COURT OF APPEALS STANDING COMMITTEE

ON RULES OF PRACTICE AND PROCEDURE

Minutes of a meeting of the Rules Committee virtually held via GoToWebinar on June 18, 2020.

Members present:

Hon. Alan M. Wilner, Chair

H. Kenneth Armstrong, Esq.
Julia Doyle Bernhardt, Esq.
Hon. Yvette M. Bryant
Sen. Robert G. Cassilly
Hon. John P. Davey
Mary Anne Day, Esq.
Del. Kathleen M. Dumais
Christopher R. Dunn, Esq.
Hon. Angela M. Eaves
Alvin I. Frederick, Esq.
Pamela Q. Harris, Court Administrator
Irwin R. Kramer, Esq.
Victor H. Laws, III, Esq.
Dawne D. Lindsey, Clerk
Bruce L. Marcus, Esq.
Donna Ellen McBride, Esq.
Stephen S. McCloskey, Esq.
Hon. Danielle M. Mosley
Hon. Douglas R. M. Nazarian
Hon. Paula A. Price
Gregory K. Wells, Esq.
Hon. Dorothy J. Wilson
Thurman W. Zollicoffer, Esq.

In attendance:

Sandra F. Haines, Esq., Reporter
Colby L. Schmidt, Esq., Deputy Reporter
Heather Cobun, Esq., Assistant Reporter
Meredith A. Drummond, Esq., Assistant Reporter
Joseph Cassilly, Esq.
Thomas J. Dolina, Esq., Bodie Law
Debra Gardner, Esq., Legal Director, Public Justice Center
Amber Herrmann, Deputy Director, District Court Admin. Services
Daniel Kobrin, Esq., Assistant Public Defender
Hon. Mary Morton Kramer, Assoc. Judge, Howard County Circuit Court
Hon. John P. Morrissey, Chief Judge, District Court of Maryland
Suzanne Pelz, Esq., Maryland Judiciary Government Relations and Public Affairs
Thomas Stahl, Esq., Spencer & Stahl, P.C.
Nisa Subasinghe, Esq., Policy Law Specialist, Maryland Judiciary Juvenile and Family Services

Gillian Tonkin, Esq., Staff Attorney, District Court Chief Clerk's Office
Mark Tyler, Esq.
Michael Wein, Esq., Law Offices of Michael Wein
Brian Zavin, Esq., Deputy Chief Attorney, Office of the Public Defender, Appellate Division

The Chair convened the meeting. He introduced new Committee staff members, assistant reporters Ms. Heather Cobun and Ms. Meredith Drummond, and executive aide Ms. Wendy Purcell. He also announced that seven Committee members' terms will expire on June 30: Judge Bryant, Judge Davey, Judge Wilson, Mr. Shellenberger, Mr. Dunn, Judge Eaves, and Judge Mosely. He explained that Judges Bryant, Davey, and Wilson and Mr. Shellenberger are eligible for reappointment but the remaining three members are not due to term limits. He said that the Court has not yet taken up the question of reappointments and replacements, but he hopes to have an answer within a week, then new subcommittee assignments will be made. He asked that the minutes reflect that the loss of any one of the departing members at the end of their term is significant, but all of them have been of extraordinary value to the Committee and to the Court. He also expressed his hope that the members who are not reappointed can still be called on for advice in the future.

The Chair said that the 205th Report and its supplement were approved by the Court of Appeals on June 17, including rules authorizing remote proceedings in trial courts. Those

Rules take effect July 1. The Court has announced that a hearing on the 202nd and 203rd Reports will take place June 29.

Ms. Haines said that the 204th Report, which was filed after the Committee last met, also has been approved. She noted that there will be subcommittee meetings over the summer, particularly after new members are appointed.

Ms. Haines explained how members can speak during the meeting using the GoToWebinar software and pointed out "handout" materials, which are available via the software toolbar.

Agenda Item 1. Consideration of proposed amendments to Rule 4-612 (Order for Cell Site Simulator or Electronic Device Location Information) and Rule 4-263 (Discovery in Circuit Court).

The Chair presented Rule 4-612, Order for Cell Site Simulator or Electronic Device Location Information, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 600 – CRIMINAL INVESTIGATIONS AND MISCELLANEOUS PROVISIONS

AMEND Rule 4-612 to include cell site simulators in the title and section (b) of the Rule, as follows:

RULE 4-612. ORDER FOR <u>CELL SITE SIMULATOR OR</u> 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 use a cell site simulator or 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 the information sought by the cell site simulator or the location information is being sought, and the information sought by the cell site simulator or 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 223, 2020 Laws of Maryland (SB 246) adds to Code, Criminal Procedure Article, § 1-203.1 provisions that permit a court to issue an order authorizing or directing a law enforcement officer to use a cell site simulator. Proposed amendments to Rule 4-612 add references to cell site simulators to conform the Rule to the revised statute.

The Chair told the Committee that the amendments to Rule 4-612 are intended to implement Senate Bill 246, which passed the General Assembly in 2020. The bill applies the requirements for an order authorizing access to an electronic location information service to the use of a cell site simulator. He explained that a cell site simulator is "kind of a scary device" that masquerades as a cell tower and forces all cell phones in the vicinity to connect to it and share information. He said that the bill requires the police to obtain a warrant, as already required in Rule 4-612 for location information devices. There is a five-year sunset provision in the statute.

