shall dismiss the charges without a hearing, terminate the proceedings, and serve notice of the dismissal upon the attorney and Bar Counsel, who shall also notify the complainant. If dissatisfied with a dismissal without a hearing, subject to the approval of the Chair of the Commission, Bar Counsel may file with the Commission a request for review of the dismissal and a statement of reasons by Bar Counsel for the review. Bar Counsel shall serve copies of any request for review and statement of reasons upon the attorney. Within 10 days of service, the attorney may file with the Commission a reply to the statement of reasons.

(c) Notice of Hearing

The Panel Chair shall notify Bar Counsel, the attorney and the members of the Panel of the time and place scheduled for a hearing. The notice shall be in writing and mailed at least 15 days before the scheduled date. If the attorney fails to appear for the hearing, after adequate notice, the Panel may proceed with the hearing in the attorney's absence and may consider the attorney's failure as evidence of the factual allegations.

(d) Continuance

On written request of a party or on the Panel's own initiative, the Panel Chair may postpone or continue a hearing for good cause. The absence of a necessary witness is not cause for a postponement or continuance unless supported by an affidavit meeting the requirements of Rule 2-508 (c).

(e) Bar Counsel Disclosures

Upon request of the attorney at any time after service of the statement of charges, Bar Counsel shall promptly allow the attorney to inspect and copy (1) all evidence accumulated during the investigation; (2) all statements as defined in Rule 2-402 (d); (3) summaries of any oral statements for which contempo- raneously-recorded recitals do not exist; (4) the record of prior final discipline or previous adjudication of misconduct or incapacity of the attorney that Bar Counsel intends to introduce after a hearing pursuant to subsection (k)(3) of this Rule; and (5) any other information that Bar Counsel chooses to disclose in the interest of fairness or to expedite the hearing.

(f) Exchange of Information

Within a reasonable time before the date scheduled for the hearing, Bar Counsel and the attorney shall provide to each other a list of the names of the witnesses that each intends to call and copies of the documents that each intends to introduce in evidence at the

hearing.

(g) Depositions of Unavailable Witnesses

Bar Counsel or the attorney may take the deposition of a witness and offer it in evidence before the Hearing Panel if the witness is either (1) unable to attend the hearing because of illness or other disability or (2) unwilling to attend and cannot be served with a subpoena or certified letter as provided in section (c) of Rule 16-718. Chapter 400 of Title 2 governs the taking of such a deposition in a Hearing Panel proceeding except (1) the notice required by Rule 2-412 shall be filed with the Panel Chair; (2) the filing requirements of Rule 2-404 (a)(3) and Rule 2-415 (e) are not applicable; and (3) the deposition shall be filed with the Panel Chair prior to the scheduled hearing date. The Panel Chair may enter protective orders permitted by Rule 2-403 and make other rulings as justice may require pertaining to the deposition of an unavailable witness.

ALTERNATE

(g) Depositions of Unavailable Witnesses

Bar Counsel or the attorney may take the deposition of a witness and offer it in evidence before the Hearing Panel if the notice of the deposition alleges that (1) the witness is **[**either (1)**]** unable to attend the hearing or testify because of **[**illness or other disability**]** age, mental incapacity, sickness, infirmity, or imprisonment or (2) **[**unwilling to attend and cannot be served with**]** the party noting the deposition has been unable to procure the attendance of the witness by a subpoena or certified letter as provided in section (c) of Rule 16-718. The deposition may be admitted in evidence at the hearing if the Panel Chair finds that the statements in subsection (1) or (2) exist. Chapter 400 of Title 2 governs the taking of **[**such**]** a deposition **[**in a Hearing Panel proceeding**]** under this section except (1) the notice

required by Rule 2-412 shall be filed with the Panel Chair; (2) the filing requirements of Rule 2-404 (a)(3) and Rule 2-415 (e) are not applicable; and (3) the deposition shall be filed with the Panel Chair prior to the scheduled hearing date. The Panel Chair may enter protective orders permitted by Rule 2-403 and make other rulings as justice may require pertaining to the deposition of an unavailable witness.

(h) Mental or Physical Examination

When the statement of charges or any response alleges that the attorney is incapacitated, the Panel Chair, on motion of Bar Counsel for good cause, may order the attorney to submit to a mental or physical examination by a physician pursuant to Rule 2-423.

(i) Oaths

The Panel Chair may administer oaths to witnesses.

(j) Testimony

The Panel may take the testimony of witnesses. The testimony shall be under oath. The attendance and testimony of a witness or the production of documents or other tangible things may be compelled in accordance with Rule 16-718.

(k) Rules of Evidence

(1) Generally

Unless excluded by the Panel Chair pursuant to Rule 5-403, all evidence disclosed in accordance with sections (e) and (f) of this Rule, shall be admissible at the hearing. Otherwise the hearing shall be conducted in accordance with the rules of evidence in Title 5. The Panel Chair shall rule on objections to the evidence.

(2) Burden of Proof

Bar Counsel shall have the burden of persuading the panel that it is more likely than not that the attorney engaged in misconduct or was incapacitated. The burden of going forward regarding defenses or mitigating factors is on the attorney who asserts such defenses or factors.

(3) Prior Discipline

Evidence concerning prior final discipline or previous adjudication of misconduct of the attorney shall not be admitted or considered by the Panel until a finding of misconduct is made under Rule 16-719, unless such evidence is probative of the issue of misconduct presented in the statement of charges or is otherwise admissible under Rule 5-404 (b). At the conclusion of the hearing, Bar Counsel may submit to the Panel a sealed envelope containing such evidence and Bar Counsel's written statement whether or not the evidence was disclosed under subsection (e)(4) of this Rule, and the attorney at that time may submit a sealed envelope containing written argument on the effect to be given to such evidence. Upon a finding of misconduct, the Panel may unseal the envelopes and consider the contents in arriving at an appropriate disposition of the charges.

(l) Record of Proceedings

All testimony and argument at the hearing shall be recorded stenographically or electronically. Except as required by section (b) of Rule 16-720, a transcript shall not be prepared. The attorney may, at the attorney's expense, have the recording of the hearing transcribed.

(m) Disposition of Charge

At the close of the evidence the Panel, after hearing any argument, shall render a decision in accordance with Rule 16-719.

Source: This Rule is in part derived from former Rule 16-706 (d) (BV6 d) and in part new.

Rule 16-717 was accompanied by the following Reporter's Note.

This Rule incorporates some of the procedural provisions of former Rule BV6 d and some material from the Commission's Guidelines.

Section (a) omits part of the first sentence of former Rule BV6 d 1 and adds new language regarding the attorney's procedural rights. It is similar to Rule 16-808 (f), which applies the procedural rights of judges before the Commission on Judicial Disabilities.

Section (b) is based upon Commission Guidelines § 5-102. The current Rule and the guideline are consistent in providing that the only action that may be taken without a hearing is dismissal. However, Bar Counsel is afforded the opportunity to request the review of a dismissal without a hearing pursuant to Rule 16-718 (a). The last sentence is new and was added by the Subcommittee to afford the attorney the opportunity to respond to Bar Counsel's statement of reasons.

