N E W J E R S E Y

J U D G E S S E M I N A R

A d v a n c e R e a d i n g M a t e r i a l

Nassau Inn Princeton

September 3 and 4, 1964

Table of Contents

V. JUVENILE AND DOMESTIC RELATIONS COURT PROBLEMS

I. PROBLEMS IN CIVIL CASES - BEFORE TRIAL

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1. Changes in Discovery and Pretrial Rules Effective September 9, 1964

4:23-2. When to Serve Interrogatories

(a) After commencement of the action, interrogatories may be served without leave of court [, except that if service is made by the plaintiff upon any defendant within 10 days after service upon him of the summons and complaint, leave of court granted with or without notice must be obtained] ; except that leave of court, granted with or without notice, must be obtained where such service is made by the plaintiff upon any defendant within 10 days after service upon the defendant of the summons and complaint.

(b) Initial interrogatories must be served within 40 days after issue joined as to each defendant.

(c) Interrogatories shall not be used for [the] purpos es of delay.

4:23-6. Service of Answers; Sanctions or Failure to Answer

[The party upon whom the interrogatories are served shall serve on the party submitting the interrogatories the original and all but one of the copies of the interrogatories served upon him together with the answers thereto. The answers shall be served within 20 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time.]

(a) The party receiving interrogatories shall serve fully responsive answers to each interrogatory upon the party propounding them within 60 days after service of such interrogatories upon him.

(b) Such answers shall be served together with the original and all but one copy of the respective interrogatories to which the answers apply.

(c) The party submitting the interrogatories shall serve copies of the interrogatories and the answers thereto on all other parties as provided in Rule 4:5-1.

(d) The court may enlarge or shorten the time in which service of the answers must be made under paragraph (a) on formal motion and timely notice thereof within such 60-day period, and for good cause shown. Consent or mailed orders enlarging the time are prohibited.

(e) If timely answers are not served, and no formal motion for extension under paragraph (d) has been made, the complaint, counterclaim or answer of the party failing to comply with this Rule shall be dismissed or suppressed by the court, upon the filing of an affidavit by the party entitled to answers setting forth such failure. The affidavit shall be accompanied by, and have attached to it the order of dismissal or suppression. A copy of all such orders with affidavits attached shall be served on the delinquent party within 7 days after the date thereof.

(f) On formal motion the court may vacate its order dismissing a complaint, counterclaim or suppressing an answer or defense within 30 days after service of such order, provided fully responsive answers to the propounded interrogatories are presented and the delinquent party pays $50 costs to the clerk of the county of venue.

4:23-8. Objections to Interrogatories

Within 10 days after service of interrogatories, the party upon whom they are served may serve a notice of motion to strike out any interrogatories, setting out the grounds of objection. The motion shall be brought on for hearing at the earliest practicable time.

Answers to interrogatories to which objection is made shall be deferred until the objections are determined. Any interrogatories not stricken out shall be answered in the form hereinabove provided, within [5 days after the determination of the motion] the unexpired period of the 60 days referred to in Rule 4:23-6(a) that remained when the notice of motion was served or within such time as the court shall direct.

The prevailing party shall present the order forthwith, and, regardless of Rule 4:55-1, the time for furnishing the necessary answers to the disputed interrogatories, if longer than the remainder of the 60 days specified by Rule 4:23-6(a) is allowed by the court, shall begin to run from the date of grant of the motion whether oral or by memorandum decision, and not from the date of entry of the order. If the order is presented and filed on a day other than at the grant of the motion, the date of grant of the motion shall be specified therein.

For frivolous failure or failure for purposes of delay to answer interrogatories which resulted in formal motion to compel answers or to strike questions, the court in its discretion may impose such costs as are just and proper.

4:23-12. Amendment of Answers

If the party furnishing answers to interrogatories [shall] obtains information [subsequent to the pretrial conference] which renders such answers incomplete, amended answers shall be served not later than 20 [10] days prior to the date [day] fixed for trial. Thereafter amendments may be allowed only for extraordinary or compelling reasons and to prevent manifest injustice, and upon such terms as the court may direct. In no case shall amendments be allowed at the trial where it appears that the evidence sought to be introduced was known to the party seeking such leave, more than 10 days prior to trial.

RULE 4:28. TIME FOR COMPLETION OF DISCOVERY AND OTHER PRETRIAL PROCEEDINGS

(a) All proceedings referred to in Rules 4:16-1 to 4:27-4 inclusive, except proceedings under Rules 4:17-1 to 4:17-4 inclusive, shall be completed as to each defendant within [100] 150 days of the date of service of the original complaint on him, unless [for good cause shown the period is extended by order of the court] on notice, in open court, for good cause shown, an order is entered before the expiration of said period extending the time for such proceedings to a date specified in said order.

(b) No motion for the relief provided by the following rules may be granted in any action unless it is returnable before the expiration of the time limited for discovery in said action by paragraph (a) unless on notice, in open court, for good cause shown, an order is entered before the expiration of said period extending the time for such proceedings to a date specified in said order:

(1) Motion for leave to file a third-party complaint under Rule 4:14;

(2) Motion for joinder of additional parties under Rules 4:15-1, 4:32-1 or 4:34; and

(3) Motion for consolidation under Rule 4:43-1.

(c) [(b)] The provisions of this Rule shall not preclude the further use of discovery proceedings, on motion and order of the court [either before or] after the entry of judgment.

(d) The time limitation of this Rule shall not apply to timely demands for admission under Rule 4:26-1.

4:29-1. Pretrial Conferences

(a) In every contested action except an action for divorce, nullity of marriage and only as may be practicable in an action brought in a summary manner under Rule 4:85, and except in automobile negligence cases where pretrial conference shall be held only at the request of any party or the court, the court shall direct the attorneys for the parties to appear before it for a conference in open court. [to:

(1) state and simplify the issues to be litigated and to amend the pleadings accordingly;

(2) obtain admissions of fact and of documents that will avoid unnecessary proof;

(3) limit by agreement the number of expert witnesses;

(4) specify all damage claims as of the date of the conference;

(5) consider such other matters as may aid in the disposition of the action.]

(b) [At the pretrial conference it shall first be determined if the case is to be transferred to the county district court as provided in Rule 4:3-4. If the case is to be so transferred an appropriate order of transfer shall be entered and it shall be discretionary with the court as to whether the conference is to be continued and a pretrial order entered.] If the case is not to be transferred to the county district court as provided in Rule 4:3-4, the pretrial conference shall [continue] proceed and the court shall make a pretrial order reciting the action taken at the conference, which order shall recite specifically:

(1) A concise descriptive statement of the nature of the action. (For example: Pedestrian-automobile, intersection, negligence, personal injury action; pedestrian, personal injury, public sidewalk, negligence, nuisance action; landlord-tenant, common hallway, personal injury, negligence action; action for breach of contract, action on a book account; action for possession of land; action under the Mechanics Lien Act; action for specific performance; etc.).

(2) [(4)] The admissions or stipulations of the parties with respect to the cause of action pleaded by plaintiff or defendant-counterclaimant.

(3) [(2)] The factual and legal contentions of the plaintiff as to the liability of the defendant.

(4) [(3)] The factual and legal contentions of the defendant as to non-liability and affirmative defenses.

(5) All claims as to damages and the extent of injury, and admissions or stipulations with respect thereto, and this shall limit the claims thereto at the trial. Where such claims have been disclosed in [depositions or] answers to interrogatories they may be incorporated by reference.

(6) Any amendments to the pleadings made at the conference [or fixing] and, where necessary, the time fixed within which such amended pleadings shall be filed. Except when ordered on the court's own motion, no amendments of pleadings shall be granted at the conference which would justify an adverse party in demanding additional time for investigation and further discovery, and result in delay of the trial.

(7) A specification of the legal issues [raised by the pleadings as amended or to be amended which are] to be determined at the trial. Such specification shall include all special evidence problems to be determined at trial. The pretrial judge shall also specify any legal issues, not raised by the pleadings, which occur to him, with an appropriate notation if the attorney concerned does not wish to advance such issues.

(8) A specification of the legal issues raised by the pleadings which are abandoned [.] or otherwise disposed of. No legal issue should be ruled upon at the pretrial conference as to which there is any doubt or reasonably arguable question. If a ruling is sought on any such legal issue, the matter should be set forth with directions that formal motion be made thereon at a later time, before the pretrial judge, if possible.

(9) A list of the exhibits marked in evidence by consent.

(10) If leave is granted [to make any further use of discovery proceedings by way of additional interrogatories, depositions or otherwise, such fact shall be stated as well as any time limit imposed for the completion thereof. Such leave at this stage is undesirable and should be granted only in the most exceptional cases. Any additional discovery must be completed prior to the scheduled trial date so that the disposition of the case will not be delayed] for an additional physical examination, such fact

shall be stated as well as any time limit imposed for the completion thereof. Such additional examination must be completed sufficiently prior to the scheduled trial date so that the trial of the case will not be delayed.

(11) Any limitation on the number of expert witnesses.

(12) Any direction with respect to the filing of briefs. Request by the court for briefs should be included where the resolution of any general legal problem is not clear, or where special problems of evidence exist, as noted by the attorneys or on inquiry by the pretrial judge.

(13) When a consolidated action, or an action which includes a third-party suit, a counterclaim, a cross-claim, or where there are several plaintiffs or defendants separately represented by counsel, the order of opening and closing to the jury at the trial.

(14) Any other matters which have been agreed upon in order to expedite the disposition of the [matter] case.

(15) In the event that a particular member or associate of a firm is to try a case, or if outside trial counsel is to try the case, the name must be specifically set forth. No change in such designated trial counsel shall be made without leave of court if such change will interfere with the trial schedule. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar.

(16) [(15)] The estimated length of the trial.

(17) [(16)] When the case shall be placed on the weekly call.

Such order shall be signed by the court and attorneys for the parties, and when entered, becomes part of the record, supersedes the pleadings where inconsistent therewith, and controls the subsequent course of action

unless modified at or before the trial or pursuant to Rule 4:15-2 to prevent manifest injustice. The matter of settlement may be discussed at the sidebar, but it shall not be mentioned in the order.

(c) [For failure to appear at a pretrial conference or to participate therein or to prepare therefor, the court in its discretion may make such order with respect to the imposition of costs and counsel fees and with respect to the continued prosecution of the cause, including dismissal, or of the defense thereof, as is just and proper.] Failure to prepare for, appear at, or fully participate in, a pretrial conference, unless good cause is shown for any such failure, is an improper interference with the proceedings of the court. For any such failure the court shall order any one or more of the following: (1) the payment by the delinquent attorney or delinquent party of costs, in such amount as the court shall fix, to the clerk of the county in which the action is pending or to the adversary party; (2) the payment by the delinquent attorney or delinquent party of counsel fees and expenses to the adversary party; (3) the dismissal of the complaint, cross-claim or counterclaim, or the striking of the answer and the entry of a judgment by default; or (4) such other action as it deems advisable.

