

December 16, 2005

The Honorable Robert M. Bell,  
Chief Judge

The Honorable Irma S. Raker  
The Honorable Alan M. Wilner  
The Honorable Dale R. Cathell  
The Honorable Glenn T. Harrell, Jr.  
The Honorable Lynne A. Battaglia  
The Honorable Clayton Greene, Jr.,  
Judges

The Court of Appeals of Maryland  
Robert C. Murphy Courts of  
Appeal Building  
Annapolis, Maryland 21401

Re: Maryland Rule 16-760 and  
Rule 5.3 of the Maryland  
Lawyers' Rules of  
Professional Conduct

Your Honors:

Following oral argument on September 6, 2005 on three cases involving the issue of a disbarred attorney working as a paralegal, the Court requested that the Rules Committee reconsider Rule 16-760 (d) (2) and submit its recommendations concerning the Rule to the Court. By Letter Report dated September 19, 2005, the Committee recommended that Rule 16-760 (d) (2) be deleted.

On October 11, 2005, the Court held an open Rules meeting concerning Rule 16-760 (d) (2). At the conclusion of the open meeting, the Court directed that the Committee submit to it recommendations for amendments to the Maryland Rules, using as a model PA Rule 217 (j) of the Pennsylvania Rules of Disciplinary Enforcement.

In accordance with that directive, the Committee submits herewith proposed amendments to Maryland Rule 16-760 and Rule 5.3

of the Maryland Lawyers' Rules of Professional Conduct. The operative provisions of the proposed Rules changes are contained in Rule 5.3 and are directed to the practicing attorney who hires or retains the services of a nonlawyer who was formerly admitted to the practice of law and who has been disbarred, suspended, or placed on inactive status because of incapacity. The differences between the proposed amendments to Rule 5.3 and PA Rule 217 (j) are described in a Reporter's note to Rule 5.3.

Rule 16-760 is proposed to be amended by the deletion of subsection (d) (2) and the addition of a directive that a respondent who has been disbarred, suspended, or placed on inactive status by an order entered pursuant to the Rules in Title 16, Chapter 700 and who is or becomes employed or retained by or associated with a lawyer must comply with Rule 5.3 (d) and assist the supervising lawyer with the lawyer's responsibilities under Rule 5.3 (d).

For the guidance of the Court and the public, following each proposed Rules change is a Reporter's Note describing the reasons for the proposal and any changes that would be effected in current law or practice. We caution that these Reporter's Notes were prepared initially for the benefit of the Rules Committee; they are not part of the Rules and have not been debated or approved by the Committee; and they are not to be regarded as any kind of official comment or interpretation. They are included solely to assist the Court in understanding some of the reasons for the proposed changes.

Respectfully submitted,

Joseph F. Murphy, Jr.  
Chairperson

Linda M. Schuett  
Vice Chairperson

JFM/LMS:cdc

MARYLAND RULES OF PROCEDURE

APPENDIX: THE MARYLAND LAWYERS' RULES OF PROFESSIONAL CONDUCT

AMEND Rule 5.3 of the Maryland Lawyers' Rules of Professional Conduct to add certain provisions with respect to a nonlawyer assistant who was formerly admitted to the practice of law in any jurisdiction and who has been disbarred, suspended, or placed on inactive status because of incapacity, as follows:

Rule 5.3. RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; ~~and~~

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Maryland Lawyers' Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; and

(d) a lawyer shall not employ or retain the services of a nonlawyer who was formerly admitted to the practice of law in any jurisdiction and who has been disbarred, suspended, or placed on inactive status because of incapacity, except under the following circumstances:

(1) all law-related activities of the formerly admitted lawyer shall be (A) performed from an office that is staffed on a full-time basis by a supervising lawyer who has been a member in good standing of the Bar of this State for at least 5 years, and (B) conducted under the direct supervision of the supervising lawyer, who shall be responsible for ensuring that the formerly admitted lawyer complies with the requirements of this Rule.

(2) the formerly admitted lawyer is specifically prohibited from:

(A) representing himself or herself to be a lawyer;

(B) rendering legal consultation or advice to a client or prospective client;

(C) appearing on behalf of or representing a client in any judicial, administrative, legislative, or alternative dispute

resolution proceeding;

(D) appearing on behalf of or representing a client at a deposition or in any other discovery matter;

(E) negotiating or transacting any matter on behalf of a client with third parties or having any contact with third parties regarding such a negotiation or transaction;

(F) receiving, disbursing, or otherwise handling client funds; and

(G) if the formerly admitted lawyer was disbarred or suspended by an order effective after [Insert the effective date of the Rule change], performing any law-related activity (i) for a law firm or lawyer with whom the formerly admitted lawyer was associated when the acts that resulted in the disbarment or suspension occurred, or (ii) for any client who was previously represented by the formerly admitted lawyer.

Committee note: Paragraph (d) (2) (G) of this Rule does not apply to a formerly admitted lawyer who was disbarred or suspended from the practice of law by an order effective on or before [Insert the effective date of the Rule change] nor to a formerly admitted lawyer who was placed on inactive status because of incapacity.