The Chair said that the proposed rule was not presented to a subcommittee, so a motion is required to approve it. Judge Nazarian moved to approve the Rule as presented. Judge Eaves seconded the motion. The Committee approved Rule 4-612 by majority vote.

The Chair presented Rule 4-263, Discovery in Circuit Court, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 4 – CRIMINAL CAUSES

CHAPTER 200 – PRETRIAL PROCEDURES

AMEND Rule 4-263 by adding the term "benefit" to subsection (d)(6)(B), by adding a cross reference after subsection (d)(6)(B), and by adding include a Committee Note after section (n), as follows:

RULE 4-263. DISCOVERY IN CIRCUIT COURT

. . .

(d) Disclosure by the State's Attorney

Without the necessity of a request, the State's Attorney shall provide to the defense:

(1) Statements

All written and all oral statements of the defendant and of any co-defendant that relate to the offense charged and all material and information, including documents and recordings, that relate to the acquisition of such statements;

(2) Criminal Record

Prior criminal convictions, pending charges, and probationary status of the defendant and of any co-defendant;

(3) State's Witnesses

As to each State's witness the State's Attorney intends to call to prove the State's case in chief or to rebut alibi testimony: (A) the name of the witness; (B) except as provided under Code, Criminal Procedure Article, § 11-205 or Rule 16-912 (b), the address and, if known to the State's Attorney, the telephone number of the witness; and (C) all written statements of the witness that relate to the offense charged;

(4) Prior Conduct

All evidence of other crimes, wrongs, or acts committed by the defendant that the State's Attorney intends to offer at a hearing or at trial pursuant to Rule 5-404 (b);

(5) Exculpatory Information

All material or information in any form, whether or not admissible, that tends to exculpate the defendant or negate or mitigate the defendant's guilt or punishment as to the offense charged;

(6) Impeachment Information

All material or information in any form, whether or not admissible, that tends to impeach a State's witness, including:

(A) evidence of prior conduct to show the character of the witness for untruthfulness pursuant to Rule 5-608 (b);

(B) a relationship between the State's Attorney and the witness, including the nature and circumstances of any agreement, benefit, understanding, or representation that may constitute an inducement for the cooperation or testimony of the witness;

Cross reference: For benefits to in-custody witnesses, see Code, Courts Article, § 10-924.

(C) prior criminal convictions, pending charges, or probationary status that may be used to impeach the witness, but the State's Attorney is not required to investigate the criminal record of the witness unless the State's Attorney knows or has reason to believe that the witness has a criminal record;

(D) an oral statement of the witness, not otherwise memorialized, that is materially inconsistent with another

statement made by the witness or with a statement made by another witness;

(E) a medical or psychiatric condition or addiction of the witness that may impair the witness's ability to testify truthfully or accurately, but the State's Attorney is not required to inquire into a witness's medical, psychiatric, or addiction history or status unless the State's Attorney has information that reasonably would lead to a belief that an inquiry would result in discovering a condition that may impair the witness's ability to testify truthfully or accurately;

(F) the fact that the witness has taken but did not pass a polygraph examination; and

(G) the failure of the witness to identify the defendant or a co-defendant;

Cross reference: See Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995); Giglio v. U.S., 405 U.S. 150 (1972); U.S. v. Agurs, 427 U.S. 97 (1976); Thomas v. State, 372 Md. 342 (2002); Goldsmith v. State, 337 Md. 112 (1995); and Lyba v. State, 321 Md. 564 (1991).

(7) Searches, Seizures, Surveillance, and Pretrial Identification

All relevant material or information regarding:

(A) specific searches and seizures, eavesdropping, and electronic surveillance including wiretaps; and

(B) pretrial identification of the defendant by a State's witness;

Committee note: In addition to disclosure of a pretrial identification of a defendant by a State's witness, in some cases, disclosure of a pretrial identification of a

co-defendant by a State's witness also may be required. See Green v. State, 456 Md. 97 (2017).

(8) Reports or Statements of Experts

As to each expert consulted by the State's Attorney in connection with the action:

(A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion;

(B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and

(C) the substance of any oral report and conclusion by the expert;

(9) Evidence for Use at Trial

The opportunity to inspect, copy, and photograph all documents, computer-generated evidence as defined in Rule 2-504.3 (a), recordings, photographs, or other tangible things that the State's Attorney intends to use at a hearing or at trial; and

(10) Property of the Defendant

The opportunity to inspect, copy, and photograph all items obtained from or belonging to the defendant, whether or not the State's Attorney intends to use the item at a hearing or at trial.

. . .

(n) Sanctions

If at any time during the proceedings the court finds that a party has failed to

comply with this Rule or an order issued pursuant to this Rule, the court may order that party to permit the discovery of the matters not previously disclosed, strike the testimony to which the undisclosed matter relates, grant a reasonable continuance, prohibit the party from introducing in evidence the matter not disclosed, grant a mistrial, or enter any other order appropriate under the circumstances. The failure of a party to comply with a discovery obligation in this Rule does not automatically disqualify a witness from testifying. If a motion is filed to disqualify the witness's testimony, disqualification is within the discretion of the court.