[(d) Illustrative forms of notice of pretrial hearing and of pretrial orders to be followed are set forth in the Appendix of Forms.]

(d) [(e)] Whenever trial briefs are ordered at a pretrial conference the pretrial order shall specify to which judge or other court official they shall be submitted and within what time. Where it appears that the trial will be presided over by a judge other than the pretrial [conference]

judge, the latter shall file a copy of the pretrial order with the Assignment Judge or such other person as he may designate. It shall be the responsibility of the Assignment Judge in such cases to make appropriate arrangements so that it may be determined after the briefs are received whether the action is one which requires study in advance by the trial judge. If so, a day certain shall be fixed and the action assigned to a particular trial judge for disposition, such assignment to be at least 2 days in advance of the date so fixed.

(e) Notwithstanding the provisions of (d) hereof, and even though a continuance is ordered during the conference because of inadequate preparation by the parties of any matter, in the absence of some unusual circumstance the pretrial judge shall retain the case assigned to him until the completion of the conference. The Assignment Judge shall, wherever possible, assign the case for trial and all preliminary motions to the pretrial judge.

4:29-2. Time for Mailing Notices

(a) Except in actions in lieu of prerogative writ, the county clerk shall give [to all attorneys] at least [2 weeks'] 30 days notice [.] [by mail] of the pretrial conference to all parties or their attorneys by mail. Subject to paragraph (b), the notice shall not be mailed until [100] 150 days after [the] service of the original complaint upon the defendant [,]; except that [upon application of a party with or without consent of the other party] the court may direct the earlier mailing of the notice, either on its own motion or for good cause on the application of a party, with or without

consent of the adverse party. [shown expressly stated in the order. Seventy days after the service of the complaint the county clerk shall mail to the parties or their attorneys a preliminary notice advising them that their case may be scheduled for pretrial shortly.]

(b) Notice of pretrial conference in actions in lieu of prerogative writ shall be mailed to the attorneys for the parties within 10 days of the joinder of issue. When discovery is not complete, timely consent orders may be submitted postponing the conference for a stipulated period not greater than the time limitation set forth in Rule 4:28(a).

(c) Except in actions in lieu of prerogative writ and in Chancery Division actions where the judge specifies otherwise, the county clerk shall mail a preliminary notice in the form required by Rule 4:29-2A to all parties or their attorneys 120 days after service of the original complaint upon the defendant, advising them that the case may be scheduled for pretrial shortly. In Chancery Division actions the judge to whom it is assigned, after advising the county clerk, may utilize his own form of preliminary notice to be sent to all parties or their attorneys at such time as he shall specify.

4:29-2A. Contents of Preliminary Notice

(a) The preliminary notice required in Rule 4:29-2(c) shall state that:

(1) The attorneys for the respective parties making or defending against personal injury or damage claims shall send to the Assignment Judge of the county of venue or other named judge, within 30 days of receipt of such notice, a statement of such claims by the proponent thereof and a

statement by the adversary of his position with respect to such claims; that copies of the medical report or reports on which the parties rely shall be furnished with such statements; and that in all other actions, within 30 days of receipt of such notice, statements shall be furnished to the Assignment Judge by the proponent party and the adversary party with respect to the claim for damages.

(2) An automatic transfer of the case to the county district court, subject to Rule 4:3-4(b), will result from failure to file statements of injury or damage, and copies of medical reports, within the 30-day limit. When one party files the medical report or reports required by paragraph (1) hereof, and the other party fails to do so, appropriate costs shall be imposed by the court, or in its discretion such other appropriate penalties as may be just.

(3) If the action is one for automobile negligence and a pretrial conference is desired by any party, such party shall include a request therefor in the statement required by paragraph (1).

(4) The attorneys shall be required to advise the court, as part of the injury and damage statements, if the complexities of the case will require more than 30 minutes for the pretrial conference.

(5) The attorneys shall advise the court as to the possibilities of settlement of the case; and that, on request of the parties to the Assignment Judge or pretrial judge, an early conference will be arranged to discuss settlement.

(b) When the Assignment Judge or other judge designated in the preliminary notice has received the papers mentioned in paragraph (a), he shall review them ex parte and determine whether a transfer to the county district court should be ordered. On affirmative finding, he shall sign such order immediately and send copies thereof to all parties. Such order shall be final, subject to Rule 4:3-4(b).

4:29-2B. Contents of Notice of Pretrial Conference

The notice of pretrial conference required in Rule 4:29-2 shall state that:

(a) The attorneys in the case shall be prepared to submit a memorandum statement and to discuss settlement as required under Rule 4:29-3;

(b) The attorneys shall be prepared to meet the provisions of Rule 4:29-1;

(c) Applications for adjournment shall be made within 10 days from receipt of the notice;

(d) No adjournment shall be granted thereafter without appearance in court and good cause shown;

(e) Except for extraordinary cause no application for adjournment shall be considered unless made at least 5 days prior to the date fixed for conference;

(f) The Assignment Judge will consider applications for a special pretrial hearing in complicated or involved cases;

(g) The attorneys shall indicate whether settlement possibilities are favorable, and whether a special settlement day would be productive, if assigned by the court in advance of the conference,

4:29-3. Conference of Attorneys; Pretrial Memoranda; Preparation to Discuss Settlement

(a) The attorneys shall confer before the date assigned for the pretrial conference to reach agreement upon as many matters as possible.

(b) Each attorney shall prepare and submit to the court [at the pretrial conference] a memorandum statement of the matters agreed upon, and of the factual and legal contentions to be made on behalf of his client [as respects the] with respect to those issues remaining in dispute. [, including specifically a detailed statement as to damages for the purpose of assisting the pretrial judge in determining whether the action should be transferred to the county district court pursuant to Rule 4:3-4.] Such memoranda shall be submitted at the pretrial conference in all actions, except actions in the Chancery Division and actions in lieu of prerogative writ in the Law Division. In all Chancery Division actions and actions in lieu of prerogative writ in the Law Division such memoranda shall be submitted 3 days prior to the pretrial conference.

(c) Every memorandum shall certify at the foot thereof that:

(1) The case is ready for pretrial conference;

(2) On a specified date, the attorneys for the parties conferred both as to the factual and legal issues, and as to settlement;

(3) The attorney to appear at the pretrial conference is fully familiar with the case and all discovery that has been engaged in, and is prepared for and authorized to participate in the pretrial conference within the spirit of the Rules.

(d) The memorandum shall refer to any unusual problems of evidence which may arise in the case, so that the pretrial judge may, at the pretrial conference, direct submission of briefs on such problems.

(e) [(b)] Counsel for all of the parties should come to the pretrial conference prepared to discuss settlement, and should have their clients or their authorized representative available, in person or by telephone, for this purpose.

4:29-3A. When No Pretrial Conference Held: Designation of Trial Counsel and Submission of Trial Memorandum

(a) In those cases in which no pretrial conference is held, counsel shall, in writing, prior to the weekly call, notify the Assignment Judge that a particular member or associate, or outside counsel is to try the case, and set forth the name specifically. No change in such designated counsel shall be made without leave of court if such change will interfere with the trial schedule. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar.

(b) At the outset of the trial of every automobile negligence case in which no pretrial conference has been held, each party shall submit to the trial judge a memorandum of his factual contentions and the legal issues to be considered and determined.

4:29-4. Scheduling of Pretrial Conferences

(a) Not more than [3 pretrial conferences of] 2 cases shall be noticed for pretrial conferences within the same hour before the same judge.

(b) The county clerk of each county is charged with responsibility for preparing and mailing pretrial conference notices. He shall, before preparing and mailing the notices of cases to be pretried on a particular day, analyze the list, and to the extent possible notice all cases of the same attorney or firm before the same judge and consecutively. [Where there is an integrated list,] Assignments shall be made to Superior and County Court judges without regard to the court in which the action was instituted.

(c) [(f) The provision of this rule shall not preclude] The Assignment Judge [of any county from scheduling] shall schedule pretrial conferences at such times as may be necessary [either] to maintain a full trial calendar and [or] to utilize fully the services of available judges.

4:29-5. Pretrial Conferences in Open Court; Settlement Conferences in Chambers

All pretrial conferences shall be conducted in open court, [but the judge may conduct such conferences at counsel table] and the judge shall conduct the pretrial conference in his judicial robes and from the bench. Settlement conferences may be held in chambers.

7:6-4A. Interrogatories in Motor Vehicle Collision Cases

(a) The provisions of Rules 7:6-4A, 7:6-4B, 7:6-4C, and such provisions of Rule 4:23 as are not inconsistent therewith, shall apply to all motor vehicle collision cases.

(b) In motor vehicle collision cases a defendant, or a plaintiff defending a counterclaim, who wishes to propound interrogatories may only do so by inserting in a separate paragraph, immediately following the signature on the appearance or answer to the complaint or counterclaim, a demand that the party or parties upon whom such demand is made answer all or any (specifying which if less than all) of the questions in County District Court Form 16A, printed in the Appendix of Forms, if claim is made for damages resulting from personal injury, and County District Court Form 16B, printed in the Appendix of Forms, if claim is made for damages to property. Each party upon whom such demand is made shall, within 30 days from the date of service of such appearance or answer to the complaint or counterclaim, serve answers to such questions upon a form duplicating County District Court Form 16A or 16B, or both, with adequate space provided between the questions for the answers.

(c) In motor vehicle collision cases a claimant who wishes to propound interrogatories may only do so by inserting in a separate paragraph, immediately following the signature on the complaint or counterclaim, a demand that the party or parties upon whom such demand is made answer all or any (specifying which if less than all) of the questions in County

District Court Form 16C, printed in the Appendix of Forms. Each party upon whom such demand is made shall, within 40 days from the date of the service of the appearance or answer to the complaint or counterclaim, serve answers to such questions upon a form duplicating County District Court Form 16C, with adequate space provided between questions for the answers.

7:6-4B. Additional Interrogatories in Motor Vehicle Collision Cases

Additional interrogatories shall not be served in motor vehicle collision cases without an order of the court. Such an order shall be allowed only for good cause and if application therefor is timely made, on notice, and shall be on such terms as the court shall require.

