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 May 16, 1997.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Robert L. Dean, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Harry S. Johnson, Esq.
Hon. Joseph H. H. Kaplan
Joyce H. Knox, Esq.
James J. Lombardi, Esq.
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Hon. Mary Ellen T. Rinehardt
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James N. Vaughan

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Melvin Hirshman, Esq., Bar Counsel
Glenn Grossman, Esq., Deputy Bar Counsel
Kate McDermott, Esq.

The Chair convened the meeting. He asked if there were any additions or corrections to the minutes of the April 25, 1997 Rules Committee meeting. The Assistant Reporter said that she had one correction. On page 57, the minutes indicated that the language from Code, State Government Article, §10-213 had been added to proposed Rule 16-717A of the Attorney Discipline Rules. This was erroneous. Instead the second full paragraph on the page should be deleted, and

in its place, the following paragraph should be inserted: "Mr. Bowen commented that in the first sentence of subsection (g)(1), the reference to Rule 5-403 could be deleted, and in its place, there would be a reference to the preceding sentence. In the alternative, the language from the State Government article could be plugged in here. He moved that the reference to Rule 5-403 be deleted and language referring to the preceding sentence be added. The motion was seconded, and it carried unanimously." There were no other corrections or additions to the minutes, and the Committee approved them by consensus with the one correction.

Agenda Item 1. Consideration of proposed amendments to: Rule 4-212 (Issuance, Service, and Execution of Summons or Warrant), Rule 4-216 (Pretrial Release), Rule 4-245A (Determination of Sexually Violent Predators), Rule 4-632 (Record of Assertion of Spousal Privilege), and Circuit Court Arrest Warrant Form

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The Chair told the Committee that the rules to be discussed were mostly due to changes made in the 1997 legislative session. Judge Johnson presented Rule 4-212, Issuance, Service, and Execution of Summons or Warrant, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-212 to clarify that when a person has been previously processed and released on bond pursuant to Rule 4-216 and

indicted again on the same alleged facts, it is not necessary to issue another arrest warrant unless there is a substantial likelihood that the defendant will not respond to a criminal summons, as follows:

Rule 4-212. ISSUANCE, SERVICE, AND EXECUTION OF SUMMONS OR WARRANT

. . .

(d) Warrant -- Issuance

. . .

(2) In the Circuit Court

Upon the request of the State's Attorney, a warrant shall issue for the arrest of a defendant, other than a corporation, if an information has been filed against the defendant and the circuit court or the District Court has made a finding that there is probable cause to believe that the defendant committed the offense charged in the charging document or if an indictment has been filed against the defendant; and (A) the defendant has not been processed and released pursuant to Rule 4-216, or (B) the court finds there is a substantial likelihood that the defendant will not respond to a summons. A copy of the charging document shall be attached to the warrant. A warrant shall not issue for a defendant who has been processed and released pursuant to Rule 4-216 unless the court finds that there is a substantial likelihood that the defendant will not respond to a criminal summons. When the defendant has been processed and released pursuant to Rule 4-216, the issuance of a warrant for violation of conditions of release is governed by Rule 4-217.

. . .

Rule 4-212 was accompanied by the following Reporter's Note.

A letter from William A. Saltysiak, Esq. (See Appendix 1) indicates that at least one jurisdiction is having a problem with an arrest warrant being issued again for a person who has been previously processed and released on bond pursuant to Rule 4-216 and then indicted by the Grand Jury on the same alleged facts. The Criminal Subcommittee is proposing a change to Rule 4-212 (d)(2) to make it clear that the person can be served with a criminal summons after the indictment, and there is no need to issue an arrest warrant, unless there is a substantial likelihood that the defendant will not respond to the summons.

Judge Johnson explained that this Rule was not changed because of a legislative action. The proposed change came about because of a letter from an attorney who pointed out the problem that when a defendant has been released on bond on a District Court charging document and then indicted by the Grand Jury or charged on an information in the circuit court for a crime based on the same facts, some State's Attorneys are requesting that an arrest warrant issue for the defendant without even trying to issue a summons. The Criminal Subcommittee has recommended that language be added to Rule 4-212 which clarifies that an arrest warrant shall not issue unless the court finds that there is a substantial likelihood that the defendant will not respond to a criminal summons.

The Vice Chair asked if the proposed language would preclude the issuance of a warrant on an unrelated offense. The Chair suggested that language be added to the proposed language to indicate

that this only applies to the situation where the circuit court charge is the same as the charges pending in the District Court. Judge McAuliffe noted that the charges on the same set of facts may be different. The Vice Chair referred to the letter from Mr. Larry Shipley, Clerk for the Circuit Court of Carroll County, who is a member of the Rules Committee, but was unable to attend today's meeting (See Appendix 2). In the letter which was distributed at the meeting, Mr. Shipley expressed the view that when additional charges are handed down by the Grand Jury, which were not charged in the District Court, an arrest warrant should be issued. Judge Johnson suggested that in subsection (d)(2) of Rule 4-212 after the word "Rule 4-216" and before the word "unless", the following language could be added: "on the same alleged facts."

Mr. Dean commented that the Subcommittee had discussed at its recent meeting that the normal routine is that the District Court issues a charging document. The problem comes up later when the prosecutor feels there is not enough evidence to proceed. No indictment is issued, and the District Court case is dropped. Then, more evidence becomes available, and the Grand Jury does indict the person. Judge Vaughan remarked that the rules provide that the primary way to reach the defendant after an indictment by the Grand Jury is through a summons. The arrest warrant should be used only as a last resort, but it is being overused. A study revealed that in the District Court, arrest warrants are being used 50% of the time.

The idea is that an arrest warrant should be used only if the defendant will not appear when he or she receives a summons. The first step is to reissue a summons.

Mr. Dean asked if the prosecutor should be able to request a warrant where the charges have been increased, such as when assault in the second degree is changed to assault in the first degree, or armed robbery becomes armed robbery with the use of a handgun. Judge Johnson responded that this is done when the defendant is not likely to respond to the summons. Mr. Sykes questioned as to how one could tell that the defendant is not likely to respond to the summons.

The Chair noted that in answer to some of the problems identified in today's discussion, language similar to that in Rule 4-204, Charging Document -- Amendment, pertaining to the character of the offense being changed could be added to Rule 4-212. He proposed that the language should be "the circuit court charging document has changed the character of the offense" to be added in after the word "unless" and before the words "the court finds" in subsection (d)(2) of Rule 4-212. Judge McAuliffe expressed the opinion that this is a narrow definition. It is routine to have more offenses than those charged previously when a new offense is added. It would be preferable to use the idea of the offenses arising out of the same transaction. The Chair drew the Committee's attention to the language of Rule 4-203 which provides in section (a) that "the offenses charged are of the same or similar character or

are based on the same act or transaction." Mr. Sykes remarked that it is preferable to refer to "offenses based on the same incident." The Vice Chair added that the language could be "the same act or incident." The Chair said that he preferred the language "the same act or transaction." He suggested that the following language be added to Rule 4-212 (d)(2) after the word "Rule 4-216" and before the word "unless": "if the circuit court charging document is based on the same act or transaction." Mr. Brault moved that this language be added to Rule 4-212 (d)(2), the motion was seconded, and it passed unanimously.

Judge Johnson presented Rule 4-216, Pretrial Release, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

AMEND Rule 4-216 to conform it to changes made to Article 27, §616 1/2 by Senate Bill 235, as follows:

Rule 4-216. PRETRIAL RELEASE

(a) When Available

[Unless ineligible for pretrial release under Code, Article 27, §616 1/2,**]** (1) A defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment is entitled to be released before verdict or pending a new trial in conformity

with this Rule, and (2) a defendant charged with an offense for which the maximum penalty is death or life imprisonment may, in the discretion of the court, be released before verdict or pending a new trial in conformity with this Rule. Title 5 of these rules does not apply to proceedings conducted under this Rule.

Committee note: Code, Article 27, §616 1/2 prohibits a District Court commissioner from releasing certain categories of persons; see subsections (c), (i), (j), and (l). The 1997 change to the statute added another category of presumptively ineligible persons, namely, those persons charged with a crime of violence under Article 27, §643B, who have been previously convicted of a crime of violence as defined by that section, regardless of where the prior conviction occurred.

. . .

(d) Conditions of Release

A defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment **[**shall**]** may be released before verdict or pending a new trial **[**on persons recognizance**]** unless the judicial officer determines that **[**that condition of release will not reasonably ensure the appearance of the defendant as required**]** neither suitable bail nor any condition or combination of conditions will reasonably assure that the defendant will not flee or pose a danger to another person or the community prior to trial. Upon determining to release a defendant charged with an offense for which the maximum penalty is death or life imprisonment or to refuse to release a defendant charged with a lesser offense on personal recognizance the judicial officer shall state the reasons in writing or on the record and shall impose the first of the following conditions of release which will reasonably ensure the appearance of the defendant as required, or, if no single condition is sufficient, the judicial officer

> shall impose on the defendant that combination of the following conditions which is least onerous but which will reasonably ensure the defendant's appearance as required:
>
> . . .

Rule 4-216 was accompanied by the following Reporter's Note.

> The 1997 Legislature changed Article 27, §616 1/2 to prohibit a District Court commissioner from releasing pretrial an individual previously convicted of a crime of violence if the individual is charged with committing another crime of violence. The Subcommittee recommends that the Committee note to section (a) be expanded to include this change.
>
> Section (d) has been changed to conform to the legislation which clarified that a judge may allow pretrial release on either bail, certain conditions, or both bail and certain conditions, and which provided that a judge is to order the defendant to be detained if the judge determines that neither bail nor any condition or combination of conditions will assure that the defendant will not flee or pose a danger to others prior to the trial.

Judge Johnson explained that the proposed changes to Rule 4-216 are in response to changes made to Code, Article 27, §616 1/2 by Senate Bill 235. One of the changes proposed is to the Committee note to section (a) which shifts the responsibility to the defendant who seeks pretrial release to show why he or she should be released on bond. The added language defines another category of persons presumptively ineligible for pretrial release -- those persons

charged with a crime of violence under Code, Article 27, §643B who have been previously convicted of a crime of violence under that section. A substantive change has been made to section (d) to conform to the legislation.

The Chair noted that the introductory language to section (a) which reads, "Unless ineligible for pretrial release under Code, Article 27, §616 1/2" should not have been deleted. The Vice Chair questioned as to why the language which has been added to the Committee note is necessary. It is preferable not to cite the statutory changes, because the statute could be amended again. Judge McAuliffe suggested that the Committee note could highlight the recent legislative change and then be eliminated once there is familiarity with the statutory change. The Chair pointed out that the first sentence of the note could be eliminated as well. Mr. Sykes agreed that neither sentence is needed, since section (a) refers to the applicable Code section. The Chair asked if the Committee was in agreement with the change in section (d) substituting the word "may" for the word "shall." The Vice Chair noted that this change conflicts with section (a) which provides that a defendant is entitled to be released, unless....". The Reporter observed that this is the language in the statute. Judge McAuliffe commented that it may not be accurate either as "shall" or as "may" because the change involves a shift in the presumption and not in the ineligibility. Mr. Dean observed that the ineligibility is for

release by a commissioner, but that the person may be eligible for release by a judge. This needs to be clarified. The term "judicial officer" encompasses both commissioners and judges.