The first and second sentences of section (c) are based upon Commission Guidelines §5-103. The third sentence incorporates the substance of the last sentence of former Rule BV6 d 1, but allows the Panel to consider the attorney's unexcused absence as evidence of the factual allegations.

Section (d) is a new provision based in part on Rule 2-508 (a) and (c). It is essentially consistent with Commission Guidelines §5-104.

Section (e) is also a new provision. It is based upon, and is consistent with, Commission Guidelines §5-106. Section (e) is patterned upon the "open file" policy declared

in Rule 16-808 (d)(1) governing proceedings before the Commission on Judicial Disabilities.

Section (f) is new. It reflects Bar Counsel's practice and is derived from the required exchange of information provision in Rule 16-808 (d)(2).

Section (g) is derived from former Rule BV6 d 3 (b), with conforming style changes. It authorizes de bene esse depositions of unavailable witnesses, but not depositions for discovery purposes.

Section (h) is new. Because the extent that an attorney is incapacitated may become an issue, the Panel Chair is authorized to invoke the medical examination procedures of Rule 2-423 on motion of Bar Counsel for good cause. For example, an attorney who raises alcohol or drug abuse as a defense or in mitigation may be an appropriate candidate for a mental or physical examination under Rule 2-423. See, e.g., AGC v. Keister, 327 Md. 56, 77 n.17 (1992). This conforms to Rule 23.C of the A.B.A. Model Rules.

Section (i) is derived from former Rule BV6 d 3 (a) but provides that the Panel Chair, rather than the Panel as a body, may administer oaths to witnesses. Ordinarily this will not be necessary if a court reporter is present.

Section (j) is derived from former Rule BV6 d 3 (a) also; because the subpoena provisions are in a separate Rule, it goes on to refer to the Panel's powers in that regard.

Subsection (k)(1) rejects the policy expressed in former Rule BV6 d 1 that the rules of evidence "need not apply". Instead, section (k) obliges the Panel to apply the Maryland Rules of Evidence; however, the evidence disclosed in accordance with sections (f) and (g) is made automatically admissible at the hearing. In this respect, it is identical to the requirement in Rule 16-808 (e)(4). The Panel Chair rules on objections to the

evidence.

Subsection (k)(2) is new and declares that the standard of proof at the Panel hearing stage is a preponderance of the evidence. This familiar standard represents a compromise between a relaxed standard of "probable cause" and the more demanding "clear and convincing evidence" standard required by former Rule BV10d at the judicial hearing stage (see Rule 16-735). Similarly, subsection (k)(2) imposes upon the attorney the burden of proving by a preponderance of the evidence any factual matters in defense or mitigating circumstances existing at the time of the alleged misconduct. See AGC v. Glenn, 341 Md. 448, 470 (1996).

Subsection (k)(3) is new and is an amplification of A.B.A. Model Rule 11.D (5). Although prior discipline is relevant and material to the sanction to be imposed for proven misconduct, it is usually irrelevant to the issue whether or not the alleged misconduct actually occurred and it may be prejudicial. However, in order to avoid delay resulting from bifurcated hearings, a mechanism is created to allow evidence of prior discipline and the attorney's arguments in mitigation to be submitted in sealed envelopes which the Panel may open only upon a finding of misconduct.

Section (l) is new but is based on Commission Guidelines §5-203. A sentence is added to provide that the attorney may order a transcript at his or her own expense. Section (l) is similar to Rule 16-808 (e)(5).

Section (m) incorporates the substance of former Rule BV 6 d 4 (a) but leaves to Rule 16-719 the details of the various possible dispositions.

Mr. Howell explained that this version of Rule 16-717 contains an alternate section (g). The Rule is an amalgam of old provisions, and including it makes the Attorney Discipline Rules more parallel to

the Judicial Disabilities Rules. It spells out Commission guidelines and practices that were never previously included in a rule. Section (b) provides for a prehearing review. The Panel can dismiss the charges without a hearing if Bar Counsel has not stated a violation of the Code of Professional Responsibility. Bar Counsel can appeal that dismissal to the Review Board by filing a request for review, accompanied by a statement of reasons.

Mr. Klein noted that the attorney has 10 days to file a reply to the statement of reasons, but no time limit is imposed on Bar Counsel to come up with reasons to have a review. Mr. Titus suggested that Bar Counsel be required to file the request for review within 30 days after the date of the dismissal, and that the response to the request for review be made within 30 days of its receipt. Mr. Howell responded that he did not object in principle to this, except that he felt that 30 days goes too far. One of the goals of the revision of the Attorney Discipline Rules is to speed up the process, not slow it down. Mr. Broderick pointed out that the request for review by Bar Counsel is filed with the Commission which only meets once a month. Mr. Howell explained that the request for review is physically filed with the Commission, but the Chair approves it, so it would not be necessary for the Commission to meet.

The Vice Chairperson suggested that since the time for a response to the statement of charges is 15 days in Rule 16-713, Disciplinary Proceedings, the same time period could be used in Rule

16-717. Mr. Titus agreed with this suggestion. David Downes, Esq., Chairman of the Attorney Grievance Commission, said that under the current system, Bar Counsel appeals to the Review Board, with the approval of the Commission, and the Board determines at its next meeting if the case should go back to the Panel for a hearing. Mr. Howell explained that the revised Attorney Discipline Rules have a different procedure than the BV Rules. The appeal of the dismissal by Bar Counsel goes to the Commission Chair to decide whether or not to approve the Bar Counsel decision to go forward. If the Chair approves, the next step is to proceed to Rule 16-720, Review of Panel Decision.

Mr. Sykes inquired about the respondent attorney's opportunity to present his or her reasons that the dismissal was proper. Mr. Howell pointed out that the last sentence of section (b) provides that the attorney may file with the Commission a reply to the statement of reasons filed by Bar Counsel. Mr. Brault asked why the appeal of the dismissal is not filed with the Review Board. Mr. Howell answered that the Commission is in an identifiable location. The Review Board and the Inquiry Panels disband and are reconstituted periodically, so it may be difficult to find them.

Mr. Klein asked if Mr. Titus, who had made the suggestion to have a similar time period for both Bar Counsel and the respondent attorney in section (b), agreed with a 15-day time period for Bar Counsel to file a request for a review of the Panel decision to

dismiss and a 15-day period for the respondent attorney to file with the Commission a reply to Bar Counsel's statement of reasons. Mr. Titus expressed his agreement, and the Rules Committee agreed by consensus to both time periods.

Mr. Howell pointed out that the final sentence of section (c) has a standard default provision, so that if an attorney defaults, the proceedings do not have to grind to a halt. The Vice Chairperson noted that section (d) of Rule 16-713 provides that failure of the attorney after service to serve a timely response without asserting a privilege or other basis for the failure may be treated by the Panel as an admission of the factual allegations in the statement of charges unless excused for good cause. She asked why the failure of the respondent attorney to appear in section (c) of Rule 16-717 is only considered as evidence of the allegations, and not as an admission which is what Rule 16-713 (d) provides when there is a failure to respond. Not showing up at the hearing is a greater problem than filing no answer or a late answer. Mr. Howell remarked that this could be changed to being considered as an admission instead of evidence of the factual allegations.