(3) The supervising lawyer and the formerly admitted lawyer shall file with Bar Counsel (A) a notice of employment identifying the supervising lawyer and the formerly admitted lawyer and listing each jurisdiction in which the formerly admitted lawyer has been disbarred, suspended, or placed on inactive status because of incapacity; and (B) a copy of an executed written agreement between the formerly admitted lawyer

and the supervising lawyer that sets forth the duties of the formerly admitted lawyer and includes an undertaking to comply with requests by Bar Counsel for proof of compliance with the terms of the agreement and this Rule. As to a formerly admitted lawyer employed as of [Insert the effective date of the Rule change], the notice and agreement shall be filed no later than \_\_\_\_\_ [Date] \_\_\_\_\_. As to a formerly admitted lawyer hired after [Insert the effective date of the Rule change], the notice and agreement shall be filed within 30 days after commencement of the employment. Immediately upon the termination of the employment of the formerly admitted lawyer, the supervising lawyer and the formerly admitted lawyer shall file with Bar Counsel a notice of the termination.

Committee note: Subject to the conditions and restrictions set forth in paragraph (d) of this Rule, a nonlawyer who was formerly admitted to the practice of law and who was disbarred, suspended, or placed on inactive status because of incapacity may engage in the same law-related activities as any other nonlawyer.

#### COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and ~~should be~~ is responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish

internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Maryland Lawyers' Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Maryland Lawyers' Rules of Professional Conduct if engaged in by a lawyer.

[3] Paragraph (d) addresses formerly admitted lawyers engaging in law-related activities and does not establish a standard for what constitutes the unauthorized practice of law.

Model Rules Comparison.-- The language of Rule 5.3 (a) through (c) is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct. Paragraph (d) and Comment [3] are in part derived from Rule 217 (j) of the Pennsylvania Rules of Disciplinary Enforcement and in part new.

#### REPORTER'S NOTE

At the October 11, 2005 open meeting of the Court of Appeals concerning Rule 16-760 (d) (2), the Court, by a vote of 4 to 3, directed that the Rules Committee draft proposed amendments to the Maryland Rules "roughly consistent" with Rule 217 (j) of the Pennsylvania Rules of Disciplinary Enforcement. Amendments to Rule 5.3 of the Maryland Lawyers' Rules of Professional Conduct and Rule 16-760 have been drafted in accordance with that directive.

In addition to stylistic changes, new paragraph (d) proposed to be added to Rule 5.3 differs from Pennsylvania Rule 217 (j) in several respects:

(1) paragraph (d) applies to nonlawyers formerly admitted to the practice of law who have been disbarred, suspended, or placed on inactive status because of incapacity in any jurisdiction, not just to Maryland lawyers who have been disbarred, suspended, or placed on inactive status;

(2) the supervising lawyer must be a lawyer who has been a member in good standing of the Maryland Bar for at least 5 years;

(3) the "laundry list" of permissible activities, including the delineation of specific types of communications in which the nonlawyer may engage, is omitted; the Committee believes that it is not possible to create a comprehensive list of permissible

activities and that, as stated in the proposed Committee note that follows paragraph (d), a formerly admitted lawyer should be permitted to engage in the same law-related activities as any other nonlawyer, subject to the conditions and restrictions set forth in the Rule;

(4) in paragraph (d) (2) (A), the phrase "or person of similar status" is omitted;

(5) in paragraph (d) (2) (B), the prohibition against rendering legal consultation or advice to a client is expanded to include legal consultation or advice to prospective clients, also;

(6) in paragraph (d) (2) (C), the phrase "or representing" is added and the language "hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, hearing officer, or any other adjudicative person or body" is replaced by the more comprehensive language, "judicial, administrative, legislative, or alternative dispute resolution proceeding;"

(7) the restrictions set forth in paragraph (d) (2) (G), concerning former law firms and clients, are inapplicable to formerly admitted lawyers who have been placed on inactive status because of incapacity and, as to disbarred and suspended lawyers, are prospective only, i.e., applicable only to formerly admitted lawyers whose disbarment or suspension becomes effective after the effective date of the Rule change;

(8) the formerly admitted lawyer and the supervising lawyer must enter into a written agreement, filed with Bar Counsel but not subject to prior approval by Bar Counsel, which sets forth the duties of the formerly admitted lawyer and includes an undertaking to comply with requests by Bar Counsel for proof of compliance with the terms of the agreement and Rule 5.3;

(9) a time requirement is added as to when the notice of employment of the formerly admitted lawyer must be sent to Bar Counsel; and

(10) the sentence, "The supervising attorney shall be subject to disciplinary action for any failure by either the formerly admitted attorney or the supervising attorney to comply with the provisions of this [paragraph]," is not included in paragraph (d).

The Attorneys Subcommittee of the Rules Committee discussed, but declined to recommend, a restriction that would preclude a family member of the formerly admitted lawyer from serving as the supervising lawyer under the Rule.

