COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Room 1100A, People's Resource Center, Crownsville, Maryland on November 21, 1997.

Members present:

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

Lowell R. Bowen, Esq.
Albert D. Brault, Esq.
Bayard Z. Hochberg, Esq.
H. Thomas Howell, Esq.
Hon. G. R. Hovey Johnson
Hon. Joseph H. H. Kaplan
Richard M. Karceski, Esq.
Robert D. Klein, Esq.
Joyce H. Knox, Esq.
Hon. James J. Lombardi
Hon. John F. McAuliffe
Anne C. Ogletree, Esq.
Hon. Mary Ellen T. Rinehardt
Larry W. Shipley, Clerk
Sen. Norman R. Stone, Jr.
Melvin J. Sykes, Esq.
Roger W. Titus, Esq.
Del. Joseph F. Vallario, Jr.
Hon. James M. Vaughan
Robert A. Zarnoch, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Ms. Marian D'Anna, MICPEL
Alvin I. Frederick, Esq., Litigation Section of the Maryland State Bar Association
Ellen Mugmon, Esq., Governor's Council on Child Abuse and Neglect
Kate Shatzkien, Baltimore Sun
Professor Lynn McLain, University of Baltimore School of Law
Judy Barr
Alex Leikus
Lauren Casey, Esq., House of Delegates, Counsel for Judiciary Committee
Julie Bernhardt, Esq., Office of the Public Defender
Tom Morrow, Esq.
Sue Schenning, Esq., Baltimore County State's Attorney Office
Kristy Anderson, Esq. MSTA
Eileen McInerney, Esq., Howard County State's Attorney Office
Judy Catterton, Esq.
Rachel Wohl, Esq.
Ramona Buck, Mediation Division, Circuit Court for Prince

George's County
Trish Miller, Esq.
Sue Small, Esq., Center for Alternative Dispute Resolution
Hon. Steven I. Platt, Circuit Court for Prince George's County

The Chair convened the meeting. He read a letter which had been written by the Honorable Alan M. Wilner, Associate Judge of the Court of Appeals, to the Chair in which Judge Wilner thanked the members of the Rules Committee and its staff for the Resolution and the Waterford clock honoring his 11 years as Chair of the Rules Committee. These items had been presented to him at a dinner given by Governor and Mrs. Glendening to honor the Rules Committee on the occasion of its 50th Anniversary. A copy of the letter is appended to these Minutes (See Appendix 1). The Vice Chair thanked the Chair for his role in arranging the dinner.

The Chair asked if there were any additions or corrections to the minutes of the October 10, 1997 Rules Committee meeting. There being none, Judge Kaplan moved to adopt the minutes, the motion was seconded, and it passed unanimously.

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

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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 BV16 a 2, 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 BV16 b. 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 BV16 c. 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. This point was recently settled in AGC v. Garland, 345 Md. 383, 394-95 (1997). "If the evidence presented at the hearing is sufficient to sustain a finding by clear and convincing evidence that the conduct occurred, the fact that a criminal conviction did not result from the conduct or that the judgment was reversed does not preclude a finding of misconduct." 345 Md. at 395.

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. Gittens, 346 Md. 316, 325 (1997); 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.

Mr. Howell explained that several different provisions from the BV Rules have been put into Rule 16-721. The definition of the term "serious crime" is similar to the definition in the ABA Model Rules, which many states have adopted. Once an attorney has been charged with a serious crime, the attorney may be temporarily suspended from the practice of law. Section (a) is new and states that there is a duty on an attorney who has been charged with any crime to notify Bar Counsel of the charge and then of any further disposition in the case. Section (b) notes the duties of Bar Counsel once he or she has been notified that an attorney was convicted of a serious crime. Under the present Rule, the Court of Appeals determines, in its discretion, whether a person is to be suspended during the pendency of an appeal. The Subcommittee has recommended that this discretion be curtailed. The ABA model does not provide for discretionary calls on suspension for charges of serious crimes. The Subcommittee feels that the Court of Appeals should consider a change in policy. Once a conviction has been determined to qualify as a "serious crime," there should be a presumptive validity of the conviction, and the convicted attorney should not be allowed to practice law until the conviction is overturned on appeal. Otherwise, there is the specter of

inconsistency. Some attorneys may be allowed to practice law while their convictions are on appeal; others are automatically suspended from the practice of law. No statement of reasons for the decision on suspension is required, and perhaps, there should not be, because a statement may prejudice the appellate rights of the attorney.

The Chair questioned as to how the various states have decided the issue of temporary suspension while an attorney's criminal conviction is on appeal. Mr. Howell replied that this has not been fully researched. At least 15 states have adopted the ABA model, and Mr. Howell said that he did not know if the other states have rejected the ABA model or have not considered it. The Chair commented that many years ago, an appeal to the U.S. Fourth Circuit would not be decided for a very long time, which allowed an attorney, who had not been temporarily suspended, much more time to practice law. Mr. Howell observed that this is still the case, and the Court of Appeals has no way to expedite federal appeals. A case argued in the Fourth Circuit may last as long as two years with no disposition. The Chair remarked that Bar Counsel could try to seek disciplinary action on the basis of the underlying conduct, but this is usually not done.

The Vice Chair noted that the next Rule allows for delaying a hearing. Mr. Howell pointed out that under the current rule, a hearing is deferred until after the appeal has been decided to avoid retrying a case on the merits while awaiting a binding or informative

decision. The Subcommittee did not want this changed. Mr. Karceski expressed the view that the Court of Appeals is wise enough to make a decision as to temporary suspension, and the Rule should not take the strict liability approach.

Mr. Bowen inquired as to the difference between a "crime" and a "serious crime." He asked if an attorney has to inform Bar Counsel if the attorney gets a traffic ticket. Judge Rinehardt suggested that in this context a "crime" is an incarcerable offense. Mr. Howell said that to leave the determination of what a crime is solely in the hands of an attorney is not appropriate and does not accomplish the purpose of the Rule. There is such a variety of infractions that one would have to go to the law books each time someone was charged. The Chair pointed out that when someone applies for a judicial position, not every infraction should have to be reported on the application. Mr. Brault observed that on many of the judicial applications, the applicants note every minuscule traffic ticket. The Chair stated that serious traffic offenses are to be reported.

The Reporter suggested that crimes which have incarceration as a potential penalty could be to what section (a) refers, while subsection (b)(1) could refer to "serious crimes." Mr. Howell noted that the defined term, "serious crime," is a new aspect of the attorney discipline rules. The Vice Chair remarked that the pure way of organizing this Rule is to require the attorney to report all

crimes of which he or she has been convicted. If only "serious crimes" or crimes which have incarceration as a potential penalty must be reported, then an attorney can commit other crimes and hide them. Mr. Brault pointed out that a broad definition picks up anything which might affect an attorney's competency to practice law. Mr. Howell added that an attorney who does not report a crime can argue that he or she did not think the crime was serious.

The Reporter read section (j) of Rule 16-701. This provision reads as follows:

> "Serious Crime" means (1) any felony, (2) any lesser crime that reflects adversely on an attorney's honesty, (3) any other crime, an element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, or theft, or (4) an attempt, conspiracy, or solicitation of another to commit a crime included within clause (1), (2), or (3) of this section.

Judge Vaughan noted that this definition does not include serious traffic offenses. Mr. Howell suggested that section (a) of Rule 16-721 could be amended to add the word "serious" before the word "crime." Mr. Brault commented that a respondent attorney had been disbarred over a traffic record, because the attorney lied to the judge about his poor traffic record. Even a traffic violation can involve a serious crime in the course of the prosecution of the charge.

Mr. Howell moved to add the word "serious" before the word "crime" in section (a). The motion was seconded, and it passed with one opposed.

The Chair noted that under subsection (b)(1), as soon as the verdict is returned, Bar Counsel takes action. Mr. Howell responded that this is true under the current BV Rules. The Chair commented that a certified copy of the judgment of conviction is not available until the attorney is sentenced. If the attorney receives a sentence of probation before judgment (PBJ), there is no judgment of conviction. This may be a matter for the Style Subcommittee to rework. Mr. Bowen remarked that the significance of the judgment is that it is prima facie evidence against the attorney; however, there may be other evidence. Mr. Howell said that the Subcommittee did not intend to change the existing law. Mr. Brault pointed out that this language in subsection (b)(1) is verbatim the language from current Rule 16-716, Suspension upon Conviction of Certain Crimes. The Chair noted that the current Rule does not pertain to PBJ's, but the revised Rule should become effective once there is a verdict of guilty. The certified copy of the docket entries reflect that there has been a finding of guilty. Mr. Brault asked if the Rule should use the language "docket entry of conviction" in place of "certified copy of the judgment of conviction." Mr. Sykes observed that there cannot be a judgment without a conviction. Mr. Howell said that the current practice is to wait for the attorney to be sentenced. The

Vice Chair questioned whether the language in the revised Rule which reads "whether sentenced or not" is in the current Rule. Mr. Brault answered that this language is not in the current Rule. The Chair noted that this provision will not reach a PBJ if the verdict of guilty is the operative event. Mr. Brault commented that Bar Counsel may want to take action if the attorney gets a PBJ. Mr. Hochberg pointed out that sentencing is never delayed that long after a finding of guilt. Whether there is a judgment of conviction or a PBJ may make a difference. Mr. Sykes said that post-trial motions may mean that a guilty finding by a jury will be set aside.

The Chair stated that the Rule should clarify that a suspended sentence may be the subject of discipline. He suggested that the Rule use the language of Rule 5-609 as follows: "whether or not the sentence is suspended" in place of the language "whether sentenced or not." The Vice Chair commented that if the language "whether sentenced or not" is deleted, what is left is that one would have to be sentenced after a judgment of conviction. The Chair suggested that the language "whether sentenced or not" should be removed, and the Committee agreed with this suggestion by consensus.

Turning to subsection (b)(2), Mr. Howell explained that this covers the situation where the attorney committed a crime which is less than a serious crime, and Bar Counsel feels the investigation is warranted. This would proceed as an ordinary matter before an Inquiry Committee. The current rules do not have a provision for Bar

Counsel to proceed when the crime is not a "serious" one. The Vice Chair said that she did not understand the provision. Mr. Howell responded that Bar Counsel can proceed on the underlying facts, not on the basis of the conviction. The Vice Chair inquired as to why both sentences of subsection (b)(2) are not parallel, with both providing that Bar Counsel may file a statement of charges. Mr. Howell answered that the only justification he can recall is that once the Court of Appeals has already had the matter before it, the lid of confidentiality is off. It would not be necessary to go back to the earlier stage in the proceedings. This is the only basis for a distinction. The Vice Chair expressed the view that this is not logical. The last sentence of section (b) provides that if the Court of Appeals dismisses a petition on the ground that the crime was not serious, Bar Counsel may (emphasis added) file a statement of charges. Under Rule 16-711, Preliminary Investigation, Bar Counsel should investigate to determine whether to file a statement of charges.

The Chair pointed out that Bar Counsel may not wish to file a statement of charges, because the Court of Appeals determined that the crime was not serious. Mr. Howell commented that the Court of Appeals may have found that the crime did not meet a certain definition which would require automatic suspension, but the attorney may have been involved in the commission of a lesser crime. The Chair noted that a serious assault may not be identified by the

docket entries as serious. It would be necessary to look at the conviction and the seriousness of the surrounding circumstances. Mr. Howell said that if the Court of Appeals dismissed a crime as not serious, Bar Counsel might be precluded from bringing a statement of charges without going through the Inquiry Panel stage. Through the Rule, the Subcommittee was empowering Bar Counsel to go forward.

The Chair referred to the question posed by Mr. Bowen earlier as to what crimes have to be reported. The Chair remarked that the Rule appears to require Bar Counsel to investigate any report that an attorney has been convicted of an offense. Mr. Howell suggested that subsection (b)(2) could provide that Bar Counsel "may" investigate the matter and proceed as appropriate under Rule 16-711 instead of using the word "shall." The Committee agreed to this change by consensus. Mr. Karceski observed that the last sentence of subsection (b)(2) should be put into subsection (b)(1). The Chair noted that subsection (b)(1) deals with serious crimes. The Vice Chair observed that there may be a problem with the structure of the Rule. She asked why the Court of Appeals would dismiss the entire proceeding just because the crime was not serious. Mr. Karceski explained that the Rule only deals with suspension. The Court of Appeals is not temporarily suspending the attorney; it is waiting until after the trial to make a decision. An attorney who has been convicted of a serious crime is automatically suspended. Mr. Bowen agreed with Mr. Karceski that the last sentence of subsection (b)(2)

should be moved, and Mr. Bowen suggested that it could be moved to the end of section (c). Mr. Howell agreed that section (b) should be restructured so that subsection (b)(1) is followed by subsection (b)(2) without the last sentence, which will be moved to section (c). The Vice Chair expressed the opinion that subsection (b)(2) breaks the flow of the Rule because it deals with crimes other than serious ones, but the first sentence of subsection (b)(2) relates to serious crimes. She suggested that the Style Subcommittee rework this.