Judge Vaughan commented that the attorney may deliberately not attend the hearing, because he or she has disdain for the proceedings, feeling that they are not meritorious. Mr. Lombardi observed that an attorney's failure to appear could have a substantial impact on the case. Ms. Knox remarked that the

attorney's response could be that he or she refuses to attend the hearing. Mr. Broderick said that technically that is a violation of Rule 8.1 (b). The investigatory phase presumes a later stage where full due process applies. The Court of Appeals has said that the procedure of Rule 16-717 is part of the investigatory stage; the Panel hearing is the conclusion of the investigation. The Panel has subpoena power to get to the repository of information which is in the possession of the respondent attorney. The Panel needs that information to determine if there is probable cause for the case to proceed further. Mr. Brault commented that it is not a standard of probable cause. Mr. Broderick said that if an attorney filed an artful written response, but opted not to come to the Panel hearing, and if the matter were in equipoise, it would be resolved in favor of the attorney.

Mr. Brault noted that in a civil proceeding, no rule or law requires the defendant to attend his or her trial; the defendant has to be subpoenaed. If requested, the judge has to give an instruction to the jury that the defendant is not required to attend the trial. Bar Counsel can argue that the respondent attorney has to attend the Panel hearing, but in order to assure the respondent attorney's presence, the attorney has to be subpoenaed. If the attorney defends his or her case by testifying at the Panel hearing, and the Panel does not find the attorney a credible witness, the attorney can be charged with a violation of Rule 8.1 and with perjury. The attorney

may have only been brought before the Panel on a charge of having an excessive fee or failing to return telephone calls, which are relatively innocuous charges, yet the attorney may be disbarred for lack of credibility based on his or her testimony in the hearing.

Mr. Karceski again questioned whether the failure of the attorney to be present at the Panel hearing can be considered as evidence of the factual allegations. Mr. Broderick reiterated that the notice of the Panel hearing is a subpoena in the form of a certified letter. Mr. Sykes asked what the procedure is when the Panel dismisses the charges. Mr. Downes responded that if a hearing is to be held, the notice is filed pursuant to section (c). If the Panel then dismisses the charges, Bar Counsel can appeal, and another Panel may then be constituted. Mr. Sykes commented that when the Panel dismisses the charges without a hearing and Bar Counsel files a request for review, it is not clear from the Rule that it is the Review Board who then considers the matter. Mr. Howell responded that Mr. Sykes had made a good point. Another provision or a cross reference may need to be added to Rule 16-717 (b). An additional sentence could be added which states that the Review Board shall proceed pursuant to Rule 16-720.

Mr. Johnson inquired if Rule 16-717 contemplates the issuance of a dismissal with a warning. Mr. Brault replied that that is in another rule. Mr. Johnson pointed out that section (b) provides: "[i]f the Panel concludes that the statement of charges alleges facts

which, if true, constititute professional misconduct or incapacity, the Panel shall schedule a hearing on the charges." If the charge was very minor, and the attorney had never been charged before, issuing a dismissal with a warning might be the most appropriate punishment. According to section (b), if the Panel determines a technical violation, it must hold a hearing. This excludes the issuance of a dismissal with a warning, which is a category of relief that is frequently granted. Mr. Howell explained that this Rule does not have provision for a warning; it is a dismissal without a hearing. Mr. Johnson noted that under the current rules, the Panel can dismiss with a warning. Mr. Broderick remarked that Rule 16-719 (b) provides for a dismissal with a warning.

Mr. Johnson expressed the view that the dismissal with a warning screens out the cases with minor violations. A hearing should not be required for every violation. Mr. Howell observed that the responsibility for screening out the cases is on Bar Counsel who has the unfettered right to dismiss with a warning. If the attorney feels that the warning is unjustified, he or she can ask for a hearing. Mr. Brault said that the Panel Chair should be able to dismiss with a warning without having a hearing.

Mr. Howell commented that Rule 16-717 is a prehearing review, not a prejudgment review. It is simply a look at the statement of charges, but the investigative file is not read. Mr. Johnson pointed out that this is more than a review, because the Panel is deciding if

there has been a violation of the Rules of Professional Conduct. Even if the attorney's conduct constitutes a technical violation, it may not rise to the level which would require a hearing. The ability to issue a dismissal with a warning should be protected. Mr. Broderick agreed that the Panel is only getting the statement of charges and not the file. The decision as to whether to hold a hearing is based on limited information. The Vice Chairperson commented that this is similar to a summary judgment, but Mr. Broderick noted that a summary judgment anticipates that documentation will be presented, and Rule 16-717 does not anticipate any documentation.

Mr. Howell pointed out that nothing in the Rule prevents Bar Counsel from dismissing the charges with a warning. Bar Counsel always has that power, but this can be specifically added to the Rule if the Committee feels it is necessary. Mr. Karceski remarked that under current Rule BV6, the Panel gets more than a statement of charges, because it also gets the file. Mr. Howell said that the Commission guidelines currently control the prehearing review. It would be a change of practice if no file were given to the Panel. Mr. Karceski inquired if documentation should be sent to the Panel under Rule 16-717. Judge Vaughan expressed the view that it would be preferable if the Panel decided to dismiss the case after viewing attached documentation. Mr. Brault observed that the proposed Rules would eliminate automatic review procedures by the Review

Board, and this would place more responsibility on the Panel than it has under the current rules. Mr. Johnson asked why the Panel should get less information if the Panel has more responsibility under the proposed Rules. Mr. Howell responded that there seems to be some confusion about the process. Rule 16-717 (b) provides an administrative ex parte review with neither Bar Counsel nor the respondent attorney present. The Panel decides if the statement of charges sufficiently alleges on its face a violation of the Rules of Professional Conduct. This does not involve weighing the investigative file. Mr. Johnson expressed the opinion that this invites a hearing in almost every case. If the Panel only looks at the statement of charges and response, there is no alternative but to have a hearing. If the Panel is the only body reviewing the case, it should have more information.

Mr. Howell said that hypothetically, Bar Counsel could have determined that the charges were important, but may have offered to dismiss with a warning which was rejected by the attorney. At the prehearing review, would it be sensible for the Panel to dismiss with a warning? Mr. Johnson argued that if charges are filed, all the Panel can do is to have a hearing, since Bar Counsel will ask for a hearing. Mr. Howell pointed out that section (b) provides that the Panel shall schedule a hearing if it concludes that the statement of charges alleges facts constituting professional misconduct. The Panel has no discretion, unless the statement of charges is

insufficient on its face. The Panel has no authority to pass judgment on the merits of the case.

Mr. Sykes noted that there is no opportunity for the Panel to dismiss without a hearing but with a warning at the first stage, which is the point made by Mr. Johnson. This takes away a power that the Panel currently has and impedes rather than facilitates the screening out process. Mr. Brault suggested that the language "warranting discipline" be added to the second sentence of section (b) after the word "misconduct" and before the word "or." Mr. Broderick clarified that a dismissal without a warning is not discipline. Ms. Knox inquired if the Panel has the statement of charges at this point in the proceedings under the current rules. Mr. Johnson replied that the name of the case is circulated before the Panel is constituted. Once it is constituted, the file and the respondent attorney's response go to the Panel. The Panel looks at everything and determines if a hearing should be held or if other action should be taken such as a dismissal or a dismissal with a warning.

