COURT OF APPEALS STANDING COMMITTEE
ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee held in Training Rooms 9 and 10 of the Judicial Education and Conference Center, 2011 Commerce Park Drive, Annapolis, Maryland on June 19, 2014.

Members present:

Hon. Alan M. Wilner, Chair
Hon. Robert A. Zarnoch, Vice Chair

H. Kenneth Armstrong, Esq.
James E. Carbine, Esq.
Mary Anne Day, Esq.
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Alvin I. Frederick, Esq.
Ms. Pamela Q. Harris
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Scott G. Patterson, Esq.
Hon. W. Michel Pierson
Hon. Paula A. Price
Sen. Norman R. Stone, Jr.
Steven M. Sullivan, Esq.
Melvin J. Sykes, Esq.
Hon. Julia B. Weatherly
Robert Zarbin, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Sherie B. Libber, Esq., Assistant Reporter
Mary G. Bodley, Esq., Assistant Reporter
Jamie Walter, District Court Headquarters
Hon. John P. Morrissey, Chief Judge, District Court of Maryland
Roberta Warnken, Chief Clerk, District Court of Maryland
Sherri Hancock, Clerk, Circuit Court for Charles County
Loretta Knight, Clerk, Circuit Court for Montgomery County
Dorothy Lennig, Esq., House of Ruth
Shannon Noble, Esq.
Brian L. Zavin, Esq., Office of the Public Defender
Kim N. Doan, Esq., Circuit Court for Anne Arundel County
Shantell Davenport, Esq., Circuit Court for Anne Arundel County
Rachel Dombrowski, Esq., Court of Special Appeals
Scott MacGlashan, Esq., Clerk, Circuit Court for Queen Anne's County
Kathleen Wherthey, Esq., Deputy Director, Legal Affairs, Administrative Office of the Courts
Chris Flohr, Esq.
Valarie Timms, Esq.
Ms. Rogers-Key, Court Reporter, Circuit Court for Prince George's County

Gary Offutt, Esq., Office of the Public Defender
Lisae C. Jordan, Esq., Executive Director, Maryland Coalition Against Sexual Assault
Joyce Tippett, Chief Deputy Clerk, Circuit Court for Charles County
Dawne D. Lindsey, Clerk, Circuit Court for Allegany County
Dennis J. Weaver, Clerk, Circuit Court for Washington County
Scott D. Shellenberger, Esq., State's Attorney for Baltimore County
Matthew Esworthy, Esq., Maryland State Bar Association

The Chair convened the meeting. He announced with regret that Mr. Sykes, Mr. Maloney, and Judge Love would be leaving the Rules Committee and said that each would be missed. Mr. Maloney was supposed to be at the meeting, but he was in the middle of a trial. He hopefully would be able to attend the meeting later. The Court of Appeals had named replacements for Mr. Sykes and Mr. Maloney. Bruce L. Marcus, Esq., who was in attendance at the meeting, will be joining the Committee as will Thurman W. Zollicoffer, Esq. from Baltimore City, commencing July 1, 2014. The Court had not yet named a replacement for Judge Love.

Agenda Item 1. Consideration of possible amendments to Rules 1-322.1 (Exclusion of Personal Identifier Information in Court Filings) and 1-322.2 (Certificate of Exclusion of Personal Identifier Information) - [See Memorandum of June 5, 2014] - (See Appendix 1)

The Chair presented Rules 1-322.1, Exclusion of Personal Identifier Information in Court Filings, and 1-322.2, Certificate of Exclusion of Personal Identifier Information, for the Committee's consideration.

The Chair said that a memorandum had been sent to the Rules Committee on June 5, 2014. (See Appendix 1). It explained why these Rules were being discussed. At an open hearing on July 17, 2014, the Court of Appeals delayed the effective date of Rule 1-322.2 until September 1, 2014. This was done solely so that the Committee could consider the concerns raised mostly by clerks around the State and decide what, if any, changes should be made. The Chair commented that he expected that the Court would consider any recommendation made by the Committee at its conference on August 26, 2014.

The Chair told the Committee that he would explain the background for the proposed changes to Rules 1-322.1 and 1-322.2. Rule 1-322.2 accompanied Rule 1-322.1, which is the Rule that prohibits personal identifiers from being placed in pleadings and papers filed in an action. Up through the date of the meeting, there had been no complaints about Rule 1-322.1. It had been taken from Fed. R. Civ. Proc. 5.2. It has been in effect for a while, and other states have adopted a similar rule.

The Chair said that Rule 1-322.2 is consistent with a similar rule that was approved by the Committee and approved by the Court of Appeals for the Maryland Electronic Courts System ("MDEC"). This is subsection (f)(1) of Rule 20-201, Requirements for Electronic Filing. MDEC has been slated to take effect on October 1, 2014 in Anne Arundel County. There had been no complaints about Rule 20-201 (f)(2). Rule 1-322.2 had been proposed and adopted with the full support of the clerks, and its

purpose was to assist them. The reason that it had been drafted was so that it would be the same as the MDEC Rule and so that the clerks would not be tasked with needing to review every paper filed to see whether it had any of the prohibited information in it. The burden would be on the filer to make sure that any papers filed did not have personal identifiers in them, and the filer would certify that the papers were clear of these identifiers. All the clerk would need to do was to make sure that the certificate was there.

The Chair stated that the issue being discussed at today's meeting was not whether the clerks should be punished for waiting a year to point out the problems. The only issue was whether the belatedly expressed concerns of the clerks were valid and whether the concerns required some change to or repeal of Rule 1-322.2. The Chair told the Committee that it was important to keep in mind that unlike Rule 1-322.1, its partner, Rule 1-322.2, had not been taken from rules either in the federal system or from any other state rules. This had been the invention of the Committee to provide consistency with Rule 20-201 and to accommodate the then-current wishes of the clerks. The Chair said that the Committee would like to hear from anyone present who wished to speak on this issue.

Ms. Rogers-Key told the Committee that she was an official court reporter for the Circuit Court for Prince George's County. She was at the meeting on behalf of the court reporters. Her concern was the issue of transcripts. The reporters may be

tasked with certifying that personal identification information was not in a transcript that they had prepared. She and the other court reporters believe that this is an unfair burden that would be placed on court reporters just by the nature of their job. Many times unless they have been sworn to prepare transcripts of Grand Jury testimony, which they do themselves, they may farm out the preparation of the transcripts to a series of transcribers. Requiring the court reporters in the end to spend extra time going through the transcripts to determine if they have personal identification information in them is not fair. It is not clear exactly what the definition of "personal identification information" is at any specific time, and going through the transcripts looking for personal identification information would be an undue burden. The court reporters are the keepers of the record, not the makers of the record. They believe that it is incumbent upon attorneys at the beginning stage of the case to inform their witnesses how to answer the questions appropriately.

Ms. Rogers-Key remarked that one suggestion that the court reporters would give is that information may be put in subpoenas sent to witnesses, so that they know their rights. When witnesses testify in court, they would know not to give that personal information. Some of the editorials that Ms. Rogers-Key had seen on this subject recently had said that some attorneys may not be familiar with some of the Rules of Procedure, and this may be why they get into trouble sometimes. This may result in

appeals. If the information about personal identifiers is given at the front end, then court reporters, who are at the back end and prepare the transcripts as well as submit them, should not be tasked with having to certify that the personal identifiers are not in the transcripts.

Judge Price commented that she had spoken with the clerk in Wicomico County, who was concerned about Rule 1-322.2. The concern was the number of *pro se* filings and other requests that come in the mail daily that would not have the required certificate that there is no personal identification information in them, even though it is obvious that there is none. The burden on the clerks to mail everything back to the *pro se* filers is a heavy one. The clarification as to what it applies to is the problem. Is it civil pleadings, is it all pleadings, is it every minor traffic ticket request that comes through the mail?

Mr. Lowe reiterated that this is a major concern of the clerks. The fact that Rule 1-322.2 is written so broadly means that it will apply to cases and documents that are by law restricted from public access anyway. Juvenile cases, adoption cases, and guardianship cases will all have to be sent back for a lack of a certificate of compliance. Rule 1-322.1 also covers mundane filings, such as requests for hearings, entry and withdrawals of appearance, or any of the basic business-oriented filings that have nothing to do with the merits of the case. This gets into a large swath of material that is affected by Rule 1-322.2.

Mr. Lowe said that in the past few days, he had reached out to the clerks in all of the jurisdictions. He had communicated with 16 jurisdictions. Fourteen of those 16 did not report having any issue as to compliance with Rule 1-322.1. Two counties had a few issues, one with Social Security numbers being listed on Qualified Domestic Relations Orders (QDROs). Another county had been dealing with some personal identifier information included in foreclosures. Mr. Lowe added that he understood that it had taken a year for the problems to be raised. As the clerk representative on the Committee, that is his responsibility, and he acknowledged that he may have dropped the ball somewhat. However, the silver lining was that a year of data pertaining to Rules 1-322.1 and 1-322.2 had been available, since those Rules went into effect. The clerks were seeing very few examples of anyone having any problems complying with Rule 1-322.1. The question becomes whether Rule 1-322.2 is necessary with all of the associated issues it creates because of so much material having to be sent back for lack of compliance.

The Chair pointed out that with respect to transcripts, the Committee should be aware that in the revision of the General Court Administration Rules, which is Part I of the 178th Report to the Court of Appeals, the issue of redacting certain sensitive information, which is termed "restricted information" in the MDEC Rules and is broader than the personal identifiers, was addressed. Part I had been approved by the Committee and by the Court, although it is not yet in effect. Almost all of the

circuit courts and the District Court have electronic court recording systems. They use the CourtSmart system or something similar.

The Chair noted that under the MDEC approach, if a witness is about to testify to something that contains restricted information, which is the case in many situations, a party can point this out and request that this part of the testimony be tagged electronically, so that in transcribing the electronic version of it, that part can be redacted from any disk that is accessible to the public and from any transcript that is prepared from the testimony. It is up to the party to make clear what part of the testimony he or she would like to be shielded. It is part of the record, and it is recorded, but it will be shielded from public access, both in terms of the disk and the transcript. This is the procedure that is part of the Rule pertaining to recording in both circuit court and District Court. The Court of Appeals has adopted this but has not put it into effect yet, primarily because the Court is waiting for the rest of the reorganized Rules, including (1) Part II pertaining to judges and judicial appointees, which is before the Court, and (2) Part III, addressing attorneys, which will be sent to the Court within the next month or two. The Court has to put all three parts into effect at one time, because of all of the cross references within the three parts.

The Chair said that this is how transcripts are addressed in the Rules, and it is not only within the MDEC system but across

the board. Any redactions are going to have to come through this process. At trial, if someone wants the testimony shielded, the court reporter does not have to worry about it, because it is electronically tagged. The court reporters do not have to go searching through the testimony, nor are they put in the position of having to redact testimony that has been given in court, which therefore makes the record, in effect, not complete. This process has been through the Rules Committee and discussed at great length, and it was also discussed at great length in the Court of Appeals.