The Chair stated that the Committee still needs to work on the substance of the Rule. Mr. Karceski questioned whether there is a need for the section on other crimes. His feeling was that it is obvious that an attorney can be investigated for crimes other than serious ones. The Chair responded that there is a theoretical implication that if the Rule does not provide for this, Bar Counsel cannot investigate other crimes. Mr. Sykes noted that up until subsection (b)(2), the Rule covers temporary suspension. Mr. Howell suggested that subsection (b)(2) could be placed at the end of the Rule. The Vice Chair noted that some crimes, while not serious, may involve a question as to whether a Rule of Professional Conduct has been violated. Mr. Sykes remarked that if the Court of Appeals does not think an attorney's action is a serious crime, it will not suspend the attorney.

The Chair commented that to eliminate a reference as to what should happen for a crime that is not serious, there should be some

discussion of the role of Bar Counsel. Mr. Sykes said that Bar Counsel is back to square one; he or she may or may not investigate. Putting this in the Rule clutters it. The Vice Chair suggested that the first sentence of subsection (b)(2) be excluded. The Chair suggested that the second sentence be moved. The Vice Chair then suggested that the title of the Rule could be changed to "Conviction of Serious Crimes," but Mr. Howell noted that section (e) pertains to any crime.

The Vice Chair said that the problem she was having with the Rule is that although she would be in favor of the idea of it in 99% of the cases, in the small number of cases in which the attorney's conviction was arguably wrong, at least the attorney will be given the opportunity to say that he or she will win on appeal, and the court can listen to the attorney or suspend the attorney. If the attorney is automatically suspended, the attorney may be ruined for the remainder of his or her career, particularly if the appeal takes a great amount of time. The Chair commented that the court considers the likelihood of success on appeal. Mr. Brault noted that the Fourth Circuit has convicted someone of a felony for cutting down a tree on federal park land. Mr. Karceski said that another felony is hunting ducks flying over a baited pond.

The Chair referred to the Vice Chair's suggestion that suspension not be mandatory in subsection (b)(2). The Vice Chair moved that the word "shall" be changed to the word "may", the motion

was seconded, and it passed unanimously. The Vice Chair said that the Committee note should be deleted, and the Committee agreed with this by consensus.

Mr. Howell explained that section (d) was derived from Rule 16-806 (c), and there is no intent to change it. The Subcommittee tried to improve on the terminology and provide alternatives. The Vice Chair asked about the first sentence of section (d). Mr. Howell replied that on its own time, the Court of Appeals can enter an order assigning the petition. The attorney has the right to introduce mitigating circumstances. The Vice Chair commented that the Court could let the matter sit until the appeal is affirmed. The Chair said that an attorney may say that he or she has been convicted, and since the appeal in the Fourth Circuit could take a long time, the attorney asks to be heard immediately. Mr. Howell commented that later on there is a rule which provides for motions for relief from suspensions. The Chair observed that that rule does not come into play at the point in the proceedings when Rule 16-721 is applicable. Mr. Brault noted that the Court may order a hearing pursuant to Rule 16-721, but if the Court is relying on the attorney's conviction, the Court does not have to order a hearing.

The Chair pointed out that the second sentence of section (d) provides that the hearing shall be delayed until the completion of appellate review. The Vice Chair noted that there is a hearing in the trial court after the petition for disciplinary action is

assigned pursuant to Rule 16-732. Mr. Sykes said that pursuant to section (c), the Court of Appeals issues a show cause order, and the attorney has an opportunity to respond. The Vice Chair pointed out that this provision does not allow for a hearing, only an opportunity to respond in writing. The Chair reiterated that Rule 16-721 suggests that while the appeal of a conviction is pending, the attorney does not get a hearing on the suspension. Some of the cases present a hardship for the attorney, and some present a hardship for Bar Counsel. Mr. Brault suggested that language could be added to section (d) which provides that the attorney can request a hearing. The Vice Chair suggested that the word "shall" in the second sentence of section (d) should be changed to the word "may." Mr. Sykes suggested that the following language be added at the end of the second sentence of section (d): "unless the attorney requests an earlier hearing."

Judge McAuliffe expressed the view that the Rule is appropriate when it provides that the attorney should wait for a hearing until the appeal is finished. He questioned as to why an attorney would want a hearing on the basis of having committed a serious crime which is not a hearing on the merits. The Chair answered that the attorney could get the opportunity to put on mitigating evidence to persuade the Court that the attorney should not be prevented from practicing law for a long period of time. The Vice Chair commented that this is more appropriately raised first in the Court of Appeals and not in

the trial court which cannot remove the suspension, anyway. She asked if under section (c) there would be any times that the attorney would have the right to present evidence. The Chair responded that hypothetically in the situation where the attorney committed a felony by cutting down a tree, on an appeal to the Fourth Circuit, it could take three years until the matter is resolved. What mechanism will rule to provide the attorney a disciplinary hearing on the conviction? The facts may not be disputed, but to keep the attorney out of practice for two-and-a-half years just because he or she wishes to appeal the conviction may not be fair. The Vice Chair remarked that the Court of Appeals should not have suspended the attorney in the first place. She questioned as to what should happen if the attorney does get suspended. The Chair replied that the attorney should have the opportunity to seek a hearing as to the appropriate disciplinary action. The Rule should not provide that there is no hearing available until disposition.

Mr. Brault said that an attorney can move to have the suspension lifted based on the finding from the hearing. Even if the conviction is affirmed, it may be that the appropriate discipline is a 30-day suspension. In that instance, the attorney can file a motion to lift the suspension after the 30 days have been served. Mr. Karceski inquired whether, in the same scenario, the attorney gets a second shot at the process, if the Court determines to take action when the conviction is reversed. The Chair answered in the

negative, explaining that the attorney would be given the option to hold off until the appeal process is finished or take the earlier hearing. Mr. Sykes asked about the nature of the hearing. As to the issue of whether a temporary suspension is imposed, does the nature and extent of the misconduct go to mitigation or to the underlying charges? The Chair answered that the hearing is on the ultimate sanction. Mr. Howell agreed, explaining that if the conviction is reversed, Bar Counsel is limited to the remedy on the underlying facts. This is determined at the hearing. If the conviction is affirmed, any extenuating circumstances go to the sanction. The Subcommittee did not contemplate a hearing before the appellate review process is completed.

Mr. Sykes pointed out that the first sentence of section (d) provides that the Court of Appeals may assign the petition. He inquired if this means that the Court can assign the question of whether to suspend. Mr. Howell replied that the Court is able to do that, especially if it is not clear as to what the underlying offense is. The Chair commented that one model is that the attorney gets suspended, and if the attorney appeals, the case is sent to a circuit court judge to make findings of fact. Under the model in Rule 16-721, the case cannot go to the circuit court judge until the appeal is resolved. Without the second sentence of section (d), the Rule could provide that Bar Counsel can go forward with the disciplinary action. Mr. Howell remarked that the Subcommittee did not go into

this in depth, because the current Rule is working well. No change had been intended.

Mr. Karceski observed that if the hearing were accelerated, the trial judge could only rely on the conviction in deciding on a sanction. If the criminal case is then reversed, this would supersede the action of the trial court. The Chair said the attorney would have to make a choice as to whether to accelerate the hearing. Mr. Karceski responded that if the attorney makes the wrong choice, he or she will be penalized. Mr. Howell noted that section (d) only applies if the attorney has not been suspended. There could be a cross reference to section (k) of Rule 16-737, Order Imposing Discipline or Inactive Status. Section (k) provides for a motion to modify a suspension.

Mr. Sykes said the problem he was having with section (d) was the language "to determine the nature and extent of the misconduct." Pursuant to Rule 16-735, when the Court of Appeals sends the case to a trial judge, it is similar to any other disciplinary hearing. Actually, once the case gets to the trial court, it should await the final determination by the appellate court and any remedy the attorney has modifying and lifting the suspension. The Chair commented that this protects the attorney. He suggested that the first sentence of section (d) end after the language "Rule 16-735," and the word "shall" in the second sentence be changed to the word "may." Mr. Sykes moved to end the first sentence with the language

"Rule 16-735," and the motion was seconded.

Mr. Howell asked what the purpose of the Rule 16-735 hearing is. The Vice Chair expressed the opinion that the language at the end of the second sentence of section (d), which has been proposed for deletion, may be necessary. Section (e) is entitled "Conclusive Effect of Final Conviction of Crime." The language in question in the second sentence of section (d) implies that there will be an evidentiary hearing. The Chair questioned whether prima facie evidence is "conclusive." This Rule provides a chance for an attorney to contest the issue of whether he or she is guilty as charged. If the evidence is overwhelming, prima facie evidence will not change anything. If the evidence is not overwhelming, prima facie evidence may not be conclusive. Mr. Sykes remarked that he does not know of any jurisdiction where prima facie evidence is not conclusive.

The Chair asked if the Rule should provide that the hearing may be delayed. Mr. Sykes commented that it is a waste of time to have a hearing while an appellate proceeding is going on. The ruling in the lower court may be upset, and if the conviction is automatic, there may be a discrepancy on the basis of the conviction. If the hearing is on the entire issue, Bar Counsel has to prove a complicated case, which is a waste of time. The Vice Chair observed that if an attorney has not been suspended, the attorney may wish to have the matter resolved. An example would be the attorney who cut down a

tree, but wants to argue that the crime is not one for which he or she should be sanctioned. The Chair added that the attorney may want to get the matter over with quickly, because the sanction may be less onerous than waiting. Mr. Howell commented that the attorney may wish to take the 30-day suspension, rather than risk disbarment after a hearing before a trial judge.

The Chair suggested that the Rule give the attorney a right to ask for a hearing. Mr. Howell said that unless section (e) is modified, conclusive effect will govern the hearing and can never be used for the attorney who has a hope of reversal. The Chair commented that although it is a rare situation, given the length of delay in the federal appellate process, the attorney should have the option of requesting an early hearing.

Mr. Sykes pointed out that subsection (d) provides in the last sentence that the incarcerated attorney has to make financial arrangements for attending an earlier hearing. Mr. Hochberg suggested that the Rule could provide that the hearing shall be delayed until the attorney has had the opportunity to make financial arrangements. Mr. Sykes inquired as to what would happen if the attorney did not make the financial arrangements. Mr. Hochberg answered that the hearing would go forward. Mr. Howell noted that once the conviction is affirmed, there is no immediate hearing unless the attorney requests one and makes the necessary arrangements. Mr. Sykes questioned as to who can submit a petition for a writ of habeas

corpus ad testificandum if the attorney is incarcerated. The Chair responded that if an incarcerated attorney wants to attend the hearing, the attorney must make arrangements for attending the earlier hearing. The attorney may want his attorney to argue or waive the right to present evidence.

Mr. Howell said that only part (2) of the last sentence of section (d) needs to be amended. Mr. Sykes pointed out that an attorney may want the hearing to proceed, even if the attorney is not present at the hearing. Mr. Brault suggested that at the end of the last sentence of section (d), the following language should be added: "unless the attorney's appearance is waived." The Chair said once the hearing is held and the attorney is sentenced, the attorney can file a motion similar to Federal Rule of Criminal Procedure 35 to ask for his or her sentence to be cut. Mr. Sykes remarked that if the attorney is convicted, and the evidence is conclusive, an early hearing would only demonstrate how terrible the attorney was. The smartest strategy is that the attorney would be kept out of court, and his own counsel would say nice things about him or her. Mr. Brault observed that the attorney's suspension could coincide with his or her incarceration. Mr. Howell pointed out that the hearing could take place after the incarceration is over. He said that he could not imagine a situation where the attorney would want to accelerate the hearing.

Mr. Karceski inquired whether an attorney who has been charged,

suspended, and convicted and is in prison can continue to practice law. Mr. Howell said that he did not think an incarcerated attorney could practice law. Mr. Karceski expressed the opinion that the Chair's suggestion is sensible. The attorney can make his or her own arrangements to attend the hearing. This will be difficult if the attorney is incarcerated. The Chair noted that the way the Rule reads now, an attorney who wants an earlier hearing cannot get one. The Rule can be changed to provide that an earlier hearing is available, and the attorney can waive his appearance at the hearing. Mr. Hochberg asked if Bar Counsel can get an earlier hearing. The Chair replied in the affirmative. He pointed out that the last sentence of section (d) is not limited to the situation where no appeal is taken; it also applies to an attorney who is incarcerated and is appealing the conviction. The Chair asked if this sentence should be moved. Mr. Howell replied that it should not be moved.