Mr. Broderick told the Rules Committee that the philosophical underpinnings of the current discipline system involve a trade-off between the protection of the public and its right to know, contrasted with the right of an attorney to keep his or her reputation unblemished. If there is some minimal misconduct, there need be no public sanction, and this protects the confidentiality of

the attorney. At the screening stage, the system should be informal. The rules of evidence do not apply, and neither do due process rights. Once the screening process is over and the case goes to the Court of Appeals, then those rights apply. The premise of the system is confidentiality. Much of the procedure is confidential, including a reprimand. Under the proposed Rules, the trade-off has been lost. The Panel hearing is a full administrative hearing complete with the rules of evidence and the exchange of documents.

Mr. Broderick said that the original decision of the Rules Committee was to streamline the process, but, in his opinion, the revised rules will not streamline it, with the exception of Rule 16-715, Hearing Panel, which provides for a hearing before one person; Rule 16-723, Injunction; Expedited Disciplinary Action; and Rule 16-716, Probation Agreement. The concern is that the proposed Rules will require the staff in the Office of Bar Counsel to double. A full panoply of rights is available in the Panel hearing, and confidentiality is at risk. The revised Judicial Disabilities Commission Rules became a model for the revision of the Attorney Discipline Rules. The revised judicial rules gave up some of the confidentiality aspects of those predecessor rules.

Mr. Brault responded that the Rules Committee had not intended for the Judicial Disabilities Commission Rules to give up confidentiality, and the Committee did not particularly want those Rules used as a model for the Attorney Discipline Rules. He

expressed the view that confidentiality is more important. Mr. Howell commented that drafting the Attorney Discipline Rules forces the Committee to walk a tightrope. The attempt is to adjust the rights of the attorney who has a reputation to preserve against the rights of the public. The Subcommittee looked at the balance that exists in the current BV rules and in the rules of other jurisdictions. It is difficult to accommodate everyone's point of view. The screening process is a footnote on how the case moves to a hearing. It is simply a scheduling conference for Panel members, and it is not intended as the hearing.

The Vice Chairperson remarked that the concepts of due process and confidentiality are very different. In a review of a motion to dismiss, it does not seem fair that the entire file would come in before the attorney has a right to speak. Mr. Broderick noted that Rule 16-717 provides that the Panel is only considering the charging document. A dismissal with a warning would be a highly unlikely decision at this point when the Panel has no information before it. Mr. Brault suggested that a dismissal without a hearing but with a warning should be presented in the Rule after the disclosures in sections (e) and (f) of Rule 16-717 have been made. After a hearing concerning any material in the investigative file to which the respondent attorney objects on the basis of Rule 5-403, a ruling would be made, and then a dismissal with a warning would be available. Mr. Johnson noted that this would work and would not

require a hearing in every case.

Mr. Titus commented that he did not see the same parallels to the Judicial Disabilities Commission Rules as Mr. Broderick. The Attorney Discipline Rules wisely do not provide the right to a public hearing advertised in The Maryland Register. The secrecy of the Inquiry Panel process is appropriate. Not all of the due process protections are necessary at the Inquiry Panel stage. When the case goes to court, those protections are available. Judge Kaplan expressed his agreement that the process should be confidential. Mr. Broderick pointed out that under the current system, the Court of Appeals has held that the legal argument to exclude evidence from the Panel does not lend itself to full review. This will be available when charges are filed in court. It is a policy issue. The prevailing thought is that peer review screens out what goes to the court. The Vice Chairperson clarified that under the proposed Rules, there will be a hearing in all cases, unless the statement of charges fails to state a claim. She expressed her agreement with the Subcommittee. The public's perception is that decisions are made behind closed doors, especially when a dismissal with a warning is issued. However, confidentiality is cleaner. The Subcommittee has set up an appropriate balance, even if more hearings than under the current system are required.

Mr. Sykes noted that Bar Counsel and the respondent can agree to bypass a hearing. There is an argument that more secrecy leads to

a less clean process. The Vice Chairperson asked if Bar Counsel should be able to throw a case out. Their office does not like to do that, because it creates an inference of a "good ol' boy" system. There will not be too many dismissals. Mr. Johnson remarked that currently there are a substantial number of dismissals with warnings which could become trials under the proposed Rules. However, Mr. Brault's suggested addition will allow the Inquiry Panel to dismiss a case with a warning before a hearing.

Mr. Johnson moved to include a procedure in Rule 16-717 whereby the Inquiry Panel can dismiss a statement of charges with a warning prior to a hearing. Mr. Sykes suggested that the dismissal would be with a warning if the Panel finds professional misconduct, but decides that it does not warrant discipline. Mr. Johnson accepted Mr. Sykes' amendment. Judge Kaplan seconded the amended motion. It passed with four opposed.

After the lunch break, Judge Vaughan pointed out that section (b) of Rule 16-717 does not explain what happens if the request for review by Bar Counsel is sustained. Mr. Brault responded that this section needs to be improved. The Vice Chairperson said that the prehearing section of the Rule will be placed in a separate rule, and a cross reference will be added. Mr. Howell noted that a final sentence will be included which will provide that if the request for review is granted, it will be covered under Rule 16-720. Mr. Brault suggested that because of the motion made by Mr. Johnson, the

Subcommittee could draft a separate prehearing review rule which would come before Rule 16-717 and pertain to a hearing which is required by the Panel or the Review Board. The Committee agreed to this suggestion by consensus. Mr. Brault observed that the new rule can contain provisions concerning discovery, Bar Counsel disclosures, depositions of unavailable witnesses, and rules of evidence.

The Vice Chairperson asked if the notice which is referred to in section (c) of Rule 16-717 includes a subpoena. Mr. Broderick replied that the notice is in the form of a subpoena. The Vice Chairperson questioned whether there is a rule in the Rules of Professional Conduct which requires the attendance of an attorney at the hearing. Mr. Broderick answered that there is no rule compelling attendance. The Vice Chairperson noted that the attorney's failure to appear has to be conditioned upon the attorney being required to appear. Mr. Brault suggested that the following language be added to the last sentence of section (c) after the word "and" and before the word "may": "if the attorney was subpoenaed and failed to appear." The Committee agreed by consensus to the addition of this language.

Judge Rinehardt inquired what would happen if the attorney who is being subpoenaed cannot be found. The Vice Chairperson replied that service can be effected through the means stated in Rule 16-708, which includes mailing to the attorney's last known address and to the address contained in the records of the Clients' Security Trust Fund. Mr. Sykes commented that this provides a method to go forward

with cases which previously could not be completed due to lack of service.