Judge Pierson remarked that he was trying to figure out the meaning of the statement: "There have not been any problems." That means that no one has complained to the clerks that identifying information that should not have been included was included. That does not necessarily mean that there have not been instances of inclusion of personal information. He had a case where someone included some information that should not have been included. From some of the filings that Judge Pierson had seen, including some mortgage cases and cases in which there are self-represented litigants, there are huge stacks of papers, and the clerk should not have to go through them. No one is going through those stacks of papers looking for personal information. When Mr. Lowe said that there have been no problems, it means no one has complained about identifying information. The actual extent of non-compliance with Rule 1-322.1 is not known. The Chair agreed that this is not known.

The Chair commented that the concerns expressed by the clerks began to trickle in about a month ago. The comments went through the legal unit of the Administrative Office of the Courts. The clerks were asking questions as to what Rule 1-322.2 covers. It was obvious that behind these inquiries was a concern that if the Rule covered certain papers, it would be a problem. A meeting was held with Mr. Lowe, Ms. Harris, and clerks from the District Court last week at which all of these issues had been fleshed out. In the District Court, which is very form-driven, most of the papers filed are on pre-printed forms. These forms do not have the certificate of redaction on them. Hundreds of thousands of these forms are filed every year in the District Court. This could be addressed by simply fixing the forms.

The Chair noted that the circuit court is a different issue, because it is less form-driven. Those filing use their own documents. The point had been made that in the District Court, since the forms that are used do not ask for this personal information, no one includes information such as Social Security numbers, because it is not asked for. The circuit court is different, because there are no forms. At the recent meeting, the clerks present recommended strongly that Rule 1-322.2 be repealed. They did not want to add a list of exceptions, because that would be too lengthy.

The Chair said that the clerks also wanted an amendment to Rule 1-322.1 to make clear that the burden is on the filer, not the clerk, to ensure that any personal information is not put in

documents filed in court. The clerks felt that this would be very helpful. Mr. Lowe expressed his agreement with this proposed amendment. Mr. Frederick commented that in addition to the concerns of the clerks, after talking with other attorneys at the recent Maryland State Bar Association meeting and around the State, it concerned him that there are a significant number of his colleagues who do not know about this requirement of a redaction certificate, notwithstanding the efforts of The Daily Record and other publications to disseminate information about it. Rule 1-322.2 requires performance, and it is not known whether it is being complied with. This is party-driven. If someone does something inappropriate, the other party may ask the court for relief.

Mr. Frederick remarked that his fear was that at least for a while, if Rule 1-322.2 is not repealed, many pleadings could be stricken, which would cause horrific problems that are totally unintended and may result in cases of default. The problems may be rectified, but not without having created a large amount of paperwork and not without requiring a great amount of time and effort on the part of judges. It also will penalize someone whose attorney may not have been up to date on this requirement of certification. Mr. Lowe's position on behalf of the clerks is a meritorious one with regard to the question of whether Rule 1-322.2 is necessary.

Mr. Carbine told the Committee that he believed that he had been the person who invented the redaction certificate as part of

the MDEC Rules. The Committee should consider two aspects of this issue. The first is to answer the question: "How important is it that sensitive information is kept out of public records where unscrupulous people can access it?" This issue had been heightened with MDEC, because the system is electronic. Currently, no one can access the electronic files unless he or she is a party. There is no guarantee that later on that MDEC will not become more like the federal PACER system (Public Access to Court Electronic Records), which allows access for a fee.

Mr. Carbine explained that MDEC has the requirement of a certificate of redaction. When a filer files a paper, in addition to the certificate of service, the filer also files a certificate of redaction that states that the paper has no sensitive information in it, or if there is sensitive information, that it has been redacted. The balance is that from a practical point of view, it is better to keep the sensitive information from going into the system in the first place rather than waiting for a problem to arise from sensitive information that got into the system. If it is very important to include the information, it has to be balanced against the pain and suffering that it inflicts upon attorneys and clerks.

Mr. Carbine pointed out that the reason that the certificate was invented was because of Mr. Carbine's strong belief that the clerks should not have to read through huge filings to see if some sensitive information is in there. In MDEC, if the certificate is not filed, the system does not accept the

pleading. MDEC eventually will be in effect statewide. The interim Rule is the one being discussed. The question is whether to address the issue now or wait until MDEC is used throughout the State. It is really a philosophical question. It creates problems for attorneys, clerks, and court reporters.

The Chair clarified that the way MDEC is set up, if the filer does not have the certificate of redaction, the filer will not be able to file the paper at all. The certificate is part of the filing process. Mr. Patterson said that to answer Mr. Carbine's first question, from the standpoint of the potential harm, the electronic world is new and different as to the availability of information. There is the potential of economic harm or harm from a personal security standpoint. It is important to operate from the premise that what is being sought to be protected is very important to protect. As to the point that Mr. Frederick had made concerning the potential for the striking of pleadings, Mr. Patterson asked about the possibility of a provision being added to Rule 1-322.2 where a pleading could be accepted but instead of being docketed, it would be suspended until the compliance has taken place, so that time deadlines are not missed. This would avoid litigation problems. There are situations where items are filed improperly, but they need to be amended.

Judge Price pointed out that the circuit court has formal pleadings, and often parties are represented by attorneys, but in the District Court, 90% of the filings are by people who are

unrepresented. Thousands and thousands of landlord-tenant complaints are filed every day. Thousands of filings come through the mail. To require the people filing to put a certificate on those filings stating that they do not contain personal identifiers will back up the system before it is even implemented. With MDEC, it is not a problem, because the system is electronic. For the District Court, the chances that the filings will contain personal identifying information is so low, it is not worth the harm that the certification requirement will create.

Ms. Lindsey told the Committee that she was the clerk in Allegany County. She dockets all of the filings, including requests for child support, foreclosures, criminal cases, etc. She works with the files constantly. From her experience, very little identifying information is in those pleadings. However, if something does slip through, section (b) of Rule 16-1009, Court Order Denying or Permitting Inspection of Case Record, allows parties to file a motion requesting the clerk to shield identifying information. Allegany County also has a huge inmate population. It is difficult enough to process the inmates' pleadings. She could not imagine returning all of the inmates' pleadings and trying to explain to them about their being non-compliant with Rule 1-322.2. She asked for the Rule to be repealed.

Mr. Sullivan commented that in the federal system, there is no problem with personal information. The system has a prompt

that asks the filer if the paper being filed has any information that should not be in there. Mr. Sullivan noted that there are unknown quantities of requirements that all litigants have to satisfy in order to proceed in court. But only one of those requirements has to be certified to. The interest in protecting this information does not have to be sacrificed merely because the certification would no longer be required. It should be presumed that litigants will mostly comply with the law.

Mr. Weaver told the Committee that he was the Clerk of the Court in Washington County where there is also a large inmate population. The only other process that has to be certified is service. The clerks reject papers that do not have a certificate of service. Their advice from the Attorney General is that if the pleading has a certificate of service, the clerk accepts it. The clerk does not have to read it to make sure that the litigant is stating that copies had been mailed to all of the parties. Sometimes, the certificate of service states that the paper was mailed to Dennis Weaver as Clerk. This is accepted. Attaching a certificate to documents filed by *pro se* individuals does not make it necessarily correct. It may increase awareness but not always. Attorneys will learn not to include this information, but with so many *pro se* parties, the certification is an added exercise that has no meaning.

Judge Weatherly expressed her concern about Rule 1-322.2, because in family cases, it is not unusual where there are marital property agreements that the papers filed would have

lists of bank accounts, credit card numbers, and Social Security numbers. She said that she had been impressed by the response of the bar. She often thumbs through the agreements when they come into court, and she and the other judges never see the lists of bank account or credit card numbers. Those items and the Social Security numbers are only listed by the last four digits, which allows the court to identify them.

Judge Weatherly noted that she and her colleagues had come up with a way to shield the pension orders that required Social Security numbers. A redacted copy was put in the file, even though it created more work for the clerk's office. This procedure is going well in Prince George's County. Judge Weatherly does not see every one of these documents, but she does see a large number of them. Prince George's County has made huge steps to comply with keeping out personal identification information from their files.

Ms. Day agreed with Judge Weatherly. This new procedure has changed the practice of domestic law greatly. The attorneys do not put the personal identification information in agreements any more. The QDRO's have the Social Security numbers under separate cover. Instead of asking for papers to be redacted, they are sent under separate cover. The domestic bar is very aware of keeping out private information.

Mr. Carbine pointed out that a compromise could be made. The requirement for a paper filing, which is in an interim rule and will be gone when MDEC is statewide, could be eliminated.

The Chair agreed that it is interim until each county gets the MDEC system, but even under MDEC, there will be paper filings, because *pro se* litigants are not permitted to file electronically unless they are registered users. So, it has always been anticipated that in both courts there will be paper filers.

Mr. Carbine acknowledged this. He explained that what he had been thinking was that what was being discussed now is paper that gets put into the files, not electronic information that is filed. While waiting for MDEC to be instituted either county by county or by groups of counties, the bar will get used to filing these certificates of redaction. Unlike the current situation, if the certificate is not filed, the feedback is instantaneous. The problem can be fixed right on the spot, so this avoids the problem of getting the pleading back after the deadline for filing it has passed. If it is left to self-policing through existing rules, it should be sufficient. Mr. Carbine expressed the view that Rule 1-322.1 should not be changed.

The Chair reiterated that to his knowledge so far, there had been no recommendation to repeal Rule 1-322.1. The only recommendation that had been made at the meeting last week was that if Rule 1-322.2 is repealed, then a provision should be added to Rule 1-322.1 stating that the responsibility of assuring that no personal identifiers are in any of the documents is that of the filer and not the clerk. The clerks would like to ensure that there is no duty on their part to police this.

The Chair noted that if any change is to be made at all, it

would take a motion to do so. Rules 1-322.1 and 1-322.2 are in effect. Rule 1-322.2 has been stayed, but both Rules had been approved by the Court of Appeals. If the Committee votes in favor of any such motion, the change can be sent to the Court for them to consider.

Judge Price moved that Rule 1-322.2 be repealed and Rule 1-322.1 be amended, so that it provides that it is the duty of the filer to redact personal identifying information. The motion was seconded. Mr. Sullivan inquired whether the effective date would be July 1, 2014. The Chair answered that Rule 1-322.2 would become effective on September 1, 2014. Mr. Sullivan asked if the Court could act on the Rule before the effective date. The Chair replied that this was why the Court stayed the Rule. The Rule would go to the Court so they would have enough time to consider it before their August 26, 2014 conference.

Mr. Carbine questioned what would happen if Rule 1-322.2 is eliminated and on October 1, 2014 in Anne Arundel County, a non-electronic filer files a paper that has sensitive information in it. The Chair responded that some of the MDEC Rules cover paper filings. Non-electronic filers cannot have sensitive information in their filings, either. This does not pertain only to personal identifiers but to any restricted information. This will be in effect in Anne Arundel County on October 1 assuming that is the date that MDEC starts up. Judge Pierson commented that Rule 1-322.1 seemed to him to be precisely crafted. A necessary implication from that Rule is that it is the filer's

responsibility to redact personal information. Judge Pierson added that he did not know why language had to be added to Rule 1-322.1 to indicate that the Rule means what it says.