Judge Johnson pointed out that the statute provides that a judge may allow the pretrial release of a defendant. Mr. Sykes said that subsection (1) in section (a) of Rule 4-216 provides that a defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment is entitled to be released before verdict or pending a new trial, but subsection (2) provides that a defendant charged with an offense for which the maximum penalty is death or life imprisonment may be released. The first provision is mandatory, the second is discretionary. Section (d) provides that some release is discretionary. The rules may need to be tightened up.

The Vice Chair inquired if under Code, Article 27, §616 1/2 a judge could set suitable bail and find that there are other conditions that will reasonably assure that the defendant will not flee or pose a danger to another person or the community, yet still not release the defendant. The use of the word "may" in the statute seems to mean "shall." Mr. Brault commented that there had been an appeallte opinion which held that the word "may" meant "shall." The Chair noted that if someone were arrested for a crime of violence and sentenced to two years, and then the person were back in front of a judge, the judge would apply the criteria of section (d). The person

is considered to be presumptively ineligible pursuant to Code, Article 27, §616 1/2. How would this work in the face of section (d)? The burden of persuasion is not addressed in this portion of the Rule.

The Vice Chair suggested that all of Rule 4-216 be considered. In the beginning of section (d), the language "on personal recognizance" was deleted, but then it appears later in the section. The Chair had referred to the presumption problem. The Rule may need rewriting. Judge Johnson agreed, and he stated that the Rule would be withdrawn from discussion today.

Judge Johnson presented Rule 4-245A, Determination of Sexually Violent Predators, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 200 - PRETRIAL PROCEDURES

ADD Rule 4-245A, as follows:

Rule 4-245A. DETERMINATION OF SEXUALLY VIOLENT PREDATORS

(a) Definitions

As used in this Rule, the following words have the following meanings:

(1) Sexually Violent Offense

"Sexually violent offense" means a

violation of any of the provisions of Article 27, §462, rape; §463, second degree rape; §464, first degree sexual offense; §464A, second degree sexual offense; §464B, third degree sexual offense; and §464F, attempted rape or sexual offense.

(2) Sexually Violent Offender

"Sexually violent offender" means a person who:

(A) has been convicted or a sexually violent offense;

(B) has been convicted of an attempt to commit a sexually violent offense; or

(C) has been convicted in another state of an offense that, if committed in this State, would constitute a sexually violent offense.

(3) Sexually Violent Predator

"Sexually violent predator" means a person who:

(A) is convicted of a second or subsequent sexually violent offense; and

(B) has been determined in accordance with section (d) to be at risk of committing a subsequent sexually violent offense.

(b) Request for Determination of a Sexually Violent Predator

If a person who is convicted of a second or subsequent sexually violent offense, the State's Attorney may request the court to determine before sentencing whether the person is a sexually violent predator for purposes of registration and reevaluation procedures pursuant to Article 27, §792.

(c) Notice to Defendant

The State's Attorney must serve written

notice at least 30 days before trial on the defendant, who has been convicted of a second or subsequent sexually violent offense that the State's Attorney intends to make the request pursuant to section (b).

(d) Determination by the Court

In making a determination pursuant to section (b), the court shall consider:

(A) Any evidence that the Court considers appropriate to the determination of whether the individual is a sexually violent predator, including the presentencing investigation and sexually violent offender's inmate record;

(B) Any evidence introduced by the person convicted; and

(C) At the request of the State's Attorney, any evidence presented by a victim of the sexually violent offense.

Source: This Rule is new and is derived from Code, Article 27, §792.

Rule 4-245A was accompanied by the following Reporter's Note.

This is a new Rule which is derived from changes made in the 1997 legislative session to Article 27, §792. The legislature is requiring persons, who have been determined by the court to be sexually violent predators after being convicted of a second or subsequent sexually violent offense, to comply with stricter registration and reevaluation procedures. In compliance with the statute, the Rule provides a procedure for the State's Attorney to request that a court determine whether a defendant with a prior conviction for a sexually violent offense is a sexually violent predator. It also provides for notice to the defendant that the request has been made and criteria for the

court to make the determination.

Judge Johnson explained that this is a new rule which tracks changes made to Code, Article 27, §792. The Vice Chair pointed out that the statute also covers offenses against children which are not sexually related, such as false imprisonment, and she asked if this would need to be addressed by Rule 4-245A. The Assistant Reporter explained that to be determined a sexually violent predator a person has to be convicted of a subsequent sexually violent offense, which is defined on page 5 of House Bill 343 to mean a violation of certain provisions of Article 27, none of which include crimes which are not of a violent sexual nature, such as false imprisonment. The Vice Chair questioned the meaning of the word "convicted" which is defined in the statute to include a probation before judgment and a finding of not criminally responsible. The Chair suggested that Rule 4-245A should have a definition of the word "convicted", since the statute's definition is so broad. Mr. Dean inquired if the Rule could simply include a cross reference to the definition in the statute, instead of a definition.

Mr. Bowen asked why the language "second or" is needed in the term "second or subsequent offense", because a second offense is a subsequent offense. Mr. Dean noted that this term comes directly out of the statute. Mr. Bowen questioned the meaning of the language "at risk" in subsection (a)(3)(B) in the new Rule. Mr. Brault replied that this language is used in a medical context. Mr. Bowen suggested

that in place of the language "at risk", it might be preferable to use the language "likely to commit." Mr. Brault disagreed, explaining that in the medical context, no expressions of probabilities are used. Medical terminology includes a reference to risk factors. He expressed the view that this language should remain, because it gives the court discretion.

Judge McAuliffe remarked that if the statutory definition of "convicted" is simply put into a Committee note in Rule 4-245A, the Rule supersedes the statute because the Rule is later in time, and there is a risk that the ordinary meaning of "convicted" would be used in the Rule. The Reporter stated that the definition of "convicted" would be put into the definitions in Rule 4-245A.

Mr. Sykes pointed out that the statute refers to two separate court proceedings. One is where the State's Attorney asks for the defendant to be declared a sexually violent predator for registration purposes, and then there is a later one where the defendant can come into court and ask to be de-registered. Rule 4-245A only tracks the first one, but it should include all the procedural parts of the statute, or the entire matter should be left up to the statute and not put into the Rules of Procedure at all. The Chair suggested that the reference to the de-registration procedure could be handled in a shorthand manner in the Rule by providing that someone who is eligible for the de-registration procedure is entitled to petition the court for a determination that the person is no longer a sexually

violent predator pursuant to Code, Article 27, §792. The Vice Chair commented that the initial procedure to determine if someone is a sexually violent predator could also be done that way. The Chair responded that the registration procedure is the more common one, and it should be spelled out in the Rule.

The Vice Chair asked if the determination of a sexually violent predator only happens on the request of the State's Attorney. If the State's Attorney does not make the request or serve it on time, even though the defendant has a prior conviction, it appears that the determination cannot be made. This vests a great amount of power in the State's Attorney. Mr. Dean responded that it is a great burden for the Office of the State's Attorney. Judge Johnson commented that this is similar to the subsequent offender law.

Mr. Bowen said that the word "who" needs to be deleted from section (b) of Rule 4-245A, because it is not grammatically correct. The Committee agreed with the deletion. The Reporter asked if the Committee agreed with the suggestion to put in a shorthand reference to section (k) of the statute pertaining to the de-registration procedure. Judge Kaplan moved that this should be added into Rule 4-245A along with the statutory definition of the word "convicted." The motion was seconded, and it passed unanimously.

Judge Johnson presented Rule 4-632, Record of Assertion of Spousal Privilege, for the Committee's consideration.

TITLE 4 - CRIMINAL CAUSES

CHAPTER 600 - CRIMINAL INVESTIGATIONS AND MISCELLANEOUS PROVISIONS

ADD new Rule 4-632 as follows:

Rule 4-632. RECORD OF ASSERTION OF SPOUSAL PRIVILEGE

The clerk shall maintain a record of each occasion on which an alleged victim asserts the testimonial privilege provided for by Code, Courts Article, §9-106.

Source: This Rule is new.

Rule 4-632 was accompanied by the following Reporter's Note.

The Criminal Subcommittee is proposing the addition of Rule 4-632 to conform to Senate Bill 161 which is changing Code, Courts Article, §9-106 to require that the clerk maintain a record of each occasion when an alleged victim asserts spousal privilege not to testify in an assault trial of the other spouse.

Judge Johnson explained that this is a short rule which was based on the structure of Rule 4-644 and conforms to the amendment to Code, Courts Article, §9-106. The Vice Chair commented that the Reporter's note indicates this applies only when there is an assault trial. The Assistant Reporter suggested that this condition be added into the Rule. Mr. Sykes suggested that in place of the words

"provided for", the word "permitted" be added. Judge Vaughan moved that the reference to an assault trial and the word "permitted" in place of the words "provided for" be added to the Rule. The motion was seconded and carried unanimously.

Judge Johnson presented the Arrest Warrant Form for the Committee's consideration.

CIRCUIT COURT OF MARYLAND FOR _____
City/County

Located at _____ Case No. _____

STATE OF MARYLAND VS. _____
Defendant

Charge (1) _____ _____
Address

AR _____ Code _____ _____
City, State, Zip

Charge (2) _____ _____
Arresting Officer's Agency,
Sub-Agency, I.D.

AR _____ Code _____

CC# _____

ARREST WARRANT
(Circle one)

STATE CAPIAS CONTEMPT CONTEMPT OF COURT BODY ATTACHMENT

DEFENDANT'S DESCRIPTION: Driver's License # _____ Sex

___ Race ___ Ht. ____ Wt. _____ Hair _____ Eyes _____ Complexion _____

Other Pertinent Information _____ DOB: _____ ID _____

Social Security # _____

Known Distinguishing Body Marks or Scars _____

STATE OF MARYLAND, _____, City/County:

TO ANY PEACE OFFICER, Greetings:

YOU ARE ORDERED to arrest and bring before a judicial officer the above-named Defendant as soon as practicable and without unnecessary delay. If a judicial officer is not readily available, this Warrant shall authorize the prisoner's detention until compliance is had with Rule 4-212 and the arresting officer is authorized and required to comply with Rule 4-212.

IF THE DEFENDANT IS NOT IN CUSTODY FOR ANOTHER OFFENSE,

☐ Initial appearance is to be held in county in which Warrant was issued.

☐ Initial appearance is to be held in county in which Defendant is arrested.

IF DEFENDANT IS IN CUSTODY FOR ANOTHER OFFENSE, this Warrant is to be lodged as a detainer for the continued detention of the Defendant for the offense charged in the charging document. When the Defendant is served with a copy of charging document and Warrant, the Defendant shall be taken before a judicial officer of the District or Circuit Court.

Issued _____ _____
Date Judge

Given to _____
Name of Law Enforcement Agency for Service

RETURN OF SERVICE

☐ I certify that at _____ o'clock ____ M. on

_____ at _____

_____
Place

I executed this Arrest Warrant by arresting the Defendant and delivered a copy of the Statement of Charges to the Defendant.

☐ I left a copy of the Warrant and Charging Document as a detainer for the continued detention of the Defendant at:

_____
Detention Facility

_____

_____
Signature of Peace Officer

_____
Title

Judge Johnson explained that the legislature added a new provision, Code, Article 27, §594D-1, which requires a standard arrest warrant form to be used by all of the circuit courts. The proposed form is patterned after the form used in the District Court. The idea is to standardize all of the forms in the State. The Chair said that the Commission on the Future of the Courts was concerned

that there are different arrest warrants in different jurisdictions. He personally had never heard of a problem, but there was one case where a problem arose on the Eastern Shore. Judge Kaplan explained that in that case, a warrant, which had been issued in Allegany County and served in Somerset County, gave no instructions. The Somerset County sheriff did not know what to do with the defendant pending pickup by Allegany County. The Chair commented that the statute and the rules specifically provide what to do. Judge Rinehardt remarked that that would presuppose that the sheriff is familiar with the Rules of Procedure.