Mr. Johnson asked if counsel for the respondent attorney also gets notice under section (c). The Vice Chairperson responded that the Attorney Discipline Rules specifically provide notice only to the respondent attorney. She questioned whether the Subcommittee looked at the Title 1 notice rules to see how they interact with the notice provisions in the Attorney Discipline Rules. Rule 1-331 provides that when notice is to be given by or to a party, the notice may be given by or to the attorney for that party. Mr. Howell suggested that a cross reference to Rule 1-331 could be added to section (c), but the Vice Chairperson pointed out that there are many other places in the Attorney Discipline Rules which refer to notice to the respondent attorney. To only cross reference one rule could imply that in the other situations, the respondent attorney is notified, but the respondent attorney's attorney is not. Mr. Brault asked Mr. Broderick how the Office of Bar Counsel handles notice. Mr. Broderick answered that whenever counsel enters an appearance, his office notifies counsel for the respondent attorney throughout the proceedings. However, they do notify the respondent attorney directly if there has been a breakdown in the relationship between counsel and the respondent attorney. They make sure that counsel is always apprised as to how the case is proceeding.

Mr. Brault said that the Attorney Discipline Rules provide that

notice is given directly to the respondent attorney, and there is no provision that it has to be given to counsel for the respondent attorney. Mr. Broderick added that the respondent attorney gets certified mail notice of the hearing with a copy to counsel. All other notices can go to counsel of record.

There was no discussion of section (d) of Rule 16-717. Mr. Howell drew the Committee's attention to section (e). Judge Vaughan asked the meaning of item (5) of section (e) which read "any other information that Bar Counsel chooses to disclose in the interest of fairness or to expedite the hearing." Mr. Karceski remarked that since the other items listed in of section (e) seem to cover everything, item (5) implies that Bar Counsel may be hiding something. Mr. Brault noted that Bar Counsel does maintain a work product file which is not disclosed. Mr. Broderick explained that the way this is handled is different from assistant to assistant in the Office of Bar Counsel. The Attorney Grievance Commission guidelines provide that the file should contain all correspondence with the complainant and all the information received from respondent. The Office sends what they generate as investigative reports, and the only item not included is attorney work product, which may include the personal ruminations of the person handling the case for the Office of Bar Counsel, directions to the office paralegals to do research, and communications with the Commission. Mr. Broderick said that he will include in the file case law from

other jurisdictions, and other research central to the issue in the case against the attorney. Mr. Brault commented that simplistically what the respondent attorney is not entitled to is the work product.

Mr. Karceski commented that what is to be excluded from the file should be referenced in section (f), and not section (e), of Rule 16-717. The choice in item (5) of section (e) should not be discretionary. What is properly exchanged is case law from other jurisdictions and research along with the names of witnesses. Mr. Brault agreed with Mr. Karceski. The Vice Chairperson commented that this could be couched in terms of required and permitted disclosures. Mr. Karceski questioned as to why this should be optional. Either the parties exchange the information referred to in item (5), or this provision should be eliminated. Mr. Howell noted that under the Rules of Evidence, all evidence to be disclosed is admissible unless it is excluded by the Panel Chairman. He expressed his agreement with deleting item (5), because the information shared by Bar Counsel is automatically admissible. Mr. Sykes pointed out that if item (5) is deleted, the implication is that all the other information listed in the first four categories is only what is required to be disclosed. He asked what the harm is of leaving item (5) in the Rule, indicating that the field of information is not necessarily exhausted by the first four items. A future Bar Counsel could argue that he or she would only turn over information required to be disclosed and nothing else. Mr. Howell added that Bar Counsel may

say that he or she is not authorized to turn over any other information, except what is listed in the first four items. The information known as Brady material according to the case of Brady v. Maryland, 373 U.S. 83 (1963), which held that material helpful to the defense must be disclosed, is very important, and Bar Counsel may choose not to disclose this, using the reason that it is not listed in the first four items in section (e).

Mr. Brault commented that the privileged information in the possession of Bar Counsel, such as attorney-client communications, presents an ethical problem. Mr. Broderick noted that sometimes in the course of an investigation, the investigator gets information from another case. Bar Counsel may have to redact the file to sanitize it, removing the information from the other case. However, fairness may dictate that Bar Counsel disclose the identity of the other attorney, so that the respondent attorney in the original case knows who to contact to get information. It is not a problem now, because the Office of Bar Counsel gives all the information it has available. However, with a subsequent Bar Counsel, this policy could change.

The Vice Chairperson pointed out that redacting the file appears to violate section (e). Mr. Sykes said that the items required in section (e) apply only to the first investigation. Mr. Brault commented that the Rules should avoid the situation where the names of important witnesses are withheld under the doctrine of work

product. Mr. Klein asked if exculpatory evidence is turned over, since item (1) refers to all evidence accumulated during the investigation. Mr. Broderick said that his office does turn over exculpatory evidence. Under the Commission guidelines, counsel for the respondent can look at the file of Bar Counsel. This is different from what is in the investigative file which goes to the Panel. Some items are not in the files including irrelevant evidence or material which is considered to be work product. However, the Office of Bar Counsel uses a strict application of work product. Disclosure is analogous to a review of the office files.

Mr. Klein asked if exculpatory evidence, which is not in the context of the investigation of the respondent attorney's case, but rather from an investigation of another case, ever gets into the case file of the respondent attorney. Mr. Broderick replied that if the evidence which comes into their office is relevant, they always disclose it. Exculpatory information has to be disclosed. Disclosure facilitates getting to the root of the issue in a case. Judge Vaughan questioned as to what happens to information accumulated after an inspection has been completed. Mr. Broderick answered that supplemental information is sent to the Panel and to the respondent attorney.

The Vice Chairperson asked if a statement should be added to section (e) which provides that Chapter 400 of Title 2 applies. Mr. Howell remarked that there is no similar provision in the Judicial

Disabilities Rules. Mr. Karceski questioned whether the entire file minus the work product is open to inspection and how one would object to certain items in the file being shown. Mr. Howell asked if there are two separate files. Mr. Broderick replied that there are not two files. The investigative part of the file is kept in a manila folder with an acco fastener, and it is organized document by document with exhibit slips to identify the documents. The file has the notice letter and the original complaint. There may be memoranda pertaining to planning assignments, and the investigation, as well as personal thoughts of the person from the Office of Bar Counsel who is handling the case. Mr. Broderick noted that when the file is made available to the respondent, he would like to be able to exclude the planning and other memoranda, and the personal ruminations of the assistant who is handling the case.

Mr. Brault commented that the obligation of disclosure in section (e) should be continuing as it is in Rule 2-401 (e). The Reporter noted that this applies to section (f) of Rule 16-717 as well. Mr. Howell pointed out that section (f) provides that disclosure should be made within a reasonable time. The Judicial Disabilities Rules provide for disclosure not later than 10 days before the hearing. Using the term "a reasonable time" leaves the amount up to a common sense determination. Mr. Karceski expressed the view that it is preferable not to limit the time period for disclosure to a specific number of days. Mr. Howell remarked that

most counsel wait to decide how to put the case together. A reasonable time could be three days or three months before the hearing. Mr. Brault noted that time limits generate controversy.

The Vice Chairperson commented that in the Visual and Electronic Evidence Rules, the evidence in the case-in-chief was differentiated from rebuttal evidence. She asked if Rule 16-717 should make this differentiation. Mr. Howell replied that it is not necessary.