The Style Subcommittee of the Rules Committee observed that the words "should be" are used in the third sentence of Comment 1. To more accurately state the responsibility of a lawyer for the work product of the lawyer's assistants, the word "is" is proposed to be substituted for the words "should be."

MARYLAND RULES OF PROCEDURE

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 700 - DISCIPLINE AND INACTIVE STATUS OF ATTORNEYS

AMEND Rule 16-760 to add to section (c) certain duties with respect to Rule 5.3 (d) of the Maryland Lawyers' Rules of Professional Conduct and to delete subsection (d)(2), as follows:

Rule 16-760. ORDER IMPOSING DISCIPLINE OR INACTIVE STATUS

. . .

(c) Duties of Respondent

Unless otherwise stated in the order, an order that disbars or suspends a respondent or places a respondent on inactive status shall operate as an immediate directive that the respondent perform each of the following duties in a timely manner:

(1) The respondent shall not accept any new clients or undertake any new or further representation of existing clients.

(2) The respondent shall take any action necessary to protect current clients.

(3) The respondent shall conclude any current client matters that can be concluded within 15 days after the date of the order.

(4) Within 15 days after the date of the order, the respondent shall supply to Bar Counsel or an attorney designated by Bar Counsel a list of the attorney's clients (by name, address, and telephone number) whose legal matters have not been concluded by the respondent and identify any client matters (by

name, tribunal, and docket reference) currently pending in any court or agency.

(5) Within 15 days after the date of the order, the respondent shall mail a letter to each client whose legal matter has not been concluded, to counsel for any other party or to any unrepresented party in a pending action or proceeding, and to all attorneys with whom the respondent is associated in the practice of law, notifying each of them of the order and the fact that the respondent will be unable to practice law after the effective date of the order. The respondent shall supply copies of the letters to Bar Counsel or an attorney designated by Bar Counsel.

(6) Within 30 days after the date of the order, the respondent shall withdraw from all client matters.

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

(8) The respondent shall deliver promptly to clients with pending matters any papers or other property to which the clients are entitled or notify the clients and any co-counsel of a suitable time and place to obtain the papers and other property and call attention to any urgent need to obtain them.

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

(10) Within 30 days of the effective date of the order, the respondent shall file with the Commission an affidavit that states (A) the manner and extent to which the respondent has complied with the order and the provisions of this section, (B) the names of all state and federal jurisdictions in which and administrative agencies before which the respondent has been admitted to practice, (C) the residence and any other address of the respondent to which future communications may be directed, (D) the policy number and the name and address of each insurer that provided malpractice insurance coverage to the respondent during the past five years and the inclusive dates of coverage, and (E) the date and manner that a copy of the affidavit required by this subsection was served upon Bar Counsel. The affidavit shall be accompanied by copies of the list required by subsection (c) (4) of this Rule and the letters mailed under subsection (c) (5) of this Rule.

(11) If the respondent is or becomes employed or retained by or associated with a lawyer, the respondent shall comply with Rule 5.3 (d) of the Maryland Lawyers' Rules of Professional Conduct and assist the supervising lawyer in complying with the supervising lawyer's obligations under the Rule.

~~(11)~~ (12) The respondent shall maintain records of the various steps taken to comply with this section and the order of the Court of Appeals and make those records available to Bar Counsel on request.

(d) Effect of Order; Prohibited Acts

After the effective date of an order that disbars or

suspends a respondent or places a respondent on inactive status, the respondent may not practice law, attempt to practice law, or offer to practice law in this State either directly or through an attorney, officer, director, partner, trustee, agent, or employee. Unless otherwise stated in an order of the Court of Appeals, the respondent shall not:

(1) occupy, share, or use office space in which an attorney practices law unless under circumstances clearly indicating to clients, prospective clients, and persons who may visit the office that the respondent is not a lawyer and is not permitted to practice law;

~~(2) work as a paralegal for or as an employee of an attorney;~~

~~(3)~~ (2) use any business card, sign, or advertisement suggesting that the respondent is entitled to practice law or maintain, either alone or with another, an office for the practice of law;

~~(4)~~ (3) use any stationery, bank account, checks, or labels on which the respondent's name appears as an attorney or in connection with any office for the practice of law;

~~(5)~~ (4) solicit or procure any legal business or retainer for an attorney, whether or not for personal gain; and

~~(6)~~ (5) share in any fees for legal services performed by another attorney after the effective date of the order, but may be compensated for the reasonable value of services rendered prior to that date.

. . .

REPORTER'S NOTE

Rule 16-760 (d) (2), which prohibits a respondent who has been disbarred or suspended or placed on inactive status from working as a paralegal or as an employee of an attorney, is proposed to be deleted.

Proposed new subsection (c) (11) tracks the language of Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants) of the Maryland Lawyers' Rules of Professional Conduct by requiring a respondent who is or becomes "employed or retained by or associated with a lawyer" to comply with proposed new section (d) of Rule 5.3 and assist the respondent's "supervising lawyer" with compliance.