Judge McAuliffe pointed out that the notice provided for in Rule 4-202 needs to be placed on the back of the charging document. The Chair said that the document being considered is an arrest warrant accompanied by a charging document. Mr. Dean questioned whether it is clear that the charging document is to be attached. Judge Vaughan asked what the difference is between contempt and contempt of court, both of which are listed under the words "ARREST WARRANT." Judge Rinehardt noted that in the same place, the term "body attachment" can be used both for a defendant and a witness. She observed that the form being considered today might not be the best form for a body attachment. The Vice Chair expressed the view that there should be a separate form for a body attachment.

Judge Kaplan remarked that warrants vary around the State. Some instruct the sheriff as to what to do with the individual who

has been arrested, but some do not. Judge Vaughan commented that the legislation is somewhat inartful, and he suggested that Delegate Vallario and Senator Stone be consulted as to whether the form designed has to be totally tailored to the legislation. Judge McAuliffe cautioned against confusing a body attachment with an arrest warrant. Body attachments are intended to be different. For example, the person detained on a body attachment is not fingerprinted, but just brought before the court.

Judge Johnson suggested that there be two separate forms. Mr. Bowen expressed his agreement, noting that the statute seems to contemplate as many forms as needed. He referred to the boxes at the top of page 2 of the proposed form which use the language "in county." He asked if this is a term of art. Judge Rinehardt remarked that this could be changed. Judge Kaplan suggested that the proposed form be used for the arrest warrant and that there be one or more forms used for contempt and body attachment.

The Vice Chair commented that in contempt cases, the Rules provide for a show cause order. The Reporter noted that Rule 15-205 (d) provides for a summons or a warrant. When the Contempt Rules were discussed, the fact that a warrant is occasionally needed was brought up. Judge Kaplan added that in criminal nonsupport cases, warrants are often issued for those people in contempt.

The Chair said that there are actually four different documents. More specific language would need to be added to the body

attachment form. Judge Johnson commented that the Subcommittee has to do more work on the forms, and the arrest warrant form is withdrawn from consideration today.

Mr. Sykes stated that he would like further consideration of Rule 4-245A. He pointed out that Mr. Shipley, in his letter which was distributed at today's meeting, had said that there is a discrepancy between sections (b) and (c) of Rule 4-245A. Section (b) requires the State's Attorney to request the court to determine before sentencing that the defendant is a sexually violent predator. Section (c) requires the State to serve written notice 30 days before trial on the defendant who has been convicted of a second or subsequent sexually violent offense that the State intends to proceed under section (b). Mr. Brault remarked that the statute is confusing. If a person has been charged with a second or subsequent offense, the State's Attorney has to give notice 30 days before trial that if the person is convicted, the State will seek a determination before sentencing that a person is a sexually violent predator. The Chair said that section (c) of the proposed rule needs to be changed. In place of the words "convicted of", the words "charged with" should be substituted. The Committee agreed by consensus to this change. Mr. Sykes remarked that in this context the language "second or subsequent offense" makes sense. Mr. Dean suggested that the notice provision could use similar language to the notice provision in Article 27, §643B.

The Vice Chair asked why the provisions in sections (c) and (d) were in that order, since they are reversed in the statute. The Assistant Reporter responded that she had reversed the order. The Vice Chair said that sections (c) and (d) should be reversed in the Rule. The Committee agreed to this change. The Subcommittee discussed amending Rule 4-245, Subsequent Offenders, to include the provision about determination of a sexually violent predator, but it decided this should go into a separate rule. The Reporter inquired if the Subcommittee had discussed what happens if the criminal trial is postponed. Mr. Brault pointed out that the statute does not cover whether a guilty plea to the second or subsequent criminal offense is included. Rule 4-245 does include guilty pleas as a subsequent offense.

The Chair suggested that the Rule could provide for notice at least 30 days before the scheduled trial date. Mr. Brault suggested that it could be at least 30 days before the scheduled trial date or the acceptance of a plea. Mr. Dean questioned whether the plea would include both a plea of guilty and a plea of nolo contendere, which is what Rule 4-245 covers. Mr. Brault responded that if the term "plea" is used, the definition of "conviction" can cover which pleas are included. The Reporter asked if this would go into section (c), and Mr. Brault replied that it would. The Chair commented that in a capital case, when the defendant's case is postponed, there is the risk that the State's Attorney will file a notice that this will be a

death penalty case. When proposed new Rule 4-255, Intention to Seek a Sentence of Death or Life Imprisonment Without the Possibility of Parole, was drafted, the Rules Committee had proposed that the notice of the intention to seek the sentence of death or life imprisonment without the possibility of parole should be filed by the first scheduled trial date. The Court of Appeals did not accept this. Code, Article 27, §792 refers to the trial date, which means the date the trial begins, not the first scheduled trial date.

Judge McAuliffe suggested that section (b) provide that the State's Attorney may file a copy of the notice with the clerk and request the court to make the determination. This clarifies that the request is not filed earlier with the court. Mr. Dean noted that under Rule 4-245, a postponement of the sentence when the State's Attorney fails to give notice of an alleged prior conviction is given when the sentence is a mandatory one, but not when it is an enhanced sentence. Mr. Brault pointed out that section (b) provides that the court make the determination before sentencing. This could mean the court makes the determination on the day the sentence is issued.

Judge Johnson asked if the State's Attorney can file after a continuance is requested and granted, even though the original deadline was missed. Mr. Dean answered that after the continuance is granted, the State's Attorney can file the request. This is the same principle as filing to seek the death penalty.

Mr. Brault commented that it is conceivable that the State's

Attorney may not know about the defendant's prior convictions of sexually violent offenses. Mr. Dean responded that very often the State's Attorney will not know; this is a land mine for the prosecution. Judge Johnson observed that in Prince George's County, the State's Attorney looks for prior convictions of a defendant, and after the trial, when the Department of Parole and Probation does the pre-sentence investigation, more convictions appear than the State's Attorney had originally looked up. Judge Vaughan remarked that because the courts are not unified, many convictions do not show up on the computer. Mr. Dean added that out-of-state convictions may never be found. The Chair commented that this an argument for consolidating the courts.

The Chair inquired if Mr. Dean's position on the issue of "30 days before trial" is to put in "30 days before the first scheduled trial date." Mr. Dean replied that he preferred the language as it currently reads. Judge McAuliffe suggested that it could be any time before a guilty plea, because the defendant will have to know before he pleads guilty about the State's intention to request the court to determine if the defendant is a sexually violent predator. Mr. Dean remarked that what often happens is that the defendant agrees to be placed on the register as part of the plea to a lesser sentence. The Chair suggested that a definition of "trial" be added to include a trial on the merits or an acceptance of a plea of guilty or nolo contendere. Mr. Sykes commented that this does not belong in the

definitions section -- it should go into the operative section. Mr. Brault observed that if the plea is taken more than 30 days before the trial date, the defendant could be surprised upon learning of the State's Attorney's request for the determination by the court. The Reporter suggested that the time period should be any time before the acceptance of a plea or 30 days before trial. Mr. Dean expressed his agreement with that suggestion. The Vice Chair inquired if this means acceptance by the court. The defendant and the State's Attorney may have accepted the plea, but the court may not have. Mr. Brault responded that the defendant is not bound until the court accepts the plea. The Chair stated that this would mean acceptance by the judge.

Agenda Item 2. Consideration of a "housekeeping" amendment to Rule 10-104, Show Cause Orders

The Reporter presented Rule 10-104, Show Cause Orders, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 10 - GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 100 - GENERAL PROVISIONS

AMEND Rule 10-104 to correct a reference to a certain form, as follows:

Rule 10-104. SHOW CAUSE ORDERS

Except as provided in Rules 10-209 (b), 10-213, and 10-705, upon the filing of a petition, the court shall issue a show cause order directing a person to show cause in writing on or before a specified date why the court should not take the action described in the order. Unless the court orders otherwise, the specified date shall be 20 days after the date prescribed for service in the order. The order shall also specify who is to be served and the method of service and, if a hearing is scheduled when the order is issued, the date, time, and place of the hearing. A copy of any related petition or document shall be served with a copy of the order. If required, the Advice of Rights form and the **[**Advice**]** Notice to Interested Persons form shall also be served with the copy of the order.

Source: This Rule is new.

Rule 10-104 was accompanied by the following Reporter's Note.

This amendment to Rule 10-104 corrects an erroneous reference to an "Advice to Interested Persons" form. The correct name of the form is "Notice to Interested Persons."

The Reporter explained that Mr. Lombardi had noticed an error in Rule 10-104 which referred to the form entitled "Advice to Interested Persons." The form is actually entitled "Notice to Interested Persons", and Rule 10-104 needs to be changed so that the form is referred to correctly. Judge Vaughan moved to make this

change, the motion was seconded, and it passed unanimously.

Agenda Item 3. Consideration of an amendment to Rule 2-423, Mental or Physical Examination of Persons

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The Vice Chair presented Rule 2-423, Mental or Physical Examination of Persons, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 2 - CIVIL PROCEDURE -- CIRCUIT COURT

CHAPTER 400 - DISCOVERY

AMEND Rule 2-423 to allow examinations by suitably licensed or certified examiners and to make certain stylistic changes, as follows:

Rule 2-423. MENTAL OR PHYSICAL EXAMINATION OF PERSONS

When the mental or physical condition **[**or characteristic**]** <u>(including the blood group)</u> of a party or of a person in the custody or under the legal control of a party is in controversy, the court may order the party to submit to a mental or physical examination by a **[**physician**]** <u>suitably licensed or certified examiner</u> or to produce for examination the person in the custody or under the legal control of the party. The order may be entered only on motion for good cause shown and upon notice to the person to be examined and to all parties. It shall specify the time and place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. The order may regulate the filing and distribution of a report of findings and conclusions and the testimony at trial by the

[examining physician or physicians,] examiner, the payment of [the] expenses [of the examination], and any other relevant matters.

. . .

Rule 2-423 was accompanied by the following Reporter's Note.

Kerpelman v. Smith, Somerville & Case, L.L.C., ___ Md. App. ___ (No. 1213, September Term, 1996, filed May 2, 1997) holds that the term "physician" in Maryland Rule 2-423 precludes a court order authorizing an examination by anyone other than a physician. The amendments to this Rule broaden its scope to allow for an examination by any suitably licensed or certified examiner. The amendment brings the Maryland Rule into conformity with F.R.Civ.P. 35(a), with minor style changes.

The Vice Chair explained that at the last Rules Committee meeting the policy question was presented to the Committee as to whether Rule 2-432 should be expanded to allow for examinations by professionals other than physicians. The Court of Special Appeals recently decided the case of Kerpelman v. Smith, Somerville & Case, L.L.C., _____Md. App.____ (No. 1213, September Term, 1996, filed May 2, 1997) which deals with this issue. The Court held that since the Rule refers to physicians, no other professionals can fall within the boundaries of the Rule. Since the ruling numerous people have contacted the Vice Chair, including attorneys handling lead paint cases and judges handling domestic relations cases, all of whom need to use professionals other than physicians to examine parties and witnesses. The Discovery Subcommittee has drafted changes to Rule 2-

423 to broaden the Rule and make it similar to Federal Rule of Civil Procedure 35 (a).