7:6-4C. Extension of Time to Answer Interrogatories in Motor Vehicle Collision Cases

The time to answer interrogatories in motor vehicle collision cases cannot be extended except by order of the court. Such an order shall be allowed only for good cause and if application therefor is timely made, on notice, and shall be on such terms as the court shall require.

7:6-6. Time for Completion of Discovery Proceedings

The provisions of Rule 4:28(a) shall not apply to proceedings in the county district courts[.], except that in a case transferred to the county district court pursuant to Rule 4:3-4 the parties shall have only as much time after the date of transfer to complete discovery as they would have been entitled to under Rule 4:28(a) had the case not been transferred.

PRELIMINARY NOTICE OF PRETRIAL CONFERENCE

_____ Court

Case No. _____

_____ vs. _____

Please take NOTICE that the above case will be set down for pretrial conference in the near future. The purpose of this NOTICE is to make certain that all discovery, pleadings, etc. will be complete prior to the conference date.

1. So that the court may determine whether it is likely that the recovery therein will exceed the jurisdictional limit of the County District Court, the attorney for the party making the claim shall, within 30 days of receipt of this NOTICE, submit to the Assignment Judge (a) in actions other than personal injury or property damage actions, a statement of the damages claimed; (b) in personal injury or property damage actions a statement showing the details of the alleged injuries and special damages claimed, together with copies of the medical reports on which the party relies. Within the same time, the attorney for the adverse party shall send to the Assignment Judge a copy of his medical reports. Medical reports will be returned to counsel and stamped, self-addressed envelopes should be enclosed for that purpose.

Upon receipt of the statement and the medical reports, the court will determine whether the case is to be transferred to the County District

Court and, if it is, will enter an order providing for such transfer unless, pursuant to Rule 4:3-4(b), a motion objecting to such transfer is filed within 7 days after the order is entered.

Failure of the parties to submit the injury and damage claims statement or the statement required in any other action within the time limited will result in automatic transfer of the case to the County District Court in accordance with Rule 4:3-4. Failure of defendant to submit his medical examination report or reports may result in imposition of costs or, in the discretion of the court, suppression of any medical proof in possession of defendant at the time referred to in this NOTICE.

2. If this case is a complicated one, please advise if pretrial conference will require more than 30 minutes.

3. Please advise also as to possibility of settlement. If reasonable possibility exists, conference for settlement purposes may be requested.

4. If this is an automobile negligence case, and a pretrial conference is desired by any party, such party shall include a request therefor in the statement required by paragraph 1 hereof (see Rule 4:29-1(a) making pretrial conferences optional in automobile negligence cases). If a pretrail conference is neither requested nor directed by the court, none will be held and, if this case is not transferred to the County District Court, you will receive, at about the same time the pretrial conference would normally be held, a notice advising you of the weekly call on which the case will be placed.

5. All discovery must be completed within the time limited by the rules. Failure to have completed discovery will not be recognized as a

reason for adjournment of a scheduled pretrial conference or a weekly call.

_____, Assignment Judge

by _____
County Clerk

DISTRICT COURT Form 16A

UNIFORM INTERROGATORIES BY A DEFENDANT IN A MOTOR VEHICLE COLLISION CASE INVOLVING PERSONAL INJURIES

(Caption)

1. State:

(a) Full name

(b) Present address

(c) Date of birth

(d) Marital status at time of accident

2. State the following facts with respect to the collision:

(a) Date

(b) Time

(c) Condition of weather

(d) Condition of visibility

(e) Condition of roadway

3. Give a detailed description of the nature, extent and duration of any and all injuries.

4. Give a detailed description of the injury or condition claimed to be permanent, together with all present complaints.

5. If confined to hospital, state name and address of same, and the date of admission and discharge therefrom.

6. If X-rays were taken, state the name and address of the place where they were taken, the name and address of the person who took them, the date each was taken and what it disclosed.

7. If treated by doctors, state the name and present address of each doctor, the dates and places where treatments were received and the date of last treatment.

8. If still being treated, state the name and address of each doctor rendering treatment, where and how often treatment is received and the nature thereof.

9. If a previous injury, disease, illness or condition is claimed to have been aggravated, accelerated or exacerbated, specify in detail the nature of each and the name and present address of each doctor, if any, who rendered treatment.

10. If employed at time of accident, state:

(a) The name and address of the employer.

(b) Position held and nature of work performed.

(c) Average weekly wages for past year.

(d) Period of time lost from employment, giving dates.

(e) Amount of wages lost, if any.

11. If other loss of income, profit or earnings is claimed:

(a) State total amount of the loss.

(b) Give a complete detailed computation of the loss.

(c) State nature and source of loss of income, profit and earnings and date of deprivation thereof.

12. If there has been a return to employment or occupation, state:

(a) Name and address of present employer.

(b) Position held and nature of work being performed.

(c) Present weekly wages, earnings, income or profit.

13. Itemize in complete detail any and all moneys expended or expenses incurred for hospitals, doctors, nurses, X-rays, medicines, care and appliances and state the name and address of each payee and the amount paid or owed each payee.

14. Itemize any and all other losses or expenses incurred not otherwise set forth.

15. State the names and addresses of all persons who have knowledge of any relevant facts relating to the case.

16. State the names and addresses of any and all proposed expert witnesses.

17. State the name and address of:

(a) The operator of your vehicle.

(b) The owner of your vehicle.

(c) Each of the other occupants of your vehicle.

(Note: The term "your vehicle" in this and other questions herein has reference to the vehicle in which you were an occupant at the time of the collision.)

18. State in what municipality, county and state the collision occurred.

19. State on what street, highway, road or other place (designate which) and in what general direction (north, south, east or west) your vehicle was proceeding immediately prior to the collision. (You may include a sketch for greater clarity.)

20. With respect to fixed objects at the location of the collision, state as nearly as possible the point of impact. If you included a sketch, place an X thereon to denote the point of impact.

(Note: The term "point of impact" as used in this and other questions has reference to the exact point on the street, highway, road or other place where the vehicles collided.)

21. Describe in detail your version of how the collision occurred.

22. If you allege a violation of statute as a factor to be considered in establishing negligence, state the title, section and paragraph of the statute.

23. State whether there were any traffic control devices, signs or police officers at or near the place of the collision. If there were, describe them (i. e., traffic lights, stop sign, police officers, etc.) and state the exact location of each.

24. If the collision occurred at an uncontrolled intersection state:

(a) Which vehicle entered the intersection first.

(b) Whether your vehicle came to a full stop before entering the inersection.

(c) If your vehicle did not come to a full stop before entering the intersection, the speed of your vehicle when it entered the intersection.

25. State in terms of feet the distance between:

(a) The front of your vehicle and the point of impact at the time you first observed the other vehicle or vehicles collided with, and state the speed of your vehicle at that time.

(b) The front of the other vehicle or vehicles collided with and the point of contact at the time you first observed it or them, and state its or their speed at that time.

(c) Your vehicle and the vehicle or vehicles collided with at the time you first saw it or them.

26. State where each vehicle came to rest after the impact. Include the distance in terms of feet from the point of impact to the point where each vehicle came to rest.

27. State what part of your vehicle came into contact with what part of the other vehicle or vehicles involved.

DISTRICT COURT

Form 16B

UNIFORM INTERROGATORIES BY A DEFENDANT IN MOTOR VEHICLE COLLISION CASES INVOLVING PROPERTY DAMAGE

(Caption)

1. State whether the claimant was the sole owner of the motor vehicle involved in the alleged accident.

2. State the name and address of the person, firm or corporation, from whom the claimant purchased the motor vehicle and the date of purchase.

3. State whether the motor vehicle was new or used at the time of purchase.

4. State make, model and year of the motor vehicle.

5. State amount paid by claimant for the motor vehicle.

6. State whether the motor vehicle has been repaired since the accident.

7. If repaired, state the name and address of person, firm or corporation making the repairs.

8. If repaired, state specifically the part or parts of the motor vehicle alleged to have been damaged in the accident and furnish a copy of the repair bill.

9. State date upon which claimant authorized the repair of the motor vehicle.

10. State date on which repairs were completed.

11. State the market value of the motor vehicle immediately before the accident.

12. State the market value of the motor vehicle in its damaged condition immediately after the accident.

13. State the market value of the motor vehicle in its repaired condition.

14. State whether the motor vehicle was used in connection with claimant's business and, if so, state whether claimant was obliged to hire another motor vehicle for use in connection with his business. State the name and address of the person, firm or corporation from whom claimant hired another motor vehicle, the dates during which it was hired and the amount paid for its hire.

15. If no repairs have been made but an estimate of the said repairs has been obtained, attach a copy of the estimate to the answers to these interrogatories, and state the name and address of the person, firm or corporation who made the estimate.

16. State whether the claimant has sold or otherwise disposed of the motor vehicle.

17. If sold or otherwise disposed of, state the name and address of the person, firm or corporation to whom the motor vehicle was transferred and the date of the transfer, and the amount of consideration paid to the claimant therefor.

18. If it is alleged that the claimant incurred any other expenses or losses as a result of the alleged damage to the motor vehicle, set forth the additional alleged losses in detail, giving an itemized statement of them.

19. State the names and addresses of all persons who have knowledge of any relevant facts relating to the case.

20. State the names and addresses of any and all proposed expert witnesses.

21. State the following facts with respect to the collision:

(a) Date.

(b) Time.

(c) Condition of weather.

(d) Condition of visibility.

(e) Condition of roadway.

22. State the name and address of:

(a) The operator of your vehicle.

(b) Each of the other occupants in your vehicle.

(Note: The term "your vehicle" in this and other questions herein has reference to the vehicle in which you were an occupant at the time of the collision.)

23. State in what municipality, county and state the collission occurred.

24. State on what street, highway, road or other place (designate which) and in what general direction (north, south, east or west) your vehicle was proceeding immediately prior to the collision. (You may include a sketch for greater clarity.)

25. With respect to fixed objects at the location of the collision, state as nearly as possible the point of impact. If you included a sketch, place an X thereon to denote the point of impact.

(Note: The term "point of impact" as used in this and other questions has reference to the exact point on the street, highway, road or other place where the vehicles collided.)

26. Describe in detail your version of how the collision occurred.

27. If you allege a violation of statute as a factor to be considered in establishing negligence, state the title, section and paragraph of the statute.

28. State whether there were any traffic control devices, signs or police officers at or near the place of the collision. If there were, describe them (i. e., traffic lights, stop sign, police officers, etc.) and state the exact location of each.

29. If the collision occurred at an uncontrolled intersection state:

(a) Which vehicle entered the intersection first.

(b) Whether your vehicle came to a full stop before entering the intersection.