Committee Note: When testimony of an in-custody witness is offered, the Court, at the request of a defendant, shall conduct a hearing to ensure that the State's Attorney has disclosed all material and information related to the in-custody witness as required by this Rule. See Code, Courts Article, § 10-924.

Source: This Rule is new and is derived in part from former Rule 741 and the 1998 version of former Rule 4-263.

Rule 4-263 was accompanied by the following Reporter's note.

Code, Courts and Judicial Proceedings Article § 10-924 was added by Chapter 282, 2020 Laws of Maryland (HB 637). The new statute concerns requirements for recording, reporting, and disclosing information obtained from an in-custody witness by a State's Attorney. § 10-924 requires, pursuant to Rule 4-263, the disclosure of any benefits received or expected to be received by an in-custody witness in exchange for providing testimony.

> Rule 4-263 (d)(6)(B) currently requires disclosure of the nature and circumstances of any agreement, understanding, or representation that may constitute an inducement for the cooperation or testimony of a witness for the State. To conform the Rule to the new legislation, the term "benefit" is added to the required disclosures. The addition of a cross reference after subsection (d)(6)(B) directs the reader to the statutory definition of "benefit."
>
> The proposed Committee note after section (n) explains when a hearing is required pursuant to the new law prior to admission of in-custody witness testimony.

The Chair said that the proposed changes are intended to implement a new statute passed by the General Assembly. The law concerns information obtained by a state's attorney from an in-custody witness who receives a "benefit" in exchange for supplying that information. The law defines a benefit as any consideration given to the witness or to a third party at the request of or on behalf of the witness in return for testimony and lists examples. The law requires the State's Attorney to record the information received, report it to the Governor's Commission on Crime Prevention, Youth, and Victim Services, disclose it to the defendant pursuant to Rule 4-263, and disclose any kind of leniency or incentive to any victims in the witness' case. The law also requires, on the defendant's request, that the court hold a hearing to determine whether the

State's Attorney has complied with the requirements before allowing the witness to testify. Rule 4-263 already requires the State to disclose *Brady* material (*Brady v. Maryland*, 373 U.S. 83 (1963)) and the Chair noted that it is unclear what the law adds. The proposed amendments would add the word "benefit" to the list of things to disclose in subsection (d)(6)(B), add a cross-reference to the statute about the definition of benefit, and add a Committee note about the hearing requirement.

The Chair also pointed out that the statute, on its face, refers only to Rule 4-263 and would not apply to District Court proceedings. The timing provisions in the Rule would not work in the District Court, but he questioned whether the statute's requirements could apply in District Court. There is also a question of whether the definition of "benefit" may include things that would not be regarded as *Brady* material. He referred the Committee to the comment submitted by Joseph Cassilly, former Harford County State's Attorney.

Senator Cassilly said that the bill was intended to address in-custody witnesses, but the proposed amendments extend the language of the statute to a much wider group. Judge Nazarian said that there is not a great deal of case law on the issue of what constitutes a benefit, but there is some in the related area of Code, Courts Article §9-123, which allows a State's Attorney to ask for an order compelling testimony. Judge

Nazarian said that in *Preston v. State*, 444 Md. 67 (2015), the Court found that a benefit was direct quid pro quo compensation. In that case, a witness put in protective custody for seven months with her rent paid did not receive a benefit, according to the opinion. Mr. Joseph Cassilly told the Committee that State's Attorneys provide services and assistance to witnesses and their families as a matter of course, including food, clothing, and counseling. He explained that such assistance is not in exchange for testimony and is not currently subject to discovery at trial. The Chair asked Mr. Joseph Cassilly if the Committee could leave the Rule as it is and rely on prosecutors and defense attorneys to know to comply with the statute. Mr. Joseph Cassilly responded that the statute defines the term benefit and if that definition is incorporated into the Rule, it could address his concern, but he added that it would still expand the requirement to a larger class of witnesses not required by the statute. Senator Cassilly suggested removing the word benefit from the Rule but keeping the cross-reference, potentially reworded. Daniel Kobrin, of the Appellate Division of the Maryland Office of the Public Defender, said that the statute does provide a definition of a benefit and includes financial assistance. He pointed out that the Rule governs discovery, and just because something is discoverable does not make it admissible at trial. Judges will have discretion about

admissibility. He suggested that keeping the language broad is appropriate. Delegate Dumais said that the statute indicates that the examples of benefits is not exhaustive. The Chair responded that the statute refers to "any benefit" and agreed that the examples listed are not exhaustive. He also agreed that the statute is limited to in-custody witnesses, and suggested that benefit be removed from where it is placed in the proposed Rule and moved to the end of the clause along with the phrase "and as to an in-custody witness" along with a reference to benefits and the statute. Mr. Joseph Cassilly said that it is easier to track what is happening with a limited number of witnesses who are in custody. He noted that prosecutors are presumed to know what other prosecutors and agencies are doing and to apply the statute broadly would create "an unworkable mess" for prosecutors to track. Mr. Marcus said that the General Assembly imposed the duty and suggested that a Rule that highlights the statutory section and provides a reference is sufficient. He said that compliance with the law will be determined on a case-by-case basis by trial judges.