The Vice Chair pointed out that the Subcommittee proposed three changes to Rule 2-423. The first is the substitution of the language "including the blood group" in place of the language "or characteristic." Mr. Bowen questioned as to why the Rule needs to be narrowed this way. The Vice Chair replied that this is the federal language. By using the language "or characteristic," the Maryland Rule deviated from the federal rule in 1984. Ms. Ogletree noted that the reference to "blood group" would exclude DNA testing. The Vice Chair stated that the Subcommittee is withdrawing the suggestion to add in the language "including the blood group" to Rule 2-423.

The Vice Chair said that the most important change proposed to be made is to substitute the language "suitably licensed or certified examiner" for the word "physician." The Chair pointed out that the Court did not hold that the mere fact that the appellant's attorney could not be held in contempt for refusing to reimburse appellee for the costs incurred due to the appellants' failure to appear for the scheduled examinations by the psychologist did not mean he could not have had an expert other than a physician in unchallenged cases. The holding could have been that no expert can conduct tests unless the other side is allowed to have their expert conduct tests. Mr. Brault commented that if this were the holding, the answer to it would be that the other side's expert cannot repeat the tests, but only

interpret the results.

Judge Kaplan observed that the 900 to 1000 lead paint cases in Baltimore City are governed by the pretrial orders which provide when the test can be conducted by the plaintiff and by the defendant. The tests are always done by psychologists and neuropsychologists. If the test is not conducted in time, the expert cannot be used. After the decision, Mr. Kerpelman, the appellant's lawyer, notified all the defendants that their appointments for examinations by psychologists would be cancelled. The problem is that the issue will have to be determined on a case-by-case basis. On the day of trial, the judge will have to determine this on a motion in limine, or a party will ask the judge to postpone the trial. This will wreak havoc with the docket. The Chair remarked that the trial judge will have to determine if the evidence is admissible on behalf of the plaintiff even though there was a violation of a pretrial order. The Chair noted that in the cases he has seen, there is a summary judgment in favor of the landlord after a discovery violation by the plaintiff resulted in an order prohibiting testimony because of the violation. The situation is never that the defendant is appealing from a discovery ruling in favor of the plaintiff.

The Chair suggested that the proposed language "suitably licensed or certified" should be eliminated, because the judge should have the discretion to determine if the examiner is appropriate. Ms. Ogletree commented that in domestic cases, the parties are often pro

se. All of the parties have a psychological examination. No issues are raised in the discovery context. One has to go to the psychologist if the court orders this. Mr. Johnson remarked that under the Kerpelman opinion, one cannot be ordered to go to the psychologist. The Chair said that the other side of this is that if the attorney refuses to submit his or her client to the same kind of expert to testify on behalf of the client, the expert cannot be called at trial.

The Vice Chair inquired about the use of the word "suitably" in Rule 2-423. Mr. Bowen commented that the examiner has to be an appropriate one, and this should be left up to the judge to determine. The Vice Chair cautioned that without some parameters, the door would be open to a "witch doctor" as an expert. Mr. Sykes observed that the expert should be qualified in a relevant subject area. The Chair reiterated that this is up to the discretion of the judge. Judge Kaplan asked about the term "licensed." Mr. Brault pointed out that some professions do not have a licensing examination. For example, DNA scientists do not get licensed. Whether the expert is suitably qualified should be up to the court. The Vice Chair cautioned that this could lead to many hearings as to qualifications of experts.

The Chair suggested that the language "mental or physical", which is in front of the word "examination," be deleted. The Vice Chair commented that this would make the Rule go from a very narrow

to a very broad rule. The goal of the Subcommittee was to conform the Rule to the federal rule whenever possible. There is federal case law on this issue. The Chair commented that the language "suitably licensed" means that the judge makes the decision. Mr. Brault remarked that the "certified examiner" is certified by a professional organization. Judge Kaplan observed that the language is broad enough to cover this.

The Vice Chair said that the Discovery Subcommittee has other issues to consider involving those where the federal rule is different. The Subcommittee will compare the rules in Maryland to the federal rules to see if changes need to be made. The Chair stated that the immediate problem is to figure out what to do about Rule 2-423. Judge Kaplan noted that often in the lead paint cases, the expert conducting the examination is a top-notch neuropsychologist from Johns Hopkins.

The Chair said that this Rule would go to the Court of Appeals on an emergency basis. The Vice Chair asked what the soonest time of adoption of the Rule would be. The Chair replied that a Court conference has been scheduled for June 9, 1997. The Vice Chair pointed out that the last proposed change to Rule 2-423 is the deletion of the words "of the examination" in the final sentence. The order can provide for expenses if someone does not attend. The expenses may be related to the entire process.

Judge Kaplan moved that the Rule be adopted with all of the

changes proposed by the Subcommittee, except for the first change. The motion was seconded, and it passed unanimously.

Agenda Item 4. Continued consideration of a policy issue concerning amendment of an *ad damnum* after a jury verdict (See Appendix 1)

Mr. Brault explained that the case of Falcinelli v. Cardascia, 339 Md. 414 (1995), raised the question of whether an *ad damnum* clause may be amended after a jury verdict. Although the question was not answered in the case, the Honorable Lawrence F. Rodowsky, who wrote the opinion, wrote a letter to the Rules Committee asking if the Committee would look at the problem of whether *ad damnum* clauses may be amended. The Process, Parties, and Pleading Subcommittee could not reach an agreement on this issue, and it referred the matter directly to the full Committee. The *ad damnum* clauses have been eliminated in medical malpractice cases to avoid undue publicity and a possible effect on jury awards. Traditionally, Maryland courts have limited recovery to what was requested in the *ad damnum* clause. This puts the defense on notice as to what is at risk. The *ad damnum* clause triggers whether personal monies are at risk beyond the limits of any insurance. The federal policy is that the *ad damnum* clause can be amended to conform to the evidence. The judge has the discretion to amend the clauses upon request.

Mr. Brault said that since the Falcinelli case, the Court of Appeals has decided the case of Scott v. Jenkins, 345 Md. 21 (1997).

The Court of Appeals reversed the Court of Special Appeals, holding that the *ad damnum* clause is binding as to both compensatory and punitive damages. The Reporter noted that the case is included in the meeting materials. Mr. Brault commented that to be consistent with the Scott case, either the Rules should provide that the *ad damnum* clause is binding for all purposes, or it should be eliminated totally.

The Vice Chair pointed out that Judge Rodowsky took no position on this issue in the letter he wrote. She also told the Committee that the federal policy is to allow amendments after a verdict. Mr. Brault added that the federal rule has been interpreted to allow amendments to conform to the evidence. Mr. Howell observed that one could plead the requisite facts and ask for an appropriate amount. He questioned whether a specific monetary amount is needed in the *ad damnum* clause. The Chair inquired about medical malpractice cases. Mr. Brault responded that those are different, because of the enormous damage amounts which have been alleged. Judge McAuliffe expressed the view that there should be *ad damnum* clauses, which should not be amended after the trial. The Chair commented that it may be difficult for the plaintiff attorney to put in an appropriate monetary amount of damages early on in the case. Mr. Brault suggested that the *ad damnum* clauses could be amended liberally up to 15 days before trial.

Mr. Howell pointed out that the Scott case is clear that

punitive damages need to be stated with particularity. The Chair cautioned that it is important not to run afoul of the constitutional requirement of fair notice. He asked if the Subcommittee is making a motion. Mr. Brault answered that the Subcommittee is not recommending a stand on this, but it is leaning towards the status quo of pleading a fixed dollar amount. Mr. Dean inquired what the trend is in the United States on this. Mr. Brault responded that the trend is toward the federal view of allowing amendment. The Chair asked Mr. Brault if he wished to require the complaint to have a dollar amount. Mr. Brault commented that the case law is that nothing can be awarded which is higher than the dollar amount in the pleading. The Vice Chair remarked that the pleading could ask for damages in an amount to be proven at trial. Judge McAuliffe noted that the Falcinelli case seems to require a specific statement of money damages in the pleading. Mr. Brault said that he had seen cases, such as those to which the Vice Chair just referred, in which the pleading asked for law-equity relief with damages to be calculated at the end of an accounting.

Judge McAuliffe noted that there are other statutory requirements, such as the medical malpractice exception. Rule 2-305 could be amended to state that unless otherwise required by law, the claim for damages in the *ad damnum* clause shall be in a sum certain. He asked if the Rules should provide that amendment of the *ad damnum* clause is allowed after a verdict. The Vice Chair

responded that that is the question before the Committee today.

Judge McAuliffe moved that there should be no amendments allowed to an *ad damnum* clause after a verdict. The motion was seconded, and it carried with two opposed. Judge McAuliffe moved to amend Rule 2-305 to add the language "unless otherwise required by law, a demand for monetary judgment shall include the amount sought." The motion was seconded, and it passed with four opposed.

Mr. Brault observed that in his letter, Judge Rodowsky had also referred to Rule 8-604 (c)(2) as an anachronism. This section seems to provide that a party cannot get more money than was requested. It could be deleted, since it is in Rule 2-305. Judge McAuliffe questioned as to why it has to be removed. This covers the situation where there was no motion in the trial level, and the error is alleged on appeal. Mr. Johnson said that he thought that this issue had to be raised in the trial court. The Chair pointed out that ordinarily that is the case, but the appellate court does have the discretion to consider it. This provision allows the plaintiff to prevent the appellate court from considering it. There was no motion to delete Rule
8-604 (c)(2).

After the lunch break, the Chair announced that Chief Judge Robert Bell supports the idea of a dinner commemorating the 50th Anniversary of the Rules Committee. The dinner may be held at the Mount Vernon Club or at the Governor House. It will take place in

the fall, but there is no specific date as of yet.

The Chair explained that Senate Bill 63 was passed by the legislature in the 1997 session. It requires the Court of Appeals to establish a course on parenting or a parental education seminar for people to take when they divorce. A similar course in Baltimore County works well. If anyone has any ideas, these should be conveyed to the Reporter or Assistant Reporter. A rule will be drawn up for the next meeting.

Agenda Item 5. Continued consideration of proposed new Title 16, Chapter 700, concerning the discipline and inactive status of attorneys

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Mr. Howell explained that three separate rules were carved out of proposed Rule 16-717 -- Rules 16-712A, 16-717, and 16-717A. In a recent conference call, the Attorneys Subcommittee agreed on the text of the three rules. Mr. Howell presented the revised versions of the three rules for the Committee's consideration.

Rule 16-712A. PERPETUATION OF EVIDENCE BEFORE STATEMENT OF CHARGES

(a) Right to Take

Bar Counsel or an attorney who may have an interest in an anticipated statement of charges may perpetuate testimony relevant to any **[**complaint**]** allegations of misconduct or defense that may be asserted **[**in**]** with respect to the **[**expected**]** anticipated statement of

charges in accordance with this Chapter.

(b) Notice

The notice of disposition shall include a description of the subject matter of the [expected] anticipated statement of charges, the substance of the testimony that the person expects to elicit, and a statement that any person served has a right to be present. The notice shall include a statement that the testimony sought may be used in a later disciplinary proceeding or action.