(c) If your vehicle did not come to a full stop before entering the intersection, state the speed of your vehicle when it entered the intersection.

30. State in terms of feet the distance between:

(a) The front of your vehicle and the point of impact at the time you first observed the other vehicle or vehicles collided with, and state the speed of your vehicle at that time.

(b) The front of the other vehicle or vehicles collided with and the point of contact at the time you first observed it or them, and state its or their speed at that time.

(c) Your vehicle and the vehicle or vehicles collided with at the time you first saw it or them.

31. State where each vehicle came to rest after the impact. Include the distance in terms of feet from the point of impact to the point where each vehicle came to rest.

32. State what part of your vehicle came into contact with what part of the other vehicle or vehicles involved.

DISTRICT COURT Form 16C

UNIFORM INTERROGATORIES BY A PLAINTIFF IN MOTOR VEHICLE COLLISION CASES

(Caption)

1. With respect to the collision referred to in the complaint filed herein:

	Underline Answer	
(a) Do you admit ownership?	Yes	No
(b) Do you admit operation?	Yes	No
(c) Do you admit agency?	Yes	No
(d) Do you admit control?	Yes	No
(e) Do you admit the date and place?	Yes	No

2. If you do not admit ownership:

(a) State the name and address of the owner.

(b) State the registration number, year, make, model and color of each motor vehicle owned by you on the date of the collision as alleged in the complaint.

3. If you do not admit operation, state the name and address of the operator.

4. If you do not admit agency and the owner was not also the operator, explain the circumstances under which the vehicle came into the possession of the operator, the purpose for which the vehicle was being used and its destination.

5. If you do not admit control:

(a) State the name and address of the one in control.

(b) If control was in another by agreement, state the names and addresses of the parties to the agreement, whether the agreement was oral or written and, briefly, the terms of the agreement.

6. If you do not admit the date and place of the collision as alleged in the complaint, state the date and place of the collision as you recall it.

7. State whether your vehicle was licensed under an Interstate Commerce Commission permit. If so licensed, state the number of such permit, the name and address of the permittee, and the name and address of the lessee or other party in control, if any.

8. State on what street, highway, road or other place (designate which) and in what general direction (north, south, east or west) your vehicle was proceeding immediately prior to the collision. (You may include a sketch for greater clarity.)

(Note: The term "your vehicle" in this and other questions herein has reference to the vehicle in which you were an occupant at the time of the collision.)

9. With respect to fixed objects at the location of the collision, state as nearly as possible the point of impact. If you included a sketch, place an X thereon to denote the point of impact.

(Note: The term "point of impact" as used in this and other questions has reference to the exact point on the street, highway, road or other place where the vehicles collided.)

10. State whether there were any traffic control devices, signs or police officers at or near the place of the collision. If there were, describe them (i. e., traffic lights, stop sign, police officers, etc.) and state the exact location of each.

11. Describe in detail your version of how the collision occurred.

12. If the collision occurred at an uncontrolled intersection state:

(a) Which vehicle entered the intersection first.

(b) Whether your vehicle came to a full stop before entering the intersection.

(c) If your vehicle did not come to a full stop before entering the intersection, state the speed of your vehicle when it entered the intersection.

13. State in terms of feet the distance between:

(a) The front of your vehicle and the point of impact at the time you first observed the other vehicle or vehicles collided with, and state your speed at that time.

(b) The front of the other vehicle or vehicles collided with and the point of contact at the time you first observed it or them and state its or their speed at that time.

(c) Your vehicle and the vehicle or vehicles collided with at the time you first saw it or them.

14. State where each vehicle came to rest after the impact. Include the distance in terms of feet from the point of impact to the point where each vehicle came to rest.

15. State what part of your vehicle came into contact with what part of the other vehicle or vehicles involved.

16. State the names and addresses of all persons who have knowledge of any relevant facts relating to the case.

17. State the names and addresses of all proposed expert witnesses.

2.

RULE 4:25A. IMPARTIAL MEDICAL EXAMINATIONS AND EXPERT TESTIMONY

4:25A–1. Scope of Rule

Rule 4:25A shall be applicable to all actions to recover damages for personal injuries or wrongful death when the nature, extent or cause of injuries or the cause of death are in dispute.

Note: Adopted July 27, 1961 to be effective September 11, 1961; amended December 9, 1963 to be effective January 2, 1964.

4:25A–2. Panel of Impartial Medical Experts

For purposes of this rule the Administrative Director of the Courts shall maintain a panel of impartial medical experts. The specialties to be represented on the panel and the number of experts in each specialty shall be determined jointly by the Medical Society of New Jersey and an Advisory Committee appointed by the Supreme Court. The experts to serve on the panel in the several specialties shall be designated by the Medical Society of New Jersey.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–3. Appointment of Impartial Medical Expert; At Pretrial or on Motion Before Trial

(a) At the pretrial conference, or prior to trial on the motion of any party or on the court's own motion, the court may consider the appointment of an impartial medical expert. For this purpose the court may require counsel to submit reports from all physicians or surgeons who have treated or examined the injured party or the decedent. If in the opinion of the court an examination of the injured person and a report thereon or a report on the cause of death by an impartial medical expert would be of material aid to the just determination of the action, the court shall order such an examination, where appropriate, and report.

(b) The court, after consultation with counsel, shall advise the Administrative Director of the Courts of the area of specialty in which an impartial medical expert is to be appointed. From the panel of experts maintained pursuant to this rule, the Administrative Director of the Courts shall furnish the court with the names of 3 experts in the indicated specialty, one of whom shall be designated by the court, after consultation with counsel, to make the examination, where appropriate, and report.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–4. Provisions of Order Appointing Impartial Medical Expert and Directing Examination and Report

The order for the appointment of an impartial medical expert and directing an examination of an injured party and report thereon or a report on the cause of death of a decedent shall, to the extent applicable:

(a) Designate the name of the impartial medical expert and his specialty; and

(b) Specify the conditions and scope of the examination to be conducted and the report to be made; and

(c) Direct the injured party to submit to a physical examination as specified in the order; and

(d) Direct all parties and their counsel to deliver to the Administrative Director of the Courts for the use of the designated expert all medical reports, X-rays, X-ray reports and records and reports of pathological or neurological examinations or tests of the injured party or of the decedent which are in their possession or under their control; and

(e) Direct the injured party or his counsel to prepare a list of the names and addresses of any physicians or hospitals which may have any relevant medical records and to deliver the same to the Administrative Director of the Courts, for the use of the designated expert, together with a written and signed consent for the examination by the designated expert of any hospital records or other medical records or reports which are not in the possession or under the control of the injured party or his counsel; and

(f) Direct the injured party to be examined to disclose to the designated expert at his request, and not otherwise, any fact necessary and relevant to his examination and report; and

(g) Authorize the designated expert to make or to have made by others of his selection such supplementary diagnostic procedures or tests as shall be necessary and relevant to his examination and report and direct the party to be examined to submit thereto; and

(h) Fix the date by which the examination is to be made and the date by which the report of the designated expert is to be delivered to the Administrative Director of the Courts.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–5. Delivery of Records and Fixing of Date of Examination

(a) Upon receipt of a copy of the order appointing the impartial medical expert and directing the examination, the Administrative Director of the Courts, after consultation with the designated expert and the party to be examined, or his counsel, shall fix the time and place of the examination and shall give counsel for all parties written notice thereof.

(b) Upon receipt from the parties or their counsel of the hospital and other medical records specified in the order, the Administrative Director of the Courts shall deliver them to the designated expert. When the examination has been completed and the report made the Administrative Director of the Courts shall arrange for the return of such records to the proper parties.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–6. Who May Attend at Examination

Unless otherwise ordered by the court, counsel for all parties and experts retained by them may be present during the examina-

tion by the designated expert, or during any supplementary diagnostic procedures or tests directed by him, to the extent permitted by the ethics of the medical profession.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–7. Refusal or Failure to Comply with Order Directing Examination and Report; Sanctions

In the event a party or his counsel shall refuse to comply with an order, or any portion thereof, entered pursuant to this rule or shall refuse or fail to present himself for examination by the designated expert at the time and place fixed by the Administrative Director of the Courts, the court may impose such sanctions as are just and reasonable in the circumstances, including, where appropriate, the payment of reasonable attorney's or expert's fees, the exclusion of evidence, and the dismissal of the cause of action or the suppression of defenses.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–8. Delivery of Report to Court and Counsel; Filing

The report of the designated expert shall be delivered on or before the date fixed in the order to the Administrative Director of the Courts who shall transmit it to the judge who ordered the examination and shall furnish copies thereof to all parties or their counsel. The report shall not be filed with the clerk of the court and shall not become a part of the record of the case unless duly introduced in evidence at the trial.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–9. Additional Pretrial Conference

If the report of the designated expert is received by the court subsequent to the pretrial conference, the court shall schedule a further pretrial conference for the purpose of considering the effect of the report upon the issues of liability and of damages and upon the possibilities of settlement.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–10. Impartial Medical Expert as Witness

The designated expert may be called as a witness at the trial by any party or by the court. When so called the fact that said expert made his examination of the injured party or of the pertinent medical records at the direction of the court shall be made known to the trier of the facts.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

4:25A–11. Compensation of Impartial Medical Expert

The fees of the designated expert, both for his examination and report and for his appearance in court, together with the fees for any supplemental diagnostic procedures or tests ordered by him in connection with such examination and report, shall be approved by the Administrative Director of the Courts for payment out of funds appropriated for the operation of the State courts.

Note: Adopted July 27, 1961 to be effective September 11, 1961.

TEMPLE LAW QUARTERLY

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3. THE IMPARTIAL MEDICAL EXPERT SYSTEM: THE JUDICIAL POINT OF VIEW

HON. FRANCIS L. VAN DUSEN†

The so-called impartial medical testimony plan involves the appointment by judges of a *nisi prius* court, in appropriate cases where the record discloses a substantial divergence of medical opinion, of a doctor from a panel of experienced physicians recommended by the appropriate Medical Society (county or state) to examine the injured person (or the plaintiff's decedent in death actions) and to report to the court on his condition and its relation to the cause alleged by plaintiff. If the case goes to trial, and most of such cases are settled before trial on the basis of the report of the panel doctor, normally the doctor testifies as to his examination and opinion and is subject to cross-examination by the parties.

The single purpose of expert testimony has, since the beginning of its use, been to provide guidance to the trier of fact on matters beyond the ken of ordinary laymen, so that the trier can intelligently decide questions which may depend on specialized knowledge or experience.[1] However, the strains produced by the partisan selection and use of such testimony have seriously impaired its utility as an aid to the jury.