Mr. Sykes observed that disbarment protects the public. Mr. Hochberg noted that the attorney can continue to practice if he has not been suspended. The Vice Chair agreed with Mr. Hochberg. She felt that the Rule needs some work. Mr. Howell explained that the idea was to avoid hearings when the appellate process is going on. If an attorney is incarcerated, the postponement of the hearing was meant to benefit the attorney and his or her due process rights, since the attorney cannot attend. The Rule was designed to avoid the unseemly situation of two proceedings taking place at the same time,

which may lead to inconsistent results. Priority is given to the criminal conviction on appeal. The Chair commented that if the attorney has not been suspended, there is no problem. The problem arises when the attorney is suspended for an offense that does not merit discipline, and the suspension lasts as long as the appellate process takes.

Mr. Howell said that if the interim suspension is too onerous, the Court of Appeals can exercise its discretion not to suspend, or the attorney can ask for a modification of the existing suspension. This is not the ultimate disposition of the case. If the conviction is affirmed, reversed, or no appeal is taken, there will be a final disposition of the case which is not an interim suspension. The Rule can cross reference Rule 16-737, which provides a full right on motion to terminate a suspension. The two Rules should be kept clear of one another. The Vice Chair noted that section (c) provides that Rule 16-737 applies to an order suspending an attorney under section (c). This provision intimates that the temporary suspension could be vacated earlier. Mr. Howell commented that the modification provision in section (k) of Rule 16-737 could be incorporated into Rule 16-721. The suspended attorney could have his or her suspension lifted, but if the conviction is affirmed, there could either be the suspension as to the time served, or whatever is appropriate.

The Vice Chair referred to the language which was suggested to be added to the second sentence of section (d): "unless the attorney

requests an earlier hearing and is willing to proceed." She expressed the opinion that it is a mistake to add in the language "and is willing to proceed." This will happen in less than one percent of all the cases. The real problem is that the attorney, who has been temporarily suspended, may wish to go back to court a number of times while the conviction is pending. The Chair pointed out that the first sentence of section (d) indicates that the Court may only do one thing, either suspend the attorney or send the case to the circuit court. He questioned whether the Court can do both. If so, the inherent conflict needs to be resolved. Mr. Howell responded that the Court can do both. The Rule applies after the period of interim suspension. The Vice Chair noted that the Rule does not say this. Mr. Howell stated that the Court can and does both. The Chair remarked that if the Court does both, and a person is suspended, with no hearing to address the sanction until the appellate process is completed, an attorney may have to wait for the circuit court hearing which is delayed until the merits of the appeal have been decided. It is preferable to either suspend or send the case to the circuit court. Mr. Howell pointed out that it is not necessarily assumed that the Court will do both simultaneously. The end of the period of suspension may trigger a referral to the trial court for final disposition. The attorney may then be up for disbarment after the conviction is affirmed and can mitigate against the disbarment or further suspension. The Vice Chair said that she did not see a

problem. If the Court suspends an attorney for the conviction of a serious crime, and sends the case to a circuit court judge, the Rule provides that the judge cannot do anything until the appeal is disposed of. If the Court made a mistake, pursuant to Rule 16-737, the Court can do what it wants. Once the conviction is affirmed, the attorney can go before the circuit court judge and present mitigation arguments. The temporary suspension ends if the appeal is vacated. Mr. Brault commented that current Rule 16-716 provides that the attorney can appeal only if a suspension has been issued, but not if the suspension has been denied. Under the proposed Rule, a petition is filed when the suspension has been issued. Mr. Howell said that there is no provision to cover the situation when the Court refuses to suspend, the process goes forward, and the attorney is convicted. The proposed Rule allows for trial court proceedings. Mr. Brault remarked that the proceedings take place, anyway. If the Court of Appeals suspends an attorney for a serious crime, the attorney has the right to answer charges filed in the circuit court with no preliminaries of panel review. Currently, if the Court denies the suspension, Bar Counsel proceeds on an ordinary complaint before the Inquiry Panel.

The Chair noted that this is a change in the current rule. On one track there is no suspension by the Court of Appeals, and the disciplinary process goes forward. On the other track, the attorney is suspended. Does the attorney fight a disciplinary battle with the

conviction hanging over his or her head? What if the Court can do both? Mr. Brault noted that the problem can be avoided if the proposed Rule is limited to apply only to suspensions as the current Rule does. Mr. Howell said that one of the objections to the current Rule is that there are too many levels of hearings built in. Once a petition is filed in the Court of Appeals, and the Court sends it out, the proceedings go before the Inquiry Panel after the attorney is convicted. If the conviction is not serious, the issue is what the sanction is to be. Once the Court of Appeals makes a decision as to whether to discipline the attorney, and the decision is not to discipline, the matter should not be sent before the Inquiry Panel. The Chair commented that the operative effect is disastrous for the attorney who cannot do anything while the appeal is pending. The Vice Chair added that once the attorney is suspended, there is no way for him or her to move forward. What should the attorney do -- go to the Court of Appeals or move forward on the immediate sanction?

Mr. Sykes pointed out that the time had elapsed for Agenda Item 1 to be considered. He suggested that since the Rule is causing some difficulties, it should go back to the Subcommittee so it can consider separate tracks in each of the situations. Mr. Bowen expressed the view that the Rule is appropriate the way it has been presented. The Chair said that the decision on the Rule will be held for further discussion until the other agenda items have been

reached.

The Chair asked Judge Lombardi to come forward. The Chair stated that Delegate Vallario had brought a citation from Governor Glendening to present to Judge Lombardi for his 25 years as a member of the Rules Committee. Judge Lombardi will be retiring from the Committee. Judge Lombardi accepted the citation, saying that he enjoyed his service on the Committee and is sorry to be leaving. He began his service in 1972 as the legislative representative from the House of Delegates, and he noted that his counterpart from the Senate was Joseph Curran, who is now the Attorney General of Maryland.

Agenda Item 2. Consideration of proposed amendments to certain rules in Title 5, Evidence: Rule 5-412 (Sex Offense Cases; relevance of Victim's Past Behavior) and Rule 5-803 (Hearsay Exceptions: Unavailability of Declarant Note Required)

Mr. Titus presented Rule 5-803 (b)(25) for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 800 - HEARSAY

AMEND Rule 5-803 to provide that certain judgments of previous convictions and statements concerning assaultive behavior are not excluded by the hearsay rule, as follows:

Rule 5-803. HEARSAY EXCEPTIONS: UNAVAILABILITY OF DECLARANT NOT REQUIRED

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Statement by Party-opponent

A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

Committee note: Where there is a disputed issue as to scope of employment, representative capacity, authorization to make a statement,

the existence of a conspiracy, or any other foundational requirement, the court must make a finding on that issue before the statement may be admitted. These rules do not address whether the court may consider the statement itself in making that determination. Compare Daugherty v. Kessler, 264 Md. 281, 291-92 (1972) (civil conspiracy); and Hlista v. Altevogt, 239 Md. 43, 51 (1965) (employment relationship) with Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 775 (1987) (trial court may consider the out-of-court statement in deciding whether foundational requirements for coconspirator exception have been met.)

(b) Other Exceptions

(1) Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for Purposes of Medical Diagnosis or Treatment

Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) Recorded Recollection

See Rule 5-802.1(e) for recorded recollection.

(6) Records of Regularly Conducted Business Activity

A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Committee note: Public records specifically excluded from the public records exceptions in subsection (b)(8) of this Rule may not be admitted pursuant to this exception.

Cross reference: Rule 5-902 (11).

(7) Absence of Entry in Records Kept in Accordance with Subsection (b)(6)

Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) Public Records and Reports

(A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

Committee note: This section does not mandate following the interpretation of the term "factual findings" set forth in Beech Aircraft Corp. v. Rainey, 488 U.S. 153 (1988). See Ellsworth v. Sherne Lingerie, Inc., 303 Md. 581 (1985).

(9) Records of Vital Statistics

Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

Cross reference: See Code, Health General

Article, §4-223 (inadmissibility of certain information when paternity is contested) and §5-311 (admissibility of medical examiner's reports).

(10) Absence of Public Record or Entry

Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) Records of Religious Organizations

Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, Baptismal, and Similar Certificates

Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family Records

Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) Records of Documents Affecting an Interest in Property

The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) Statements in Documents Affecting an Interest in Property

A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) Statements in Ancient Documents

Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthiness.

(17) Market Reports and Published Compilations

Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) Learned Treatises

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable

authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation Concerning Personal or Family History

Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) Reputation Concerning Boundaries or General History

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) Reputation as to Character

Reputation of a person's character among associates or in the community.

(22) ~~[Vacant]~~ Judgment of Previous Conviction

~~There is no subsection 22.~~ Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment. In criminal cases, the State may not offer evidence of a judgment against persons other than the accused, except for purposes of impeachment. The pendency of an appeal may be shown but does not preclude admissibility.

Committee note: This section is derived without substantive change from F.R.Ev. 803 (22). Any language differences are solely for purposes of style and clarification.

(23) Judgment as to Personal, Family, or General History, or Boundaries

Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the

matter would be provable by evidence of reputation under subsections (19) or (20).

(24) Other Exceptions

Under exceptional circumstances, the following are not excluded by the hearsay rule, even though the declarant is available as a witness: A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Committee note: The residual exceptions provided by Rule 5-803 (b)(24) and Rule 5-804 (b)(5) do not contemplate an unfettered exercise of judicial discretion, but they do provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5-102.

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other

exceptions contained in Rules 5-803 and 5-804 (b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

(25) Statements Concerning Assaultive Behavior

A statement concerning assaultive behavior to which the declarant was subjected, if the court determines that the time, content, and circumstances of the statement provide sufficient indicia of reliability. A statement is admissible under this subsection only if: (A) at the time the statement was made, the declarant was (i) under the age of 12 years or (ii) chronologically 12 years or older, but had a mental or developmental age of under 12, because of mental retardation or developmental disability, as defined in Code, Health-General Article, §§7-101 (l) and 7-101 (e); (B) the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant; and (C) the court makes a finding on the record as to each of the following specific indicia of reliability that are present or absent:

(i) the declarant's personal knowledge of the event,

(ii) any apparent motive or lack of motive to fabricate or exhibit partiality by the declarant,

(iii) any apparent motive or lack of

motive to fabricate or exhibit partiality by the witness to whom the statement was made,

(iv) whether the statement was spontaneous,

(v) the timing of the statement,

(vi) the content of the statement,

Committee note: This factor includes, for example, whether the declarant's young age makes it unlikely that the declarant fabricated the statement that represents a graphic, detailed account beyond an unabused declarant's knowledge and experience and the appropriateness of the terminology to the declarant's age.

(vii) the nature and duration of the alleged assaultive behavior,

(viii) the inner consistency and coherence of the statement,

(ix) whether the declarant was suffering pain or distress when making the statement,

(x) whether the substance of the statement was suggested by the use of leading questions, and

(xi) whether the witness to whom the statement was made is one to whom the declarant normally would turn for protection, solace, or advice.

Committee note: Subsection (b)(25) of this Rule does not limit the admission of an offered statement under any other applicable hearsay exception or law.

In this subsection, motive includes interest, bias, corruption, and coercion.

In Idaho v. Wright, 497 U.S. 805 (1990), a majority of the Supreme Court held that, in determining the admissibility of a child

victim's hearsay statement, the court may not consider corroborating evidence.

Source: This Rule is derived as follows:
Section (a) is derived from F.R.Ev. 801 (d)(2).
Section (b) is derived from F.R.Ev. 803, except that subsection (b)(25) is new.

Rule 5-803 was accompanied by the following Reporter's Note.

The proposed amendments to Rule 5-803 add two categories to the list of types of hearsay that are not excluded by the hearsay rule even though the declarant is available as a witness.

When new Title 5 was transmitted to the Court of Appeals with the One Hundred Twenty-Fifth Report of the Rules Committee, Rule 5-803 contained a proposed subsection (b)(22), Judgment of Previous Conviction. When the Court adopted Rule 5-803, it declined to adopted subsection (b)(22). In rejecting subsection (b)(22), members of the Court expressed policy concerns about the fact that the subsection deviates from existing case law and about any effect that the subsection might have on recidivist statutes. As a result of some recent civil cases in several courts involving the "slayer's rule," the Evidence Subcommittee has concluded that it would be appropriate to request that the Court reconsider adopting subsection (b)(22), which has been redrafted with style changes. Additionally, because subsection (b)(22) addresses only the admissibility of evidence, not whether that evidence conclusively establishes the convicted individual as the decedent's killer in a "slayer's rule" action, the Subcommittee suggests that the Legislature consider a statutory change with respect to the issue of conclusiveness of the previous conviction in "slayer's rule" actions.