(c) Filing

The notice and any exhibits as well as the transcript of testimony shall be filed with the Commission under seal.

(d) Service

The notice [request, or motion] shall be served in the manner provided by Chapter 100 of Title 2 for service of summons on each person against whom the testimony or other evidence is expected to be used and on any other interested person. [If the court orders that service be made upon a person in accordance with Rule 2-122, the court may appoint an attorney to represent that person.]

(e) Subpoena [or Court Order]

Upon request of the person noting the deposition, the Chair of the Commission shall issue a subpoena in accordance with Rule 16-718 and shall perform all functions of the Panel and Panel Chair under that Rule. No sanctions shall be available against a person from whom evidence is sought under this Rule in the absence of service of a subpoena [or court order].

(f) Use of Perpetuated Testimony

Testimony perpetuated in accordance with the requirements of this [section] Rule may be

used in any disciplinary proceeding or action involving the same subject matter and against the attorney served with a notice in the manner provided by [subsection (1)] section (a) of this [section] Rule.

Source: This Rule is derived from Rule 2-404.

Rule 16-712A was accompanied by the following Reporter's Note.

This Rule is new and was added to provide a method to perpetuate evidence before a statement of charges has been filed.

Section (a) is derived from Rule 2-404 (a)(1).

Section (b) is derived from Rule 2-404 (a)(2).

Section (c) is derived from Rule 2-404 (a)(3).

Section (d) is derived from Rule 2-404 (a)(4).

Section (e) is derived from Rule 2-404 (a)(5).

Section (f) is derived from Rule 2-404 (a)(6).

Rule 16-717. PREHEARING PROCEDURES

(a) Transmittal to Hearing Panel

Upon notice of appointment [of] of a Hearing Panel, Bar Counsel shall send to the Panel Chair copies of [the Panel members shall review] (1) the statement of charges, [and] (2) any response, (3) the file containing all evidence accumulated during the investigation except work product, (4) all statements as defined in Rule 2-402 (d), and (5) summaries or reports of all oral statements for which contemporaneously-recorded substantially-verbatim recitals do not exist. [If the Panel concludes that the statement of charges does not allege facts which, if true, constitute professional misconduct or incapacity, 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. Otherwise, the Panel shall keep the matter open pending receipt of Bar Counsel's disclosures.]

(b) [Bar Counsel] Disclosures to Attorney

[Upon request of the attorney at any time after service of the statement of charges,] Bar Counsel shall promptly [allow] notify the attorney that the attorney may, upon request, 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 contemporaneously-recorded recitals do not exist; and (4)] all materials transmitted to the Panel Chair pursuant to section (a) of this Rule and, in addition, receive a copy of the record of prior [final discipline or previous adjudication of misconduct or incapacity of the attorney] disciplinary sanctions that Bar Counsel intends to introduce at a hearing pursuant to subsection (g)(3) of Rule 16-717A. The obligation of disclosure pursuant to this [Rule] section shall be continuing as

provided in Rule 2-401 (e).

(c) Depositions of Unavailable Witnesses

. . .

(d) Mental or Physical Examination

. . .

[(e) Perpetuation of Evidence Before Statement of Charges**]**

[. . .**]**

[(f)**]** (e) **[**Final**]** Prehearing Review

[Following Bar Counsel's disclosures as provided in section (b) of this Rule, Bar Counsel shall provide to the Panel all information which has been disclosed.**]** The Panel shall review the materials transmitted pursuant to section (a) of this Rule. If the Panel concludes **[**after reviewing the material provided that the investigation of the statement of charges, even if true, does not constitute**]** from its review of the materials that there is no reasonable basis for finding professional misconduct or incapacity, **[**or does not constitute misconduct that warrants discipline**]** or that any misconduct would not warrant discipline, the Panel may dismiss the charges with or without a warning and terminate the proceedings **[**and service notice of the dismissal upon the attorney and Bar Counsel who shall also notify the complainant**]** in accordance with section (b) of Rule 16-719. Otherwise, the Panel shall schedule a hearing.

[(g)**]** (f) Dismissal Review

If dissatisfied with a dismissal without a hearing pursuant to section **[** (a) or (f)**]** (e) of this Rule, ...

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

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

Section (a) is in part derived from former Rule 16-706 d 4 (c) and is in part new. The language describing what is in the file which goes to the Panel is derived from Commission Guidelines §5-106.

Section (b) is a new provision which is based upon, and is consistent with, Commission Guidelines §5-106. Section (b) is patterned upon the "open file" policy declared in Rule 16-808 (d)(1) governing proceedings before the Commission on Judicial Disabilities.

Section (c) 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 (d) 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., ACG v. Keister, 327 Md. 56, 77 n.17 (1992). This conforms to Rule 23.C of the A.B.A. Model Rules.

Section (e) is derived from former Rule BV6 d 4 (c). The Committee wanted to clarify that if the Panel found there was misconduct on the part of an attorney but it did not warrant discipline, the Panel could dismiss the charges with or without a warning and without a hearing.

Section (f) is new and is based upon Commission Guidelines §5-102. The next-to-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 last sentence was added by the Committee to clarify that Rule 16-720 pertains to the consideration of Bar Counsel's request for review.

Rule 16-717A. 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 on 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) 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**]** 30 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, if the attorney was served with a subpoena to appear, may consider the attorney's failure as evidence of the factual allegations.**]**

(c) Exchange of Information

[Within a reasonable time**]** At least 15 days 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 into evidence at the hearing.

(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) Effect of Failure to Appear

If adequate notice was given to the attorney pursuant to section (b) of this Rule, but the attorney fails to appear for the hearing, the Panel may proceed with the hearing in the attorney's asbence. If the attorney was served with a subpoena to appear, the Panel may consider the attorney's failure to appear as evidence that the factual allegations are true.

[(e)**]** (f) Oaths

The Panel Chair may administer oaths to witnesses.

[(f)**]** (g) 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.

[(g)**]** (h) **[**Rules of**]** Evidence

(1) Generally

The Panel Chair shall rule on onjections to the evidence and shall conduct the hearing in an informal manner without being bound by technical rules of evidence, except those relating to privileged communications. Unless excluded by the Panel Chair pursuant to **[**Rule 5-403**]** the preceding sentence, all relevant **[**evidence**]** information disclosed in accordance with **[**section (b) of**]** Rule 16-717 (b) and section (c) of this Rule, shall be admissible at the hearing. **[**Although 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 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 is on the attorney and the burden of persuasion regarding 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**]** disciplinary sanctions against 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 or 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 as to 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.

[(h)**]** (i) 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.

[(i)**]** (j) 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 16-717A was accompanied by the following Reporter's Note.

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 §5-103. The Committee changed the timing on the notice from 15 days before the scheduled date of the hearing to 30 days before the scheduled date.

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

Section (e) 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 (f) 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 (g) 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.

Section (h)(1) is based on the philosophy of former Rule BV6 d 1 which is that the rules of evidence "need not apply." The language is derived from the former language of Rule 3-701 which had provided before 1994 that a small claim action was to be conducted in an informal manner "without being bound by technical rules of evidence, except those relating to privileged communications." However, the evidence disclosed in accordance with section (b) of Rule 16-717 and section (c) of Rule 16-717A 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 (h)(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 BV10 d at the judicial hearing stage (see Rule 16-735). Similarly, subsection (g)(2) imposes upon the attorney the burden of proving by a preponderance of the evidence any factual matters in defense of mitigating circumstances existing at the time of the alleged misconduct. See ACG v. Glenn, 341 Md. 448, 470 (1996).

Subsection (h)(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 of 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 (i) 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 (i) is similar to Rule 16-808 (e)(5).

Section (j) incorporates the substance of former Rule BV6 d 4 (a) but leaves to Rule 16-719 the details of the various possible dispositions.

The Vice Chair referred to the use of the word "Chapter" in section (a) of Rule 16-712A, and she asked if all of the Attorney Discipline Rules will be in a chapter. Mr. Howell replied that they would all be in a chapter.

The Vice Chair pointed out a typographical error in section (b) of Rule 16-712A -- the word "disposition" should be the word "deposition." The Committee agreed to this change to correct the error. The Vice Chair referred to section (c). She said that generally filings are not required, and she asked why the notice, exhibits, and transcript of the testimony are required to be filed. Mr. Howell responded that this is an exception. It is used in the event that cases are filed, so there is a repository for this information. The Vice Chair argued that filing requirements have been eliminated in other rules. The idea is that parties keep the originals. Mr. Sykes noted that this provision is similar to subsection (a)(3) of Rule 2-404. The Vice Chair expressed the view

that requiring the filing creates unnecessary paper. She moved that the notice, exhibits, and transcript be filed upon request. The motion was seconded and passed unanimously.

The Vice Chair referred to section (e) and asked if there are other sanction provisions in the Attorney Discipline Rules. Mr. Howell answered that there are sanctions for noncompliance with a subpoena generally. Section (e) is a limited exception, and no sanctions are available. The Vice Chair observed that if a person does not attend a hearing, there is no sanction, unless the person was served with a subpoena. If the person attends, but refuses to answer, no action can be taken, unless the person was served with a subpoena. Mr. Brault pointed out that section (e) refers to Rule 16-718 which has a section on circuit court enforcement. Mr. Howell commented that the second sentence of section (e) of Rule 16-712A is not necessary. The Committee agreed by consensus to take it out.

Mr. Howell said that at the previous meeting, the Committee was discussing what should go into the sealed envelope, which goes to the Panel and is opened after the Panel makes a finding of misconduct. This is provided for in Rule 16-717A. Some members felt that prior warnings should be included in the envelope. The Chair remarked that the Committee seemed to be split 50-50 as to whether prior warnings should be included. Mr. Howell pointed out that this question is an important one. If an attorney has been found to have engaged in misconduct, and Bar Counsel submits a sealed envelope with evidence

of prior disciplinary sanctions, what sanctions are appropriate to be listed? The problem is with prior dismissals with a warning. Some people felt that these should be included. On the other hand, a warning is defined as not being discipline and not being disclosed to anyone but the respondent attorney. If the Rules Committee feels that a prior warning counts in assessing the determination of sanction, then Rule 16-711, Preliminary Investigation, which has a section pertaining to warnings, should be revisited.

Judge McAuliffe inquired if an attorney can object to a dismissal with a warning. Mr. Howell replied that this is not spelled out in the proposed Rules. Judge McAuliffe remarked that including the dismissal with a warning in the envelope is a major difference from the way the Rule reads now. Mr. Howell said that at present the Commission has an internal rule allowing the attorney to reject a warning. If the attorney rejects dismissal with a warning, Bar Counsel either dismisses the case without a warning or sends the case to a Panel. Mr. Hirshman pointed out that the Rule is not mandatory. Bar Counsel may dismiss, send the case to a Panel, or do nothing.