The impetus for this plan comes not only from the experience of the trial judges but also from long-standing professional dissatisfaction, both medical and legal, with sole reliance on partisan expert testimony.[2] Evidence of this dissatisfaction is reported in England

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1. The history of the use of experts as an aid to both court and jury is related in Rosenthal, *The Development of the Use of Expert Testimony*, 2 LAW & CONTEMP. PROB. 403 (1935). See, also, 7 WIGMORE, EVIDENCE, § 1917. Rosenthal traces the use of experts back to the 14th Century. Then, in cases requiring special knowledge, experts served as advisors to the court, whereupon the court would instruct the jury on the matters involved. Or the court would impanel a special jury of experts to decide the questions presented. With the development in the 16th and 17th centuries of proof of facts by witnesses and the concurrent development of juries in which the office of juror was distinct from that of witness, expert advice took the form of testimony by expert *witnesses* addressed to the jury. Rosenthal, *supra*, pp. 406-411.

For a modern instance of the use of an expert as an advisor to the court and also of the court's use of its power to call witnesses on its own motion, see the opinion of Judge Wyzanski in United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 305-6 (D. Mass. 1953). (Civil antitrust case.)

2. A number of these references are collected in 2 WIGMORE, Sec. 563 at n.2. See, also, Morgan, *Suggested Remedy for Obstruction to Expert Testimony by Rules*

as long ago as 1876. There, an English judge, in commenting on the natural inclination of a party to find, not the best scientist, but the "best witness", stated:

> * * * The mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does some times, to half-a-dozen experts. * * * He takes their honest opinions, he finds three in his favor, and three against him; he says to the three in his favor, "will you be kind enough to give evidence?" and he pays the three against him their fees and leaves them alone; the other side does the same. * * * I am sorry to say the result is that the Court does not get that assistance from the experts which, if they were unbiased and fairly chosen, it would have a right to expect.[3]

And the United States Supreme Court observed, in 1858:

> * * * Experience has shown that opposite opinions of persons professing to be experts may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross-examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury, and perplexing, instead of elucidating, the questions involved in the issue. *Winans v. New York and Erie R. Co.*, 62 U.S. 88, 101 (1858).

This century, with its rapid advances in the sciences, has witnessed a proliferation of the use of expert testimony, particularly medical testimony in actions seeking recovery for physical injuries. The increased use of such partisan testimony has intensified its study and criticism.

The nub of the criticism is that the credibility of such testimony, and, hence, its value as an aid to the fact finder,—the only basis for permitting its use,—has been materially diminished by the consequences of partisan selection and use.

Experience shows that opposing parties still search until they find experts whose testimony supports their positions. At one ex-

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of Evidence, 10 U. CHI. L. REV. 285, 293 (1943); MCCORMICK, EVIDENCE 35-38 (1954); L. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53-56 (1901); Prettyman, *Needed, A New Trial Technique*, 34 A.B.A.J. 766 (1948); Elliott and Spellman, *Medical Testimony in Personal Injury Cases*, 2 LAW & CONTEMP. PROB. 466, 473 (1935); Peck, *Impartial Medical Testimony*, 22 F.R.D. 21; Report of Committee on Impartial Medical Testimony, Section of Judicial Administration, American Bar Association (1956); Impartial Medical Testimony, Association of the Bar of the City of New York (1956).

3. Jessel, M. R. in Thorn v. Worthing Skating Rink Co. (M.R. 1876, Aug. 4), quoted in Plimpton v. Spiller, 6 Ch. D. 412, 1415-6 (1877), and in MCCORMICK, EVIDENCE 35 (1954).

treme, this has led to the practice of the corrupt "medical expert" who is prepared to use the labels and language of expertise as a means of deceiving the trier of fact. Less extreme is the partisan expert. Under ordinary adversary procedure, the expert employed by a party with the knowledge that he will be paid by him is more likely to develop a bias, often unconsciously, than an expert selected by an impartial tribunal and beholden to neither party. It is likely that when selected by one of the parties and called by him to testify, the expert will emphasize deductions and inferences in a way that furthers his party's case. The well-known "battle of experts," with its unproductive waste of time and resources and with its inability to aid the jury to reach an intelligent determination of the issues in the case, is the result.

Judge David W. Peck, former Presiding Justice, Supreme Court of New York, Appellate Division, First Department, expressed the reasons for the need of such a plan in courts serving metropolitan areas as follows, after emphasizing that the plan improves the quality of the judicial product as well as expedites the disposition of the court's business through settlements and the shortening of cases which have to be tried:

> The problem is two-dimensional—how to save on the large part of case and court time consumed in the medical inquiry, and how to secure more reliable guidance for a jury in the medical aspects of a case, which are beyond jury competence and understanding except through the receipt of trustworthy expert advice.
>
> Under present procedure, where the medical testimony comes from no objective or necessarily qualified source, and only through the hirelings of the parties, partisan experts, medical mouthpieces, the jury is more apt to be confused than enlightened by what it hears. It hears black from one expert, white from the other, a maximizing or minimizing of injuries in accordance with the interest of the source of payment for the testimony.
>
> An enormous amount of time is spent on the battle of partisan experts, and in the end the jury is unable to detect the medical truth or to pass upon underlying questions of competency and honesty between the medical contenders. Indeed, the witness with the cultivated courtroom manner, rather than with the superior knowledge and greater integrity, may make the best appearance and carry the jury. The premium thus placed on personality and patter is so great that lawyers become more interested in retaining a good testifier than in retaining a good doctor.

See "Impartial Medical Testimony," Peck, 22 F.R.D. 21, at 22 (1958).

The report of the American Bar Association Committee on Impartial Medical Testimony (August 1956) uses the following language:

> We are satisfied from our observations of the New York and Baltimore experience that the introduction of impartial medical experts of the highest standing into those cases where the parties are in dispute as to the medical facts has the following wholesome and beneficial results:
>
> 1. It improves the process of finding the medical facts, vastly increasing the likelihood of reaching the right result.
>
> 2. It serves to relieve court congestion by bringing about the settlement of many cases which would otherwise have to be tried and which by their nature would entail lengthy trials.[4]
>
> 3. It has a prophylactic effect upon the formulation and presentation of medical testimony in court.
>
> 4. The modest cost involved in the payment of independent experts is a positive economy in effecting a large saving in court operation.

The use of a neutral expert has been widely recommended by leading authorities, including Professor Wigmore,[5] Professor Morgan,[6] Professor McCormick,[7] Judge Learned Hand,[8] and Judge Prettyman.[9] In addition, both the Uniform Rules of Evidence, drafted and approved by the National Conference of Commissioners on Uniform State Laws,[10] and the Model Code of Evidence, promulgated by the American Law Institute,[11] advocate the use of impartial medical experts.

Although there have been some minor changes in wording of the Local Rule establishing this plan in the United States District Court for the Eastern District of Pennsylvania, the following language of this Rule as it is now worded is substantially the same as the language originally adopted by the court in June 1958 in accord with the foregoing responsible recommendations:

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4. The plan also shortens the length of trials where settlement is not achieved by securing agreement of the parties to many medical issues which are disputed prior to receipt of the report.

5. 2 WIGMORE, EVIDENCE, § 563.

6. Morgan, *Suggested Remedy for Obstruction to Expert Testimony by Rules of Evidence*, 10 U. CHI. L. REV. 285, 293 (1943).

7. MCCORMICK, EVIDENCE, 35-38 (1954).

8. Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 56 (1901).

9. Prettyman, *Needed, A New Trial Technique*, 34 A.B.A.J. 766 (1948).

10. Uniform Rules of Evidence, 59, 61 (1953).

11. Model Code of Evidence, 403-410 (1942).

Rule 22. Impartial Medical Experts.

(a) In any personal injury, death, survival, or malpractice case in which, prior to the trial thereof, a judge shall be of the opinion that an examination of the injured person and a report thereon, a report, and/or testimony by an impartial medical expert or experts on the facts involved would be of material aid to the just determination of the case, he may, after consultation with counsel for the respective parties and after giving counsel a hearing if such hearing be requested by either counsel, order such examination, report, and/or testimony. The examination will be made by a member or members of a panel of examining physicians designated for their particular qualifications by the Medical Society of the State of Pennsylvania after consultation with the Court. Copies of the report of the examining physicians will be made available to all parties.

(b) The compensation of the expert or experts shall be fixed at the termination of the case by the judge ordering the examination and shall be paid by the losing party, unless the court otherwise directs. Such judge may direct the deposit, by the moving party, of security which may be used for the payment of such compensation in the discretion of the court.

(c) If the case proceeds to trial after such examination and report, either party may call the examining physician or physicians to testify or the trial judge may, if he deems it desirable to do so, call the examining physician or physicians as a witness or witnesses for the court, subject to questioning by any party.[12]

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12. In November 1959, the United States District Court for the Northern District of Illinois adopted a similar rule (their Local Rule 20) and in February 1961, the United States District Court for the Western District of Pennsylvania adopted a rule (Part III of their Local Rule 5) for the appointment of a doctor from a panel recommended to the court by the local medical society for the purpose of reporting and testifying, if necessary. The above-mentioned Part III of Local Rule 5 includes this language:

> B. . . . As part of his report, the medical expert shall answer the following question:
>
> Considering all the facts presented, and based on your examination of the party, is the proposed medical testimony of any doctor who may be called as a witness in this case of such a nature or so slanted that in the present state of medical science a reasonable medical scientist could not accept it either as to diagnosis, causal connection or prognosis?
>
> C. If the answer to this question is "Yes", and the case proceeds to trial, the medical expert may be called as a witness by the judge or by any party to the action as the impartial medical expert appointed by the Judge and his testimony submitted to the jury under proper instructions from the Judge.
>
> D. If the answer to this question is "No", the medical expert may be called as a witness by any party to the action, but he shall not be identified as having been appointed as an impartial medical expert.

The Supreme Court of Illinois adopted on June 1, 1961, Rule 17-2 entitled "IMPARTIAL MEDICAL EXPERTS", to be effective 9/5/61 and containing this language applying to the Illinois State trial courts:

> When in the discretion of a trial court it appears that an impartial medical examination will materially aid in the just determination of a personal injury case, the court, a reasonable time in advance of the trial, may on its own motion or

Pursuant to the above Rule, the Medical Society of the State of Pennsylvania furnished to the court three lists or panels of doctors, broken down among the following specialties:

Cardiovascular Diseases
Dermatology
Gastro-Enterology
Internal Medicine
Metabolic Diseases (Endocrinology)
Neurology
Neurosurgery
Obstetrics-Gynecology
Ophthalmology
Orthopedics
Otolaryngology
Pathology, Malignant Disease and Trauma
Pediatrics
Plastic Surgery
Psychiatry
Roentgenology
Surgery (General)
Diseases of the Chest
Urology

One panel is for use where the plaintiff can conveniently be examined by a doctor with offices in Region A (Philadelphia County), another panel is for use where the plaintiff can conveniently be examined by a doctor with offices in Region B (Delaware, Montgomery, Chester and Lancaster Counties), and the third panel is for use where the plaintiff can conveniently be examined by a doctor with offices in Region C (Northampton, Lehigh, Bucks, Berks and Schuylkill Counties).