Ms. Walter told the Committee that she was the Assistant Chief Clerk for Operations at District Court Headquarters. Her office is responsible for transcribing, for requests for waiver of trials for traffic citations, and for overseeing business practices. She thanked the Committee for expressing so well the concerns of her colleagues and her. They are very strongly in favor of altering Rule 1-322.1, because they read it to place a burden on the clerk to be looking through files. They felt that under Rule 1-322.1 (b), there should be a provision that would make it clearer that it is the responsibility of the filer to make sure that no confidential information is in the filing. The way the Rule is now drafted, stating that the personal identifier information "shall not be included" does not make it clear whether it is the filer's responsibility or the clerk's responsibility to make sure that the private information is not included.

Judge Pierson asked if what they would like is a provision that states that the clerk shall have no responsibility. Mr. Sullivan noted that this exists implicitly, but in any court records provision, there seems to be no way to ever hold the court or the clerk responsible if there is a failure to seal something or something leaves the office that should not. The drafters of Rule 1-322.1 have done a good job protecting court

personnel.

The Chair commented that there may be a way to modify this somewhat. Rule 1-322.1 is in the meeting materials. Section (b) addresses this situation. It is worded in the passive voice: "...the following personal identifier information shall not be included in....". This could be changed to be in the active voice. It could read: "...a person filing shall not include in....".

Mr. Carbine suggested that Judge Price's motion be divided into two parts. One would involve the repeal of Rule 1-322.2 and the other a possible amendment to Rule 1-322.1. Mr. Carbine expressed the view that it is everyone's responsibility to keep the personal information out of the public files. If the clerk sees this information, the clerk should act on it. It is implicit from the Rule that the clerks do not have to scan the paper filings on their own, but if a clerk sees personal information, the clerk should take some action to redact it. This is the way the passive voice protects the clerks and also places the burden on them that if they see this information, they would act on it.

The Chair asked Judge Price if she was willing to amend her motion. She answered that she was willing to bifurcate the motion as Mr. Carbine had suggested. The person seconding agreed to bifurcate the motion. The Chair said that the first motion was to repeal Rule 1-322.2. The motion was seconded, and it carried with one opposed.

Mr. Lowe remarked that he would restate the second motion. It was that Rule 1-322.1 be changed to clarify that it is the filer's responsibility to ensure that personal identifier information should not be included in any electronic or paper filing. The motion carried with 10 in favor and six opposed. The Chair stated that he would draft the new language for Rule 1-322.1.

By consensus, the Committee approved Rule 1-322.1 as amended, subject to the Chair drafting the changes.

Agenda Item 2. Consideration of possible expansion of voir dire [See Memoranda of May 20, 2014 and June 5, 2014] - (See Appendix 2)

The Chair explained that the next item on the agenda was the question of changing the scope of voir dire. This had been addressed in the memorandum written by the Chair dated June 5, 2014, a copy of which was in the meeting materials. (See Appendix 2). Since the memorandum had been sent to the Committee, the Chair had learned that the Maryland State Bar Association ("MSBA") had created a special committee about two years ago that is chaired by Paul Mark Sandler, Esq. to develop form voir dire questions. The committee is broad-based and had been working for the past two to two-and-a-half years on this. They had produced some drafts of the questions. Mr. Sandler had said that it was not their mission to decide whether there should be an expansion of voir dire; it was only to develop forms of questions with respect to the current voir dire practice. This

process is still going on.

The Chair had also learned today from Mr. Patterson that the Pattern Jury Instruction Committee was looking at voir dire questions in criminal cases. The purpose seemed to be to develop form questions. Mr. Patterson noted that what motivated the Pattern Jury Instruction Committee to do this was the social networking issues that occurred in the trial of Sheila Dixon, former Mayor of Baltimore City. As a result of that case, the Pattern Jury Instruction Committee became interested in drafting what would be Court of Appeals-approved standardized voir dire questions. The Pattern Jury Instruction Committee had been working on this on and off, but other issues kept popping up that would affect the content of jury instructions. There had been no real discussion as to whether there will be a set of voir dire questions from which someone can choose, whether they are to be standard and used in every case, or whether voir dire is to be expanded into other different areas.

The Chair said that the Rules Committee had been tasked by the Court of Appeals specifically to look at whether there should be an expansion of the scope of voir dire in terms of including questions that would guide the exercise of peremptory challenges. The Chair did not believe that this would be in any way inconsistent with what the Pattern Jury Instructions Committee is doing or what the MSBA is doing in terms of trying to develop form questions.

Mr. Esworthy told the Committee that he was at the meeting

on behalf of Mr. Sandler, who was unable to attend. He was there to answer any questions about the work of the special MSBA committee. Mr. Sandler had submitted a letter to the Rules Committee, copies of which had been distributed previously. Copies were available at the meeting as well. Mr. Esworthy added that his committee would be happy to share any of their work with any of the other groups who were interested. They had successfully put together model questions for tort cases and for criminal cases, but the recent decision in *Pearson v. State*, 437 Md. 350 (2014) had slowed that process down. They had gone back to the drawing board to work on the model questions further.

The Chair said that if the Rules Committee was inclined to recommend to the Court of Appeals an expansion of voir dire to include questions relating to peremptory challenges, the Committee might or might not want to mention these efforts of the other groups. If the Court is told about the groups, the Court could decide whether it would like to expand the scope of what the other groups are doing to include the kinds of questions that might be relevant to peremptory challenges.

The Chair reiterated that he saw no inconsistency. The Rules Committee had been asked to make a study which had been done and then to make a recommendation, which could include collateral issues, such as whether there should be any change in the current process as to who conducts voir dire, whether there should be any recommendation with respect to controlling the process, whether form questions should be used, and whether any

of these issues should be addressed by a rule at all.

The Chair asked if anyone had comments as to the study of voir dire. Mr. Sullivan inquired if there was any lobby or dissent advocating that expanding voir dire to questions that would allow the more intelligent use of peremptory challenges should not be permitted. The Chair replied that one of the purposes of the meeting was to find this out. The involvement of the Rules Committee came solely from the request by the Court, which had been made in a footnote in *Pearson*. The issue had been raised in the case as to whether the Court of Appeals by adjudication should extend voir dire. The Court had been able to resolve the case without having to address the issue of expanding voir dire. In the footnote, the Court had indicated that they did not want to address the issue, because they were not aware of any national study that focused on what other jurisdictions were doing about this. They had referred to at least one law review article on this subject. The Court had asked the Rules Committee to make a study, which was done, and they had asked the Committee also to make a recommendation.

The Chair said that the Committee had received a comment letter from the Office of the Public Defender ("OPD") and a position paper from the Maryland Criminal Defense Attorneys' Association ("MCDAA"). They had asked prosecutors to weigh in on this. Mr. Carbine pointed out that as a matter of policy, the first question was whether the scope of voir dire should be expanded, the second question was whether there should be a

change as to who conducts the voir dire examination, and the third was whether the questions should be asked of individual jurors or the panel as a whole.

Mr. Carbine commented that from his years as a member of the American Bar Association, he had learned how the voir dire process is conducted in other states. In some states, the judges are not even in the room when the jurors are questioned. This can lead to chaos. Mr. Carbine said that he was not an expert on this issue, particularly in criminal cases, but he felt very strongly that the judges should ask the questions, not the attorneys. The questions should be asked of the panel as a whole, not of the individual jurors.

The Chair noted that another question was whether there should be any distinction between civil and criminal cases. Mr. Shellenberger told the Committee that he was the State's Attorney in Baltimore County. He was present on behalf of the Maryland State's Attorney's Association. They had polled the elected State's Attorneys, and the majority of those polled were not opposed to expanding voir dire, but they had one caveat, which was that the efforts being made by the Pattern Jury Instructions Committee get approved by the Rules Committee and hopefully the Court of Appeals.

Mr. Shellenberger remarked that as many people are aware, over the last few years, there had been a number of reversals, because attorneys are not sure as to what is and is not mandatory, and what is and is not optional. As State's

Attorneys, he and his colleagues do not like to see reversals, particularly when they pertain to mistakes made so early in the trial in voir dire. They are not opposed to expanding voir dire as long as it is understood what the mandatory questions are, and after that, which questions would be in the discretion of the judge.

Mr. Shellenberger directed his next comments to the circuit court judges who were present. He noted that the potential jurors really do not want to serve as jurors in cases. They do not like their personal privacy being pried into. The majority of jurors who sit on cases currently are the ones who have not answered any of the questions posed to them. The concept that a better jury can be picked intelligently may be unrealistic. When Mr. Shellenberger had been trying cases in the 1980's, the jurors really wanted to serve, and they enjoyed serving.

Mr. Shellenberger added that he had picked juries in other states. When only the bailiff was in the courtroom, and not the judge, it was a nightmare. It did not seem to lead to getting an impartial jury. The goal really was not to find an impartial jury, it was to find a jury partial to the attorney and his or her client. Mr. Shellenberger expressed the opinion that the current procedure should not be changed. He was not opposed to the expansion of voir dire, but he felt that standard guidelines were needed in the State to avoid all of the reversals.

Mr. Patterson commented that judges have their own ways of doing things. He had seen voir dire examinations that took five

minutes, because the judge asked the questions quickly, and there were no followup questions. Sometimes jurors would come up to the bench and answer a disqualifying question in the affirmative. The judge would continue to ask all of the other questions anyway, so that interviewing the rest of the prospective jurors took most of the day. Some people do not answer any questions, but does that mean that the judge can bring everyone up and continue to ask the questions anyway?

Mr. Patterson said that in his jurisdiction, the biggest change in the attitude of jurors was when the basis for locating jurors to serve changed from using the lists from voter registration to also using the lists taken from drivers licensed in the State, because when jurors are chosen from the latter lists, which are much lengthier, often people are extremely reluctant to serve and cannot wait until they can leave. Those people probably did not answer any questions at the outset. The jury selection process is complex. Much of it has to do with standardization in some form. The jury selection process is not the same way in various courts; even within certain circuits, it is not done the same way. Sometimes even within the same court, it is not done the same way, if there are multiple judges. Judges are free to run their courtrooms the way that they see fit as long as it is permitted by the Rules of Procedure, which do not totally address jury selection, expanded or not.

Judge Pierson pointed out that there was an additional question, not referred to by Mr. Carbine, which was whether the

change to the jury selection process should be made by rule. The rule that exists now is a case-law rule that is not in the Maryland Rules. It has been adopted by the Court of Appeals as a judge-made rule. The report could provide the data that had been gathered in response to the court's direction.

The Chair noted that the Court had not asked for a recommendation from the Rules Committee on that issue. As the study had indicated, all states except for Maryland, Pennsylvania, Virginia, and half of California, in some way, either explicitly, or by their case law, had expanded voir dire to permit inquiries for the purpose of exercising peremptory challenges. Some states have made this change by rule and some by statute. In other states, it was accomplished by court decisions. In some of the states, which have made the change by rule, it was only in criminal cases. This does not mean that the same approach is not followed in civil cases, but there is no rule that requires it. It is hard to figure out exactly where some of the states really are regarding voir dire. The Court of Appeals had asked the Committee to make a recommendation.