Mr. Brault expressed the view that the Rule should be left as it is -- the dismissals with warnings do not go into the envelope. Judge Rinehardt commented that the Panel members may want to know if the person was given other warnings. Mr. Howell noted that there are three kinds of dismissals with a warning -- one by Bar Counsel where

no charges have been filed, one with a warning but no hearing, and one after a hearing with a warning. There is some merit to the sanction of dismissal after a hearing with a warning being included in the envelope, since the Panel heard evidence before it made its ruling. Judge McAuliffe asked if the attorney can reject this. Mr. Howell answered that the way the proposed Rule is designed now, the attorney cannot reject this. Judge McAuliffe commented that the attorney may not like something about the way the warning was given, and it could be used against him or her later with no right to appeal. Mr. Grossman observed that it is not a sanction. Judge McAuliffe responded that in that case it should not be in the envelope. Mr. Howell noted that a reprimand is discipline, and the attorney can reject it. Mr. Grossman remarked that every state has an informal admonition. In Maryland, this is the dismissal with a warning. The problem comes when an attorney has been warned five times. If the Inquiry Panel cannot know about that, the public is not being protected. The Chair said that the problem is when Bar Counsel decides to warn the attorney without taking him or her to a Panel. The Bar Counsel finding is not in the envelope, but if the Panel issues a warning, it is in the envelope.

Judge Rinehardt suggested that the attorney could be able to reject all of the warnings, but all of the warnings would go into the envelope. Mr. Howell said that one possibility is that the attorney would consent to the warnings going into the envelope. If the

attorney has the right to reject the warning, then it is usable in subsequent proceedings. The envelope could contain the warnings which were issued after hearings. The Reporter pointed out that Rule 16-711 (f) provides that a warning may not be disclosed to any other person other than the attorney. Mr. Sykes inquired if, under current practice, the Inquiry Panel dismisses and issues a warning with no finding of misconduct. Mr. Howell responded that dismissal is the disposition, and a warning does not count. This is in internal Commission regulations, not in the BV Rules.

Mr. Howell asked what the consensus of the Rules Committee is as to what goes into the envelope. Judge McAuliffe remarked that the only sanctions that should go into the envelope are those that the attorney has the ability to reject. The Chair noted that subsection (h)(3) of Rule 16-717A provides that evidence concerning "prior disciplinary sanctions against the attorney" can be put into the envelope. The Rule has to clarify what the term "prior disciplinary sanctions" means. Judge Kaplan reiterated that any warning where the attorney has an opportunity to reject it can go into the envelope. Mr. Howell pointed out that a warning is not discipline. Mr. Brault suggested that dismissals with warnings should go into the envelope. Mr. Howell commented that Rule 16-707 lists the disciplinary sanctions, and what is being considered today is adding a subsection (5) to section (a) of Rule 16-707 to include warnings in the list.

The Chair said that if an attorney consents to a dismissal with

a warning, he or she should understand that this could go into the envelope in a subsequent proceeding. Delegate Vallario suggested that everything should go into the envelope. Judge Kaplan reiterated that the attorney should consent to a sanction before it goes into the envelope. Mr. Bowen stated that he was renewing his objection to the form of Rule 16-717A. He noted that there are two different kinds of disciplinary proceedings -- those with probative value and those without. There are two different kinds of discipline -- a warning and a full-blown sanction. The Rule should provide that no evidence of prior discipline can be introduced unless it has probative value. He cautioned that there has to be an envelope at every Panel hearing; otherwise the presence of an envelope would signal that there is evidence of prior discipline. A similar problem would exist if there are thin envelopes for cases with no prior discipline and thick envelopes for cases with prior discipline. Mr. Hirshman remarked that a closed envelope is always given to the Panel. Mr. Grossman added that if there have been no previous sanctions, the envelope will contain a letter stating this or that there has been a dismissal with a warning. Mr. Brault questioned whether the envelope could be held aside until there has been a finding of misconduct. Mr. Howell said that as a practical matter, once the hearing is over, the Panel makes a decision. The proposed Rule was changed so that there was no second proceeding. A sealed envelope should be required in all cases with a limit on thickness

and no color coding.

Mr. Howell remarked that evidence of prior discipline should not be divulged to the Inquiry Panel unless it is probative. Mr. Grossman pointed out the problem that the Panel will expect an envelope, but subsection (h)(3) provides that Bar Counsel may submit a sealed envelope containing evidence of prior discipline, and the attorney may issue one also containing a written argument of the effect to be given the evidence. Judge Vaughan said that the envelope should contain a letter and not be in the form of a packet. Judge McAuliffe suggested that in all cases, Bar Counsel should submit a sealed envelope to the Panel which is not to be opened until the adjudication. The respondent attorney would get advance notice of the contents, and everything would go into the envelope. The Panel has to make the determination of misconduct before the envelope is opened.

Mr. Bowen moved to send Rule 16-717A back to the Attorneys Subcommittee to rewrite it in the spirit of the ABA rules. The Rule should be exclusionary, evidence of disciplinary sanctions should be admissible only if probative, and all sanctions should be submitted subject to Bar Counsel notifying the attorney that they are being included, and giving the attorney a chance to respond. There should also be an envelope in every case. The Chair clarified that in the envelope there would either be a statement that there have been no prior sanctions, or the attorney's response to the sanctions

identified would be included. The motion was seconded, and it passed unanimously.

Mr. Howell presented Rule 16-718, Panel Subpoena, for the Committee's consideration.

Rule 16-718. PANEL SUBPOENA

(a) Authority of Panel Chair

At the request of Bar Counsel or the attorney who is the subject of the statement of charges, the Panel Chair shall cause a subpoena to be issued by a clerk of a circuit court pursuant to Rule 2-510 to compel the attendance of witnesses and the production of documents or other tangible things at the time and place of the hearing specified in the subpoena.

Committee note: The issuance of these subpoenas is arguably done under no legislative authority; it is a purely judicial function.

(b) Service

A subpoena shall be served in accordance with Rule 2-510.

(c) Certified Letter in Lieu of Subpoena

If the attendance of any attorney and the production of designated documents or other tangible things by any attorney is required, the Panel may compel the attendance and testimony by sending to the attorney a letter by certified mail requesting "Restricted Delivery -- show to whom, date, and address of delivery." If the attorney is admitted to practice law in this State or the letter is delivered to the attorney within this State, the letter shall be as effective against the attorney as if a subpoena had been issued pursuant to section (a) of this Rule.

(d) Objection and Enforcement

On motion of a person served with a subpoena or certified letter filed promptly and, whenever practicable, at or before the time specified by the subpoena or letter for compliance, the Panel Chair may enter any order permitted by Rule 2-510 (e). Upon a failure to comply with a subpoena or letter issued pursuant to this Rule, the circuit court for the county in which the subpoena was served or the letter was delivered may on motion compel compliance with the subpoena or the letter.

(e) Confidentiality

The provisions of section (c) of Rule 16-712 apply to a subpoena or certified letter issued under this Rule and any proceedings in court with respect to the subpoena or the letter. Source: This Rule is derived from former Rule 16-706 (d) (3) (C), (D), and (E) (BV6 d 3 (c), (d), and (e)).

Rule 16-718 was accompanied by the following Reporter's Note.

Section (a) of this Rule is derived from former Rule BV6 d 3 (c) with one change -- it permits the Panel Chair, as opposed to the Panel as a whole, to issue a subpoena.

Section (b) incorporates by reference the service provisions of Rule 2-510.

Section (c) incorporates the substance of former Rule BV6 d 3 (d). Rule 8.1(b) of the Rules of Professional Conduct requires an attorney to respond to a lawful demand for information from a disciplinary authority, unless the information is protected from disclosure by Rule 1.6 of those Rules.

Section (d) is patterned after similar provisions in Rule 16-712, Investigative Subpoenas, but includes references to certified

letters as appropriate.

> Section (e) applies the confidentiality provisions of Rule 16-712 (c) to a Hearing Panel subpoena or certified letter. This is consistent with the policy embodied in the second sentence of former Rule BV 6 d 3 (c).

Mr. Howell suggested that the Committee note to section (a) be deleted, since that was written before the Opinion of the Attorney General that there need not be legislative authority for the Panel Chair to have the clerk issue a subpoena. The Committee agreed by consensus to remove the Committee note.

The Vice Chair inquired if section (c) only applies to attorneys. Mr. Howell answered in the affirmative, explaining that this also applies to attorneys who are not parties. The Vice Chair noted that section (d) refers to persons served with a subpoena or certified letter. The certified letter is not served on persons other than attorneys. Mr. Howell suggested that section (d) could read "[o]n motion of a person served with a subpoena or an attorney served with a certified letter", but there was no motion to this effect.

Judge Vaughan asked about the effect of a subpoena being signed for by an attorney's secretary and if that constitutes delivery. Judge McAuliffe commented that the Post Office keeps on file the designation of an authorized agent who can sign for certified mail. Judge Vaughan expressed the view that the attorney should be the one to sign for the certified mail which he or she is receiving; the

attorney's secretary should not sign for it. Mr. Brault remarked that it works the other way in practice, and service is not usually challenged. Judge Vaughan questioned as to what happens if the secretary throws the certified letter out. Mr. Brault responded that in most cases, the process is in the hands of the attorney. If the attorney or the party never gets process, and then they receive a notice of default, the attorney can challenge the service.

Mr. Howell noted that Rule 16-718 is the same as current Rule BV6 d 3 (d) which has been in effect for 15 years, and it has not caused any problems. No changes were suggested.

Mr. Howell presented Rule 16-719, Panel Decision, for the Committee's consideration.

Rule 16-719. PANEL DECISION

(a) Disposition

If the Hearing Panel after hearing finds that the attorney has engaged in professional misconduct or is incapacitated, it shall direct the filing of a petition for disciplinary action against the attorney pursuant to Rule 16-731 in accordance with section (d) of this Rule. Alternatively, if section (c) of this Rule applies, the Panel may reprimand the attorney. Otherwise, the Panel shall dismiss the charges and terminate the proceedings.

(b) Notice of Dismissal; Warning

If the Hearing Panel dismisses the charges, the Panel Chair shall serve notice of the dismissal upon the attorney and Bar Counsel, who shall notify the complainant. When so directed by the Panel, the Panel Chair

shall accompany the notice of dismissal with a warning to the attorney against future misconduct. A warning is not a reprimand, does not constitute discipline, and may not be disclosed to any person other than the attorney and any complainant.

(c) Reprimand

(1) When Authorized

A Hearing Panel may reprimand an attorney if, after a hearing, it finds that the attorney has engaged in professional misconduct for which a reprimand is appropriate, but further finds that the misconduct was not so serious as to warrant disbarment or suspension.

(2) Content and Service

The reprimand shall summarize in writing the misconduct for which the reprimand is imposed and include specific reference to any rule or statute allegedly violated by the attorney. The Panel Chair shall prepare the reprimand and serve copies upon the attorney and Bar Counsel, who shall also notify the complainant. (3) Rejection By Attorney

If the attorney serves a written objection upon the Panel Chair within 15 days after service of the reprimand, the Panel shall withdraw the reprimand and direct the filing of a petition for disciplinary action in accordance with subsection (d) of this Rule.

(4) Request for Review

If dissatisfied with a reprimand that is not rejected and withdrawn in accordance with subsection (3), Bar Counsel not later than 30 days after service of the reprimand may file with the Commission a request for review of the reprimand and a statement of reasons by Bar Counsel for such review. Bar Counsel shall serve copies of the request for review and the statement of reasons upon the attorney and any

complainant. Within 10 days of service, the attorney may file with the Commission a reply to the statement of reasons.

(5) Exception

A reprimand by a single-member Panel appointed by stipulation pursuant to subsection (f)(1)(C) of Rule 16-715 is not subject to rejection under subsection (c)(3) of this Rule nor review requested under subsection (c)(4) of this Rule.

(d) Decision to Authorize Disciplinary Action

(1) Panel Statement

If the Hearing Panel directs the filing of a petition for disciplinary action, the Panel shall prepare a brief statement that sets forth its findings, describes the nature and extent of any misconduct or incapacity, and directs the filing of the petition.