The second proposed new subsection is subsection (b)(25), Statements Concerning Assaultive Behavior, a "tender years exception" to the hearsay rule, applicable in both civil and criminal proceedings. Subject to safeguards to keep unreliable statements out of evidence, subsection (b)(25) allows admission of a child's out-of-court statement concerning assaultive behavior to which the child was subjected. For a statement to be admissible under this subsection, (1) the statement must have been made by a person with a chronological or mental age of under 12 years at the time the statement was made, (2) the proponent of the statement must have given an advance notice

> similar to the advance notice requirement set forth in subsection (b)(24) of this Rule, and (3) the court must determine that the time, content, and circumstances of the statement provide sufficient indicia of reliability and must make a specific finding on the record as to each indicia of reliability listed in the Rule. The list of indicia of reliability is based upon the list set out at pp. 43-44 of the October 6, 1997 memorandum of Professor Lynn McLain, with the addition of subsection (b)(25)(c)(iii), concerning motive or lack of motive to fabricate or exhibit partiality by the witness. Also, with respect to the "tender years exception," the Subcommittee recommends that concurrent legislative changes be made to Code, Article 27, §775.

Mr. Titus explained that this provision involves a "tender years" exception to the hearsay rule, applicable in both civil and criminal proceedings. The Evidence Subcommittee had already held a spirited discussion of this issue. Various letters both in support of and against the proposed changes have been received. The current statute, Code, Article 27, §775 which covers criminal cases provides that the child's out-of-court statement concerning assaultive behavior to which the child was subjected has to be made to certain professionals in order to be admissible.

Professor Lynn McLain, a consultant to the Evidence Subcommittee, told the Committee that the first version of the statute pertaining to the "tender years" exception was passed in 1988. The statute is a perennial in the General Assembly. Other states have similar exceptions. The case of Walker v. State, 107 Md. App. 502 (1995) foreclosed the use of a catchall exception which would allow

the admission of hearsay evidence against an accused in a criminal trial where the evidence is not admissible under a recognized exception to the hearsay rule. Correspondence from the Hon. Robert Karwacki and the House Judiciary Committee has asked the Rules Committee to look at a rule change or proposal for legislation intended to allow judges to hear the hearsay complaints of allegedly abused children, so that the judges could decide if there is sufficient indicia of reliability to allow the statements into evidence. The proposed Rule is different from current law, which only allows persons from certain occupations who are witnesses to testify. The Vice Chair asked if this was statutory. Professor McLain replied that there is a statute which has been amended many times. The perennial fight is on the issue of whether the professionals who testify as to what the children said should be limited to being in certain occupations. Currently, a parent, minister, school counselor, or friend would be precluded from testifying. Robert Dean, Esq., Acting State's Attorney for Montgomery County, who is a member of the Rules Committee, but was unable to attend today's meeting sent in a letter, which is part of the meeting materials for today, in which he objects to the occupations in the statute being so limited.

Professor McLain said that as long as there are safeguards to make a pretrial determination as to reliability, a statement by a child concerning the child's abuse should be able to be admitted. In

her memorandum (See Appendix 2), she answered questions which had arisen in the General Assembly. One question was why this provision is necessary. The practical problem is that young children often cannot testify at trial. The court may find them incompetent to testify because they are intimidated or because of the psychological development of the age of the child. The Rule allows the judge to look at all of the circumstances and evaluate the testimony for reliability. In the case of Idaho v. Wright, 497 U.S. 805 (1990), the Supreme Court held that the Constitution does not bar out-of-court statements by a child as long as the judge looks at factors which state and federal courts have identified to make sure the child's statements are reliable. The proposed Rule lists six factors. Professor McLain noted that one of the factors, any apparent motive or lack of motive to fabricate or exhibit partiality by the witness to whom the statement was made, gives her pause. This goes beyond the credibility of the declarant; it is the credibility of the witness who is testifying to the out-of-court statement. No other hearsay exception judges the truthfulness of the witness. This can be typically attacked on cross-examination.

The Chair stated that several people were present at the meeting to speak on this issue. The proposed Rule is a combination of language used and approved by the Court of Appeals in other rules of evidence. Two issues to determine are whether the statement of the child should only be allowed in criminal cases, since the statute

only applies in criminal cases, and the laundry list of factors to assess reliability. Mr. Dean had pointed out in his letter that Maryland is the only state which excludes someone from testifying based on occupational related qualifying criteria. One aspect of the proposed Rule to consider is that the judge must address the motive of the witness to whom the out-of-court statement was made. This would not be the only area of evidence law in which the trial judge gets involved in weighing the credibility of the witness. A declaration against penal interest offered to exculpate the accused is excluded unless there is a lack of motivation to falsify shown.

The Chair said that several people would be speaking about the proposed Rule. Three are in support of the Rule and three are opposed. First, a proponent will speak and then an opponent. The first speaker was Sue Schenning, Esq., Deputy State's Attorney in Baltimore County. Ms. Schenning told the Committee that she has been a prosecutor for 20 years. The prosecutors are concerned because Code, Article 27, §775, the existing law pertaining to testimony by children, does not work. Often the children under the age of 12 years who come to court to testify freeze up, because the courtroom setting scares them. They become so intimidated that they are not able to testify. In Baltimore County when a suspected child abuse is reported, a social worker speaks to the children involved. According to the categories in the statute, if a policeman or policewoman speaks to the children, the police are not able to testify as to what

the children said. In Baltimore City, there is no social worker to speak with the children nor, in the vast majority of child abuse cases, is there any person who qualifies under the statute. Generally "human service workers" speak to the alleged victims, and these workers are not included in the categories in the statute. Other groups of professionals, such as nurses in hospital emergency rooms, are not included in the statute. Many of the physicians in the emergency rooms are not licensed in Maryland because they are in training, and therefore, they do not fall under the statute, either. Many statements made by children cannot be heard in court.

Ms. Schenning said that she is bothered by the inequity which has resulted. The categories in the statute are part of the peculiar nature of the problem. Proponents of a change in the statute have gone to the legislature many times to try to correct the problem. There is no reasonable relationship between the categories and the reliability of the out-of-court statement. The Maryland State Bar Association (MSBA) has requested that a requirement that the declarant be unavailable be added to the statute. Ms. Schenning explained that this would not work. It was originally in the statute, but it was taken out. If it were written back in, it would render the statute a nullity. There would be no way to get child hearsay admitted. The expert who testifies would have to find that the child is unable to testify in the presence of the defendant. That is usually not the problem -- it is the atmosphere of the

courtroom which upsets the child.

The next speaker was Judith Catterton, Esq., who is a member of the Criminal Law Section of the MSBA. She said she was not representing any group, but testifying on her own behalf. She noted that she is a defense attorney in criminal cases, but she had previously been a prosecutor. She commented that although the proposed Rule was well-intentioned, it could be devastating. It would cause an extraordinarily important change. It would impact Child in Need of Assistance (CINA) cases and delinquency cases, which are non-jury cases in which the judge makes the decision as to reliability. The anomaly is that the judge will hear bolstering proffers crediting hearsay. What can an attorney do if the judge lets in the hearsay which he or she credits? The stakes are enormous, involving the custody of children and visitation rights. Often there are no depositions and no interviews, even with the person who is going to testify. The accuser is offering key evidence, and the attorney cannot interview the child or the witness, who may be the estranged spouse of the alleged abuser. Even in criminal cases, when there is a jury trial, if the proposed Rule were in place, the defense may not know if the child or someone else will be testifying. There may be elaborate indicia of reliability of which the defense would not be aware, and there would be no way to prepare for the trial. The defense may wish to use a different opening statement depending on who testifies in the case.

Ms. Catterton expressed the opinion that there is no need for the proposed Rule. She stated that she never had a case either as a prosecutor or a defense attorney where a child was unable to testify because he or she was intimidated. She had qualified children as young as four to seven years of age. She said that she did not know how other states handle this. In Maryland, in camera testimony has been upheld. Other available techniques include videotaping and simulation taping to accommodate a frightened child. Also, there is a statute, Code, Courts Article, §9-103.1, which allows testimony through a health care provider, and the category of teacher has been added. She remarked that she is convinced that the change to the Rule will affect innocent people who may go to jail or lose parental rights.

The next speaker was Ellen Mugmon of the Governor's Council on Child Abuse and Neglect. She said that the legislation had been drafted differently by the Governor's Task Force. The Council disagrees with the opponents to the Rule. Ms. Mugmon's belief is that the Council is concerned about fairness to parents who cannot testify because they are not part of the statutory list. The American Bar Association did a study of 9000 contested custody cases. In only two percent of the cases were false accusations made. This is a rare situation. The Maryland State Teachers' Association testified that accusations against teachers are rampant. However, there have only been 46 in a ten-year period in Howard County,

including some against bus drivers. There are 40,000 students and 3,000 teachers in Maryland. Some of the accusations involve high school students, who are not covered by the statute. The courts should not be barred from considering reliable testimony. Case law is replete with cases involving children who are unable or incompetent to testify. Ms. Mugmon stated that she is in support of the proposed Rule.

Thomas Morrow, Esq. spoke next. He explained that he was speaking for himself as a defense attorney, but the Criminal Law Section of the MSBA was also in agreement with his views. He stated that there is no criminal defense attorney who would not view the proposed Rule as a catastrophe. He said that defense attorneys recognize the problem of child abuse -- there are 250,000 reported cases each year. He had previously been a prosecutor, and he expressed the view that cases are not dropped due to unavailable witnesses. The problem with the proposed Rule is that it does not provide for in camera testimony, and it eliminates depositions. The term "assaultive behavior" is broader than child sexual abuse. He looked at the legislation in other states as noted in Prof. McLain's memorandum, and every one refers to sexual abuse or behavior, not assaultive behavior. This is a significant problem in civil procedure. The two percent number mentioned by Ms. Mugmon as cases where there have been false accusations refers to domestic relations litigation. Many attorneys in custody battles raise the issue of

child abuse. There are reasons to have the restrictive categories of witnesses, because they are persons who are not biased. To eliminate these categories opens up a Pandora's box of testimony by biased people. The tender years exception of 12 years of age and under may not make sense. Children of ages 10 and 11 are committing offenses. The age requirement should be related to the demographics of society.

Mr. Morrow said that the issue of the unavailability of witnesses is critical. As Professor McLain refers to in her memorandum, other states implicitly or explicitly require the witness to be unavailable. If the witness is unavailable, there is a greater need for hearsay to be admitted. Professor McLain cites the case of Ohio v. Roberts, 448 U.S. 56 (1980) which discusses the indicia of reliability. The case of White v. Illinois, 502 U.S. 346 (1992) deals with excited utterances, and it holds that the declarant's unavailability need not be shown. Bourjaily v. United States, 483 U.S. 117 (1987) holds that statements by a co-conspirator are admissible, since the declarant was unavailable to testify. Under the proposed rule, the judge weighs the factors and makes an ad hoc determination. The standard is variable, and it is unworkable. Mr. Morrow said that he is not in favor of child abuse, but in defending those who are accused, the proposed Rule would make inroads into the right to confront witnesses.

The next person to speak was Eileen McInerney, Esq., an Assistant State's Attorney in Howard County. She told the Committee

that her area of concentration is in these child abuse cases. The child hearsay statute is very difficult to deal with. Depositions are not allowed in any other criminal proceedings. The proposed Rule eliminates depositions. It is appropriate for defense counsel to have a pretrial hearing. This would help with the problem of trial counsel not knowing what to expect. She noted that her experience has been with open file discovery which involves giving the defendant everything in the file and making the witnesses available. A hearing is held well in advance of the trial to determine if the testimony is inherently reliable. Hearsay evidence will not be offered if it is not inherently reliable. The evidence is weighed closely. Her office is conservative and careful that what they do meets the criteria.

The next speaker was Julia Bernhardt, Esq., an Assistant Public Defender. She said that the view of the Office of the Public Defender is that the issue of children's hearsay is one that the legislature should handle. The proposed Rule has eliminated the statutory safeguards which the legislature has deemed desirable. The U.S. Supreme Court has deemed this type of evidence unreliable under the confrontation clause in the Constitution. Limited data are available as to whether testimony by children is reliable. This is an emotional issue which requires investigation. The legislature has rejected amendments to the statute, and to make a significant change to the Rule would be a

serious mistake. Allowing leading questions by untrained persons could ruin lives. The legislature may have concluded that trained professionals would not ask leading questions. Ms. Bernhardt reiterated that this is a legislative policy question, and the proposed Rule change would essentially repeal the existing statute. The Walker case is correct.

The Chair said that the Walker case does not refer to the changes proposed by the Rule. He questioned whether the changes proposed in the Rule should be done by rule or by statute. The Rules of Evidence expressly contemplate legislation concerning the admissibility of evidence. If the legislative changes are the most recent, this would control. In the federal rules, Congress has a say in the process when changes to the Federal Rules of Evidence are made. The statute is fundamentally flawed in that evidence that is so potentially unreliable can only be presented in criminal cases. Many cases are better tried on the domestic equity side. It would be preferable for a judge rather than a jury to decide the case. It is wrong to limit this to criminal cases. To avoid trial by ambush, the Rule has safeguards built into it such as those built into the catchall exception, including provisions for notice, etc. This is also the only area of criminal procedure to have depositions. In a case such as White v. Illinois there could be a false accusation. In the White case, Mrs. White said that the child was screaming, and she also said that she could see that the child was bleeding. The

child's testimony that the father was the culprit was admitted into evidence. In this case, Mrs. White could have been lying. Her testimony would fall into the category of evidence which does not come in under the Maryland statute. People will always lie, and judges have to decide veracity. A parent's testimony may be unreliable, especially in the midst of a domestic argument. If the Committee decides to send the Rule to the Court of Appeals, it will be up to the Court to decide.