Mr. Flohr told the Committee that he was at the meeting on behalf of the MCDAA. A letter from Mary J. Pizzo, Esq., the President of the Association, had been distributed at the meeting. She had indicated in the letter the Association's support for extending voir dire. Mr. Flohr said that he would be happy to tell the Committee the positive effects of attorney-conducted voir dire from his experience practicing law in New

York. He expressed the view that the report by the Chair was excellent. Mr. Flohr had participated in a 2010 American Bar Association symposium on voir dire and was a member of Mr. Sandler's committee.

Mr. Flohr referred to a portion of Mr. Sandler's letter, which stated that the members of the MSBA Special Committee "believed that *voir dire* is too narrow, and that confining *voir dire* to the obtaining of information to develop strikes for cause and not peremptory [sic] challenges hinders the administration of justice in depriving parties of a potentially fair trial." Mr. Flohr expressed the view that making a decision on attorney-conducted voir dire was not necessary. Whether to interrogate the entire panel as opposed to potential jurors individually, which was also done in New York, can be decided at a later time. He and his colleagues were not asking the Committee to make a radical change. The expanded voir dire is used in a vast majority of states. He had debated this issue with the Honorable Glenn T. Harrell, Jr., Associate Judge of the Court of Appeals.

The Chair commented that the Court of Appeals had also asked specifically, as part of any recommendation, for the Rules Committee to advise the Court as to the possible ramifications of such an expansion. This brings in the issue of what kind of court control will be over the voir dire and whether there should be anything different from what now exists. Mr. Flohr said that it seemed from the Chair's report that the Court and the Rules Committee are concerned about whether attorneys will completely

try to overhaul the system because of *Pearson* and concerned that attorneys would like for judges to have no say in the voir dire process.

Mr. Flohr remakred that when he first started practicing, the civil practitioners in New York would have a field day where there would be no judge in the room, and the two attorneys would get together and pick a jury. Magically, they would always settle the case after jury selection. But in criminal cases, a judge would always oversee the voir dire process. The MCDAA and the OPD are not asking to remove judicial oversight from this. The MCDAA is not asking at this point for attorney-conducted voir dire. In Judge Harrell's concurring opinion in *Pearson*, he cites the concurring opinion of the Honorable Irma S. Raker, who was then an associate judge on the Court of Appeals, in *State v. Thomas*, 369 Md. 202 (2002). Judge Raker had said that at that time that Maryland needs to get in line with the other states.

Mr. Flohr noted that this is not anything radical, and attorneys should be permitted to explain that the reason that they are submitting certain questions is because they want to exercise their peremptory challenges intelligently. At another time, it would be worth a discussion on the point raised by Mr. Shellenberger that jurors just want to get out as quickly as possible. Many of the jurors decide that it is better to stay quiet and not answer any questions. From a practitioner's point of view, it is particularly difficult for the attorney to ask his or her client to help with selecting the jury, when so many of

the prospective jurors had not answered any questions.

Mr. Flohr said that the pressing question for the Committee was whether to move to expanded voir dire. He asked that the Committee recommend bringing Maryland in line with the other states. As to the issue of juror questionnaires, New Jersey was cited a great amount in the ABA study and was referred to at the conference in 2010. When that state adopted the mandatory questions that are being worked on in Maryland, the attorneys in New Jersey talked about opening up the questions. Open-ended questions result in better information, so that the jury is more appropriate. The Honorable Paul Grimm, Associate Judge of the U.S. District Court in Maryland, may be the only judge in the State who actually comes down off the bench to give his instructions on voir dire, because he realizes that there is a difference in that dynamic, and he tries to relate to the jurors better.

Mr. Patterson commented that a poll of the Committee would probably indicate support for bringing voir dire in line with most of the other states. The problem is that it is not that evident as to what that means. He suggested that if the Committee makes a recommendation to the Court of Appeals, it should be that the Committee recommends an expansion with the caveat that there has to be some mechanism set up to define what that is. There is a difference between setting parameters and making any changes that anyone would like. The latter is not a good idea, because then jury selection would take a very long

time.

The Chair remarked that one of the issues is whether voir dire should be the same for civil and criminal juries. If it is expanded, should it be expanded for both? However, how it plays out may very well be different. The types of questions and the lines of inquiry in certain kinds of civil cases are going to take a different track than criminal cases. In criminal cases, there are also due process overlays.

Mr. Sykes expressed the opinion that this problem cannot be addressed until there is agreement on a list of standardized questions that would be permissible. This would eliminate the lengthy time for argument, and some of the burden on the circuit judges, because they would know which questions are proper to ask. However, it would not make it impossible to ask other questions. The discretion of the circuit court could remain as to those questions. Maryland is in no position to make this change at this point. It had been done in New Jersey. The Sandler committee is working on it. That is a long-term project that should continue based on the various types of cases, and it would be an ultimate goal.

Mr. Sykes noted that in the meantime, the mission is very limited, answering "yes" or "no" as to the expansion. The process can be started by stating the legitimacy of the expansion of voir dire to cover the intelligent use of peremptory challenges, and then the matter can be left in the discretion of the trial judges to see how it works while the standardized

questions are being worked on. These would eliminate a great deal of trouble. It may be that one alternative is to delay even the expansion of voir dire. Mr. Sykes expressed the view that the trial judges can handle this matter.

The Chair said that one of the concerns with voir dire was the lack of uniformity. If the Committee is inclined to recommend the expansion of voir dire to inquiries addressing the use of peremptory challenges, one possibility is to suggest to the Court that the expansion not be put into effect until the existing committees that have been working on this have had an opportunity to develop proposals, whether or not those proposals would come back to the Rules Committee for consideration as to whether they should be put in the form of rules. The Court could delay immediate implementation until some of this is sorted out, and it can be seen whether there is any agreement on it.

Mr. Marcus commented that one of the concerns was the fact that the Court of Appeals opinion in *Pearson* had raised the question of whether or not there should be expansion of voir dire. Could this be interpreted by a trial judge to think that unless and until the Court of Appeals tells him or her that the judge is supposed to go further, the judge would not intend to do that? Unless there is a clear statement or a policy position that is well articulated, if there is a study period as to the efficacy of voir dire, trial judges should look at this period not to curtail, limit, or refrain from expanding the scope, but rather to look towards expansion. The trial judge should be able

to exercise discretion and handle voir dire in a way that gives broader opportunities to identify issues and personal bias. The Chair noted that at this point trial judges cannot go further in expanding the scope of voir dire.

Mr. Marcus said that his experience had been with voir dire questions both in the form of questionnaires that are mailed to prospective jurors or on comprehensive lists. Generally, trial judges had been responsive to the requests. Mr. Marcus could not say that in the past few years, he had ever been limited in exploring the backgrounds of jurors. To the extent that this is not a time-consuming process, if it is well-managed and does not put a greater strain on the court, it may be that at times, prospective jurors do not give out much information, but at least the process provides the greatest amount of information that is reasonably possible. In the meantime, these studies and surveys are being done, and proposed voir dire questions are being assembled. It seemed to Mr. Marcus that the position of the Rules Committee ought to be in favor of expanded voir dire pending a more definitive list of questions or something similar.

Judge Pierson said that he had some comments, but he wanted to first pick up on what Mr. Marcus had previously said. This is what Judge Pierson had also experienced. If an attorney asks a question that Judge Pierson thinks is a fair question in the context of the case, he does not consciously say that the question is only for use in challenges for cause, so he will not give it to the jurors. There is a distinction to be made between

criminal and civil cases. He had picked juries in hundreds of cases, both criminal and civil. A qualitative difference exists between civil and criminal cases. He contested the notion that expanding voir dire in criminal cases is necessary for the fair administration of justice.

Judge Pierson commented that he had looked at the chart, which was in the May 20, 2014 memorandum written by the Chair to the members of the Committee. It is interesting that California, which has an abundance of due process, follows the same rule as Maryland in criminal cases. The other interesting coincidence between Maryland and California is that they are both states with very large numbers of peremptory challenges. California allows 10 to 20 in felony cases. Although the chart states that Maryland allows five to 10, that is not really accurate, because in cases where there is a possible penalty of life imprisonment, 10 to 20 are allowed. It seemed to Judge Pierson to be some inference that a very lavish allowance of peremptory challenges in criminal cases helps to assure that the parties are able to exercise their right to pick a fair jury without an expansion of voir dire.

Judge Pierson noted that in Baltimore City, most of the cases are attempted murder and murder. For a 10 to 20-strike case, which he would assume to have one defendant, Baltimore City has an overcall system to bring in over 100 jurors in order to select a jury, and depending on the judge, it takes either the better part of the day or possibly more than a day to select a

jury. If voir dire is to be expanded, it will have a marked effect on how long it takes to pick a jury. Apart from how this is going to affect the criminal docket, it has an effect on the jurors themselves. One of the complaints Judge Pierson and his colleagues get from jurors is that they are not getting paid; they get $15 a day to be a juror. This new procedure will add a day to the jurors' service.

Judge Pierson reiterated that jurors are much more zealous about their privacy than they have been in previous years. The Court of Appeals has changed the rules pertaining to jurors, Rules 2-521, Jury – Review of Evidence – Communications, and 4-312, Jury Selection, in the interest of protecting the privacy of jurors. Rule 4-312 (d) provides that a juror cannot be referred to by name during a trial. The protection of the juror list and the elimination of the juror's address are responsive to the legitimate concerns that jurors have about their privacy. The questions from the New Jersey model would be invasive of juror privacy. Apart from the fact that Judge Pierson did not think that it was necessary to expand voir dire in criminal cases, it would have a number of effects.

Judge Pierson expressed the view that from the many continuing legal education classes he had attended in his career, he had learned that in the states that have expanded voir dire, it is used as a persuasion tool for jurors. Many attorneys have been to seminars where it is taught that attorneys are supposed to get friendly with the jurors for the voir dire. This is when

the attorney begins to persuade the jury of the worth of the attorney's cause. This is what lies behind the desire for expanded voir dire, although it has not been stated as such. The proposal is to allow the court in its discretion to ask questions beyond those that are useful for challenges for cause. Does this mean that the Court of Appeals and Court of Special Appeals are now going to be reviewing all of these cases for abuse of discretion when a judge does not ask a question? If they are not, then what is the point of expanding voir dire?

The Chair responded that this has been the appellate standard around the country. When the case gets to the appellate court, it is universally treated as: "Was there an abuse of discretion either permitting a question or not?" Usually, the judge did not permit a question. The issues are usually questions, lines of inquiry, and time limits that judges have set. All of this is an abuse of discretion standard, other than where the court has already said that this is a mandatory question, and the judge does not ask it.

Judge Pierson commented that there will be appeals because the judge did not ask certain questions. He had found that picking juries is the most arduous task he had performed in his judicial career, in terms of it being exhausting because of the length of time it requires. It is also exhausting, because in Baltimore City, there are many people who have been victims of violent crimes. These days with the questions the judges have to ask anyway, almost all of the potential jurors are coming up to

the bench. The attorneys get the opportunity to listen to each juror and hear them speak on subjects that are important to what the case is about. This is why it is not necessary to expand voir dire.