(2) Request for Review

If any member of the Panel disagrees with a Panel decision under subsection (d)(1) of this Rule, that member may include in the statement a request for a review of the decision under this section and a summary of reasons supporting the request. Until the review process is completed pursuant to Rule 16-720, the filing of the petition shall be deferred.

(3) Filing and Service

The Panel Chair shall file the Panel's statement with the Commission and serve copies upon the attorney and Bar Counsel, who shall also notify the complainant.

(4) Transcript or Recording

Upon receipt of the Panel's statement, Bar Counsel shall cause the transcript or a

recording of the hearing to be included in the record. Bar Counsel shall make the transcript or recording available for review by the attorney or, at the attorney's request, provide a copy to the attorney at the attorney's expense.

Source: This Rule is in part derived from former Rule 16-706 (d) (4) (BV6 d 4) and in part new.

Rule 16-719 was accompanied by the following Reporter's Note.

Section (a) of this Rule incorporates the substance of former Rule BV6 d 4 (a). Language is added to make clear that a Panel finding of professional misconduct or incapacity is prerequisite to a petition for disciplinary action. Although a Hearing Panel finds misconduct much in the same way "as a grand jury may find probable cause", AGC v. McBurney, 282 Md. 116, 122-23 (1978), the Panel applies the "more likely than not" standard of Rule 16-717 (k)(2).

Section (b) tracks the substance of former Rule BV6 d 4 (c) as to notice of dismissal and warning against future misconduct. However, a Panel is no longer required to state its reasons for dismissal and there is no review of any non-unanimous dismissal. Section (b) is the involuntary dismissal analogue of Rule 16-714 (a) (Voluntary Dismissal).

Section (c) is new. Subsection (c)(1) incorporates the substance of former Rule BV6 a 3, but transfers to the Hearing Panel the authority to reprimand an attorney that was formerly vested in the Review Board by former Rule BV7 c.

Subsection (c)(2) requires the Panel Chair to prepare a written reprimand and serve copies upon the attorney and Bar Counsel, who in turn notifies the complainant. Because Bar Counsel and the attorney are not obliged to accept a reprimand that either finds objectionable, the subsection affords them an opportunity to review the text before deciding what to do.

Subsection (c)(3) continues to permit the attorney to reject a reprimand, thereby

requiring the Panel to direct the filing of a petition for disciplinary action. Because a reprimand presupposes a finding of misconduct, the Hearing Panel should not be authorized to respond to an attorney's rejection by withdrawing the reprimand and dismissing the charges, as was formerly permitted. Instead, having found misconduct, the Panel is obliged to direct the filing of a petition.

Subsection (c)(4) enables Bar Counsel to request and obtain review of a reprimand, unless previously rejected by the attorney. Bar Counsel may obtain review of a reprimand not rejected and withdrawn by filing a request with the Review Board not later than 30 days after service of the reprimand, accompanied by a statement of reasons for such review. It is Bar Counsel's responsibility to transmit to the Review Board a statement of reasons for review. The last sentence was added by the Subcommittee to afford the attorney an opportunity to reply to the statement of reasons.

Subsection (c)(5) recognizes that an attorney's right to reject a reprimand and Bar Counsel's right to request review are not available when they previously stipulated to the appointment of a single-member Hearing Panel pursuant to subsection (f)(1)(C) of Rule 16-715. Under that provision, a reprimand by a single-member Panel is final and conclusive.

Section (d) is new. Subsection (d)(1) requires the Panel Chair to prepare a statement certifying the Panel's finding and its direction to file a petition for disciplinary action in a statement similar to that required by former Rule BV6 d 4 (b).

Subsection (d)(2) permits any member of the Panel who disagrees with the Panel decision under subsection (d)(1) to include in the Panel statement a request for review of a Panel decision under the section that directs the filing of a petition for disciplinary action. Such review is conducted under Rule 16-719 by the Review Board constituted under Rule 16-706.

Such a request suspends the Panel decision.

Subsection (d)(3) requires filing with the Commission and service of the Panel's statement upon Bar Counsel, the attorney, any complainant, and the Circuit Vice Chair. The latter is the screening member of the Review Board.

Subsection (d)(4) adds the requirement that, if a petition for disciplinary action is directed, Bar Counsel must cause a copy of the transcript or tape recording of the hearing to be included in the record and make copies available for review by the attorney.

Mr. Howell pointed out that section (a) provides three separate choices for the disposition of the case after the Panel hearing. He noted that the Rules Committee had previously made a change to section (b). The Chair added that the final sentence was changed. The Reporter observed that the applicable language for the finding of the Hearing Panel has been changed to "more likely than not." The Chair replied that the burden of proof has been straightened out in other rules, and it is not needed here. The finding based on the burden of persuasion has been set forth previously. Mr. Howell commented that this is not intended to shortcut what was decided in the previous Rule. If all this takes place, Bar Counsel files a petition or the reprimand procedures apply.

The Vice Chair pointed out that Mr. Brault had suggested that the words "with prejudice" be added to the end of section (a). The Chair asked about the last sentence of section (b) in light of the discussion about whether warnings are disclosed to the Panel in the

envelope. Mr. Howell responded that the consensus seems to be that a warning which has been consented to goes into the envelope. The Chair stated that the last sentence of section (b) is not appropriate in Rule 16-719. The Committee agreed by consensus to move the last sentence of section (b).

The Vice Chair pointed out that the warning could be designed like the reprimand referred to in subsection (c)(3), which implies that if the reprimand is not rejected, it is consented to by the attorney. Mr. Howell suggested that there could be a generic rule which applies to warnings wherever they appear. They could be structured up front in Rule 16-707, Disciplinary Sanctions and Remedies. The Vice Chair said that if, in all circumstances, the attorney can dispute and object to a warning or a reprimand, they should both go in the envelope. Judge McAuliffe pointed out that a reprimand is a sanction. The Chair commented that allowing the attorney to agree to a warning helps the attorney to avoid a reprimand; the Panel is only told about this later if there is further misbehavior. Mr. Howell remarked that this helps Bar Counsel, also. In warning cases, there is no standard to be met. Even if no misconduct is found, but the actions of the attorney are close to the line, a warning can be issued. If there is a finding of misconduct which is not serious and does not warrant suspension or disbarment, a reprimand would be appropriate. Bar Counsel does not have to prove anything or to establish a breach of a rule. The Chair

asked if the Panel should not issue a warning unless the Panel were persuaded that the attorney violated a rule. Mr. Howell replied that this is not in the current Rule. The Panel can issue a warning without a finding of misconduct.

The Chair said that if the Panel finds that the attorney engaged in professional misconduct, it shall proceed to determine whether to issue a dismissal with a warning, to issue a reprimand, or to direct the filing of a petition for disciplinary action. Mr. Howell asked if the attorney should have the right to reject a warning. The Chair answered that the attorney should not have that right. Judge McAuliffe expressed the view that a new meaning is being given to a warning. It has been useful as long as it cannot haunt someone who did not want it. The Chair responded that the warning will not be in the envelope unless the respondent attorney consented to the warning. This would include warnings by Bar Counsel. Warnings from a Panel would not require consent of the respondent attorney to be used in a later proceeding.

The Chair pointed out that subsection (d)(1) provides for a brief statement of the Panel setting forth its findings, describing any misconduct or incapacity, and directing the filing of any petition. Only a member of the Panel can request a review of the Panel decision. Neither Bar Counsel nor the attorney can request review.

Mr. Howell presented Rule 16-720, Review of Panel Decision, for

the Committee's consideration.

Rule 16-720. REVIEW OF PANEL DECISION

(a) When Permitted

The Review Board shall review a decision by a Hearing Panel upon a request for review filed in accordance with section (b) of Rule 16-717 or subsections (c)(4) or (d)(2) of Rule 16-719. The review shall be on the record of the proceedings before the Hearing Panel. No other review is permitted.

Committee note: This is a new provision which abolishes review of Panel decisions unless a member so requests or when the Panel dismisses without a hearing or imposes a reprimand rejected by Bar Counsel.

(b) Transmittal of Record; Transcript

Upon the filing of a request for review, or as soon as practicable, Bar Counsel shall transmit to the Review Board the entire record of proceedings, including the transcript or recording of any hearing. Bar Counsel shall make any transcript or recording available for review by the attorney, or, at the attorney's request, provide a copy to the attorney at the attorney's expense.

(c) Notice of Review

The notice shall contain appropriate instructions and shall be served at least 15 days before the date scheduled for review. The Chair of the Review Board shall notify Bar Counsel and the attorney of the time and place scheduled for the Board's review. If the Board requests oral argument, briefs may not be received unless requested by the Chair of the Review Board.

(d) Disposition

Upon completion of its review, the Review Board shall either approve or disapprove the decision of the Hearing Panel. If the Review Board approves a decision authorizing disciplinary action, Bar Counsel shall file a petition for disciplinary action pursuant to Rule 16-731. If the Review Board approves a Panel reprimand or a Panel dismissal of the charges without a hearing, such approval is final and terminates the review. If the Review Board disapproves a Panel decision authorizing disciplinary action or a dismissal without a hearing, the Review Board shall remand the charges to the Panel and shall prepare a brief statement that summarizes the Board's reasons and contains directions for further proceedings. If a reprimand is disapproved, the Review Board shall revoke the reprimand and either remand the charges to the Panel with directions to proceed in accordance with section (d) of Rule 16-719, or, upon an express disapproval of the Panel's finding of professional misconduct, remand the charges to the Panel with directions to dismiss the charges.

(e) Notice of Board Disposition

The Board Chair shall serve notice of the Board's disposition including any statement or directions upon the attorney, the Panel Chair, and Bar Counsel, who shall notify the complainant.

(f) Return of Record

If the charges are remanded for further proceedings, Bar Counsel shall return to the Panel Chair the record of proceedings as soon as practicable.

Source: This Rule is new.

Rule 16-720 was accompanied by the following Reporter's Note.

Section (a) of this Rule is new. It supplants former Rule BV7 and is intended to abolish review of Panel decisions unless a member requests review of a decision authorizing disciplinary action, or when the Panel dismisses without a hearing or imposes a reprimand rejected by Bar Counsel. No other action of the Hearing Panel is subject to review by the Review Board. In no instance may an attorney, who is dissatisfied with a Panel decision, initiate the review process.

Section (b) is new. It imposes upon Bar Counsel the duty to transmit to the Review Board the record of proceedings, including the transcript or recording of any hearing. The transcript requirement is parallel to subsection (d)(4) of Rule 16-719 and applies to all cases in which review is requested, except a dismissal without a hearing.

Section (c) is in part new and in part derived from Commission Guidelines. Commission Guidelines §6-206 provides that, although Bar Counsel is notified in advance of the agenda of the Review Board meeting, "neither the Complainant nor Respondent need be given notice." The first sentence provides a time for serving the notice, and the second sentence provides for notice to the attorney as well as Bar Counsel. Guidelines §6-301 provides that briefs and oral argument are not permitted unless requested in the notice, but that the Review Board may, at its meeting, revoke a request or direct the Chair to request briefs and argument. Guidelines §6-301A provides that the Board shall permit oral argument upon request in certain situations. The third sentence is consistent with current practice and Commission Guidelines.