The success or failure of the plan is largely dependent upon securing on the panel of doctors men of experience and of the highest integrity. The Medical Society of the State of Pennsylvania did a magnificent job for our court in securing this type of doctor. An example of the efforts made by the above Medical Society to secure the cooperation of the very best doctors to do the work for modest fees is represented by the following editorial by Dr. I. S. Ravdin (one of our leading surgeons, who operated on President Eisenhower) appearing in the May 23, 1958, issue of "Philadelphia Medicine," (Vol. 54, No. 21, page 591):

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that of any party order a physical or mental examination of the party whose mental or physical condition is in issue. . . . Should the court at any time during the trial find that compelling considerations make it advisable to have an examination and report at that time, the court may in its discretion so order. . . .

> Responsible citizens, cognizant of and disturbed by the situation, will be encouraged by the action taken by the judges of the United States District Court for the Eastern District of Pennsylvania, to put into effect a plan by which cases will be referred for evaluation to an Impartial Medical Expert chosen in rotation from a panel of recognized medical authorities in special fields. The Panel will be designated by the Medical Society of the State of Pennsylvania with the assistance of the County Societies in the area involved. * * *
>
> A great responsibility rests upon the shoulders of the Medical Society of the State of Pennsylvania to assemble a panel of qualified and recognized authorities who are unbiased and above reproach. A great obligation rests upon those who are asked to serve—no one asked can refuse to take part in this joint effort of the bench, bar and medicine to promote justice.

The doctors serving on the panel under our Local Rule 22 have undertaken their assignments in the above spirit. Both the quality of justice has been improved and more settlements secured in the cases where difficult medical questions are involved. The Medical Society is also to be commended for the objective and fair attitude exhibited in the only malpractice case in which a request has been made for an appointment of a doctor and the doctor has filed his report.[13]

From the judge's point of view, the legal objections to the plan which are not based on some unfairness on the particular facts of a specific case do not seem valid, as long as it is made clear to a jury that it is their responsibility to make the final decision on issues of fact. See *Ex Parte Peterson*, 253 U.S. 300, 309-310 (1920), where the Supreme Court of the United States said:

> The command of the Seventh Amendment that "the right of trial by jury shall be preserved" does not require that old forms of practice and procedure be retained. [Citing cases.] It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

13. The Motion under Local Rule 22 in another such malpractice case has been granted but litigation concerning the order granting the Motion is pending. See Dill v. Egan *et al.* (No. 13,433 in 3d Cir.).

There is attached to this article as Exhibit A a collection of cases by Bernard G. Segal, Esq., on the familiar objection that a means for improving ascertainment of the truth is a violation of the Seventh Amendment to the Constitution of the United States. Similarly, the judge of almost every common law, *nisi prius* court has the power to call witnesses in order to assist in securing justice. Authorities collected by Mr. Segal on this point, as it relates to a Federal District Judge, are collected in Exhibit B. See, also, Sink, "The Unused Power of A Federal Judge To Call His Own Expert Witness," 29 So. Cal. L. Rev. 195 (1956).

The primary benefit of Local Rule 22 is that doctors appointed by the court under the rule do not have the incipient partisanship which they otherwise would obtain if they were employed by a party and knew initially that that party would pay their compensation. Moreover, the rule has the further advantage of attracting to the aid of the jury highly qualified medical experts who otherwise would be unwilling to participate in a legal proceeding in a position of partisan employment.

Together with these advantages is the preservation of the full rights enjoyed by parties in the adversary system of litigation. No matter by whom the impartial expert is called to testify, he, like any other witness, will be subject to examination by the other participants in the litigation. Further, the admissibility and scope of his testimony like that of any other witness, will be determined by the rules of evidence. Finally, the parties are free to call any other expert witness who they believe would be helpful to their cause.

Under these circumstances, the use of an impartial medical witness as contemplated by Local Rule 22, does not impair the traditional adversary system of litigation. Rather, it serves only to improve the utility of that system as a means for providing an intelligent basis for determination by the trier of fact.[14]

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14. As of March 1, 1961 only 82 motions had been made under the above-quoted Local Rule since its adoption in June 1958 and, of these 82, 12 motions had been denied and 1 motion had been withdrawn, showing that the judges have recognized that it is not appropriate to use the plan in areas of medicine where the outstanding doctors are divided into two or more responsible but opposing schools of thought. In connection with the assumption made by some critics of the plan that it is used where there are such divided schools of thought, Judge Bernard Botein has used the following language:

> In some cases, particularly in the neuropsychiatry areas, we find that the panel specialists are unable to resolve the medical conflict; they cannot say whether the plaintiff's claims are valid or unfounded. Even then, the reports, if definite enough on the inability to make findings, have an affirmative value. Both sides must give weight to a statement by a leading physician that neither party can establish its contentions with anything like medical certainty. The tendency is for both sides to pull in their claims from the goal posts toward the fifty-yard line.
>
> There are certain areas of medicine in which the outstanding men are divided into two or more responsible but bitterly opposed schools of thought. There

There have been two court tests of the above-mentioned Local Rule 22 in which the above-quoted rule and its actual use in one case have been upheld:

A. *Hankinson v. Van Dusen and Kraft*, 359 U.S. 925 (1959).

B. *Porta v. Penna. Railroad Company* (Civil Action No. 21293 in U.S. District Court, Eastern District of Penna.), aff'd. 272 F.2d 396 (3rd Cir. 1959).

Although no one claims that the plan has worked perfectly, Local Rule 22 of the United States District Court for the Eastern District of Pennsylvania has improved the quality of medical testimony in this court and has contributed to the expeditious disposition of the court's caseload, particularly the cases involving more difficult medical issues. Specifically, it has had these results, among others:

A. It has decreased a formerly growing reluctance on the part of the best doctors of our community to come into court, due to their frustration at having their well-considered opinions condemned by doctors, who they considered unqualified on the medical issues before the court.

B. It has decreased the number of cases where one doctor would testify one way and another in an exact opposite way, leaving the jury in a most difficult position.

C. It has enabled plaintiffs to secure competent medical testimony in malpractice cases.

D. In some few cases, it has enabled the court to secure by agreement additional medical treatment (including operations and observation) for impecunious plaintiffs, often assisting in their rehabilitation as well as in settlement of the cases.[15]

Since almost all the judges who have operated under a Rule such as Local Rule 22 are supporters of this plan, a short list of articles by such judges should be helpful to anyone who wishes to know the judge's viewpoint.

Hon. Bernard Botein: "Impartial Medical Testimony," 135 N.Y.L.J. 4 (1/31/56); "The New York Medical Expert Testimony Project," 33 U. Det. L.J. 388-97 (1956); "Impartial Medi-

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should be no referrals at all in such fields. Neither party should be required to run the risk that mere chance, something akin to the turn of a roulette wheel, will determine whether the case will draw an expert whose previous conditioning will render him hostile or friendly to his side.

See 328 Annals of American Academy of Political & Social Science 75, at 81 (1960).

15. Also, the experience in our court indicates that the testimony of the doctor under Local Rule 22 has been of substantial benefit to plaintiffs in many cases.

cal Testimony," 328 Annals of American Academy of Political & Social Science 75-93 (Mar. 1960); "The Role of the Physician as an Expert Witness in Civil Actions," 133 N.Y.L.J. 114 (4/8/55).

Hon. J. B. McNally, "Impartial Medical Testimony Plan—Its Operation and Results," 445 Ins. L.J. 95-6 (1960).

Hon. E. H. Niles: "Impartial Medical Testimony," 45 Ill. B.J. 282-88 (1957); "Report on Impartial Medical Testimony," ABA Section on Judicial Administration, Dallas, Texas, 1956—14 leaves.

Hon. David W. Peck: "A Successful New Plan: Impartial Medical Testimony," 42 A.B.A.J. 931 (1956); "Impartial Medical Testimony, A Way To Better and Quicker Justice," 22 F.R.D. 21 (1958).

Hon. William F. Smith: "The Neutral Medical Expert," Middlesex County Medical Society and Bar Association, Middlesex County, N. J., 1961—17 leaves.

Hon. Aron Steuer: "The Judge Looks at the Impartial Doctor," 26 Post Graduate Medicine #6, p. A52 (1959); Book Review of "Impartial Medical Testimony," entitled "A Judge's View," 31 St. John's Law Review 164 (1956).[16]

Hon. Leo Weinrott, "The Case For Impartial Medical Testimony," 21 The Shingle 81 (1958).[17]

In conclusion, I will quote the concluding two sentences of Justice Steuer's article from Post Graduate Medicine, which summarize the judicial approach to this subject:

> For my part, I believe the plan tends to reduce the effect of charlatanism, to drive quackery from the courts, and to place in their stead that degree of positiveness which in an imperfect world is the substitute for truth. So that consequently to the limit that the law permits, it should receive encouragement and support.

16. In this Article, Justice Steuer said at page 166, ". . . the project . . . represents one of the great forward steps taken in trial practice and procedure in our day."

17. Judge Weinrott concludes that the plan should be used only at the pre-trial stage. HON. WALTER R. HART, 7 THE PLAINTIFF'S ADVOCATE 20 (Oct. 1958), is the only article found by the author in which a judge apparently rejecting the plan completely.

EXHIBIT A

Validity of Local Rule 22 Under the Seventh Amendment

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

In the past, those who have resisted innovation or advance in the conduct of jury trials repeatedly have attempted to invoke the amendment as a bar. However, it has always been clear that "the amendment did not bind the federal courts to the exact procedural incidents or details of jury trials according to the common law in 1791, any more than it tied them to the common law system of pleading or the specific rules of evidence then prevailing." *Galloway v. United States*, 319 U.S. 372, 390 (1943). See, e.g., *Fidelity and Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902) (power of lower court to provide a summary judgment procedure in the absence of a general federal rule or statute); *Ex Parte Peterson*, 253 U.S. 300 (1920) (power of court, in the absence of a general federal rule or statute, to appoint an impartial auditor in an action at law with a duty to investigate and to report to the jury as to the facts in the case and his conclusions based thereon); *Arkansas Valley and Cattle Co. v. Mann*, 130 U.S. 69 (1889) (power of district court to order a remittitur in lieu of the grant of a new trial); *Baltimore and Carolina Line, Inc. v. Redman*, 295 U.S. 654 (1935) (taking jury verdict subject to ruling on questions reserved by the court); *Galloway v. United States, supra* (power of district court to direct a verdict for defendant).