Mr. Howell drew the Committee's attention to section (g). He explained that the alternate version of this section is an attempt to deal with the issue of de bene esse depositions by using language from Rule 2-419. The alternate version makes the deposition of an unavailable witness a two-step process by requiring that the notice of the deposition make certain allegations, and then allowing the deposition to be admitted into evidence if the Panel Chair finds that the allegations are true. Mr. Howell said that he prefers the alternate version.

The Vice Chairperson noted that the certified letter in lieu of a subpoena in section (c) of Rule 16-718 applies only to attorneys. Mr. Howell agreed that a certified letter can only be used if the witness is an attorney. The Vice Chairperson questioned as to why the filing required in Rule 2-404 (a)(3), which pertains to a request to perpetuate testimony and is referenced in section (g), is applicable to Rule 16-717. Mr. Howell noted that the reference to

Rule 2-415 (e) is a carryover from Rule BV6 d. 3.(b)(2)(ii). Mr. Howell suggested that the language in section (g) which reads "(2) the filing requirements of Rule 2-404 (a)(3) and Rule 2-415 (e) are not applicable" should be deleted, and the Committee agreed to this deletion by consensus.

The Vice Chairperson inquired as to why section (g) provides that the deposition is filed with the Panel Chair prior to the scheduled hearing date. Mr. Howell responded that the idea was that the Panel would review all of the evidence. The Vice Chairperson pointed out that there may be other kinds of issues relevant here, such as issues relating to admissibility. If the Panel Chair sees the deposition before these issues are decided, it may be a problem. Mr. Broderick noted that under the BV Rules, all the evidence is in the hands of the Panel Chair, who has the right to make any rules pertaining to any deposition. This latter right has been deleted from the proposed Rules. If the Panel Chair is not going to receive the deposition, then the language in section (g) which reads "(3) the deposition shall be filed with the Panel Chair prior to the scheduled hearing date" could be deleted. Mr. Brault commented that the deposition has to be filed at some time. Judge Vaughan observed that the last sentence of section (g), which provides for protective orders, will resolve any problems. Mr. Brault suggested that the language referred to by Mr. Broderick, which requires the deposition to be filed with the Panel Chair, is controlled by Chapter 400 of

Title 2, and it should be deleted from section (g). The Committee agreed to this suggestion by consensus.

The Vice Chairperson inquired about the language in section (g) which reads "(1) the notice required by Rule 2-412 shall be filed with the Panel Chair." Mr. Brault said that under Chapter 400, a certificate that there will be a deposition is filed with the court. Section (g) of Rule 16-717 requires no certificate, but it does require a notice of the deposition. Mr. Sykes pointed out that a de bene esse deposition is required to be filed with the court pursuant to Rule 2-419 (a)(3). Under section (g) of Rule 16-717 the Rule has to be clear that the de bene esse deposition only has to be filed with the Panel Chair. Mr. Brault stated that the perpetuation of evidence doctrine does not apply unless a complaint or statement of charges will be or has been filed. The Vice Chairperson asked where there is a requirement to file a deposition. Mr. Howell remarked that there are no formalities under this Rule. Mr. Brault said that the rules of Chapter 400 apply. For example, if an attorney is being investigated for theft of trust fund monies, and the fear is that the cestui que trust will die, but Bar Counsel cannot determine whether to file charges, the deposition of the cestui can be put into the file and can then be used if charges are filed.

The Vice Chairperson commented that if the reference to Rule 2-412 is taken out, then this section can be broadened to apply to a notice of a deposition to perpetuate testimony under Rule

2-404, Perpetuation of Evidence. The wording of the language which follows the word "except" would read as follows: "(1) the notice of the deposition shall be filed with the Panel Chair." Mr. Sykes observed that the perpetuation of testimony doctrine does not apply unless an action is going to be filed. Mr. Howell pointed out that the action is filed in the Court of Appeals, and Rule 16-717 applies in anticipation of this. Mr. Sykes read from Rule 1-202, Definitions, which provides that an action "means collectively all the steps by which a party seeks to enforce any right in a court or all the steps of a criminal prosecution." Mr. Brault remarked that this would be in anticipation of public charges, not in anticipation of a Panel hearing. Mr. Sykes suggested that there should be some adaption of the general rule to allow depositions to be taken in this proceeding. Mr. Broderick commented that depositions before a Panel hearing are rare. Any depositions are usually held out-of-state and are very infrequent.

Mr. Brault asked if Rule 2-404 should be incorporated into Rule 16-717. Rule 2-404 has the entire panoply of discovery, including production of documents, and mental and physical examinations. A separate rule would be needed to limit the application of Rule 2-404 in the context of Rule 16-717 to depositions. Language could be added which provides that a deposition may be taken to perpetuate testimony pursuant to the provisions of Rule 2-404 as it applies to depositions. The Vice Chairperson commented that she was hesitant

about incorporating discovery provisions in Rule 16-717. There are three forms of discovery to be concerned with: depositions of unavailable witnesses, depositions to perpetuate evidence, and mental and physical examinations. Mr. Brault disagreed, explaining that the only concern is perpetuation of testimony. The examination pertains only to the attorney who is alleged to be incapacitated. The Vice Chairperson drew the Committee's attention to section (h), and she suggested that the phrase "by a physician" be deleted. The Committee agreed to this deletion.

There was no discussion of section (i). Turning to section (j), the Vice Chairperson remarked that use of the word "may" makes it sound like the Panel could refuse to take the testimony of witnesses. Mr. Titus suggested that the first two sentences of section (j) could be combined, so that the language would be: "The Panel may take the testimony of any witnesses under oath." Mr. Sykes pointed out that that would sound as though the Panel could take the testimony of unsworn witnesses. The Vice Chairperson withdrew her comment about section (j).

Mr. Howell drew the Committee's attention to section (k). Mr. Sykes noted that subsection (k)(1) is very broad. It would allow self-serving hearsay to be admitted. Mr. Karceski suggested that the first sentence of subsection (k)(1) be deleted. Mr. Howell explained the background of this provision. He said that this had triggered a fierce debate in the Subcommittee as to whether there should be

relaxed rules of evidence applicable or no evidence rules applicable at all. The decision was to use the rules of evidence in the proceedings before the Court of Appeals. When the BV Rules were drafted, there was no evidence code. The first sentence of subsection (k)(1) was a compromise to afford some flexibility to allow evidence to come in. The Vice Chairperson asked if all the information has been exchanged at this point in the proceedings. Mr. Howell answered that both sides have seen the documents and have been able to formulate objections. The Vice Chairperson commented that one side could include every conceivable item in the file, all of which is presumed to be admissible. She suggested that the word "relevant" be added to the first sentence of subsection (k)(1) after the word "all" and before the word "evidence." Mr. Sykes observed that if it cannot be argued that certain information in the file is inadmissable hearsay, the file could be loaded with material that should not be admitted. Mr. Brault said that the Subcommittee had run into a problem. If the Attorney Grievance Commission must produce live testimony from all of its witnesses, the hearing could be endless. It would not be good to burden the hearing with unnecessary detail. Mr. Sykes remarked that it is a matter of the quality of the evidence, but Mr. Brault responded that it is difficult to include that concept in the Rule. Mr. Howell had suggested that subsection (k)(1) refer to the admissibility of all relevant evidence.