The Chair asked Senator Cassilly to restate his motion. Senator Cassilly said that he endorses the Chair's suggestion to remove benefit from where it appears in the Rule but note the statute in a cross-reference. The Chair proposed deleting the word benefit and, in the cross-reference, saying, "For

requirements to disclose a 'benefit' to an in-custody witness, see Code, Courts Article §10-924." Senator Cassilly moved to amend the Rule to adopt the Chair's proposed language. The motion was seconded and the Committee approved the amendment by majority vote. The Chair brought the note following section (n) to the Committee's attention and asked for comment. By consensus, the Committee approved Rule 4-263 as amended.

Judge Morrissey asked if a cross reference should be added to the District Court rule even though the statute does not mention the District Court. He suggested that it would be helpful to a District Court practitioner. The Chair said that *Brady* applies in District Court as well, but the timing requirements for the disclosure in the statute would be difficult to meet in District Court. Judge Morrissey agreed that the deadlines are different but noted that prosecutors will know if they are using an in-custody witness and should disclose information about the witness to the defense. The Chair asked if any member opposed adding a similar cross-reference to Rule 4-262. Mr. Marcus suggested that the statute can be amended in the future to apply to the District Court. Judge Morrissey said the Committee can wait for the legislature to act. There was no motion to further amend Rule 4-262.

Agenda Item 2. Consideration of proposed amendments to Rule 10-202 (Certificates and Consents) and Rule 10-301 (Petition for Appointment of a Guardian of the Property).

The Chair presented Rules 10-202, Certificates and Consents, and 10-301, Petition for Appointment of a Guardian of Property, for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 10 – GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 200 – GUARDIAN OF PERSON

AMEND Rule 10-202 by adding nurse practitioner to the list of health care professionals who may examine an alleged disabled person and sign a certificate required to accompany a petition for guardianship in subsection (a)(1)(B) and (a)(3)(A), as follows:

Rule 10-202. CERTIFICATES AND CONSENTS

(a) Certificates

(1) Generally Required

If guardianship of the person of a disabled person is sought, the petitioner shall file with the petition signed and verified certificates of (A) two physicians licensed to practice medicine in the United States who have examined the disabled person, or (B) one licensed physician who has examined the disabled person and one licensed psychologist, or licensed certified social worker-clinical, or nurse practitioner who has seen and evaluated the disabled person. An examination or evaluation by at least one of the health

care professionals shall have been within 21 days before the filing of the petition.

(2) Form

Each certificate required by subsection (a)(1) of this Rule shall be substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the offices of the clerks of the circuit courts.

(3) Absence of Certificates

(A) Refusal to Permit Examination

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

(B) Appointment of Health Care Professionals by Court

If the court finds after a hearing that examinations are necessary, it shall appoint two physicians or one physician and one psychologist, ~~or~~ licensed certified social worker-clinical, or nurse practitioner to conduct the examinations or the examination and evaluation and file their reports with the court. If both health care professionals find the person to

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

Cross reference: See Code, Estates and Trusts Article, § 13-801.

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

Proposed amendments to Rule 10-202 add nurse practitioners to the list of health care professionals who may examine an alleged disabled person and sign a certificate required to accompany a petition for guardianship in addition to a physician to comply with Chapter 568, 2020 Laws of Maryland (SB 576). Previously, the law required certification from two physicians or a physician and either a licensed psychologist or licensed certified social worker-clinical.

MARYLAND RULES OF PROCEDURE

TITLE 10 – GUARDIANS AND OTHER FIDUCIARIES

CHAPTER 300 – GUARDIAN OF PROPERTY

AMEND Rule 10-301 by amending the Committee note following section (d), as follows:

Rule 10-301. PETITION FOR APPOINTMENT OF A GUARDIAN OF PROPERTY

. . .

(d) Required Exhibits

The petitioner shall attach to the petition as exhibits a copy of any instrument nominating a guardian and documentation in full compliance with at least one of the following:

(1) the certificates required by Rule 10-202;

Committee note: Rule 10-202 (a)(2) requires that a certificate of a licensed physician, licensed psychologist, ~~or~~ licensed certified social worker-clinical, or nurse practitioner be substantially in the form approved by the State Court Administrator, posted on the Judiciary website, and available in the offices of the clerks of the circuit courts.

. . .

Rule 10-301 was accompanied by the following Reporter's note.

The proposed amendment to Rule 10-301 is a conforming amendment necessitated by proposed changes to Rule 10-202 in light of Chapter 568, 2020 Laws of Maryland (SB 576).