Mr. Zavin told the Committee that he was from the OPD. It is worth keeping in mind what brought the issue of expanded voir dire up in *Pearson*. The question for the jurors in that case was: "Have you ever been the victim of a crime?" The court said that this is not a mandatory question and therefore it is never reversible not to ask that question, although most criminal trial judges do ask it. Mr. Zavin polled the attorneys in the OPD, and of all the questions that they would like the extended voir dire to have, that is the main question. Under the case law, he and his colleagues are not entitled to ask that question.

The Chair inquired if this would be a mandatory question in a civil case. Mr. Zavin answered that it does not seem like it would. Part of exercising peremptories is going to be fact-specific. Mr. Zavin and his colleagues feel that Maryland is ready to join the majority of other jurisdictions that permit extended voir dire. They also do not want to underestimate the capacity of judges to exercise their discretion and limit voir dire as it is needed. There will be a few cases where they would argue abuse of discretion. But as every practitioner knows, they lose all of the time when they argue this. It is very difficult to win. The only way to win on a voir dire issue is if the questions are mandatory. Under the abuse of discretion standard,

they would not win unless there is a very important question.

Mr. Zavin remarked that he and his colleagues also recognize that further study is needed to determine the best way to implement extended voir dire in a standardized way. As the Rules exist, he and his colleagues think that with one modification, the bench and the bar are currently ready. Mr. Zavin and his colleagues propose to implement expanded voir dire and to have judges exercise their discretion by taking account not only of what the mandatory questions are but also how to enable parties to intelligently exercise their peremptory challenges. It is true that Maryland allows a significant number of peremptory challenges. A study will get the information needed based on the experience of the bench and the bar.

Mr. Zavin expressed the view that a statement of purpose should be added to the Rule as to what voir dire is supposed to do. This will apply to both challenges for cause as well as to peremptory challenges and will guide the discretion of judges in determining what questions to ask. For the time being, experience will be gained throughout the State as to what questions are being asked, how long it is taking, etc. In the meantime, these other studies can be conducted if necessary and can be implemented, although Mr. Zavin was not sure this would go through the rules process. However, even in the rules process, there should be a statement of intent as to what voir dire is designed for. It should be modeled after the ABA standards and after a number of other jurisdictions that have similar

provisions in their rules.

The Chair said that the Court of Appeals did not ask the Rules Committee specifically to recommend any particular rule. If the Committee wanted to make a recommendation, it would just be whether there should be this expansion and what the ramifications might be. As the Chair read the brief referral made in *Pearson*, it leaves the Committee with a good amount of flexibility as to how to frame any recommendation if there is to be a recommendation of expansion. If so, the Committee can make the recommendation but can say that in terms of implementation, it needs further study. The various committees working on this can try to come up with some guidelines for expanded voir dire. It can then be determined if any of those recommendations should be made by rule. In New Jersey, instead of the attorneys or anyone else asking the questions of the jury, the jurors are given questionnaires to fill out. The theory is that this invades the jury's privacy the least. This is a possible recommendation for the process in Maryland if expansion of voir dire is going to be recommended.

Mr. Carbine commented that he was in favor of Mr. Sykes' approach as modified by Judge Pierson, who had pointed out the serious side effects of Mr. Sykes' approach. Mr. Sykes had said that voir dire should be expanded, and a rule should be drafted that would provide that voir dire can enable the intelligent use of peremptory challenges. It would be left to the trial judge's discretion as to the nature of the questions. Meanwhile, some

committees are grinding out form voir dire.

Mr. Carbine noted that Mr. Sykes' approach has an advantage and a disadvantage. The advantage is the attractiveness of the free marketplace of ideas to see how this will work out. There may be important questions to answer that the Committee may not have thought of. However, other questions that might be outrageous may be included. Rather than just having a committee thinking hypothetically, there are real combatants in the real world. As Judge Pierson had pointed out, in a two-year period, there may be many appeals and many malpractice cases. It would be a good idea to find some way to marry what Mr. Sykes had recommended with safeguards to reduce the chances of appeal.

Mr. Patterson remarked that if the Rules Committee made a recommendation to the Court of Appeals that expanded voir dire should be examined, part of the recommendation should be that the Court consult with the committees already working on this. He did not know the composition of the committees working on pattern jury instructions in civil cases, but the Criminal Pattern Jury Instructions Committee is comprised of members of both appellate benches, members of the trial benches from the circuit courts, a District Court public defender, private defense counsel, several prosecutors, and a member of the federal bench. It is very diverse, and the members are very vocal and well-grounded. This would be a good group to do an extended study of how voir dire should be expanded if it is going to be expanded. They could make a recommendation both to the Rules Committee and to the

Court of Appeals.

The Chair asked if anyone had a motion for a recommendation, and if so, whether the motion should be separated out by first answering if the Rules Committee should recommend an expansion of voir dire to include aiding in peremptory challenges. If the answer is in the negative, then it is not necessary to go any further. If it is in the affirmative, then other motions may be made as to what is to be attached to that.

Mr. Sykes observed that it is a question of timing. He expressed the opinion that the Committee is not in a position now to recommend anything explicitly. The Committee could say that they were in favor of the policy of expanding voir dire and that additional study is necessary before that policy has been put into effect. The Committee could inform the Court of Appeals of the various alternatives available and tell them about the work of the other committees. The ultimate goal is to take case type by case type and to develop a list of questions that should be allowed. This will eliminate many of the problems and will eliminate many of the appeals. It is an approach. For purposes of discussion, he made this as a motion. The motion was seconded.

The Chair asked whether Mr. Sykes recommended expansion. Mr. Sykes replied that his motion would provide for two stages, with delayed implementation of approved and mandatory instructions. The Chair said that to the best of his knowledge, one of the groups working on voir dire is under the auspices of

the MSBA. From what the Chair had seen so far, which is what Mr. Sandler had sent, this is predominantly pertaining to civil cases. The Criminal Pattern Jury Instruction Committee is working on criminal voir dire. There are two reputable groups doing this.

Mr. Flohr remarked that Mr. Sandler's committee is working on both civil and criminal voir dire. Prosecutors are involved, and the committee has produced a draft of the criminal questions already. The Chair suggested that the two groups working on voir dire might want to consult with one another to make sure that the two groups are not drafting inconsistent voir dire questions. The Chair clarified that Mr. Sykes' motion was to recommend the expansion of voir dire but not to put it into play until the two groups working on this have produced something. The Reporter added that approved questions or lines of inquiry can come out of the groups. The motion passed with four opposed.

Mr. Patterson asked whether the groups that had been referred to should be identified when the recommendations are made to the Court of Appeals. The Chair asked the Committee for their opinion on this. The groups had been working for quite a while on voir dire. Mr. Sykes expressed the view that the recommendation should come through the Rules Committee. The Committee can go through the results of the various committees and come up with an agreed list. Mr. Armstrong said that many reputable organizations may want to weigh in. Some research may already be in place on this. Mr. Sykes added that the Committee

can get broader input that way. Mr. Patterson explained that he had not been suggesting that input be limited. The organizations that will have input have to be funneled through something. For the purposes of an entity channeling all of this information from all of the various groups into a position of what should be recommended and what should not, the entity should be the Rules Committee, who will then inform the Court of Appeals.

The Chair inquired if anyone had a motion to the effect that all of the information obtained should come back to the Rules Committee. Mr. Sykes added that the ultimate recommendation to the Court should come from the Rules Committee after consideration of all of the other suggestions from the various groups working on voir dire. He said that this was a motion, and it was then seconded. The Chair said that there is no inconsistency in the sense that if the MSBA and the Criminal Pattern Jury Instruction Committee, who have been working on this for some time, come up with recommendations that they present to the Rules Committee, the Committee will hold an open hearing, which can be attended by anyone who would like to weigh in on this. Mr. Carbine suggested that the Rules Committee be given two years to come up with the recommended set of voir dire questions. The Chair asked Mr. Sykes if he would accept that amendment. He accepted it as did the person seconding the original motion.

Judge Weatherly commented that her understanding was that what the Pattern Jury Instruction Committee would come up with

would not be a product of the Rules Committee. The Chair responded that it would not be. Judge Weatherly expressed the view that the voir dire expansion is much more in line with pattern jury instructions than it would be as a rule. She felt that it would not be a good idea to have the Rules Committee approve a list of questions, which can be very fact-specific. Mr. Patterson agreed with Judge Weatherly, pointing out that it may require a slight modification of the Rules depending on what the recommendations of the other committees are. The Reporter added that it may be comparable to the form interrogatories. It is not clear how all of this is going to play out later, but it may be in that kind of setting.

The Chair called for a vote on the motion, which was that the Rules Committee would make a recommendation to the Court of Appeals in two years after considering the suggestions from the other groups working on voir dire. The motion carried with 11 in favor.

The Chair said he and the Reporter would put together this as part of the report and circulate it to the Rules Committee. He would prefer that this matter not be held over until the Rules Committee meeting in September. It will be sent out to the Committee, and if anyone has objections or changes to propose, he or she should let the Chair and the Reporter know. If there is any serious disagreement, it will have to be held until the Committee can discuss it at their September meeting. Otherwise, it can be sent to the Court of Appeals.

Agenda Item 3. Consideration of proposed amendments to Rule 4-601 (Search Warrants) and new Rule 4-612 (Order for Electronic Device Location Information)

Since Mr. Maloney was not at the meeting, the Chair presented Rule 4-601, Search Warrants for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 600 - CRIMINAL INVESTIGATIONS AND MISCELLANEOUS PROVISIONS

AMEND Rule 4-601 to conform to a certain statute by adding a new section (b) pertaining to submission of the application for a search warrant, by adding a new section (c) pertaining to issuance of a search warrant, and by amending relettered sections (d), (e), and (f), and to make stylistic changes, as follows:

Rule 4-601. SEARCH WARRANTS

(a) Issuance - Authority

A search warrant may issue only as authorized by law. Title 5 of these rules does not apply to the issuance of a search warrant.

Cross reference: Code, Criminal Procedure Article, §1-203.

(b) Submission of Application

(1) Method of Submission

An applicant may submit an application for a search warrant by (A) in-

person delivery of the application, the supporting affidavit, and a proposed search warrant or (B) secure facsimile or secure electronic mail, if a complete and printable image of the application, the supporting affidavit, and the proposed search warrant are also submitted.

(2) Discussion About Application

Upon receipt of the application, the judge may discuss it with the applicant in person, by telephone, or by video conferencing.

(c) Issuance of Search Warrant

The judge may issue a search warrant either by (1) physically delivering the warrant, which the judge has signed and dated, the application, and the supporting affidavit to the applicant or (2) sending the complete and printable images of the documents to the applicant by secure facsimile or secure electronic mail.