Judge McAuliffe asked the prosecutors who were present if there has been any use of a witness coordinator to familiarize the child with the courtroom, making it possible for young children to be comfortable enough to testify. Ms. Schenning responded that this is done in Baltimore County. The witness coordinator and the prosecutor meet with the child repeatedly. Tools such as a coloring book, and all kinds of support services are used. Some children who are not from intact families and who have been abused are shattered, and when they are in the courtroom, they are unable to relate instances of the abuse. Judge McAuliffe commented that children who are under 13 years of age who are not able to testify in the courtroom should be able to be classified as unavailable so they can testify in a pretrial hearing. Ms. Schenning responded that the unavailability requirement only means that the child cannot testify in the presence of the defendant. It is difficult to show that the child is unavailable due to his or her discomfort with the courtroom

atmosphere. The Vice Chair inquired if the unavailability requirement is part of the current law. Ms. Schenning replied that it has been written out of the law. The Maryland State Teachers' Association wants it back in the law. This is an issue that comes up frequently. The Chair noted that the statute was originally drafted with a separate track for unavailable and available witnesses.

Delegate Vallario pointed out that the proposed Rule change goes farther than the statute. He referred to his letter of August 21, 1997, a copy of which is in the meeting materials, in which he asked for the input of the Rules Committee with regard to changes to the admission of hearsay evidence in child abuse cases for possible legislation in the 1998 session. He clarified that he was not asking for the Committee to draft a rule, since this is a matter for the legislature. This past year, 69 witnesses testified on child abuse bills, and nothing passed. The House of Delegates passed a bill which struck out the word "licensed" before the word "physician" in the statute, but the bill did not pass the Senate. The House also suggested adding the category of nurses to the statute, because nurses are independent. Because nurses write notes on the patient files, they should be able to testify. Teachers are frightened, because many of them are unfairly accused of child abuse, and they cannot cross-examine the child who made the accusation. In custody cases, accusations are made against the other parent, and because of the inferences, the judge is unable to award custody to that parent.

In these cases, the young child cannot testify through some other person. This is proper; only certain professionals should be able to testify.

Mr. Brault expressed concern about the comment as to unlicensed emergency room physicians. He noted that there are certain criteria which physicians must meet. Usually the emergency rooms are staffed by contract physicians who are specialists in emergency medicine and are licensed to practice in Maryland. He remarked that Rule 5-703, Bases of Opinion Testimony by Experts, could be used to allow an expert opinion on child abuse predicated on what the child had said. Ms. Schenning responded that most prosecutors do not use that Rule, because most judges have decided that the Rule cannot be used for the purpose of identifying the abuser. One example is the case of Cassidy v. State, 74 Md. App. 1 (1988). Ms. Schenning reiterated that the prosecutors in Baltimore County do not have a problem, because the victims see licensed social workers. However, in Baltimore City, the human service workers who see the children are not licensed, and they cannot testify under the statute.

Judge Kaplan said that he was previously asked to support the proposed changes to Rule 5-803 (b)(25). He noted that the interest seems to be to get unlicensed physicians and human service workers included in the statute. Seeing no need to trump the statute, he moved to table the issue of the change to Rule 5-803 (b)(25) to see what happens in the 1998 legislative session.

The motion was seconded, and it carried unanimously. The Chair complimented the speakers on their presentations.

The Chair stated that there is another change proposed to Rule 5-803 in subsection (b)(22). The change is consistent with the federal rule. Mr. Titus explained that this provision was part of the original Evidence Rules which were before the Court of Appeals in the 125th Report, but the Court declined to adopt it. He had seen the case of Connecticut General Life Insurance Co. v. Swiger, et al, Case No. 03-C-95-10392 in the Circuit Court for Baltimore County, (1997), which discussed the issue of the "slayer's rule," and he had suggested that a change to Rule 5-803 (b)(22) be considered by the Rules Committee. Mr. Bowen moved to adopt the Rule as drafted. The motion was seconded.

Mr. Karceski commented that subsection (b)(22) applies to any crime punishable by death or imprisonment in excess of one year, and he inquired whether the proposed subsection (b)(22) means that the evidence of the final judgment can be used to impeach a witness in a later criminal case. The Chair replied that if the accused in a criminal case calls an alibi witness who has several prior convictions, Rule 5-609 is the appropriate rule to use to impeach the witness. If the defendant was guilty of theft by stolen goods, the State is precluded from using the earlier offense to show that the defendant committed the burglary for which he is being tried. Delegate Vallario asked whether a prior guilty plea to running a red

light can be used. The Chair answered that a prior guilty plea is admissible. Delegate Vallario pointed out that that offense does not carry a punishment of imprisonment for more than one year. He noted that under subsection (a)(1) of the Rule the party's own statement cannot be used against that party. In the case, the murderer is entitled to the proceeds of his parents' estate. The sister is not entitled to introduce her brother's prior judgment of conviction of murder of his parents. Mr. Bowen pointed out that if the sister defends the estate to keep it from her brother, she would use up half of the estate in legal costs. Delegate Vallario said that two bills had been introduced in the legislature to cure this problem.

Mr. Titus stated that the minutes would reflect the meaning of the proposed change to the Rule. The Chair said that discussion of the Rule will be continued at a later date.

After the lunch break, the Chair told the Committee that the final item from Agenda Item 2 is the proposed change to Rule 5-412 to conform the Rule to Code, Article 27, §461A.

MARYLAND RULES OF PROCEDURE

TITLE 5 - EVIDENCE

CHAPTER 400 - RELEVANCY AND ITS LIMITS

AMEND Rule 5-412 for conformity with recent legislation, as follows:

Rule 5-412. SEX OFFENSE CASES; RELEVANCE OF

VICTIM'S PAST BEHAVIOR

In prosecutions for rape, ~~or~~ sexual offense in the first or second degree, attempted rape, or attempted sexual offense in the first or second degree, admissibility of evidence relating to the victim's sexual history is governed by Code, Article 27, §461A.

Committee note: Code, Article 27, §461A governs the admissibility of sexual history evidence only in prosecutions for rape or sexual offense in the first or second degree. The admissibility of such evidence in other sexual offense cases is governed by the rules of this Title.

Source: This Rule is new.

Rule 5-412 was accompanied by the following Reporter's Note.

The proposed amendment conforms Rule 5-412 to recent legislation that added the crimes of attempted rape and attempted sexual offense in the first or second degree to Code, Article 27, §461A.

The Reporter observed that the Committee note needs to be modified as well. Mr. Howell moved to adopt the proposed change to Rule 5-412, the motion was seconded, and it passed unanimously.

Agenda Item 3. Consideration of proposed new Rule 16-205 (Court-Referred Alternative Dispute Resolution)

The Chair presented Rule 16-205, Court-Referred Alternative Dispute Resolution, for the Committee's consideration.

TITLE 16 - COURTS, JUDGES, AND ATTORNEYS

CHAPTER 200 - THE CALENDAR -- ASSIGNMENT AND DISPOSITION OF MOTIONS AND CASES

ADD new Rule 16-205, as follows:

Rule 16-205. COURT-REFERRED ALTERNATIVE DISPUTE RESOLUTION

(a) Scope

Each differentiated case management plan shall identify the cases to be assigned to alternative dispute resolution. This Rule is applicable when, in accordance with Rule 16-202, a court has placed a civil action on a track that provides for mediation or non-binding arbitration. It is not applicable to mediation conducted pursuant to Rule 9-205, or to binding arbitration pursuant to Code, Courts Article, §§3-201 et seq.

(b) Definitions

(1) Alternative Dispute Resolution

"Alternative dispute resolution" means the process of resolving pending litigation through pretrial conferences, neutral case evaluations, mediation, arbitration, or any combination thereof.

(2) Mediation

"Mediation" means a process in which the parties appear before an approved mediator who, through the application of mediation techniques, assists the parties, their attorneys, or both in identifying the issues, exploring settlement alternatives, and resolving their disputes in a voluntary agreement.

(3) Neutral Case Evaluation

"Neutral case evaluation" means a process in which (A) the parties, their attorneys, or both appear before an approved evaluator and present a summary of the evidence and arguments supporting their respective positions and (B) the impartial person then renders an evaluation of their positions and an opinion as to the relative risks of litigation to all parties and the value of the case for settlement purposes.

(4) Non-binding Arbitration

"Non-binding Arbitration" means a process in which (A) the parties, their attorneys, or both present evidence and arguments supporting their respective positions to one or more approved arbitrators and (B) the arbitrators then render a decision that is not binding.

(5) Settlement Conference

"Settlement conference" means a conference at which the parties, their attorneys, or both appear before an approved person to discuss the issues and the positions of the parties in the action in an attempt to resolve the dispute or issues in the dispute by agreement or by means other than trial. A settlement conference may include neutral case evaluation.

(c) Mediation

(1) Qualifications of Mediators

To be approved as a mediator, a person must:

(A) Have completed at least 40 hours of mediation training in a program approved by the circuit administrative judge;

(B) Agree to abide by "Model Standards of Conduct for Mediators" promulgated by the American Arbitration Association, the American Bar Association, and the Society of Professionals in Dispute Resolution;

(C) Agree to submit to periodic monitoring of court-ordered mediations; and

(D) Comply with approval procedures set out in the differentiated case management plan of the court that has authorized the mediation.

(2) List of Mediators

Any person who is interested in serving as a mediator may make application on a form prescribed by the circuit administrative judge. The list of mediators and the accompanying forms shall be available to the parties. The parties may by agreement choose any other person to be a mediator.

(3) Agreement

If the parties reach a proposed agreement on some or all of the disputed issues, the agreement shall be reduced to writing and submitted to the court for approval and entry as an order. If no agreement is reached, the mediator shall so advise the court but not state the reasons.

(4) Confidentiality

During the trial of the case that was previously referred to mediation, except for an agreement submitted to the court pursuant to

subsection (c)(3) of this Rule, no statement or writing made in the course of mediation is admissible in evidence in that proceeding. This Rule does not require the exclusion of any evidence otherwise obtained merely because it was also presented in the course of mediation.

(5) Costs

The order for mediation shall provide for payment of the mediator or for waiver of payment. The responsibility for payment may be assessed among the parties as the court may direct.

(d) Non-binding Arbitration

(1) List of Arbitrators

Each county shall keep a list of attorneys approved by the circuit administrative judge ~~in that county~~ to be arbitrators. Parties may choose an arbitrator from the list or may by agreement choose any other person to be an arbitrator.

(2) Decision

The arbitrator shall advise the parties and the court of his or her decision. If the parties accept the decision of the arbitrator on some or all of the disputed issues, the agreement shall be reduced to writing and submitted to the court for approval and entry as an order. If no agreement is reached the arbitrator shall so advise the court, but not state the reasons.

(3) Confidentiality

During the trial of the case that was previously submitted to non-binding arbitration, no statement or writing made in the course of non-binding arbitration is admissible in evidence in that proceeding except that the decision of the arbitrator which has been disclosed to the court may be used by the court only for settlement purposes.

This Rule does not require the exclusion of any evidence otherwise obtained merely because it was also presented in the course of arbitration.

(4) Costs

The order for arbitration shall provide for payment to the arbitrator or for waiver of payment. The responsibility for payment may be assessed among the parties as the court may direct.

(e) Settlement Conferences

At any time while an action is pending, the court may require the parties to attend a settlement conference. Each party has the right to argue in support of his or her position in the case. ~~The designated~~ If the court requires that the settlement conference include a neutral case evaluation, the court shall designate a person ~~shall~~ to render ~~a neutral case~~ an evaluation and recommend a fair and reasonable settlement. No party is bound by the recommended settlement, unless the settlement agreement has been placed on the record or reduced to writing and signed by the parties or their counsel.

Source: This Rule is in part new and in part derived from Rules 5-408 and 9-205.

Section (a) is new.

Section (b) is new and is derived from the definitions in the proposed ADR Rule which was in the 128th Report.

Subsection (c)(1) is new and is derived from the proposed ADR Rule which was in the 128th Report.

Subsection (c)(2) is new.

Subsection (c)(3) is in part new and in part derived from Rule 9-205.

Subsection (c)(4) is derived from Rule 9-205 and Rule 5-408.

Subsection (c)(5) is new.

Subsection (d)(1) is new.

Subsection (d)(2) is in part new and in part derived from Rule 9-205.

Subsection (d)(3) is derived from Rule 9-205 and Rule 5-408.
Subsection (d)(4) is new.
Section (e) is new.

Rule 16-205 was accompanied by the following Reporter's Note.