These cases, and others like them, demonstrate that "the constitutional conception of jury trial is not inflexible in all details, so long as essential elements of the institution are preserved". *Byrne v. Matczak*, 254 F.2d 525, 528-529 (C.A. 3, 1958).

The essential characteristic of the right is the preservation of the "common-law distinction between the province of the court and that of the jury, whereby * * * issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court." *Baltimore and Carolina Line, Inc. v. Redman, supra*, 295 U.S. at 657. However, the inviolability of the jury as the final arbiter of the facts has never, in the national courts, rendered the judge a mere passive instrument of the parties, without responsibility for seeking the truth. See 9 Wigmore, Evidence §§ 2484, 2551 (3d ed. 1940).[a] So long as the jurors

a. In Patton v. United States, 281 U.S. 276, 288 (1930), the Supreme Court stated that an "essential element" of "trial by Jury" is that "the trial should be in the presence and under the superintendence of a judge having power to instruct them [the jury] as to the law and advise them in respect of the facts;"

clearly understand that the final determination of the facts rests with them, the jury's function has been preserved and the constitution enforced. *Ex Parte Peterson, supra*, 253 U.S. at 309-310.

The *Peterson* decision disposed of the same arguments advanced here, in a basically similar situation. In *Peterson,* the court, in the absence of either a rule or a statutory authorization, appointed an impartial auditor in an action at law to examine the accounts of the parties, with a view to simplifying the issues for the jury. The auditor was ordered to report on the facts found on his examination and to state his opinion as to the disputed items. The Supreme Court, speaking through Mr. Justice Brandeis, sustained the action of the district court in the face of the contention that plaintiff's constitutional right to a jury trial had been infringed (253 U.S. at 310-311):

> Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as *prima facie* evidence thereof. The parties will remain as free to call, examine and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. * * *

Further, *Peterson* forecloses the argument that the province of the jury would be invaded by clothing the appointee's testimony with the apparent approval of the Court. In discussing the fact that the auditor's evidence would be treated as *prima facie* correct, the Court stated (p. 311):

> * * * An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. * * *

Measured by these principles, Local Rule 22 is plainly not invalid as a violation of petitioner's right to trial by jury. Should the impartial expert testify, Rule 22 provides that he will be subject to cross-examination like any other witness.[b] Further, the rule contains no inhibition on the ability of either petitioner or defendant to call his own experts. Both are free, limited only by the bounds of relevancy and materiality, to present evidence in support of their position, regardless of the testimony of an impartial witness. Under suitable instructions, the jury will decide all questions of fact and will render a verdict accordingly.

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b. The traditional method of exploring bias in a witness is by cross-examination and is, of course, available in connection with medical experts. The question of witness bias is entirely different from the situation in Berger v. United States, 255 U.S. 22 (1921), which reflects a specific legislative policy uniquely applicable to judges. Obviously, judges cannot be examined on the question of bias. And, even if they could be, Congress has determined that the truth of factual allegations, in an affidavit of prejudice directed against a judge in a particular case, is not to be examined.

EXHIBIT B

A Federal District Court Has the Power to Call Witnesses on Its Own Motion

The keystone of the argument against the power of the district court to call a witness on its own motion is that Rule 35 of the Federal Rules of Civil Procedure does not authorize the practice.

This argument is fundamentally defective. There is nothing in the Federal Rules of Civil Procedure which requires that a local rule, to be valid, must be "authorized" by one or another of the rules. To the contrary, Rule 83 provides:

> Each district court * * * may from time to time make and amend rules governing its practice *not inconsistent with these rules.* * * * *In all cases not provided for by rule*, the district courts may regulate their practice *in any manner not inconsistent with these rules.* (Emphasis added.)

The only inhibition on the local rule making power is that it be "not inconsistent" with the rules. 7 Moore, Federal Practice Para. 83.03 (1955). Local Rule 22(c), which authorizes the trial judge to call an examining physician as a witness of the court, is clearly "not inconsistent" with Rule 35 in any respect.

Rule 35 deals only with discovery of evidence and not with the use at trial of the evidence discovered. Subsection (a) of the rule provides:

> (a) *Order for examination*—In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.[c]

The enactment of Rule 35 as part of the discovery Rules, resolved the question in the federal district courts of the amenability of a party to compulsory physical examination, which previously had depended on varying state laws. *Sibbach v. Wilson*, 312 U.S. 1, 10-11 (1941). The rule authorizes such examination. However, the rule does not speak to the evidentiary use of the facts discovered or the opinions resulting from an examination. In this respect, it neither restricts nor enlarges the evidentiary aspects of medical testimony, other than by augmenting its availability

c. The balance of the Rule deals with disclosure to the parties of the report of the examination and the consequence of disclosure or failure to disclose.

through compulsory examination.[d] Plainly, the rule does not purport to deal with such questions as the competency of medical experts, the matters to which experts are permitted to testify, and the circumstances under which a medical expert may be called to testify.[e] These matters are all beyond the ambit of the rule. Accordingly, the attempt to establish Rule 35 as the "sole source" of power to call a medical witness at trial stretches the scope of Rule 35 beyond recognizable limits.

Trial judges in the federal courts have power to call and examine witnesses in order to elicit evidence which will assist a jury in understanding the case. *Glasser v. United States*, 315 U.S. 60, 82 (1942); *Chalmette Petroleum Corp. v. Chalmette Oil Distributing Co.*, 143 F.2d 826, 828-829 (C.A. 5, 1944); *Dinsel v. Pennsylvania R. Co.*, 144 F. Supp. 880, 882 (W.D. Pa. 1956). See *United States v. Brandt*, 196 F.2d 653, 655 (C.A. 2, 1952); *Johnson v. United States*, 333 U.S. 46, 54-55 (1948) (dissenting opinion of Mr. Justice Frankfurter indicating that, in the interest of justice, the judge, in addition to the clear *power* to call witnesses, may have the duty to do so); 9 Wigmore, Evidence, § 2484. Further, the holding in the *Peterson* case, *supra*, pp. 10-11, that power exists to appoint an auditor in an action at law to hear testimony, make a finding, and present a report on evidence for consideration of the jury, necessarily assumes that the trial court has inherent authority to summon witnesses.[f]

The power to call witnesses is but one attribute of the federal trial judge's over-all responsibility for the administration of justice. In similar vein, a trial judge may examine any witness to bring out needed facts which have not been elicited by the parties. E.g., *Stuckey v. Andrews*, 249 F.2d 828 (C.A. 5, 1957); *Pariser v. City of N.Y.*, 146 F.2d 431 (C.A. 2, 1945); *United States v. Amorosa*, 167 F.2d 596, 600 (C.A. 3, 1948). And he may comment on the evidence to assist the jury in reaching its decision. 9 Wigmore, § 2551. See *Patton v. United States*, 281 U.S. 276, 288 (1930).

The exercise of these powers is all to the end of assisting the jury to arrive at the truth. The use of the judicial office for this purpose is an integral part of the jury system inherited from the common law of England.[g]

Professor McCormick has aptly summarized the problem:

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d. A similar function is performed by the other rules dealing with discovery of evidence. *E.g.*, Rule 26 (depositions); Rule 34 (production of documents).

e. If Local Rule 22(c) were invalid for the reason stated, then it would seem that a plaintiff would be precluded from calling as a witness a doctor who had conducted an examination under Rule 35 at the behest of the defendant, for nowhere is that practice "authorized" by Rule 35.

f. See 9 WIGMORE, § 2484 n.1 at p. 269.

g. 9 WIGMORE, Secs. 2484, 2551; 3 *id.*, Sec. 784. Reference to the cases of *In re Enoch and Zaretsky Bock & Co.*, [1910], 1 K.B. 327, 332, and Rex v. Harris, [1927], 2 K.B. 587, as representing the "common law" view that a judge in a civil case may not call a witness is somewhat misleading. Earlier, the English view had been to the contrary. Coulson v. Disborough, 2 Q.B. 316 (1894). Wigmore comments on these cases as follows:

> It is deeply regrettable to have to note that the English Court of Appeal in a modern case changed its view, holding now that in a *civil* case the judge may

> Under the Anglo-American trial system, the parties and their counsel have the primary responsibility for finding, selecting and presenting the evidence. * * * Our system of party-presentation is not exclusive or all-sufficient. It is but a means to the end of disclosing truth and administering justice, and for reaching this end the judge has the over-all responsibility. When the party-presentation is incomplete and fails to elicit some material fact the judge not only may, but seemingly owes a duty to supply the omission by further examination.
>
> Accordingly the judge in his discretion may examine any witness to bring out needed-facts which have not been elicited by the parties. * * *
>
> * * * *
>
> Not only may the judge examine witnesses called by the parties, he may also, for the same purpose of bringing out material facts that might not otherwise be elicited, call witnesses himself whom the parties might not have chosen to call. It is of course a matter of discretion, and is perhaps most often exercised when the prosecution expects that a necessary witness will be hostile and desires to escape the necessity of calling him and being cumbered by the rule against impeaching one's own witness. He may then invoke the court's discretion to call the witness, in which event either party may cross-examine and impeach him. Another use of the power, implemented by statute in some jurisdictions, is to mediate the battle of partisan expert witnesses employed by the parties, through the court's resumption of its ancient power to call an expert of his own choosing, or one agreed upon by the parties, to give impartial testimony to aid the court or jury in resolving the scientific issue. But the judge's power of calling witnesses in aid of justice is general and not limited to meeting these particular needs. McCormick, Evidence, pp. 12-14 (1954) (footnotes omitted).

Finally, it should be observed that there is no basis for the assertion that the provision in Rule 28 of the Federal Rules of Criminal Procedure for the employment of experts by the court shows that the Supreme Court, in Rule 35 of the Civil Rules, specifically meant to deny power to a court to call a witness in a civil case. As the Notes of the Advisory Committee on the Criminal Rules reveal, Rule 28 is but an implementation, in the case of experts, of a power existent in the court to call a witness. 18 U.S.C.

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not call a witness * * * [citing]. But the reason given by L. C. J. Hewart in the latter case [Rex v. Harris] is astonishing:

In civil cases the dispute is between the parties and the judge merely keeps the ring.