~~(b)~~ (d) Retention of Application and Affidavits - Secrecy

A judge issuing a search warrant shall ~~note on the warrant the date of issuance~~ file a copy of the signed and dated search warrant, the application, and the supporting affidavit with the court and shall retain a copy of ~~the warrant, application, and supporting affidavit~~ these documents. The search warrant shall be issued with all practicable secrecy. A supporting affidavit may be sealed for not more than 30 days as provided by Code, Criminal Procedure Article, §1-203 (e). ~~The warrant and application, affidavit, or other papers upon which the warrant is based shall not be filed with the clerk until the search warrant is returned executed pursuant to section (e) of this Rule.~~

~~(c)~~ (e) Inventory

An officer shall make and sign a written inventory of all property seized

under a search warrant. At the time the search warrant is executed, a copy of the inventory together with a copy of the search warrant, application, and supporting affidavit, except an affidavit that has been sealed by order of court, shall be left with the person from whom the property is taken if the person is present or, if that person is not present, with ~~the person apparently in charge~~ an authorized occupant of the premises from which the property is taken. If neither of those persons is present at the time the search warrant is executed, the copies shall be left in a conspicuous place at the premises from which the property is taken. The officer preparing the inventory shall verify it before making the return. Upon the expiration of the order sealing an affidavit, the affidavit shall be unsealed and delivered within 15 days to the person from whom the property was taken or, if that person is not present, ~~the person apparently in charge~~ an authorized occupant of the premises from which the property was taken.

~~(d)~~ (f) Return

The officer executing the warrant shall prepare a detailed search warrant return, which shall include the date and time of the execution of the search warrant. The officer shall give a copy of the search warrant return to an authorized occupant of the premises searched and file a copy of the search warrant return with the court in person, by secure facsimile, or by secure electronic mail. An executed warrant shall be returned to the issuing judge, or if that judge is not immediately available, to another judge of the same circuit if issued by a circuit court, or of the same district if issued by the District Court, as promptly as possible and in any event within ten days after the date the search warrant is executed or within any earlier time set forth in the search warrant for its return. The return shall be accompanied by the verified inventory. A search warrant unexecuted within 15 days after its issuance shall be returned promptly to the issuing judge.

~~(e)~~ (g) Executed Search Warrants

The judge to whom an executed search warrant is returned shall attach to the search warrant copies of the return, the inventory, and all other papers in connection with the issuance, execution, and return, including the copies retained by the issuing judge, and shall file them with the clerk of the court for the county in which the property was seized. The papers filed with the clerk shall be sealed and shall be opened for inspection only upon order of the court. The clerk shall maintain a confidential index of the search warrants.

~~(f)~~ (h) Unexecuted Search Warrants

The judge to whom an unexecuted search warrant is returned may destroy the search warrant and related papers or make any other disposition the judge deems proper.

~~(g)~~ (i) Inspection of Warrant, Inventory, and Other Papers

Upon application filed by a person from whom or from whose premises property is taken under a search warrant or by a person having an interest in the property or by a person aggrieved by a search or seizure, the court of the county in which the search warrant is filed shall order that the warrant, inventory, and other related papers filed be made available to the person or to that person's attorney for inspection and copying. Upon the filing of the application, the court may order that notice thereof be given to the State's Attorney.

~~(h)~~ (j) Contempt

Except for disclosures required for the execution of a search warrant or directed by this Rule or by order of court issued pursuant to this Rule, a person who discloses before its execution that a search warrant has been applied for or issued, or a public officer or employee who discloses after its execution the contents of a search warrant or the contents of any other paper filed with it, may be prosecuted for criminal contempt

of court.

Source: This Rule is in part derived from former Rule 780 and M.D.R. 780 and is in part new.

Rule 4-601 was accompanied by the following Reporter's note.

Code, Criminal Procedure Article, §1-203 (a) was amended by the 2014 legislature in Chapter 107, Laws of 2014 (HB 1109) to expand on how an application for a search warrant is submitted to a judge and how the judge may issue the search warrant. It also added language providing how the executing law enforcement officer is to return the search warrant.

The Criminal Subcommittee recommends amending Rule 4-601 to conform to the statutory changes.

The Chair said that Mr. Shellenberger had made a comment about the changes to the proposed Rules. Mr. Shellenberger pointed out the language at the end of section (d) of Rule 4-601 that read as follows: "...The search warrant shall be issued with all practicable secrecy. A supporting affidavit may be sealed for not more than 30 days as provided by Code, Criminal Procedure Article, §1-203 (e)." The Code provision actually allows for a 30-day extension plus an additional 30-day extension. The way section (d) was currently written might create a conflict between the Rule and the statute.

Mr. Shellenberger suggested deleting the language "for not more than 30 days," so that the third sentence of section (d) would read: "A supporting affidavit may be sealed as provided by

Code, Criminal Procedure Article, §1-203." Then, this provision would be governed by the statute. The Chair suggested that the third sentence of section (d) could read: "A supporting affidavit may be sealed for not more than 30 days, subject to one 30-day extension, as provided by Code...". Mr. Shellenberger noted that either change would be appropriate, because the statute is very clear as to what the burden is to be able to get the extension. By consensus, the Committee approved the Chair's suggested language.

Mr. Shellenberger commented that the second point he had was that under section (d) of Rule 4-601, there has always been a debate as to whether the inventory can be concealed along with the affidavit and any other accompanying papers, because the statute and the Rule both provide that the affidavit can be sealed. If an attorney has made an adequate showing to the judge that there is an ongoing investigation or there is a need for 30 days' worth of secrecy, and some of the documents, but not all of them, have to be sealed, this seems to be in conflict. Many jurisdictions do this differently. Some will seal everything, and some will only seal the affidavit. What is the point of sealing the affidavit if the inventory cannot be sealed for 30 days? The statute is very clear. It is a major burden on the State's Attorney for sealing, and of course, it cannot go more than 60 days.

The Chair noted that Code, Criminal Procedure Article, §1-203 specifically states in subsection (e)(1) that a judge may

order that an affidavit presented may be sealed. It does not refer to the application or other documents. Mr. Shellenberger agreed, but he said that the intent behind the statute was that if the burden was met, there could be secrecy for 60 days. The Rule could flesh out the intent of the statute. The Chair pointed out that the statute is very clear.

Mr. Shellenberger referred to section (c), which provides for e-mailing a search warrant. He asked if there could be any consideration given to addressing electronic signatures like the Court of Appeals did last year with the statement of charges. The Chair pointed out that this was in the Code already in subsection (a)(2)(iv)(3) of Code, Criminal Procedure Article, §1-203 as it appeared in Chapter 107, Laws of 2014, (HB 1109).

Mr. Marcus commented that another issue to consider was secure e-mail and secure facsimile transmission. He had not done an exhaustive search, but he had tried to find a definition of the term "secure e-mail." He was not sure if one existed. He was not sure how to obtain a secure e-mail in today's technology. If it came through a court server, it seemed to Mr. Marcus that the secure e-mail and secure facsimile would be vulnerable to attack. However this is to be done, there should be some kind of definition or understanding as to what is meant by the terms "secure e-mail" and "secure facsimile," so that this information could not be obtained wrongfully.

The Chair said that these references were taken directly from the statute. Mr. Marcus observed that a secure fax is a

telephone line. Mr. Frederick remarked that this relates to where the fax machine is located. The Chair noted that the word "secure" was added by amendment to the statute. Mr. Marcus expressed the opinion that some kind of definition as to what is meant by the word "secure" should be added to the Rules. The Chair remarked that the addition of the word "secure" to the statute indicated that the legislature meant something. Senator Stone responded that it probably had been suggested by the Committee Counsel to the House of Delegates.

Judge Weatherly told the Committee that the judges in Prince George's County had been given tablets. They were trained as to how they could receive search warrants on them and sign them at home. Judge Weatherly was not certain how secure this process would be. She asked whether there was a statute that provides that the court cannot accept the filing of pleadings by e-mails or faxes. The Chair answered that pursuant to Rule 1-322, Filing of Pleadings and Other Items, the clerks cannot accept papers filed by e-mail or fax. Judge Weatherly inquired what happens when the return comes in by fax and e-mail. The Chair said that the statute allows it. Judge Weatherly remarked that this will supersede Rule 1-322, which prohibits it. The Chair noted that the Rule should be consistent.

Judge Pierson pointed out that subsection (a)(2)(v) of the statute provides that the judge shall file a copy of the search warrant, the application, and the affidavit with the court, which could mean file with a judge. Normally, returns are made to the

judge. The Chair commented that the judge could be sending it from home. Judge Pierson responded that the judges do not send them from home, because they cannot get the return that fast.

Judge Pierson noted that the original is given to the officer, and the judge keeps a copy. With the change in the procedure, the judge will have to keep two copies, because one will have to be filed with the clerk right away, and one will be held until the judge gets the original and the return back. The statute does not specify when the copy of the search warrant should be filed. Judge Pierson said that he presumed that the warrant would be filed promptly upon its issuance, which means the next day or sometime soon after that. The search warrant or a copy of it will be available in the public record. This will have interesting consequences.

Judge Pierson commented that another issue is when the warrants are sent to the judge in the middle of the night. Judges often do not have copy machines in their homes. The Chair said that the statute does not require that the process be done this way, it simply provides that it can be done this way. Judge Pierson reiterated that the statute states in subsection (a)(2)(v) that a judge issuing a search warrant shall file a copy of the signed and dated search warrant. The Chair asked Judge Pierson if he had a suggestion for changing Rule 4-601. Judge Pierson answered that it is all driven by the statute. The Rule cannot be changed.

By consensus, the Committee approved Rule 4-601 as amended.

The Chair presented Rule 4-612, Order for Electronic Device Location Information, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 - CRIMINAL CAUSES

CHAPTER 600 - CRIMINAL INVESTIGATIONS AND MISCELLANEOUS PROVISIONS

ADD new Rule 4-612, as follows:

Rule 4-612. ORDER FOR ELECTRONIC DEVICE LOCATION INFORMATION

(a) Definitions

The definitions in Code, Criminal Procedure Article, §1-203.1 (a) apply in this Rule.

(b) Issuance of Order

A court may issue an order authorizing or directing a law enforcement officer to obtain location information from an electronic device if there is probable cause to believe that a misdemeanor or felony has been or will be committed by the owner or user of the electronic device or by an individual about whom location information is being sought, and the location information being sought (1) is evidence of or will lead to evidence of the misdemeanor or felony being investigated or (2) will lead to the apprehension of an individual for whom an arrest warrant has been previously issued. The application for the order, the order issued, and the notice of the order shall conform to the requirements of Code, Criminal Procedure Article, §1-203.1.

Source: This Rule is new.

Rule 4-612 was accompanied by the following Reporter's note.

> Chapter 191, Laws of 2014 (SB 698) created a new procedure permitting courts to issue orders authorizing or directing law enforcement officers to obtain location information from electronic devices if there is probable cause to believe that a misdemeanor or felony has been or will be committed by the owner or user of the device or by an individual about whom location information is being sought, and that information is evidence or will lead to evidence of the misdemeanor or felony being investigated or to the apprehension of an individual for whom an arrest warrant has been previously issued.
>
> The Criminal Subcommittee recommends the addition of a new Rule referencing the new statute, which fully sets out the new procedure.

The Chair explained that Chapter 191, Laws of 2014, (SB 698) had created a new procedure for courts to issue orders authorizing or directing law enforcement officers to obtain location information from electronic devices if there is probable cause to believe that a misdemeanor or felony has been or will be committed by the owner or user of the device or by an individual about whom location information is being sought. It also requires that for the court to issue the order this location information must be evidence or will lead to evidence of the misdemeanor or felony being investigated or to the apprehension of an individual for whom an arrest warrant has been previously issued. The Criminal Subcommittee recommended that a new Rule be added that complied with the new statute.