The Chair told the Committee that the proposed amendments in Item 3 implement Senate Bill 576, which adds nurse practitioners as persons who can sign a certificate required for the appointment of a guardian. Ms. Haines said that Nisa Subasinghe sent a stylistic comment pointing out that nurse practitioners examine patients as a physician would, but psychologists and social workers evaluate them. Ms. Haines

suggested that the comment can be addressed in the Style Subcommittee. Ms. Subasinghe said that Rule 10-112 also needs to be amended to identify nurse practitioners as qualified clinicians in the instructions at the end. In the instructions in that Rule, number one, subsection (c) lists the verified certificates that must be filed with the petition and nurse practitioners need to be added to the list. The Chair asked if that would be a conforming amendment and Ms. Subasinghe affirmed that it would be. Judge Bryant asked for more details about Ms. Subasinghe's proposal and she responded that she does not have a specific proposal but wanted to point out that the amended statute moved the words "examine" and "evaluate" and they are used differently depending upon the clinician who is seeing the patient. She agreed that the change is stylistic.

Mr. Laws moved to adopt Rule 10-202 and 10-301, if the Style Subcommittee addresses the issue raised about the language, and to make a conforming amendment to Rule 10-112. Delegate Dumais seconded the motion. The Committee approved Rules 10-202 and 10-301 and amendments to Rule 10-112 by majority vote.

Agenda Item 3. Consideration of proposed amendments to Rule 3-731 (Peace Orders), Rule 9-308 (Modification; Rescission; Extension), and Rule 9-206 (Child Support Guidelines)

Judge Eaves presented Rule 3-731, Peace Orders, and Rule 9-308, Modification; Rescission; Extension, for the Committee's consideration.

MARYLAND RULES OF PROCEDURE

TITLE 3 - CIVIL PROCEDURE - DISTRICT COURT

CHAPTER 700 - SPECIAL PROCEEDINGS

AMEND Rule 3-731 to require the filing of a motion before modifying, rescinding, or extending a peace order, to provide for an automatic extension under certain circumstances, and to make stylistic changes, as follows:

Rule 3-731. PEACE ORDERS

(a) Generally

Proceedings for a peace order are governed by Code, Courts Article, Title 3, Subtitle 15.

(b) Form of Petition

A petition for relief under ~~that~~ the statute shall be in substantially the following form:

. . .

(c) Modification; Rescission; Extension

Upon the filing of a motion, a judge may modify, rescind, or extend a peace order. Modification, rescission, and extension of peace orders are governed by Code, Courts and Judicial Proceedings Article, § 3-1506 (a). If a motion to extend a final peace order is filed before the original expiration date of the peace order, and the hearing is not held by that

date, the peace order shall be automatically extended until the hearing is held.

Committee note: Although Code, Courts and Judicial Proceedings Article, § 3-1506 (a) automatically extends a peace order under certain circumstances, judges are encouraged to issue an order even when the automatic extension is applicable.

Source: This Rule is new.

Rule 3-731 was accompanied by the following Reporter's note.

Proposed amendments to Rule 3-731 address the modification, rescission, and extension of peace orders. A proposed restructuring also separates the Rule into sections.

Pursuant to Chapters 134/135, 2020 Laws of Maryland (HB 250/SB 227), effective October 1, 2020, a final peace order is automatically extended if a motion to extend is filed and a hearing is not held before the original expiration date of the order. A proposed amendment to the Rule provides for this new method of extension.

Logistical concerns were expressed by members of the Family/Domestic Subcommittee about the implementation of this statute. One possible solution to address some of the concerns would be to include language in the peace order indicating that, if a motion to extend is filed before the expiration date of the order, the peace order will be automatically extended until a hearing is held on the motion. A proposed Committee note also recognizes that, even if an automatic extension applies, the issuance of a judge's order to extend a peace order remains the best practice.

Judge Eaves explained that the proposed amendments to Rules 3-731 and 9-308 were occasioned by House Bill 250, which permits a judge to extend a peace order or a protective order that is close to expiration if there is a motion to extend the order and a hearing cannot be held right away. The extension is automatic. She said that Rule 3-731 is expanded to include the language from the statute to automatically extend an order until a hearing can be held. The Committee note at the end of the Rule makes it clear that though the extension is automatic, it is good practice for the judge to issue a new order to make sure it is in the databases of law enforcement agencies. Rule 9-308 makes similar changes. The proposed Rules were approved by the Family and Domestic Subcommittee.

Ms. Lindsey said that these rules were difficult for her because it is a gray area for clerks. She suggested a Committee note or cross-reference to Rule 1-204 to remind staff that motions to extend must be placed before a judge right away. The Chair asked if such a note would be appropriate in the Title 16 Rules governing case management plans. Ms. Lindsey responded that clerks will look at the basic rules. Ms. Haines noted that the new law automatically extends an order when a petition to extend is filed and Rule 1-204 may not apply. Judge Eaves said that the forms that go along with the law that a petitioner might file to extend do not require an answer, just action by

the court to set a hearing and provide notice to the parties. She added that it may be a training issue for clerks to take these petitions to a judge right away. Judge Morrissey agreed that it will be a training and best practices issue. Ms. Lindsey suggested some language that draws a clerk's attention to the fact that the petition goes to a judge immediately. The Chair suggested adding to both rules that "the motion shall be presented to a judge forthwith." By consensus, the Committee approved the Rule as amended.

Judge Eaves presented Rule 9-206, Child Support Guidelines, for the for the Committee's consideration (See Appendix 1).