Mr. Howell pointed out that at its June, 1994 meeting, the Rules Committee had decided that the hearing provided for in Rule 16-717 should be a probable cause hearing, which can include the admission of hearsay evidence. Subsection (k)(1) is an attempt to compromise this issue. The respondent attorney has advance notice, and there is a screening process which affords some protection. Mr. Sykes inquired if it could be argued that hearsay statements of a dead witness should be excluded from the file, since their probative value is outweighed by the prejudicial nature of the statements. Mr. Broderick responded that evidence questions can be argued indefinitely. Practitioners understand this and will take these problems into consideration. If the case against the respondent attorney cannot be proved in enough detail, the attorney can be given a reprimand or a dismissal with a warning. This is an example of the philosophy of balancing.

Mr. Karceski questioned if a catchall similar to the one in Rule 5-803 would be helpful. This could balance hearsay which is trustworthy against useless evidence. Mr. Brault cautioned that the process should not be too rigorous, or else the Court of Appeals may conclude that it is too complicated. The Subcom-mittee had discussed using relaxed rules of evidence. This is not a perfect solution, but this is how small claims actions are handled. Mr. Sykes pointed out that attorney discipline matters are not minor.

Mr. Howell noted that the first sentence of subsection (k)(1)

conforms to the mandate of the Rules Committee. The Subcommittee went further, providing that the attorney could introduce evidence to counteract the evidence against him or her and could cross-examine damaging witnesses. He asked if the Committee agreed with the suggestion that the word "relevant" should be added before the word "evidence" in the first sentence of subsection (k)(1). The Committee agreed by consensus to add this.

The Vice Chairperson questioned whether the second sentence of subsection (k)(1) should be deleted. Mr. Brault asked if hearsay would be admitted, and the Vice Chairperson replied that hearsay could come in under the first sentence. Mr. Titus commented that the current BV Rules created certain protections, similar to a Grand Jury proceeding with a check on it. Mr. Karceski said that Rule 16-717 does not contemplate a Grand Jury proceeding. It is a prehearing review. Mr. Titus expressed the concern that the rationale for secrecy could be surrendered. Mr. Brault observed that open hearing advocates will argue that the prehearing section should be open to the public. The Committee will have to take a stand on this.

Mr. Titus expressed the opinion that the Rule should not be bogged down with references to burdens of proof, and he suggested that subsection (k)(2) be deleted. Mr. Brault noted that with a probable cause hearing there is less reason to have this provision. The Subcommittee combined the idea of probable cause and a burden of

proof. The Chairperson commented that there is a danger with the proceeding going forward if the Panel is persuaded by a preponderance of the evidence that the attorney engaged in misconduct. It might be preferable for the Panel to be persuaded that the court could conclude by clear and convincing evidence that the attorney engaged in misconduct. Mr. Brault responded that the Subcommittee disagreed with that burden of proof because it was too hard to meet. The Vice Chairperson expressed the view that the Chairperson's suggested burden of proof may be too complicated.

Mr. Titus asked again why burdens of proof are needed. Mr. Howell remarked that this was a compromise in the Subcommittee. Probable cause requires too low a threshold; it is simply a reasonable ground to believe. The Chairperson said that this is a prima facie case. Mr. Howell explained that the standard is probable cause to believe that misconduct may be found, without hearing any evidence to the contrary. Probable cause may be contrasted with clear and convincing evidence. Both are difficult to grasp; the standard of preponderance of the evidence is easier to understand. The latter means that it is more likely than not that something happened. The Rules Committee had said previously that it wanted a standard which is lower than a preponderance of the evidence standard. The Subcommittee wanted to bring the standard up somewhat but not to the level of clear and convincing evidence, which is the standard used by the Court of Appeals.

The Chairperson commented that what persuades A by a preponderance of the evidence may convince B by clear and convincing evidence, and it may convince C by the standard of beyond a reasonable doubt. The Grand Jury is hard to predict, and it is unfair to indict someone if the evidence will result in a verdict of Not Guilty. If the Panel concludes that no reasonable circuit court judge could find misconduct by clear and convincing evidence, then it should not send the case on. Mr. Howell expressed the opinion that this standard is somewhat high-risk. It is similar to a standard of guilt beyond a reasonable doubt. By using a lesser standard, some cases will not get screened out, but this avoids the greater risk that a case will be ended which should go to charges. The Chairperson remarked that recognizing the difference between the standards of clear and convincing evidence and preponderance of the evidence is a matter of "knowing it when you see it." Mr. Broderick noted that the classic case of splitting hairs is one where the respondent is charged with not returning telephone calls and not turning over client files. The Panel reviews the case and issues a dismissal with a warning. If a rigid burden of proof is applied, then the compromises which make the system work will fall by the wayside. The system with a nebulous burden of proof works better. The Attorney Grievance Commission guideline, Section 5-204 of the Administrative and Procedureal Guidelines reads:

Although Rule BV6 (c)(1) provides that the

> rules of evidence need not apply, to the extent that the rules of evidence are not followed in admitting evidence, standards designed to give reasonable assurance of authenticity and veracity should be applied.

The Chairperson stated that he did not disagree, but he asked whether the Panel should examine sufficiency of the evidence or resolve the burden of persuasion.

The Vice Chairperson remarked that she was troubled with the idea of instructing the Panel to put themselves in the judge's place. The Chairperson commented that the proposed rule involves a credibility call. For the Panel to be persuaded that something is more likely than not, it evaluates the credibility of the witnesses. The Rule provides that the case goes forward if the Panel is persuaded that it is more likely than not that the attorney engaged in misconduct or was incapacitated. One objective is to try to avoid an outraged public. The Vice Chairperson observed that the public would be more outraged if a case is dismissed at the open hearing stage. It is easier to throw out a case at the confidential stage. The Chairperson said that it is easier to dismiss a case once there has been an evaluation of credibility. Mr. Brault commented that panels make findings, and the Rule should clarify the burden of proof. His concern is that using the standard of clear and convincing evidence will allow many attorneys to sidestep being charged. Mr. Karceski pointed out that sections (e) and (f) would be applicable to this issue. Mr. Brault responded that at other stages

of the proceedings, there are live witnesses. Sections (e) and (f) only pertain to what a witness said and may involve hearsay. Mr. Sykes remarked that the Chairperson's view is that the Panel is entitled to information that the court does not get. The likelihood is that at the Panel hearing level, it is more difficult for the respondent attorney to prove his or her innocence than when the attorney is in court and is allowed to cross-examine witnesses and use the rules of evidence. If the Panel still thinks that it is not likely that a finding of clear and convincing evidence can be made, the attorney is entitled to a dismissal.