There being no comments, by consensus, the Committee approved Rule 4-612 as presented.

Agenda Item 4. Consideration of proposed new Title 9, Chapter 300 (Domestic Violence) and amendments to: Rule 1-101 (Applicability) and Rule 9-201 (Scope)

Judge Weatherly presented new Rules 9-301, Applicability; 9-302, Definitions; 9-303, Petition; 9-304, Interim Protective Orders; 9-305, Temporary Protective Order; 9-306, Final Protective Order Hearing - Waiver of Petitioner's Presence if Respondent not Served; 9-307, Final Protective Order; 9-308, Modification; Rescission; Extension; and 9-309, Appeals, as well as Rules 1-101, Applicability; and 9-201, Scope, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

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MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-301, as follows:

Rule 9-301. APPLICABILITY

The Rules is this Chapter apply to actions brought solely under Code, Family Law Article, Title 4, Subtitle 5.

Committee note: If relief is sought as part of a criminal, divorce, or other action, the Rules governing that action prevail.

Cross reference: For the issuance of a peace order for the protection of an individual who is not a "person eligible for relief" as defined in Code, Family Law Article, §4-501 (m), see Rule 3-731 and Code, Courts Article, Title 3, Subtitle 15 if the respondent is an

adult and Code, Courts Article, Title 3, Subtitle 8A if the respondent is an individual under the age of 18 years.

Source: This Rule is new.

Rule 9-301 was accompanied by the following Reporter's note.

Proposed new Title 9, Chapter 300 contains procedures applicable to actions brought solely under Code, Family Law Article, Title 4, Subtitle 5 (Domestic Violence). As noted in the Committee note and cross reference that follow Rule 9-301, if an action is not brought *solely* under that statute, the procedures for obtaining relief are set forth elsewhere.

The Rules incorporate by reference the procedures pertaining to interim, temporary, and final protective orders that are contained in the statute and highlight *where* a petition may be filed [with the District Court or a circuit court or, after business hours, with a commissioner] and *who* may issue, modify, or extend each type of protective order.

Rule 9-306 adds a new procedure by which, after a temporary protective order has been entered, if the respondent has not been served prior to the date of the first scheduled hearing to consider a final protective order, the petitioner may obtain a waiver of the petitioner's appearance at subsequent final protective order hearings until service on the respondent is made.

Code, Family Law Article, §4-505 (c) provides that a temporary protective order is not valid for more than seven days, but the court may extend the order for up to six months. Because of the short duration of each temporary protective order, courts are scheduling final protective order hearings at intervals of seven or less days.

New Rule 9-306 provides a mechanism by which the petitioner may maintain the protection of a temporary protective order without having to appear in court every week.

After appearing at the first scheduled protective order hearing, a petitioner who is granted a waiver of appearance under Rule 9-306 need only appear at a final protective order hearing after the respondent has been served.

After service on the respondent, a petitioner who seeks a final protective order must appear at the next final protective order hearing; however, the Rule permits the court, on its own initiative, to excuse the petitioner's appearance at a final protective order hearing occurring after service on the respondent and continue or postpone the hearing if service on the respondent was so recent that the petitioner may not have been aware of the service.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-302, as follows:

Rule 9-302. DEFINITIONS

The definitions in Code, Courts Article, §4-501 apply in this Chapter.

Source: This Rule is new.

Rule 9-302 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-303, as follows:

Rule 9-303. PETITION

(a) Generally

Except as permitted by section (b) of this Rule, a petitioner may seek relief from abuse by filing with the District Court or a circuit court a petition that complies with the requirements of Code, Courts Article, §4-504.

(b) Exception

When neither the office of the clerk of the circuit court nor the Office of the District Court Clerk is open for business, the petition may be filed with a commissioner of the District Court.

Source: This Rule is new.

Rule 9-303 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-304, as follows:

Rule 9-304. INTERIM PROTECTIVE ORDERS

Only a commissioner may issue an interim protective order. Interim protective orders are governed by Code, Courts Article, §4-504.1.

Source: This Rule is new.

Rule 9-304 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-305, as follows:

Rule 9-305. TEMPORARY PROTECTIVE ORDER

Only a judge may issue or extend a temporary protective order. Temporary protective orders are governed by Code, Courts Article, §4-505.

Source: This Rule is new.

Rule 9-305 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-306, as follows:

Rule 9-306. FINAL PROTECTIVE ORDER HEARING - WAIVER OF PETITIONER'S PRESENCE IF RESPONDENT NOT SERVED

(a) Scope of Rule

This Rule applies when (1) the court has entered a temporary protective order pursuant to Code, Family Law Article, §4-505, (2) the court has scheduled a hearing to consider a final protective order pursuant to Code, Family Law Article, §4-506, (3) the respondent does not appear at the hearing due to lack of service of the temporary protective order and notice of the hearing, and (4) pursuant to Code, Family Law Article, §4-505 (c), the court extends the temporary protective order pending service on the respondent.

(b) Presence of Petitioner

The petitioner shall appear at the first scheduled hearing to consider a final protective and, unless the petitioner's presence is waived pursuant to section (d) of this Rule, at each final protective order hearing scheduled thereafter.

(c) Request for Waiver of Presence by Petitioner

At the first hearing scheduled to consider a final protective order or at any time thereafter prior to service on the respondent, the petitioner may request a waiver of the petitioner's presence at any final protective order hearings scheduled for a date prior to the date on which the respondent is served with the temporary

protective order and notice of the hearing. The request for waiver shall be on a form prepared by the Administrative Office of the Courts and available in the clerks' offices and on the Judiciary website.

(d) Action by Court

(1) By Order entered pursuant to this section, the court shall grant a properly filed request for waiver and excuse the petitioner's presence at final protective order hearings scheduled for a date prior to the date on which the respondent is served.

(2) The Order shall:

(A) require that petitioner register with the Victim Information and Notification Everyday (VINE) Program operated by the Governor's Office of Crime Control and Prevention and the State Board of Victim Services to receive automatic notification of when the respondent is served;

Committee note: VINE is an electronic notification system that, by telephone or e-mail, will advise registrants of protective order case activity, including service and court hearings.

(B) require that petitioner promptly notify the court when apprised that the respondent was served;

(C) require that the clerk promptly mail extended temporary protective orders to the petitioner; and

(D) include notice to the petitioner of the consequences of non-compliance by the petitioner with the requirements in the Order.

(3) If the court has entered an order under subsection (d)(2) of this Rule, the court, on its own initiative, may excuse a petitioner's non-appearance at a final protective order hearing occurring after service on the respondent and continue or postpone the hearing if the court finds that

service on the respondent was so recent that the petitioner may not have been aware of the service.

Committee note: Code, Family Law Article, §4-505 (c) provides that a temporary protective order is not effective for more than seven days after service. It is not uncommon, therefore, for the court, when faced with non-service on the respondent, to reschedule the final protective order hearing every seven days. If service is made on the respondent shortly before the next scheduled hearing, the petitioner may not have received notice, even under VINE, that the respondent was served and thus be unaware that petitioner's presence at the hearing is required. The Committee's intent is that subsection (d)(3) of this Rule be reasonably, but liberally construed.

Source: This Rule is new.

Rule 9-306 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-307, as follows:

Rule 9-307. FINAL PROTECTIVE ORDERS

Only a judge may issue a final protective order. Final protective orders are governed by Code, Courts Article, §§4-505 (d) and 4-506.

Source: This Rule is new.

Rule 9-307 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-308, as follows:

Rule 9-308. MODIFICATION; RESCISSION; EXTENSION

Only a judge may modify, rescind, or extend a protective order. Modification, rescission, and extension of orders are governed by Code, Courts Article, §4-507 (a).

Source: This Rule is new.

Rule 9-308 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 300 - DOMESTIC VIOLENCE

ADD new Rule 9-309, as follows:

Rule 9-309. APPEALS

An appeal from a decision of a judge to grant or deny relief is governed by Code, Courts Article, §4-507 (b).

Source: This Rule is new.

Rule 9-309 was accompanied by the following Reporter's note.

See the Reporter's note to Rule 9-301.

MARYLAND RULES OF PROCEDURE

TITLE 1 - GENERAL PROVISIONS

CHAPTER 100 - APPLICABILITY AND CITATION

AMEND Rule 1-101 (i) to add a reference to Code, Family Law Article, Title 4, Subtitle 5, as follows:

Rule 1-101. APPLICABILITY

. . .

(i) Title 9

Title 9 applies to proceedings under Code, Family Law Article, Title 5, Subtitles 3 (Guardianship to and Adoption through Local Department), 3A (Private Agency Guardianship and Adoption), and 3B (Independent Adoption)<u>;</u> ~~and~~ proceedings relating to divorce, annulment, alimony, child support, and child custody and visitation<u>; and proceedings under Code, Family Law Article, Title 4, Subtitle 5 (Domestic Violence)</u>.

. . .

Rule 1-101 was accompanied by the following Reporter's note.

Amendments to Rule 1-101 (i) are proposed to conform the section to the proposed addition of new Chapter 300 (Domestic Violence) to the Rules in Title 9.

MARYLAND RULES OF PROCEDURE

TITLE 9 - FAMILY LAW ACTIONS

CHAPTER 200 - DIVORCE, ANNULMENT, ALIMONY,

CHILD SUPPORT, AND CHILD CUSTODY

AMEND Rule 9-201 by adding a cross reference following the Rule, as follows:

Rule 9-201. SCOPE

The Rules in this Chapter are applicable to a circuit court action in which divorce, annulment, alimony, child support, custody, or visitation is sought. These Rules do not apply to actions in a juvenile court or actions brought solely under Code, Family Law Article, Title 4, Subtitle 5.

<u>Cross reference: For action brought solely under Code, Family Law Article, Title 4, Subtitle 5, see Title 9, Chapter 300 of these Rules.</u>

Source: This Rule is new.

Rule 9-201 was accompanied by the following Reporter's note.

A cross reference to new Title 9, Chapter 300 (Domestic Violence) is proposed to be added following Rule 9-201.

Judge Weatherly said that Ms. Dorothy Lennig, Counsel for the House of Ruth, would explain the Rules in Agenda Item 4.

Ms. Lennig thanked the Committee for the opportunity to address them. She noted that the impetus for the new Rules began in 2009 when the General Assembly extended the length of a temporary protective order. However, because the temporary order was only good for 7 days after it had been served, in many jurisdictions, the court would be expected to require law enforcement to serve the petitioners, who would have to come back every week, while law enforcement tried to serve the respondent. This required petitioners to take off from work and to pay for child care and transportation. For some petitioners, it would mean that they would give up on the protective order and lose those protections rather than come to court every week.

Ms. Lennig commented that she had worked with Judge Eaves and the Domestic Violence Subcommittee of the Judicial Conference to come up with a waiver procedure. It would allow the petitioner to request a protective order and would allow the court to waive the petitioner's appearance until the respondent could be served. This had been approved by the Judicial Conference and by the Honorable Ben Clyburn, then Chief Judge of the District Court. The problem was that some judges were not using the procedure, either because they felt that they did not have the authority to do so, they did not like it, or they would use it differently by requiring an attorney to come in every week to represent the petitioner. The thought was that if Rules were

drafted to implement this procedure, it would be applied uniformly across the State. The Rules were before the Committee.