Judge Eaves said that House Bill 269 made changes to the definition of shared physical custody where a parent has the child or children overnight for more than 25% of the time but less than 30% of the time. The amendments add an incremental calculation to factor these overnight visits into child support obligations. The Chair said that the amendments were approved by the subcommittee. Ms. Haines said that the Committee staff struggled with how to incorporate the changes into the form and asked if the experts on the Committee believe it is correct. Delegate Dumais said that the amendments work and she looked at it with the subcommittee and with judges. She explained that the calculation seems complicated but there is already a child support calculator used by practitioners, called SASI-CALC,

which is being updated to account for these changes. She noted that the forms likely will need to be more detailed as the Rule is implemented and pro se litigants do the calculation by hand. Judge Eaves said that her SASI-CALC has not been updated yet but Delegate Dumais said she will ensure that the court has the updated version. There being no motion to amend or reject the proposed Rule, it was approved as presented.

Agenda Item 4. Consideration of proposed amendments to Rule 15-504 (Temporary Restraining Order).

Mr. Frederick presented Rule 15-504, Temporary Restraining Order, to the Committee for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 500 - INJUNCTIONS

AMEND Rule 15-504 by expanding section (a) to require the person seeking a temporary restraining order to establish the four factors for granting an interlocutory injunction, by adding a cross reference following section (a), and by making stylistic changes, as follows:

Rule 15-504. TEMPORARY RESTRAINING ORDER

(a) Standard for Granting

A temporary restraining order may be granted only if ~~it~~ the party seeking the order clearly ~~appears~~ establishes from

specific facts shown by affidavit or other statement under oath that:

(1) immediate, substantial, and irreparable harm will result to the party seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction;

(2) the party seeking the order is likely to succeed on the merits;

(3) the injury done to the non-moving party by granting the order is less than the injury to the moving party that would result from refusing to grant the order; and

ALTERNATIVES (A)(1) AND (A)(2)

(4) the public interest **[will be served][will not be harmed]** by granting the order.

ALTERNATIVE (B)

(4) **granting the order is not contrary to the public interest.**

Cross reference: See Fuller v. Republican Cent. Comm., 444 Md. 613, 635-636 (2015). **For an exception pertaining to governmental parties, see State Dep't v. Baltimore County, 281 Md. 548, 557 (1977).**

. . .

Source: This Rule is derived from former Rules BB72, 73, and 79, and the 1987 version of Fed. R. Civ. P. 65 (b).

Rule 15-504 was accompanied by the following Reporter's note.

Proposed amendments to Rule 15-504 clarify the standard for granting a

temporary restraining order. In Fuller v. Republican Cent. Comm., 444 Md. 613 (2015), the Court of Appeals addressed the appropriate standard for evaluating a temporary restraining order. The Court held that a party seeking a temporary restraining order must show the existence of immediate, substantial, and irreparable harm, as required by Rule 15-504 (a), and satisfy the four-factor test for interlocutory injunctions enunciated in Dep't of Transp. v. Armacost, 299 Md. 392, 404-405 (1984).

Subsection (a)(1) contains the requirement currently set forth in section (a) pertaining to granting temporary restraining orders. This covers one of the four factors recognized in Fuller. The remaining three factors are set forth in subsections (a)(2)-(4). The public interest factor in subsection (a)(4) contains multiple phrasing options.

The addition of the cross reference following section (a) highlights the Fuller opinion and an exception for governmental parties identified in State Dep't v. Baltimore County, 281 Md. 548, 557 (1977).

An alternate version of Rule 15-504 with the word "HANDOUT" at the bottom was also provided to the Committee prior to the meeting for consideration.

MARYLAND RULES OF PROCEDURE

TITLE 15 - OTHER SPECIAL PROCEEDINGS

CHAPTER 500 - INJUNCTIONS

AMEND Rule 15-504 by expanding section (a) to require examination of and appropriate findings regarding the four factors for granting an interlocutory

injunction and by adding a cross reference following section (a), as follows:

Rule 15-504. TEMPORARY RESTRAINING ORDER

(a) Standard for Granting

A temporary restraining order may be granted only if (1) it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the party seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction, and (2) the court examines and makes appropriate findings regarding: (A) the likelihood that the moving party will succeed on the merits; (B) the "balance of convenience" determined by whether greater injury would be done to the non-moving party by granting the injunction than would result from its refusal; (C) whether the moving party will suffer irreparable injury unless the injunction is granted; and (D) the public interest.

Cross reference: See Fuller v. Republican Cent. Comm., 444 Md. 613, 635-636 (2015). For an exception pertaining to governmental parties, see State Dep't v. Baltimore County, 281 Md. 548, 557 (1977).

. . .

Source: This Rule is derived from former Rules BB72, 73, and 79, and the 1987 version of Fed. R. Civ. P. 65 (b).

The handout version of Rule 15-504 was accompanied by the following Reporter's note.

Proposed amendments to Rule 15-504 (a) clarify the standard for granting a temporary restraining order. In Fuller v.