Judge Vaughan noted that the second sentence of section (k)(2) provides the attorney the chance to present evidence. Mr. Brault added that Bar Counsel has the burden of persuasion, while the respondent attorney has the burden of going forward with any defenses or mitigating factors. However, the burden of going forward affects the burden of persuasion, and it may add to the probability that something did happen. The Vice Chairperson pointed out that the tagline indicates that the burden of proof includes the burden of persuasion. The respondent attorney has the burden of persuasion with respect to mitigating factors. The Chairperson stated that in the circuit court, Bar Counsel has to prove the case against the respondent attorney by clear and convincing evidence, while the attorney persuades as to mitigation and other defenses using the standard of a preponderance of the evidence. Mr. Broderick noted

that these are the standards enunciated in the case of Attorney Grievance Commission v. Bakas, 322 Md. 603, modified, 323 Md. 395 (1991). The Vice Chairperson expressed the view that the terminology in the Rule needs to be clear.

Mr. Titus called the Committee's attention to Rule 16-719 on page 66 of the revised Attorney Discipline Rules. Section (a) begins as follows: "[i]f the Hearing Panel after hearing finds that the attorney has engaged in professional misconduct or is incapacitated...". Mr. Titus noted that the Panel Hearing ultimately results in a holding in the nature of a Grand Jury charge and not a finding. He suggested that in place of the language "[i]f the Hearing Panel ... finds that the attorney has engaged", the following language should be substituted: "if the Hearing Panel finds a reasonable basis to conclude that the attorney has engaged...". The Chairperson observed that the language "a reasonable basis" seems to work. Probable cause may be based on inadmissible hearsay. Using "a reasonable basis" would mean that if there is no reasonable basis for finding misconduct based upon admissible evidence, then no charges would result.

Mr. Howell pointed out that the problem with using the "reasonable basis" language is that the Panel can find either misconduct or incapacity. Mr. Titus responded that it does not make a difference which finding the Panel makes. The finding process is an Inquiry Panel function, and the Panel is making a determination

that the charges go forward. It is up to the trial judge and the Court of Appeals to make a finding by clear and convincing evidence. The Panel determination is simply finding enough evidence to go forward. Mr. Brault questioned as to what "a reasonable basis" is. The Chairperson again expressed the view that this may work well, since it implies that the Panel could make its decision using an appropriate burden of proof. He asked what would be the trigger for the Panel to send the case forward. Mr. Titus replied it is like the standard used by a prosecutor. Mr. Howell remarked that it is similar to probable cause. The Chairperson said that probable cause can exist on inadmissible evidence -- this is a reasonable basis to get the case before a judge.

Mr. Howell commented that there is a philosophical gap. The Subcommittee soundly rejected that Grand Jury-type of position. The Rules Committee can reject the position of the Subcommittee. The Subcommittee feels that a Grand Jury is inappropriate to determine attorney misconduct and accountability. The standard which should be applied should be something above probable cause. Using a reasonable basis standard without a Committee note to elucidate what it means would imply that people on the Panels could pick one piece of evidence and ignore the rest. The Subcommittee felt that some protection should be given to the attorney. There should be no secret Grand Jury proceeding without standards.

Mr. Titus remarked that it is clear to him that an Inquiry

Panel proceeding has to be more truncated. The concern is that including too many protection lengthens it substantially. Mr. Brault said that a standard of "it probably happened" is not difficult to understand. He inquired how a Panel would interpret "reasonable basis." Mr. Titus responded that a Committee note could explain this. The assessment would be by a body similar to a prosecutorial body, which, as a whole, has authorized Bar Counsel to go forward.

Mr. Titus noted that the Panels currently do not make findings, but Mr. Brault argued that the Panels could not dismiss with a warning if no findings were made. Mr. Broderick explained that there are two reasons to issue a dismissal with a warning. The threshold issue is to determine if there has been misconduct. The Panel should not make a value judgment, but it should make a screening judgment that the misconduct probably did happen and whether the conduct is of such a nature that the Court of Appeals needs to be bothered with it. This gives the Panel the ability to make a screening judgment. Mr. Brault reiterated that the Panel has to make findings to make decisions. The Grand Jury model does not fit, because the State's Attorney can charge the defendant again if the Grand Jury does not indict. The Attorney Discipline Rules should provide that if a case is dismissed, it is over, and it cannot be charged again. Mr. Broderick noted that the Office of Bar Counsel never charges a case again. Mr. Brault pointed out that under the Grand Jury model, the case can be charged again.

The Vice Chairperson stated that it is not contemplated that the case would be charged again. The wording being discussed is how the Panel determines whether or not to go forward with the case. The Reporter cautioned that under the proposed revised Rules, the function of the Review Board has been reduced, so the Rules have to be carefully crafted to minimize the disparity of outcomes from Panel to Panel. Judge Johnson commented that the Panel is weighing the evidence from both sides, while the Grand Jury only looks at the evidence from one side. Mr. Howell remarked that this is rough justice. The standard is that it is more likely than not that there was misconduct. The preponder-ance of the evidence standard is not being used. Mr. Titus said that this is not inconsistent with the change he has proposed. It is not being called a finding, although it looks, smells, and acts as if it were one.

The Vice Chairperson pointed out that the dismissal of the case by the Panel, which is provided for in section (a) of Rule 16-719, implies that the Panel has not found misconduct. Can the Panel still issue a warning? Mr. Brault noted that in civil procedure, there are dismissals with and without prejudice. If there is no burden of proof, how can a dismissal be with prejudice? Mr. Titus suggested that the Rule could specify this. Mr. Broderick said that there are two problems. One is that Bar Counsel will be concerned if a credible finding of misconduct resulted in a dismissal. If Bar Counsel disagrees, and wishes to have the case considered again, it

is more likely that the case is over if dismissed with prejudice. The second problem is that after the Panel has heard all the evidence, it may not be fair to the respondent attorney to go forward if the standard applied is that it is more likely than not that there was misconduct, since this is not the same as the standard of clear and convincing evidence. The case law as expressed in the cases of Attorney Grievance Commission v. McBurney, 282 Md. 116 (1978) and Attorney Grievance Commission v. Stewart, 285 Md. 251, cert. denied, 444 U.S. 845 (1979), is that during Inquiry Panel and Review Board proceedings a respondent attorney does not have available all of the constitutional safeguards accorded an accused in a criminal case. The Chairperson remarked that every time an unbalanced person complains about an attorney, the case should not go to a circuit court judge to decide. Mr. Broderick explained that the system anticipates compromises. One alternative is dismissal with a warning which is not made public. Mr. Brault pointed out that the difficulty is that the Court of Appeals has said that the Panel proceeding is similar to a Grand Jury proceeding. A distinction between the two is needed in the Rules. When someone applies to the Judicial Nominating Commission to become a judge, there is always a report on the individual from Bar Counsel. The questionnaire asks if there have been any complaints filed against the applicant, and this requests more information than what Bar Counsel reports to the Commission. A dismissal is a finding in favor of an attorney. If

dismissal under the Attorney Discipline Rules means that the case could not be proven, the benefit to the attorney of the dismissal is useless and has to be reported as a complaint. Mr. Brault expressed the view that having a finding would be preferable.

The Vice Chairperson referred to Mr. Titus' suggestion that the dismissal in section (a) of Rule 16-719 be with prejudice to make it the equivalent of a final finding. She said she had some concern about a finding of "more likely than not."

The Vice Chairperson adjourned the meeting due to a lack of a quorum, stating that Rule 16-717 would again be considered at the next Rules Committee meeting.