Ms. Lennig said that she had three changes to suggest for the Rules. The reference to the "Victim Information and Notification Everyday (VINE) Program" should be to the "VINE Protective Order Program", which is a victim notification system. VINE is a victim notification system in criminal cases, but the VINE Protective Order Program is a system that alerts petitioners in protective order cases. The Chair inquired if Ms. Lennig was asking to add the words "Protective Order" after the acronym "VINE," and Ms. Lennig answered that the language of the Rules should be "VPO Service Program." This would be added throughout Rule 9-306 (d)(2). By consensus, the Committee agreed to make this change.

Ms. Lennig remarked that the second change that she was requesting was in subsection (d)(2)(B) of Rule 9-306. This provided that the court order requires that the petitioner promptly notify the court when apprised that the respondent was served. This adds nothing to the Rule, and it is a burden on the petitioner. The case has already been set for a hearing the last time the court reissued a temporary protective order. There is a date for the hearing. The court will not hear the case unless the return of service is on file. Logistically, if the petitioner is notified at 3 o'clock a.m. that the respondent has been served, Ms. Lennig could not imagine how the petitioner could notify the clerk's office at that hour.

Ms. Lennig noted that her third requested change pertained to subsection (d)(3) of Rule 9-306. She suggested that a note be added that would provide that this provision is not intended to limit or restrict the authority of the court to continue a hearing for other reasons. This provision should not limit the court in setting the hearing for a week later for reasons other than that the respondent was not served. The note would be part of the Committee note after subsection (d)(3). By consensus, the Committee approved the addition of language to the Committee note.

Ms. Jordan told the Committee that she was with the Maryland Coalition Against Sexual Assault. They represent all of the rape crisis centers, which are also domestic violence centers, across the State. She thanked the Family and Domestic Subcommittee and Ms. Lennig for their work on these Rules. She agreed with Ms. Lennig that it is burdensome on the petitioner to be required to notify the court that the petitioner found out that the respondent had been served in the case. Ms. Jordan expressed the concern that this would cause petitioners to think that they are somehow responsible for doing this. There may be inadvertent contact between the parties when the goal is to keep them apart. The petitioner is being told that if he or she hears that the respondent has been served, the petitioner must tell the judge. Some of the petitioners will think that they are responsible. Ms. Jordan urged the Committee to accept the proposed changes to the Rules.

Judge Weatherly commented that the Family Law Committee of the Judicial Conference had met and also had some corrections to suggest. As amended, the Committee note after subsection (d)(2) of Rule 9-306 is going to state that the VOP Service Program will advise registrants of protective order case activity, including service and court hearings. Judge Weatherly clarified that the VOP Service Program does not notify registrants of the court hearings. It does notify them that the respondent has been served. The practicality of this is that the petitioner has not come to court, because he or she has been excused as service has been attempted. The notices are going out every seven days. The clerk's office will mail the petitioners a notice, which may or may not arrive on time. This is one of the concerns of the Family Law Committee. The petitioner will get a call that informs him or her that the respondent has been served. The VOP Service Program is supposed to notify the petitioner within two hours of the respondent being served. The petitioners are told that they need to call and make sure that they know that date, because they may not know it.

Judge Weatherly expressed the opinion that subsection (d)(2)(B) intended to put the burden on the petitioner to notify the court that the respondent has been served, but when the petitioner gets the call from the VOP Service Program, he or she has to call and confirm what the court date is, because absent that, the only other way is to have the clerk of the court, the sheriff, or law enforcement contact the petitioner to inform him

or her what the next court date is. The date could be between one and seven days later depending upon service. Two people would know when that case has been set, someone from the clerk's office of the court that has the case and someone from the law enforcement agency. But the petitioner was not at the last hearing when the court date was set, and the judges are concerned that if the petitioner waits to contact the court until the petitioner has been served, then he or she will not know the date. When the petitioner does not appear, the court will dismiss the case.

The Chair inquired what changes should be made to Rule 9-306. Judge Weatherly responded that subsection (d)(2)(C) provides that the clerk will promptly mail out the extended temporary protective order, which is good, but they come up fast. That order issued on a Friday is problematic. It will not be sent out on the weekend. It may go out on Monday and may not arrive until Wednesday. Judge Weatherly recommended that in the Committee note after subsection (d)(2)(A), the words "and court hearings" should be deleted. The VOP Service Program does advise registrants of service. The Reporter asked whether that is all that the system advises the registrants of. Ms. Lennig answered that the program definitely does not notify the registrants of the hearing date. The Chair said that it does notify them about other court activity. Ms. Jordan replied that the VINE system does, but not the VOP Service Program. The two are completely different.

The Chair noted that every time the word "VINE" appears, it should be "VOP Service Program." The Reporter said that this particular system is very narrow in what it does. It only informs the registrants about service. Ms. Lennig agreed. The Chair suggested that one of the Committee notes in Rule 9-306 should make that clear. The language should indicate that the VOP Service Program advises registrants of service on respondents.

Judge Weatherly remarked that the question becomes how to make sure that the petitioner who knows about the service also knows about the next court date. Ms. Lennig commented that she and her colleagues have struggled with this problem. It is the best system they could come up with. Her concern was that if a hearing is set for a Thursday, and the respondent get served at 5 a.m. on Thursday, the petitioner is notified of the service on the respondent and then waits until 8:30 a.m. to call the clerk's office. If the hearing is at 8:30 a.m., the petitioner will miss the hearing. The petitioners have the responsibility of keeping up with when the hearings are scheduled. Some people will miss the date. The judge has the opportunity to extend the hearing until one week later. Ms. Lennig and her colleagues could not come up with a better way to notify everyone.

Judge Weatherly pointed out that the person who knows about service is the sheriff. The sheriff serves the notice and knows what the court date is. Judge Eaves responded that the petitioner may know the court date, because he or she is going to

get a copy of the extended order if it arrives on time. If the person got the notice on time, and the hearing is set for 10:00 a.m. on a Tuesday morning, and the respondent is served at 10:00 a.m. on Tuesday morning, the hearing is obviously not going to take place that day, because, practically speaking, no one really has advance notice of the hearing. The responsibility is going to fall on the court to extend the order again and set a new hearing date. Judge Eaves was not sure that it made sense to require anyone to take any other action when the court is getting the file on the hearing date anyway. The court can see from the return when the respondent was served and can also see that it may be impractical for either party to appear on that particular hearing date. There may be no perfect solution other than that the court can take a look at the file and then determine whether to extend the order and have the clerk's office mail out the new date.

The Chair referred to the Committee note after subsection (d)(3) of Rule 9-306. The third sentence read as follows: "If service is made on the respondent shortly before the next scheduled hearing, the petitioner may not have received notice, even under VINE, that the respondent was served and thus be unaware that the petitioner's presence at the hearing is required." Also, in Judge Eaves' scenario, there is no way that the respondent is going to be able to get to the hearing.

Mr. Lowe remarked that the hearing would be on the docket. The Reporter observed that it would have to be on the docket for

there to be an extension of the temporary protective order. The Chair said that if the respondent is served 15 minutes before the hearing is scheduled, he or she could not possibly attend. Judge Eaves noted that sometimes respondents are served because they may have been inadvertently arrested for a crime or violation that is completely unrelated to the protective order case. The respondent may be locked up.

Judge Weatherly inquired whether subsection (d)(2)(B), which requires the petitioner to notify the court that the respondent was served, makes any sense. Ms. Lennig was concerned as to what the result would be if the petitioner does not notify the court. Ms. Jordan suggested that the petitioner should be advised to call the court. Judge Weatherly said that this advice should be placed on the temporary protective order. Judge Eaves asked whether the waiver order provides that the petitioner is required to contact the court. The Reporter responded that a copy of the current District Court order is in the meeting materials after the letter from Judge Clyburn. Part of Form CC-DC/DV 19 is the "Request for Waiver of Appearance," and part of it is the "Order Granting Request for Waiver of Appearance." This is used by some of the District Court judges, but not all of them feel comfortable doing this without a specific rule or statutory authorization. This is the way the current District Court form reads.

Judge Price commented that there should be language in the proposed new Rules to refer to this form. Ms. Lennig said that

the form "Request for Waiver of Appearance" could be changed to provide that the petitioner should call the court to confirm that the respondent was served. The Chair noted that Rule 9-306 (d)(2) provides what the order has to say. Ms. Lennig expressed the view that subsection (d)(2)(B) should state that the petitioner "should" notify the court and not "shall" notify the court. Judge Price suggested the language: "The petitioner should use all efforts" to notify the court. The Chair expressed the view that the word "should" is not appropriate. Ms. Lennig remarked that in many jurisdictions, the hearings are set on the same day each week. If the first hearing was set on a Monday, the next hearings would be set on Mondays. It may be that the petitioner already knows when the hearing is or got a notice of the hearing. There would be no reason to call.

The Chair said that subsection (d)(2)(B) should be deleted. Judge Weatherly asked whether language should be added to Rule 9-306 that would provide that the order shall advise the petitioner to confirm that the respondent was served. The language could be: "advise the petitioner upon notification of service to contact the court to confirm the date of the final protective order hearing." The Reporter asked if the language should be "...to promptly contact the court...". Judge Weatherly answered affirmatively. Judge Pierson suggested the language "to contact the court promptly...". By consensus, the Committee agreed with Judge Weatherly's suggested language with the Reporter's and Judge Pierson's amendments. New subsection (d)(2)(B) will read:

"advise the petitioner upon notification of service to contact the court promptly to confirm the date of the final protective order hearing;"

Judge Weatherly said that she had one more change to suggest. Section (b) of Rule 9-306 would read: "The petitioner shall appear at the first scheduled hearing to consider a final protective order, and at each final protective order hearing scheduled thereafter, and unless the petitioner's presence is waived pursuant to section (d) of this Rule." The Chair commented that this just moves the last phrase to a different place in section (b).

The Reporter disagreed with the suggested amendment, pointing out that the petitioner still has to appear at the first hearing. Judge Weatherly agreed, noting that the petitioner has to appear at each final protective order hearing scheduled thereafter unless the appearance is waived. The Reporter said that the "unless" clause only applies to the subsequent appearance, and it would not be waived for the final, actual hearing. It would not be waived for the first one or for the very last one. Judge Eaves noted that the word "order" was missing after the first time the words "final protective" appear in section (b). Judge Weatherly added that the Reporter had noted some incorrect references to the "Courts Article," which should be to the "Family Law Article" in the proposed Rules. The Reporter responded that these would be corrected.

Mr. Patterson referred to proposed Rule 9-304. He asked if

this Rule was correct. Can a judge not issue an interim protective order when the court is in session? The Chair answered that judges do not issue interim protective orders. Judge Eaves added that only commissioners issue them. Judge Morrissey observed that when a District Court commissioner issues any type of order, it is a temporary order. When a commissioner signs an order, the judge has to review it.

By consensus, the Committee approved Rules 1-101, 9-201, and 9-301 as presented, and Rules 9-302, 9-303, 9-304, 9-305, 9-306, 9-307, 9-308, and 9-309 as amended.

There being no other business before the Committee, the Chair adjourned the meeting.