> Republican Cent. Comm., 444 Md. 613 (2015), the Court of Appeals addressed the appropriate standard for evaluating a temporary restraining order. The Court held that a party seeking a temporary restraining order must show the existence of immediate, substantial, and irreparable harm, as required by Rule 15-504 (a), and satisfy the four-factor test for interlocutory injunctions enunciated in Dep't of Transp. v. Armacost, 299 Md. 392, 404-405 (1984).
>
> The addition of the cross reference following section (a) highlights the Fuller opinion and an exception for governmental parties identified in State Dep't v. Baltimore County, 281 Md. 548, 557 (1977).

Mr. Frederick explained that Linda Schuett wrote a letter to the Specific Remedies Subcommittee pointing out that Rule 15-504 did not fully capture the standard that must be met for the court to grant a temporary restraining order and was inconsistent with case law. He said that Ms. Bernhardt was involved in *Fuller v. Republican Central Committee*, 444 Md. 613 (2015), one of the recent cases on the issue, and asked her to explain further. Ms. Bernhardt said that the argument made in *Fuller* and in a subsequent case was that the rule only required the proponent of the temporary restraining order to demonstrate that immediate, substantial, and irreparable harm will result if the order is not granted. The Court of Appeals held that the moving party must also prove the factors necessary to obtain a preliminary injunction. Ms. Bernhardt said that the intent of

the amendment is to clarify the standard to judges and parties. She indicated that she favored "Alternative A" in the proposed rule in the meeting materials, requiring the proponent to prove that the public interest will be served by granting the order.

Ms. Haines asked for Ms. Bernhardt's opinion on the handout version of the Rule, which requires the court to "examine and make appropriate findings regarding" the four injunction factors. Ms. Bernhardt said that the revised language does not accurately codify case law because the burden is on the moving party to establish the existence of the factors. Debra Gardner, legal director of the Public Justice Center, told the Committee that she does not object to the intent to codify *Fuller*, but disagreed with Ms. Bernhardt's conclusion about the state of the law. She said that cases like *Department of Transportation v. Armacost*, 299 Md. 392 (1984), and *Lerner v. Lerner*, 306 Md. 771 (1986), are still good law. She urged the Committee to adopt the language in the handout, refrain from using the phrase "balance of convenience" but instead "balance of hardships," and add *Armacost* and *Lerner* to the cross reference. Ms. Bernhardt said that in *Ademiluyi v. Egbuonu*, 466 Md. 80, 115 (2019), the Court held last year that the factors are conjunctive and the burden of establishing all the factors for an injunction falls on the moving party. Mr. Laws said he favored "Alternative B" in the meeting materials version of the Rule because a case

between private parties would not necessarily be able to argue an order will be in the public interest. But he added that he would favor the handout version of the rule. Mr. Marcus agreed with Mr. Laws' preference for "Alternative B" but suggested the Rule requires further study in the subcommittee. Mr. Marcus moved to remand the issue to the Specific Remedies Subcommittee and Del. Dumais seconded. Judge Davey commented that when he considers temporary restraining orders, he deals with self-represented parties and he uses a form order listing the requirements – including the four injunction factors – to indicate what has and has not been met. He said that it is helpful for all involved to know the factors being considered. The Chair asked for further discussion on the motion to remand the Rule to the subcommittee. The Committee approved the motion by majority vote.

Agenda Item 5. Consideration of proposed amendments to Rule 2-704 (Attorneys' Fees Allowed by Contract as an Element of Damages).

Judge Davey presented Rule 2-704, Attorneys' Fees Allowed by Contract as an Element of Damages, for the Committee's consideration.

AMEND Rule 2-704 by allowing the court to order the deferment of presentation of evidence in subsection (d)(1), as follows:

RULE 2-704. ATTORNEYS' FEES ALLOWED BY CONTRACT AS AN ELEMENT OF DAMAGES

(a) Scope of Rule

This Rule applies to a claim for attorneys' fees in an action in a circuit court that are allowed by a contract as an element of damages for breach of that contract. It does not apply to a claim for an award of attorneys' fees to the prevailing party pursuant to a fee-shifting provision in a contract.

Cross reference: See Rule 2-705 for the procedure where a contract provides for an award of attorneys' fees to a prevailing party in the litigation.

(b) Pleading

A party who seeks attorneys' fees from another party pursuant to this Rule shall include a claim for such fees in the party's initial pleading or, if the grounds for such a claim arise after the initial pleading is filed, in an amended pleading filed promptly after the grounds for the claim arise.

(c) Scheduling Conference and Order

If a claim for attorneys' fees is made pursuant to this Rule, unless the court orders otherwise, the court shall conduct a scheduling conference in conformance with Rule 2-703 (c).

Committee note: Unlike a claim under Rule 2-703 based on fee-shifting permitted by law, where attorneys' fees are an element of damages for breach of a contractual obligation, any award must be included in the judgment entered on the breach of contract claim. In complex cases, however, where the evidence regarding attorneys' fees is likely to be extensive, it may be expedient to defer the presentation of such evidence and resolution of that claim until after a verdict or finding by the court establishing an entitlement to an award. See section (d) of this Rule. In that event, the admonition in the Committee note to Rule 2-703 (c) is especially critical--that, although the verdict or findings on the underlying cause of action should be docketed, no judgment should be entered thereon until the claim for attorneys' fees is resolved and can be included in the judgment.