This Rule is partly an updated version of the proposed Alternative Dispute Resolution Rule which was submitted to the Court of Appeals in the 128th Report and partly new. In redrafting the Rule, the Special Subcommittee attempted to address the concerns of the Court of Appeals and of some of the individuals who are already participating as mediators and arbitrators.

The Chair explained that this is the first time the subject of Alternative Dispute Resolution (ADR) has been discussed by the Rules Committee, since the Commission on the Future of the Courts (Futures Commission) made its cornerstone recommendation that the courts provide ADR to the litigants. The Special Subcommittee on Alternative Dispute Resolution met with attorneys and other mediators who are not attorneys to draft a rule which fulfills the intent of the Futures Commission as to settlement conferences, neutral case evaluation, arbitration, and mediation. The term "mediation" is as blurred as the term "credibility" is in search warrant litigation. It is important to come up with a workable definition of "mediation." The proposed Rule distinguishes the various types of ADR. A previous rule on the same subject went to the Court of Appeals, but the Court sent it back for further study. The administrative judges have been

doing an excellent job in structuring the differentiated case management (DCM) tracks, and many have been including a track for ADR. The system in Prince George's County is working very well. The proposed Rule defines the types of ADR and provides for the administrative judge to carefully monitor so that the right cases go to the right kind of ADR.

The Chair told the Committee that many consultants assisted with the various aspects of drafting the Rule. Several guests are present today, and no one is opposed to the Rule. These include the Honorable Steven Platt, of the Circuit Court for Prince George's County; Sue Small of the Center for Alternative Dispute Resolution; Trish Miller, Esq., an attorney-mediator who attended Subcommittee meetings; Ramona Buck, Director of Mediation Services for the Seventh Judicial Circuit of Maryland; and Rachel Wohl, Esq., Chair of the Committee on ADR. No one is scheduled to make a presentation, but any of the guests will be happy to answer questions.

The Chair drew the Committee's attention to section (a) of the Rule. He explained that this is the provision tieing the ADR cases to the DCM system. Section (b) is consistent with the mandate of the Futures Commission. Ms. Miller suggested that the language "and without providing any professional advice" should be added to the definition of "mediation" after the word "techniques" and before the word "assists." She said that she and Professor Roger Wolf, of the University of Baltimore Law School, who was one of the consultants to

the Subcommittee, had looked at the Model Standards of Conduct for Mediators from the American Arbitration Association (AAA), and it contained this language. Mr. Sykes questioned whether the language "professional advice" should be "legal advice." Ms. Miller was in agreement with changing her suggested language to "legal advice" which is also in section 6 of the Model Standards. Mr. Sykes remarked that a mediator could be a professional engineer or surveyor who should be able to use his or her professional background to state an opinion. The word "professional" is too broad.

The Vice Chair questioned as to why an attorney could not give an opinion as a mediator. Mr. Sykes said that Judge Paul Weinstein, Administrative Judge of the Circuit Court of Montgomery County, had expressed the concern that mediation could lead to the unauthorized practice of law. The purpose of mediation is to try to get each side to look realistically at the disagreement, so that an agreement can be reached. The mediator has to play some role in this. The Chair noted that the mediator is a facilitator. The mediator should not be providing legal advice. He agreed with the suggestion to add in the language "and without providing legal advice."

Judge Rinehardt referred to the memorandum in the meeting materials from Lorig Charkoudian, who is the Director of the Community Mediation Program at the Safe and Smart Center. Judge Rinehardt said that based on the mediation from that program and from Professor Wolf's program, it is evident that equally good mediation

results are coming from non-attorney mediators as from attorney mediators. It would be a mistake not to add in the suggested language in subsection (b)(2). Many attorneys and retired judges have not been trained to mediate.

Mr. Bowen moved to add in the suggested language "and without providing legal advice" to subsection (b)(2). The motion was seconded, and it passed unanimously.

Mr. Howell commented that the ABA Model Standards use the word "impartial" in place of the word "approved." Part II of the Model Standards is entitled "Impartiality: A Mediator Shall Conduct the Mediation in an Impartial Manner." There is no reference to the term "impartiality" in the proposed Rule. Mr. Bowen expressed the view that the word "approved" is the same as "impartial." Mr. Howell countered that the word "approved" means complying with standards, but does not equate with "impartiality." He suggested using "impartial and approved." Mr. Bowen suggested the language be "approved, impartial." Mr. Sykes noted that the letter from the Community Mediation Program uses the word "neutral" before the word "mediator." The Chair remarked that the word "approved" is not needed. Mr. Sykes suggested that the word "neutral" could replace the word "approved." Mr. Bowen pointed out that this term is not part of the definition of the word "mediation," but should rather be in subsection (c)(1) pertaining to the qualifications of mediators.

Mr. Klein expressed the opinion that the Rule should be

consistent with the Model Rules. The Reporter pointed out that the version of the ADR Rule that was in the 128th Report used the word "impartial." The Committee agreed by consensus that the word "impartial" would be placed after the word "approved."

Mr. Klein asked if the circuit court approves the mediators, and the Chair replied in the affirmative. Mr. Klein observed that there could potentially be different standards in the various circuit courts, the equivalent of local rules. The Chair said that with respect to the qualifications of individuals, it is difficult to find categories to fit all mediators. Mr. Sykes noted that too much judicial rhetoric detracts from the voluntary flavor of the process. An impartial mediator assists the parties with a voluntary solution.

Mr. Howell pointed out that subsection (b)(4) provides that the arbitrators are approved. He asked if there are particular qualifications. The Chair responded that there are qualifications approved by the judge. Judge Rinehardt inquired if a national group approves the qualifications. Judge McAuliffe answered that the American Arbitration Association (AAA) approves qualifications. The arbitrator need not be a member of the association. Mr. Lombardi added that the courts have certain criteria for their list.

The Chair drew the Committee's attention to subsection (b)(5). Judge Vaughan questioned whether this precludes a District Court judge from conducting settlement conferences. The Chair said that this Rule only applies in the circuit court.

Turning to section (c), the Vice Chair inquired as to how old the Model Standards of Conduct for Mediators are. Ms. Buck replied that they were printed in 1995. The Chair commented that the American Bar Association (ABA) may promulgate its own standards at some point. Ms. Buck noted that the Model Standards are backed by two ABA Sections. Mr. Howell pointed out that the Rule should not represent that the Standards are approved by the entire ABA. The Vice Chair suggested that the Model Standards should be published with the Rule, just as the Discovery Guidelines are. Mr. Howell suggested that part (B) of subsection (c)(1) provide only that the Model Standards are approved by the American Arbitration Association.

The Chair asked if the date the Model Standards were printed should be put into the Rule. Mr. Bowen responded that the date should not be included, because the dates are constantly changing. Ms. Knox suggested that the same language that is on the Model Standards should be used: "American Arbitration Association, the Litigation Section and the Dispute Resolution Section of the American Bar Association, and the Society of Professionals in Dispute Resolution." Ms. Ogletree suggested that the words "published jointly by" be added in front of the language suggested by Ms. Knox. The Committee agreed by consensus to these two suggestions.

Mr. Titus told the Committee that Judge Weinstein had called him because the judge was concerned about non-attorneys conducting

mediation. The judge had asked if he were allowed to only appoint attorneys as mediators. The Chair replied that he has the discretion to do that. The Vice Chair expressed the concern that not putting an otherwise qualified person on the list of mediators simply because he or she is not an attorney may be a problem. Ms. Ogletree commented that in her county few attorneys have the requisite training to be mediators, and some of the county's social workers are more qualified. The Vice Chair said that each jurisdiction can make its own decisions. Ms. Ogletree remarked that certain kinds of mediation are not appropriate for an attorney to mediate, but relegating the rest to an attorney is not a bad idea. The Vice Chair expressed the opinion that it is preferable for the Committee to decide if non-attorneys can mediate. Ms. Ogletree disagreed, stating that the decision should be up to the circuit administrative judge.

The Chair said that the judges can select the mediators from the list, and if the judge chooses, he or she will not appoint a non-attorney. The requirements in the Rule are simply the floor requirements. Just because someone is eligible does not mean that he or she will be appointed. Mr. Titus observed that the judge has discretion to require an attorney in all or some of the cases. The Chair noted that the DCM plan could have a provision that a person who is not a member of the bar will not be approved as a mediator. Section (d) of the Rule deals with this issue.

Judge Platt commented that, subject to approval of the DCM plan

by the Court of Appeals, the judge has unlimited discretion. If someone is aggrieved by the plan, he or she could ask the Court of Appeals to disapprove the plan. This was a compromise in the Subcommittee. Maryland allows flexibility. It would be better to revisit this issue rather than fight about it now and hold up the Rule. The courts need this tool, and it should not be too cumbersome or complex. Judge Rinehardt added that some issues should not depend on the personality of an individual. Ms. Ogletree remarked that it is a matter of whether the person is familiar with the jurisdiction.

Mr. Klein referred to the word "procedures" in part (D) of subsection (c)(1) which seems to empower someone to establish criteria. The Chair suggested that the following language be added in after the word "procedures" and before the word "set": "and satisfy any additional qualifications." The Committee agreed with this suggestion by consensus. Delegate Vallario expressed the concern that many judges, who are qualified to be mediators, cannot make the 40-hour requirement in part (A). Judge Rinehardt responded that the judges would not be qualified unless that requirement were met. The Chair pointed out that in the definitions, those judges conducting settlement conferences are not mediators. The Vice Chair inquired if the Subcommittee intended that the DCM plan could include additional requirements. The Chair replied that it did.

The Chair drew the Committee's attention to subsection (c)(2).

Judge Rinehardt asked if any other person who is not an attorney and not on the list can be the mediator. Ms. Ogletree replied that someone else could be as long as the parties agree. Mr. Howell questioned whether the parties are told about the fees at the outset. He asked how the parties could make an informed choice unless the form contains information about fees. The Chair noted that the provision dealing with costs is in subsection (c)(5). Mr. Howell remarked that at that point, the costs information is too late, because the parties already chose the mediator. Ms. Ogletree said that the qualification form should have the charges listed on it. Judge Vaughan remarked that fee schedules can be dangerous. It might be preferable to let the judge set a maximum hourly rate. The Chair said that this could be part of the approval procedure. Mr. Bowen pointed out that the AAA sends individuals a list of arbitrators, including the qualifications and the basis of the charges. The Chair suggested that a sentence could be added to subsection (c)(2) about fees, but Mr. Bowen suggested that the fee information be put on the forms.

The Vice Chair commented that information about costs is important for the parties, because there may be court-ordered sessions of mediation. Mr. Titus stated that in Montgomery County, Judge Weinstein puts the costs information in the order for mediation. Judge Rinehardt inquired as to how much it usually costs. Mr. Titus answered that it is $150 an hour. Judge Platt added that

it is the same in Prince George's County. The Chair suggested that subsection (c)(5) be added in to the Rule before subsection (c)(3). The Committee agreed to this change by consensus.

Judge McAuliffe expressed his philosophical problem with the court ordering parties to mediation and ordering them to pay for it. Some cases take time and run into a great deal of money. Judge Lombardi added that it is the same situation with non-binding arbitration. Mr. Titus explained that Judge Weinstein finessed this by not sending a case to mediation before an attorney on the list unless the parties both agree. Judge McAuliffe noted that the Rule does not provide this. The Chair agreed that this is a valid legal and philosophical question. He asked if the Rule should provide that unless the parties agree, the court cannot order ADR, or if this issue should be left to the DCM plan. Mr. Klein commented that in Texas, there is court-ordered mediation on asbestos cases which is a waste of time and costing thousands of dollars. There is no reason to go through this. Mediation will not work unless it is voluntary.

The Chair suggested that Judge McAuliffe's problem would be solved if it is up to the parties to decide on mediation or non-binding arbitration. Judge Lombardi disagreed, stating that non-binding arbitration does not fit into this analysis. It is very valuable to the courts and the courts should be able to order it with a reasonable fee. The Vice Chair remarked that the Fourth Circuit went through a mediation process with an attorney trained in

mediation which was free, except for paying for the party's attorney's time. Judge McAuliffe observed that mandatory mediation paid for by the court is appropriate. The Vice Chair said that in the prior ADR Rule which was sent back by the Court of Appeals, the trial judge was allowed to order referral to two sessions of ADR. The Chair remarked that this occurs in domestic cases pursuant to Rule 9-205. Judge McAuliffe expressed the view that domestic cases are different because of the State's interest in them and because of the involvement of children.

The Vice Chair noted that in Rule 2-504 (b)(2)(D), the scheduling order includes a "specific referral to or direction to pursue an available and appropriate form of alternative dispute resolution, provided that a court may not require the parties to submit to binding arbitration unless they agree in writing or on the record to that process." This may have to be changed. The Vice Chair asked why the ADR Rule is in Title 16, especially if non-attorneys are mediators. Mr. Titus remarked that if a judge forced him to go to a mediator, he would not like to be forced to pay for it. Judge Lombardi commented that going to free evaluators is a total waste of time. A survey of the bar did not reveal any of the problems discussed today. He expressed the view that the Rule should not micromanage the ADR program.