Section (d) is new. It streamlines the provisions of former Rule BV7 d, so that the Board either approves or disapproves the Panel decision authorizing disciplinary action or dismissal without a hearing. In the event of disapproval, the charges are remanded for further proceedings in accordance with the

> Board's directions. Such directions may include a reprimand of the attorney, but the Board itself no longer imposes the reprimand (as was authorized by former Rule BV7 (c)). When Bar Counsel requests review of a Panel reprimand, the Board either approves the reprimand or revokes it. In the latter instance, the Board either directs the Panel to authorize Bar Counsel to file a disciplinary action or, if the Board also disapproves the Panel's finding of misconduct, directs the Panel to dismiss the charges.
>
> Section (e) is derived from the seventh sentence of former Rule BV7 b.
>
> Section (f) is new. It is merely a housekeeping measure.

Mr. Howell explained that Rule 16-720 represents a great deal of compromise in the Subcommittee. The Subcommittee, at various times, has gone from retaining a full Review Board review to abolishing the Review Board totally. What has emerged is limited review in limited circumstances. Section (a) provides for three instances in which review can be requested. One is that Bar Counsel can request review of a dismissal without a hearing. The second is that Bar Counsel can request a review of a reprimand, and the third is that a Panel member can request review of the Panel decision. In none of these instances can the attorney request a review. The Vice Chair inquired if under the current Rules, the attorney has the right to request a review, and Mr. Howell answered that this is automatic. The Vice Chair remarked that it is unusual that the attorney does have the ability to go to the Review Board. Mr. Brault said that the

Subcommittee's intention was to eliminate this. The Vice Chair commented that both sides should not have the right to review. Under the proposed Rule, the prosecution gets another bite at the apple.

The Chair expressed the opinion that Rule 16-720 cuts down on unnecessary review. Mr. Brault explained that the review process has been causing many of the time delays in the discipline process. The transcript has to be filed, and the Review Board only meets once a month, causing further delay. Rule 16-720 is a compromise on eliminating the Review Board entirely.

The Vice Chair asked about the meaning of the language "appropriate instructions" in section (c). Mr. Howell replied that this refers to the last sentence of section (c), the request for oral argument. The Vice Chair inquired if the notice is from the Review Board. Mr. Howell answered in the affirmative and suggested that the Rule could be clarified if the first two sentences of section (c) were reversed. The Committee agreed with this suggestion by consensus.

The Vice Chair asked if briefs are intended to be allowed under section (c) if the Board does not request oral argument. Mr. Howell responded that this provision is poorly worded. There is no oral argument or briefs, unless the Review Board requests it. The Chair commented that the Chair of the Review Board has the discretion to require the filing of briefs, oral argument, or both. The third sentence of section (c) can be clarified to read as follows: "Unless

requested by the Chair of the Review Board, briefs may not be filed and oral argument may not be presented." Mr. Brault observed that if this Rule is read in conjunction with the previous Rule, the attorney has 10 days to file a response to Bar Counsel's reasons for review.

Turning to section (d), Mr. Howell pointed out that the Panel's action governs. The Review Board does not move the case to the Court of Appeals. The emphasis is away from the Review Board. It has a limited function in three discrete situations. This is not like the current system. Mr. Howell moved that Rule 16-720 be adopted subject to the changes made today. The motion was seconded, and it carried unanimously.

Mr. Howell presented Rule 16-721, Conviction of Crime, for the Committee's consideration.

Rule 16-721. CONVICTION OF CRIME

(a) Duty of Attorney Charged

An attorney who is charged with a crime in this State or in any other jurisdiction shall promptly inform Bar Counsel in writing of the criminal charge. Thereafter, the attorney shall promptly notify Bar Counsel of the disposition of the charge.

Cross reference: Rule 16-701 (j).

(b) Duty of Bar Counsel

(1) Serious Crime

Upon receipt of information from any source that an attorney has been convicted of a serious crime (whether sentenced or not),

whether the conviction results from a plea of guilty or of nolo contendere or from a verdict after trial, and regardless of the pendency of an appeal or any other post-conviction proceeding, Bar Counsel shall file a petition for disciplinary action in the Court of Appeals pursuant to Rule 16-731 and serve the attorney in accordance with section (b) of Rule 16-708. The petition shall allege the fact of the conviction and include a request that the attorney be suspended immediately from the practice of law. A certified copy of the judgment of conviction shall be attached to the petition and shall be prima facie evidence of the fact that the attorney was convicted of the crime charged.

(2) Other Crimes

Upon receipt of information from any source that an attorney has been convicted of a crime other than a serious crime, whether the conviction results from a plea of guilty or of nolo contendere or from a verdict after trial, Bar Counsel shall investigate the matter and proceed as appropriate under Rule 16-711. If the Court of Appeals dismisses a petition filed under subsection (b)(1) of this Rule on the ground that the crime is not a serious crime, Bar Counsel may file a statement of charges under Rule 16-713.

(c) Temporary Suspension of Attorney

Upon filing of the petition pursuant to subsection (b)(1) of this Rule, the Court of Appeals shall issue an order requiring the attorney within 15 days from the date of the order to show cause why the attorney should not be suspended immediately from the practice of law until the further order of the Court of Appeals. Upon consideration of the petition and the answer to the order to show cause, the Court of Appeals, upon a determination that the attorney has been convicted of a serious crime, shall enter an order suspending the attorney from the practice of law until final disposition of the disciplinary action. The

provisions of Rule 16-737 apply to an order suspending an attorney under this section. The Court of Appeals shall vacate the order and terminate the suspension if the conviction is reversed or vacated at any stage of appellate review.

Committee note: Under this provision, discretion as to whether to suspend the attorney who has been convicted of a serious crime no longer exists; the suspension is mandatory.

(d) Further Proceedings on Petition

When a petition filed pursuant to subsection (b)(1) of this Rule alleges the conviction of a serious crime, the Court of Appeals may enter an order assigning the petition pursuant to Rule 16-732 for a hearing in accordance with Rule 16-735 to determine the nature and extent of the misconduct. If the attorney appeals the conviction, the hearing on the petition shall be delayed until the completion of appellate review. If the conviction is reversed or vacated at any stage of appellate review, the court to which the action is assigned shall either dismiss the petition or hear the action on the basis of evidence other than the conviction. If the conviction is not reversed or vacated after the completion of appellate review, the hearing shall be held within a reasonable time after the mandate is issued. If no appeal from the conviction is taken, the hearing shall be held within a reasonable time after the time for appeal has expired. However, if the attorney is incarcerated as a result of the conviction, the hearing shall be delayed until the termination of incarceration unless the attorney (1) requests an earlier hearing and (2) makes all arrangements (including financial arrangements) for attending the earlier hearing on the scheduled date.

(e) Conclusive Effect of Final Conviction of Crime

In any proceeding under this Chapter, a final judgment of any court of record convicting an attorney of a crime, whether the conviction results from a plea of guilty or of nolo contendere or from a verdict after trial, is conclusive evidence of the guilt of the attorney of that crime. The introduction of such evidence does not preclude the Commission or Bar Counsel from introducing additional evidence nor does it preclude the attorney from introducing evidence or otherwise showing cause why no discipline should be imposed.

Source: This Rule is in part derived from former Rules 16-710 (e) (BV10 e) and 16-716 (BV16) and in part new.

Rule 16-721 was accompanied by the following Reporter's Note.

Section (a) is new. It is derived from Rule 1:20-13(a)(1) of the New Jersey Rules. For clarification the Subcommittee added a cross reference to the definition of "serious crime" in Rule 16-701 (j).

Subsection (b)(1) is derived from former Rule BV16a2, with style changes. It is important to note that immediate suspension is an interim remedy and that the petition seeks an ultimate disposition that may include disbarment.

Subsection (b)(2) is added to clarify Bar Counsel's authority to investigate and bring a disciplinary proceeding against an attorney convicted of any crime that does not constitute a "serious crime" if the facts on which the conviction is based constitute professional misconduct.

Section (c) is derived without substantive change from former Rule BV16b. Interim suspension of an attorney, pending appeal from a conviction, has not been automatic in Maryland. See, e.g., AGC v. Lieberman, 342 Md.

508 (1996) (conviction for money-laundering conspiracy; interim suspension denied); AGC v. Bereano, 338 Md. 475 (1995) (mail fraud conviction, interim suspension denied); AGC v. Protokowicz, 326 Md. 714 (1992) (guilty plea to breaking and entering dwelling and cruelly killing animal; interim suspension ordered). As the Court of Appeals has observed, "Rule BV16 authorizes an interim suspension; it does not mandate such action." Id., at 718. The Subcommittee, as a matter of policy, has drafted section (c) so as to mandate the temporary suspension of the convicted attorney upon a determination that the attorney has been convicted of a serious crime. Once that determination is made, suspension should be imposed without weighing other factors and without delay. The automatic suspension of attorneys convicted of serious crime is a policy strongly endorsed by the American Bar Association (see commentary to A.B.A. Model Rule 19) and has been adopted in many jurisdictions, including Rule XI §10(c) of the District of Columbia Bar and New Jersey Rule 1:20-13(b). Automatic suspension rules are also in force in Alabama, Alaska, Arizona, Florida, Kansas, Kentucky, Michigan, Mississippi, Nevada, New York, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Texas, and Wyoming. If an attorney is suspended pending appeal from the conviction, the attorney must comply with that order and any conditions in accordance with Rule 16-737. The final sentence of section (c) is derived from the third sentence of former Rule BV16 c.

Section (d) is derived from former Rule BV16c. The former rule contemplated "further proceedings" only in cases where the Court of Appeals suspended an attorney. However, because that Court may exercise its discretion not to suspend an attorney pending appeal, "further proceedings" should be ordered whenever the petition alleges the conviction of a serious crime. Section (d) thus contemplates further proceedings "regardless of whether the attorney is suspended by order under section (c)". Even if the conviction is eventually

reversed or vacated, the trial transcript from the criminal proceeding may yield clear and convincing evidence of the underlying misconduct so that the disciplinary hearing may go forward as long as the findings do not rely on the conviction. See A.B.A. Model Rule 19.F.

Section (e) is derived from language in former Rule BV10 e, with style changes. It applies to the conviction of any crime, including but not limited to a serious crime. The final judgment of conviction is conclusive evidence that the attorney is guilty of criminal misconduct. AGC v. Willcher, 340 Md. 217, 221 (1995); AGC v. Saul, 337 Md. 258, 267 (1995). The only issue is the appropriate sanction to be imposed. AGC v. Willcher, 340 Md. at 221. Compelling extenuating circumstances and mitigating factors may be considered on the severity of the sanction. AGC v. Breschi, 340 Md. 590, 601-03 (1995). Disbarment upon conviction of a serious offense may be ordered "unless the lawyer can demonstrate by clear and convincing evidence that compelling extenuating circumstances call for a different result." AGC v. Sparrow, 314 Md. 421, 426 (1988). See AGC v. Saul, 337 Md. at 268.

Judge Vaughan asked if the reference in section (a) to "a crime" includes a traffic offense. Mr. Howell replied that section (b) addresses this issue. It refers to "serious crimes." This is the terminology used by the ABA. Judge Vaughan noted that the word "crime" is not defined in the Rules of Procedure. The Chair commented that a battery is not necessarily a serious crime; it depends on the facts of the case.

Due to lack of a quorum, Mr. Howell suggested the Committee continue its discussion of Rule 16-721 at the next meeting.

The Chair adjourned the meeting.