(d) Presentation of Evidence

(1) Generally

~~Evidence~~ Unless the court orders otherwise, evidence in support of or in opposition to a claim for attorneys' fees under this Rule shall be presented in the party's case-in-chief and shall focus on the standards set forth in Rule 2-703 (f)(3) or subsection (e)(4) of this Rule, as applicable.

(2) Judgment by Confession

If the party seeking attorneys' fees has requested judgment by confession pursuant to Rule 2-611, evidence establishing entitlement to such fees and the reasonableness of the amount requested shall be included in the affidavit required by Rule 2-611 (a). If judgment by confession is not entered or is stricken and the action proceeds to trial, the evidence

may be submitted at trial in accordance with this Rule.

(e) Determination of Award

(1) If No Award Permitted

If a verdict returned by a jury or findings made by the court do not permit an award of attorneys' fees, the court shall include in its judgment on the underlying cause of action a denial of such an award.

(2) Trial by Court

If the underlying cause of action is tried by the court, the court shall determine whether an award of attorneys' fees is required or permitted. If the court finds that an award is required, it shall determine the amount. If the court finds that an award is permitted but not required, it shall determine whether an award should be made and, if so, the amount thereof. In determining the amount of an award, the court shall apply the standards set forth in Rule 2-703 (f)(3) or subsection (e)(4) of this Rule, as applicable.

(3) Trial by Jury

If the underlying cause of action is tried by a jury, the jury, under appropriate instructions from the court, shall determine, as part of its verdict, whether an award of attorneys' fees should be made to a party based on a breach of the contract by another party and the amount of such an award. If an award is made, on motion by any party affected by the award, the court, applying the standards set forth in Rule 2-703 (f)(3) or subsection (e)(4) of this Rule, as applicable, shall determine whether the amount of the award is reasonable and, if not, shall modify the award accordingly. This determination does not preclude any other relief the court may grant under Rules 2-532, 2-533, or 2-535.

Committee note: This subsection preserves to the jury, in a breach of contract case where attorneys' fees are part of the alleged damages, the right to determine whether an award should be made and, if so, in what amount, but preserves to the trial court the right to determine whether the award is reasonable. Under this approach, in the event of an appeal, the appellate court will have available both the jury's and the trial court's determination of reasonableness.

(4) Limited Evidence Permitted

If the claim for an award of attorneys' fees does not exceed the lesser of 15% of the principal amount found to be due or $4,500, the court need not require evidence on all of the factors set forth in Rule 2-703 (f)(3) if the party claiming the award produces evidence otherwise sufficient to demonstrate that the amount claimed is reasonable and does not exceed the amount that the claiming party has agreed to pay that party's attorney. The evidence shall include at a minimum:

(A) a detailed description of the work performed, broken down by hours or factions thereof expended on each task;

(B) the amount or rate charged or agreed to in writing by the requesting party and the attorney; and

(C) the attorney's customary fee for similar legal services.

Committee note: Section (e) follows the approach set forth in Monmouth Meadows v. Hamilton, 416 Md. 325 (2010), for contractual fee-shifting cases generally. Subsection (e)(4) is intended to permit the court to excuse the need to consider all of the Rule 2-703 (f)(3) factors where the claim for attorneys' fees does not exceed the lesser of 15% of the amount due or

$4,500. Fees in those limited amounts are common in consumer transactions and have been found reasonable by the General Assembly in some of those settings. See Code, Commercial Law Article, §§ 12-307.1 (Consumer Loans) and 12-623 (Retail Installment Sales).

(f) Part of Judgment

An award of attorneys' fees shall be included in the judgment on the underlying cause of action but shall be separately stated.

Source: This Rule is new.

Rule 2-704 was accompanied by the following Reporter's note.

The proposed amendment to Rule 2-704 (d)(1) provides the court with discretion in scheduling the presentation of evidence for an attorneys' fees award. An attorney raised the issue of an inconsistency in the Rule between section (c) and the Committee note following the section, which contemplate deferring the presentation of evidence on attorneys' fees until after the fact finder has ruled on the underlying cause of action, and subsection (d)(1), which requires the evidence be presented in the party's case-in-chief.

The amendment allows the court to order the evidence be presented at a time other than during the case-in-chief and is consistent with the Committee note following section (c).

Judge Davey explained that the proposed amendment to Rule 2-704 is to correct an inconsistency between Rule 2-704, which

applies to attorneys' fees related to a contract dispute, and Rule 2-703, which applies to attorneys' fees authorized by statute. In Rule 2-703, the judge has discretion as to when attorney fee evidence should be presented – in the case in chief or after a verdict – and Rule 2-704 does not include that discretion. The proposed amendment in section (d) gives the court the authority to decide when the evidence should be heard. He noted that in a case where attorneys' fees are part of the damages, they must be presented in the case in chief, but other than that exception, the amendment provides the same discretion as Rule 2-703. The Chair asked for comment on the Rule, which was approved by the subcommittee. There being no motion to amend or reject the proposed Rule, it was approved as presented.

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