The Chair said that the Court of Appeals will not like a rule which forces costs on litigants. The Honorable Lawrence Rodowsky has

already expressed the opinion that mediation cannot be forced on someone who has to pay for it. Ms. Ogletree remarked that people in her county would not be able to pay for the mediation. Judge Platt noted that in Prince George's County, a significant number of cases are being settled through non-binding arbitration paid for by the parties. If someone will not agree to neutral case evaluation, the Rule gives the judge the authority to order it. The Vice Chair stated that if the parties come to the pretrial conference, and the parties refuse to consider ADR after the judge asks about it, there should be the power to mandate the ADR. Judge Vaughan remarked that there should be the possibility of mediation. The costs of mediation are less than the costs of a full trial.

The Chair said that he was inclined not to include the provision that the court cannot order mediation unless the parties agree. Rule 2-504 is already on the books, and it implies the court can order costs. Ms. Ogletree reiterated that the mediation should be on a volunteer basis. Judge Platt responded that it should not be voluntary in custody and visitation cases. In his county, the judges are ordering people to mediation with an 80% success rate. If language is put in precluding this, those cases will have to be tried. No one is complaining about the current system, and the flexibility should not be removed. Montgomery County has a similar situation. Mr. Titus inquired as to what would be the result if both parties have to consent to pay. Judge Platt responded that they

would not be able to have the mediation program.

The Chair stated that the Court of Appeals rejected the 128th Report version of the ADR Rule which had the provision that the court may not require the parties to submit to more than two sessions of ADR on a fee-for-service basis. The Vice Chair pointed out that it was not that provision to which the Court objected. Judge Kaplan moved that that provision be plugged into the section pertaining to costs. The motion was seconded, and it passed unanimously.

The Vice Chair asked if the new language pertains only to persons on the mediator list. Ms. Ogletree replied that it applies to any mediator. The Vice Chair observed that there is a problem with subsection (c)(2), because it reads as if the parties can only agree to choose someone not on the list of mediators, but they cannot agree to choose someone on the list. The Style Subcommittee can fix this problem.

There was no discussion of subsection (d)(2), Decision. The Chair drew the Committee's attention to subsection (d)(3), Confidentiality. The Assistant Reporter noted that this was derived from language in Rule 5-408. Mr. Titus asked why this section is only for mediation. The Chair said that there is a similar provision for non-binding arbitration. Mr. Titus suggested that there could one generic confidentiality provision. The Chair pointed out that this provision is similar to one in Rule 9-205. The Vice Chair countered that the one in Rule 9-205 is different. The Chair

explained that the only difference is that Rule 9-205 does not have the language that "no statement or writing made in the course of mediation is admissible in evidence in that proceeding." He noted that Rule 9-205 may have to be changed.

The Vice Chair asked about the language "otherwise obtained." The Chair replied that this language was discussed by the Evidence Subcommittee. Evidence acquired during the discovery process may be able to be used in settlement negotiations. The Vice Chair remarked that if someone learns of the evidence in the settlement conference, he or she could argue that it is within the scope of discovery. Mr. Howell observed that if a statement is made in direct relation to the mediation, it should not be used in a later proceeding; otherwise, there would not be candid disclosure in mediation. The Chair pointed out that Federal Rule 408 uses the word "discoverable" in place of "obtained." The Vice Chair commented that if something is disclosed in mediation, and the document was never asked for, it should not be able to be used later. Mr. Klein remarked that if one does not want to see the document in the courtroom, one should not bring it up in mediation. This cannot be immunized.

The Chair suggested that the word "discoverable" be used in place of "obtained." The Vice Chair suggested that Rules 5-408 and 9-205 be changed, as well. The Committee agreed by consensus with these suggestions.

The Chair said that section (d) would be conformed to the

changes made in section (c).

Turning to section (e), the Vice Chair asked why this provision has to be in the Rule, since the counties already conduct settlement conferences. The Chair stated that not every county has a provision for this, and it fits in the Rule at this point. The Rule is providing for all types of ADR, and it authorizes the court to require the parties to attend.

Senator Stone moved to approve the Rule as it was amended. The motion was seconded, and it carried unanimously.

Agenda Item 4. Reconsideration of proposed rules changes proposed by the Criminal Rules Subcommittee: Amendments to Rule 4-216 (Pretrial Release) and Amendments to the rules and forms pertaining to expungement

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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 recent statutory changes and to reorganize it, as follows:

Rule 4-216. PRETRIAL RELEASE

~~(a) When Available~~

~~Unless ineligible for pretrial release~~

~~under Code, Article 27, §616 ½, (1) a defendant charged with an offense for which the maximum penalty is neither death not 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).~~

~~(b)~~ (a) Interim Bail

Pending an initial appearance by the defendant before a judicial officer pursuant to Rule 4-213 (a), the defendant may be released upon execution of a bond in an amount and subject to conditions specified in a schedule that may be adopted by the Chief Judge of the District Court for certain offenses. The Chief Judge may authorize designated court personnel or peace officers to release a defendant by reference to the schedule.

~~(c)~~ (b) Probable Cause Determination

A defendant arrested without a warrant shall be released on personal recognizance under terms that do not significantly restrain the defendant's liberty unless the judicial officer determines that there is probable cause to believe that the defendant committed an offense.

(c) Presumptively Eligible for Release

Except as otherwise provided in section (d) of this Rule, a defendant is entitled to be released before verdict or pending a new trial in conformity with this Rule on personal recognizance or with one or more conditions

imposed unless the judicial officer determines that no condition of release will reasonably assure (1) the appearance of the defendant as required and (2) if the defendant is charged with an offense under Code, Article 27, §616 1/2 (k), the safety of the alleged victim.

(d) Presumptively Ineligible for Release

A defendant charged with an offense under Code, Article 27, §616½ (c), (i), (j), or (l) or an offense for which the maximum penalty is death or life imprisonment is presumptively ineligible for release and may not be released by a District Court Commissioner. A defendant who is presumptively ineligible for release may, in the discretion of the court, be released before verdict or pending a new trial in conformity with this Rule if the judge determines that one or more conditions of release will reasonably assure (1) the appearance of the defendant as required and (2) if the defendant is charged with an offense under Code, Article 27, §616½ (c), (j), or (l), that the defendant will not pose a danger to another person or the community prior to trial.

~~(f)~~ (e) ~~Factors Relevant to Conditions of Release~~ Duties of Judicial Officer

(1) Consideration of Factors

~~In determining which~~ In making a release determination and determining conditions of release ~~will reasonably ensure the appearance of the defendant as required,~~ to impose upon the defendant, the judicial officer, on the basis of information available or developed in a pretrial release inquiry, may take into account:

~~(1)~~ (A) The nature and circumstances of the offense charged, the nature of the evidence against the defendant, and the potential sentence upon conviction, insofar as these factors are relevant to the risk of nonappearance;

~~(2)~~ (B) The defendant's prior record of appearance at court proceedings or flight to avoid prosecution or failure to appear at court proceedings;

~~(3)~~ (C) The defendant's family ties, employment status and history, financial resources, reputation, character and mental condition, length of residence in the community, and length of residence in this State;

~~(4)~~ (D) The recommendation of an agency which conducts pretrial release investigations;

~~(5)~~ (E) The recommendation of the State's Attorney;

~~(6)~~ (F) Information presented by defendant's counsel;

~~(7)~~ (G) The danger of the defendant to himself or herself or others;

~~(8)~~ (H) Any other factor, including prior adjudications of delinquency that occurred within three years of the date the defendant is charged as an adult and prior convictions, bearing on the risk of a wilful failure to appear.

(2) Statement of Reasons When a Presumption is Rebutted

Upon determining to release a defendant who is presumptively ineligible for release under section (d) of this Rule or to refuse to release a defendant who is presumptively eligible for release under section (c) of this Rule, the judicial officer shall state the reasons in writing or on the record.

(3) Imposition of Conditions of Release

If the judicial officer determines to impose conditions of release, the judicial officer shall impose on the defendant the first

of the conditions of release set out in section (f) of this Rule which will reasonably

(A) assure the appearance of the defendant as required,

(B) protect the safety of the alleged victim if the defendant is charged with an offense under Code, Article 27, §616½ (k), and

(C) assure that the defendant will not pose a danger to another person or to the community if the defendant is charged with an offense under Code, Article 27, §616½ (c), (j), or (l); but if no single condition is sufficient, the judicial officer shall impose on the defendant that combination of the conditions which is least onerous but which will reasonably achieve the purposes set out in this subsection.

(4) Advice of Conditions and Consequences of Violation

The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the consequences of a violation of any condition.

~~(d)~~ (f) Conditions of Release

~~A defendant charged with an offense for which the maximum penalty is neither death nor life imprisonment shall be release before verdict or pending a new trial on personal recognizance unless the judicial officer determines that that condition of release will not reasonably ensure the appearance of the defendant as required. Upon determining to release a defendant changed 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 office 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:~~ The conditions of release imposed by a judicial officer under this Rule may include:

(1) Committing the defendant to the custody of a designated person or organization agreeing to supervise the defendant and assist in ensuring the defendant's appearance in court;

(2) Placing the defendant under the supervision of a probation officer or other appropriate public official;

(3) Subjecting the defendant to reasonable restrictions with respect to travel, association, or residence during the period of release;

(4) Requiring the defendant to post a bail bond complying with Rule 4-217 in an amount and on conditions specified by the judicial officer including any of the following:

(A) without collateral security,

(B) with collateral security of the kind specified in Rule 4-217 (e)(1)(A) equal in value to the greater of $25.00 or 10% of the full penalty amount, or a larger percentage as may be fixed by the judicial officer,

(C) with collateral security of the kind specified in Rule 4-217 (e)(1) equal in value to the full penalty amount,

(D) with the obligation of a corporation which is an insurer or other surety in the full penalty amount;

(5) Subjecting the defendant to any other condition reasonably necessary to ~~ensure~~:

(A) assure the appearance of the defendant as required~~.~~,

(B) protect the safety of the alleged victim if the defendant is charged with an offense under Code, Article 27, §616 1/2 (k), and

(C) assure that the defendant will not pose a danger to another person or to the community if the defendant is charged with an offense under Code, Article 27, §616 1/2 (c), (j), or (l);

(6) Imposing upon the defendant, for good cause shown, one or more of the conditions authorized under Code, Article 27, §763 reasonably necessary to stop or prevent the intimidation of a victim or witness or a violation of Code, Article 27, §26, §761, or §762.

~~(e) Statement of Conditions~~

~~The judicial officer shall advise the defendant in writing or on the record of the conditions of release imposed and of the consequences of a violation of any condition.~~

(g) Review of Commissioner's Pretrial Release Order

A defendant who is denied pretrial release by a commissioner or who for any reason remains in custody for 24 hours after a commissioner has determined conditions of release pursuant to this Rule shall be presented immediately to the District Court if the court is then in session, or if not, at the next session of the court. The District Court shall review the commissioner's pretrial release determination and take appropriate action thereon. If the defendant will remain in custody after the review, the District Court shall set forth in writing or on the record the reasons for the continued detention.

(h) Continuance of Previous Conditions

When conditions of pretrial release have been previously imposed in the District Court, the conditions continue in the circuit court

unless amended or revoked pursuant to section (i) of this Rule.

(i) Amendment of Pretrial Order

After a charging document has been filed, the court, on motion of any party or on its own initiative and after notice and opportunity for hearing, may revoke an order of pretrial release or amend it to impose additional or different conditions of release. If its decision results in the detention of the defendant, the court shall state the reasons for its action in writing or on the record.

(j) Supervision of Detention Pending Trial

In order to eliminate unnecessary detention, the court shall exercise supervision over the detention of defendants pending trial. It shall require from the sheriff, warden, or other custodial officer a weekly report listing each defendant within its jurisdiction who has been held in custody in excess of seven days pending preliminary hearing, trial, sentencing, or appeal. The report shall give the reason for the detention of each defendant.

(k) Title 5 Not Applicable

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), and (j).~~

~~Source: This Rule is derived as follows:~~
~~Section (a) is derived from former Rule 721 a and M.D.R. 721 a.~~
~~Section (b) is derived from former M.D.R. 721 b.~~
~~Section (c) is derived from former M.D.R. 723 b 4.~~
~~Section (d) is derived from former M.D.R. 721 c and Rule 721 b.~~
~~Section (e) is derived from former M.D.R.~~

~~721 d and Rule 721 c.~~

~~Section (f) is derived from former M.D.R. 721 e and Rule 721 d.~~

~~Section (g) is derived from former M.D.R. Rule 721 f.~~

~~Section (h) is derived from former Rule 721 e.~~

~~Section (i) is derived from former Rule 721 f and M.D.R. 721 g.~~

~~Section (j) is derived from former Rule 721 g and M.D.R. 721 h.~~

Source: This Rule is derived in part from former Rule 721, M.D.R. 721, and M.D.R. 723 b 4, and is in part new.

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

The proposed amendments to Rule 4-216 reorganize the Rule and conform it to recent changes to Code, Article 27, §§616½ and 763 and Code, Courts Article, §3-828.

In the reorganization of the Rule, current section (a) is deleted and its contents are moved to new sections (c), (d), and (k). Sections (b) and (c) are relettered as sections (a) and (b), respectively. Although there was some sentiment among Committee members to delete the interim bail section from the Rule because of disuse, the Honorable Martha F. Rasin, Chief Judge of the District Court of Maryland, has requested that it be retained for possible use in emergency situations, such as an occurrence that results in the arrest of a large number of people in a small county.

At the heart of the reorganization is the distinction between defendants who are presumptively eligible for release and those who are presumptively ineligible for release. A defendant charged with an offense under Code, Article 27, 616½ (c), (i), (j), or (l) or an offense for which the maximum penalty is death or life imprisonment is presumptively ineligible for release, and section (d) applies. All other defendants are presumptively eligible for release and section (c) applies. Also, when read together, sections (c) and (d) compile, in a single location, answers to the questions of when a District Court Commissioner may not release a defendant, when a defendant may be released on personal recognizance, and when the judicial officer must take into account the safety of the alleged victim or whether the defendant will pose a danger to another person or to the community prior to trial.

Section (e) is a compilation of the duties of the judicial officer in making a release determination. Subsection (e)(1) is a list of the factors of release currently set out in section (f) of the Rule, with a reference to "prior adjudications of delinquency that occurred within three years of the date the defendant is charged as a adult" added in accordance with Code, Courts Article, §3-828 (b)(5). Subsection (e)(2) is derived from the first portion of the second sentence of current section (d), and requires the judicial officer

to make a record whenever a presumption of eligibility or ineligibility for release has been rebutted. Subsection (e)(3) is derived in part from the second sentence of current section (d), with additional language to make clear that the purposes of the conditions of release include not only assuring the appearance of the defendant as required but also the purposes set out in new subsections (e)(3)(B) and (e)(3)(C), when appropriate. Subsection (e)(4) is derived from current section (e).

Section (f) sets out the list of conditions of release that appear in current section (d). The "catch-all" of subsection (f)(5) is amended to reflect the additional purposes of conditions required by statute under certain circumstances. New subsection (f)(6) is added to track statutory provisions concerning victim and witness intimidation.

Sections (g) through (j) are unchanged.

Section (k) is derived from the last sentence of current section (a).

Note to Committee: The entire text of the current rule is shown in this draft; however, to facilitate comparison of the current text with the proposed new text, current section (f) has been moved out of sequence in the draft.

Judge Johnson explained that the Rule had been previously presented to the Committee, and it has been redrafted to include the newest statutory requirements and to reorganize it so it flows better. The first sections changed are sections (c) and (d) which now pertain to who is presumptively eligible and ineligible for release. Mr. Klein asked if any of the changes are substantive.

Judge Johnson replied that the only changes which are substantive were required by the statute. The Reporter's Note at the end explains the changes.

Judge Johnson pointed out that subsection (e)(1) has been reworded. Part (H) is taken from the statute. Subsection (e)(2) is from the current rule. Subsection (e)(3) spells out the conditions of release, and subsection (e)(4) pertains to what the judicial officer must advise the defendant. Subsection (f)(5) contains statutory language.

Judge Vaughan moved to approve the proposed amendments to Rule 4-216. The motion was seconded, and it passed unanimously. Judge Johnson thanked Judy Barr, an intern in the Rules Committee office, for her help in revising the Rule. He noted that in the materials handed out at the meeting, there is a letter from Russell Butler, Esq. in which he proposes amending subsection (e)(1) to include the fact that the judicial officer shall take in account the safety of the alleged victim. The Reporter pointed out that this is already covered in section (c) of the Rule by the language "unless the judicial officer determines that no condition of release will reasonably assure ... (2) if the defendant is charged with an offense under Code, Article 27, §616 1/2 (k), the safety of the alleged victim."

Judge Johnson presented Rule 4-502, Rule 4-504, Form 4-503.1, and Rule 11-601 for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 500 - EXPUNGEMENT OF RECORDS

AMEND Rule 4-502 to make the definitions applicable to the expungement forms, to conform certain terminology to the terminology used in Chapter 613, Laws of 1996, and to reflect the repeal of Code, Article 27, §292, as follows:

Rule 4-502. EXPUNGEMENT DEFINITIONS

The following definitions apply in this Chapter and in Forms 4-503.1 through 4-508.3:

. . .

(c) Court

"Court" means the Court of Appeals, Court of Special Appeals, any circuit court, and the District Court.

. . .

(j) Probation ~~on Stay of Entry of~~ Before Judgment

"Probation ~~on stay of entry of~~ before judgment" means disposition of a charge pursuant to Code, Article 27, ~~§292 (b) or~~ §641; it ~~shall~~ also means a disposition pursuant to former Code, Article 27, §292 (b), probation without finding a verdict pursuant to Code, Article 27, §641 prior to July 1, 1975, and a disposition pursuant to former Section 22-83 of the Code of Public Local Laws of Baltimore City (1969 Edition).

. . .

Rule 4-502 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-502 makes the Title 4, Chapter 500 definitions applicable to the expungement forms that follow Title 4. The proposed amendment also reflects the repeal of Article 27, §292 (b). Additionally, the proposed amendment changes the term "probation on stay of entry of judgment" to "probation before judgment," which is the term used by practitioners and in Chapter 613, Laws of 1996.

AMEND Rule 4-504 to conform to statutory changes and to the proposed consolidation of Forms 4-504.1, 4-504.2, and 4-504.3 into a single form and to add the word "substantially" to section (b), as follows:

Rule 4-504. PETITION FOR EXPUNGEMENT WHEN CHARGES FILED

(a) Scope and Venue

A petition for expungement of records may be filed by any defendant who has been charged with the commission of a crime and is eligible under Code, Article 27, §737 ~~(a)~~ to request expungement. The petition shall be filed in the original action. If that action was commenced in one court and transferred to another, the petition shall be filed in the court to which the action was transferred. If an appeal was taken, the petition shall be filed in the circuit court that had jurisdiction over the action.

~~Cross reference: Code, Article 27, §737 (c).~~

(b) Contents -- Time for Filing

The petition shall be substantially in the form set forth at the end of this Title as Form 4-504.1~~, Form 4-504.2, or Form 4-504.3, as appropriate~~. The petition shall be filed within the times prescribed in Code, Article 27, §737 ~~(d)~~. When required by law, the petitioner shall file with the petition a duly executed General Waiver and Release in the form set forth at the end of this Title as Form 4-503.2.

. . .

Rule 4-504 was accompanied by the following Reporter's Note.

The proposed amendment to Rule 4-504 reflects the relettering of Code, Article 27, §737 in accordance with Chapter 613, Laws of 1996, and the proposed consolidation of Forms 4-504.1, 4-504.2, and 4-504.3 into a single form.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

FORMS FOR EXPUNGEMENT OF RECORDS

ADD new Form 4-504.1, as follows:

Form 4-504.1

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

1. On or about _____, I was
(Date)

arrested by an officer of the _____
(Law Enforcement Agency)

at _____, Maryland, as a result

of the following incident _____

_____

_____.

2. I was charged with the offense of _____

_____.

3. On or about _____, the charge was

(Date)

disposed of as follows (check one of the following boxes):

☐ I was acquitted and either three years have passed since disposition or a General Waiver and Release is attached.

☐ The charge was dismissed or quashed and either three years have passed since disposition or a General Waiver and Release is attached.

☐ A judgment of probation before judgment was entered and three years have passed since the later of disposition or my discharge from probation. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

☐ A Nolle Prosequi was entered and either three years have passed since disposition or a General Waiver and Release is attached. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I

am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

☐ The proceeding was placed on the Stet docket and three years have passed since disposition. Since the date of disposition, I have not been convicted of any crime, other than violations of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

☐ The case was compromised pursuant to Code*, Article 27, §12 A-5 or former Code*, Article 10, §37 and three years have passed since disposition.

☐ On or about _____, I was granted a
Date
full and unconditional pardon by the Governor for the one criminal act, not a crime of violence as defined in Code*, Article 27, §643B (a), of which I was convicted. More than five years, but not more than ten years, have passed since the Governor signed the pardon, and since the date the Governor signed the pardon I have not been convicted of any crime, other than violations of vehicle

or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment; and I am not now a defendant in any pending criminal action other than for violation of vehicle or traffic laws, ordinances, or regulations not carrying a possible sentence of imprisonment.

WHEREFORE, I request the Court to enter an Order for Expungement of all police and court records pertaining to the above arrest, detention, confinement, and charges.

I solemnly affirm under the penalties of perjury that the contents of this Petition are true to the best of my knowledge, information and belief, and that the charge to which this Petition relates was not made for any violation of the Vehicle Laws of the State of Maryland, or any traffic law, ordinance, or regulation, nor is it part of a unit the expungement of which is precluded under Code, Article 27, §738.

_____ _____
(Date) Signature

_____
(Address)

_____

_____
(Telephone No.)

* References to "Code" in this Petition are to the Annotated

Code of Maryland.

Form 4-504.1 was accompanied by the following Reporter's Note.

> This Form replaces current Forms 4-504.1, 4-504.2, and 4-504.3. It has been updated to conform to Chapters 565, 613, and 632, Laws of 1996, and Chapter 399, Laws of 1997.

MARYLAND RULES OF PROCEDURE

TITLE 11 - JUVENILE CAUSES

CHAPTER 600 - EXPUNGEMENT

ADD new Rule 11-601 as follows:

Rule 11-601. EXPUNGEMENT OF CRIMINAL CHARGES TRANSFERRED TO THE JUVENILE COURT

(a) Procedure

A petition for expungement of records may be filed by a respondent who is eligible under Code, Article 27, §737 (b) to request expungement. Proceedings for expungement shall be in accordance with Title 4, Chapter 500 of these Rules, except that the petition shall be filed in the juvenile court and shall be substantially in the form set forth in section (b) of this Rule.

(b) Form of Petition

A petition for expungement of records under this Rule shall be substantially in the following form:

(Caption)

PETITION FOR EXPUNGEMENT OF RECORDS

(Code*, Article 27, §737 (b))

1. On or about _____, I was arrested by an officer of the

_____
(Law Enforcement Agency)

at _____, Maryland, as a result

of the following incident_____
_____

_____
_____.

2. I was charged with the offense of
_____
_____.

3. The charge was transferred to the juvenile court under Code*, Article 27, §594A and (check one of the following boxes):

☐ No petition under Code*, Courts Article, §3-810 was filed;

☐ The decision on the juvenile petition was a finding of facts-not-sustained; or

☐ I was adjudicated delinquent and I am now at least 21 years of age.

WHEREFORE, I request the Court to enter an Order for Expungement of all police and court records pertaining to the above arrest, detention, confinement, and charges.

I solemnly affirm under the penalties of perjury that the contents of this Petition are true to the best of my knowledge, information and belief, and that the charge to which this Petition relates was not made for any violation of the Vehicle Laws of the State of Maryland, or any traffic law, ordinance, or regulation, nor is it part of a unit the expungement of which is precluded under Code*, Article 27, §738.

_____ _____
(Date) Signature

_____
(Address)

_____

_____
(Telephone No.)

* All references to "Code" in this Petition are to the Annotated Code of Maryland.

Source: This Rule is new.

Rule 11-601 was accompanied by the following Reporter's Note.

> This Rule fills a gap in the existing rules pertaining to expungement.
>
> Under Code, Article 27, §737 (b), records pertaining to criminal charges transferred to the juvenile court may be expunged under certain circumstances. Although Rule 4-501 states that the procedure provided by Title 4, Chapter 500 "is exclusive and mandatory for use in all judicial proceedings for expungement of records whether pursuant to Article 27, §§735 through 741 or otherwise," Chapter 500 contains no procedures for expungements allowed under Code, Article 27, §737 (b). Proposed new Rule 11-601 fills this gap.

Judge Johnson explained that the Expungement Rules went to the Style Subcommittee who sent some of them back for further work. The Reporter further modified them. The Rules converge several forms into one. They do not address the issue of partial expungement, because it could not be worked into the rules. Previously, one conviction could not be expunged from the record if there were others remaining. The legislature passed a law allowing expungement of some, but not all, convictions. It is difficult to write a rule telling the clerks how to handle this. The Chair said that the clerks can handle this.

Judge Johnson also explained that Rule 11-601 is new and fills a gap in the current procedures.

Judge Vaughan moved to approve the expungement rules as presented. The motion was seconded, and it passed unanimously.

The Chair adjourned the meeting.