This philosophy is not only low in its standard, but is false to the conduct and status of the English Judge during the last three centuries. * * *

See also the reference to these "unfortunate" and "inexplicable" cases in McCormick, Evidence, p. 14, n.13 (1954).

Rule 28. No valid reason has been offered to deny this same power in civil cases, and, as we have pointed out, history and authority affirm its existence. The implementation of this power in civil cases on a regular, rather than an ad-hoc basis, is authorized by Rule 83 of the Civil Rules. Since, as we have shown, the calling of witness by the court is beyond the ambit of Rule 35, it is "not inconsistent" with that Rule and is, therefore, valid.

Further, this argument rests on the implausible assumption that the Supreme Court's intent to limit the scope of the powers of the district court in a civil case is revealed by a Criminal Rule which went into effect almost a decade later. There is nothing in the Civil Rules which indicates this intent on behalf of the Supreme Court. There would seem to be no basis on which the Criminal Rules can be used to expand or contract the powers of a District Judge sitting in a civil case.

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4. IMPARTIAL MEDICAL TESTIMONY: A TRIAL LAWYER IN FAVOR

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The Theory

The theory behind the various plans for impartial medical testimony is a simple one. Where the traditional methods of trying an Anglo-American personal injury case are to the practiced eye misleading the fact finder more than they are helping him, it is necessary to look for new methods to augment the old. To minimize deficiencies in the presentation of medical evidence, and the adversary system has proved itself capable of producing whopping deficiencies in this regard, the courts have looked to the medical profession for help.

The plans for impartial medical testimony stem from judges with a desire to improve the dispensing of justice and from medical men willing to do what they can to help. The courts and the medical societies have in theory supplied the parties with a tool to help them resolve something which often eludes them in the heat of battle, medical truth.

The impartial expert performs exactly the same function as does the physician chosen by the lawyers for plaintiff or defendant. He examines an injured litigant, writes a report, and, within the limitations imposed by the rules of evidence in the various jurisdictions, eventually testifies to the history he received, his examination, his diagnosis and prognosis. The theory and the hope is that the impartial will give to our trials the two elements necessary for accurate evaluation of injuries and disability, competence and objectivity. It is the belief of this writer that the theory is a sound one, and where the courts and medical societies have arranged for a panel of dedicated and highly qualified experts the system should and does work well.

The Need

Basic to all the arguments advanced by the opponents of impartial medical plans is the philosophy, although seldom expressed bluntly, that the present system is adequate. Thus, when the argument is made that the court-appointed panel tears at the very roots of the adversary jury system, inherent in that argument is the proposition that the adversary jury system is a good and adequate one for coping with present-day problems. This proposition is wrong. Trial lawyers

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thoroughly and carefully educated by NACCA and by the various associations on the defense side are quite capable of presenting both on direct and cross-examination the most minute intricacies of even a simple medical problem. In the great metropolitan centers the trial of the medical issues in personal injury cases has therefore become a highly refined and technical business. Experience has shown that the lay juror, unacquainted for the most part with medicine even in its relatively simple aspects, is ill-equipped to weigh the refinements thrown at him. Take, for instance a medical problem the presentation of which is routine for skilled trial lawyers, the "slipped disc." In a laboring man a herniated nucleus pulposis (a more accurate description from a medical standpoint than the colloquial "slipped disc") can cause considerable disability. Therefore, if he gets one in an accident the verdict potential of the resulting law suit is quite substantial. To diagnose accurately the existence or non-existence of a herniated disc in a man complaining of back pain requires considerable skill and experience. As every good trial lawyer knows, no single diagnostic test can establish conclusively either the existence or non-existence of such a herniation. An area of opinion develops even in the cases where an operation is performed, and controversies arise over such subjects as whether a slight bulge in a given disc actually represented a specific herniation or whether it represented wear and tear and nothing more.

Assume if you will for the purposes of this discussion, a doctor who is wrong and a doctor who is right. Dr. Wrong claims the plaintiff has a herniated disc.[1] Dr. Right is of the opinion that he does not. Dr. Wrong is called and testifies to his diagnosis, explaining in detail the anatomy of the disc and its surrounding components and describing vividly the etiology which in his opinion leads to the series of complaints the plaintiff has registered. The attorney for the defendant will then conduct a very thorough, searching, and we trust able cross-examination. The various diagnostic possibilities are gone into in detail, the possibilities of error are explored. In short, the orthopedic and neurological mysteries of the body, never before encountered by most jurors, are reviewed in the most minute detail. Dr. Right then takes the stand, and the entire process is repeated. Now the fact is, that however intelligent and objective the lay juror may be, it is asking too much that he really understand and intelligently evaluate the evidence that has been given him. Proof of that pudding lies in the conviction of the various boards of judges who have determined that an

1. The writer has heard such a diagnosis from the witness stand on several occasions where not a single diagnostic test was positive. He has also heard this diagnosis glibly made on many occasions by a G.P. who describes himself from the witness stand as a "general specialist" but whose only specialty listed in the Pennsylvania Medical Directory is EENT (eyes, ears, nose and throat).

impartial panel of experts is necessary to assist the jurors in the difficult appraisal that has been forced upon them.

With respect to our two doctors mentioned above, Dr. Right and Dr. Wrong, there is no point in trying to explore in an article such as this one the reasons Dr. Wrong happens to be wrong. Incompetence, the economic pressure resulting from the substantial witness fees paid the expert, the excitement of the court room, may all have something to do with the wrong medical testimony heard from the witness stand. The important fact is that our system, a system designed in antiquity so that lay persons could solve the factual disputes of their peers, can be utilized to mislead. A jury misled is a jury which may return an unjust verdict. Therefore, in any jurisdiction, where it becomes apparent that in case after case medical problems are being presented to necessarily ill-informed jurors by a handpicked group of medical experts on both the plaintiff's and defendant's sides of the case, those in charge of administering justice in that jurisdiction should ask themselves, are the juries being sold a bill of goods? If the answer to that question is "yes" or "it's likely" or even "could be", the impartial medical plan should be seriously considered.

How It Works

The administrative problems in setting up the panel of experts are discussed elsewhere in this symposium. From the practicing lawyer's standpoint the workings of the plan are simple. Either he, his opponent or the court concludes that the particular case is an appropriate one for submission to an impartial expert. The plaintiff, or in a death case the record concerning the deceased, is referred to the panel member. Most systems provide that the panel member is to receive background medical data from both sides. After the expert conducts his examination and reports his findings to the court and the parties, he may be called as a witness by either party or by the court itself.[2] When called as a witness he is qualified, examined and cross-examined just as any other medical witness is. The jury is given the benefit of his guidance, but it may decide that his opinion is incorrect if disposed to do so. In short, the system simply provides another medical witness. He is a witness who can be and is of inestimable help to the fact finder in making a fair evaluation of the medical claims and defenses. His report can be and is of inestimable value to the pretrial judge and to the parties in suggesting and in reaching agreement upon a fair settlement.

2. At this point variations set in, devices to keep trials more like those which lawyers are used to handling. See Cleveland, San Francisco and proposed Washington, D.C. plans.

The Criticisms of the Plan

It is perhaps a credit to the ingenuity of lawyers that so many words have been written and spoken about a plan which is as simple as is the basic concept of impartial medical. It is also a credit to the basic soundness of the impartial medical plan that little need be said in its favor. Like the written document to which we lawyers are ever referring, it speaks for itself. The need for analysis lies not with the plan itself so much as it does with the criticisms which ingenious opponents have heaped upon it. The remainder of this article is devoted to the thesis that the reasons advanced against the courts' formalizing a system for making available impartial medical witnesses are not sound. I do not propose to discuss the arguments based upon what, for lack of a better term, might be called conceptual legalism. Some opponents of the system have asserted that it runs counter to the fundamental precepts of trial by jury and is therefore unconstitutional. Others have argued that it is contrary to the procedural rules governing trials.[3] Since this article is devoted to the practical pros and cons of the impartial system, it is beyond its scope to examine the plans in light of the historical development of the legal concept of trial by jury. Undoubtedly, the reader will find more than enough material elsewhere in this volume to make his own evaluation of this point.

The practical arguments against the plan may be boiled down to these: (a) a court appointed physician is not omnipotent—he may be wrong; (b) there are different schools of medical thought on given medical problems, and it is pure chance in a given case which school will find support through the "impartial"; and (c) the fact finder will accept as true without critical evaluation what the impartial says, and thus we will lose the traditional jury trial method of discovering the truth, i.e., sifting divergent ideas during the give and take of examination and cross-examination. These criticisms are not sound.

1. *In General*

Before discussing in turn each of the arguments advanced against the impartial medical system two generalities are in order. In the first

3. Obviously the adoption of an impartial medical plan may require amendment of procedural rules in certain jurisdictions. Opponents of the plan have argued, for instance, that its adoption by a U.S. District Court runs counter to the scheme of the Federal Rules of Civil Procedure and that a District Court therefore has no power to formalize its undoubted right to call a medical witness of its own in a given case. Whereas the writer believes that this argument has no real merit, I thought it inappropriate to develop that subject in this article since there is presently pending before the U.S. Court of Appeals for the Third Circuit a case challenging the validity of a local rule adopted by the U.S. District Court for the Eastern District of Pa. (Rule 22: "Impartial Medical Examination"). *Kenneth Dill v. The Honorable Thomas C. Egan*, et al. No. 13,433.

place one must expect opposition to a plan of this kind however meritorious it may be. There are always people, perhaps rightly so, who resist change. Lawyers and judges are people. For years they have tried cases without relying on impartial medical examiners, and to interject such examiners into trials is going to change some tried and true techniques. Therefore, it is only natural that we hear (a) demands that we move slowly and (b) recommendations to force the plan for impartial examinations into the mold of the traditional adversary system.[4]

Secondly most of the arguments against the impartial medical plan suffer from the Achilles heel of the losing appellate lawyer, inability to meet the case at issue. Abstract arguments may have a plausible ring, but they should not be accepted until they are examined in light of the concrete problem involved. The problem here is not whether the impartial medical plan will produce absolute justice—nothing will do that. The problem, accepting the thesis that our present system is backfiring, is whether the plan will improve the chances of reaching correct and therefore just findings of fact on medical questions. To state the problem is to answer it. How can the presence of competent, trustworthy and dedicated medical experts, interested in promoting scientific accuracy and disinterested in the economics of a given verdict, help but improve for the fact finder the chances of his accurately deciding that Dr. Wrong is in fact wrong?

2. *The Criticism That a Court-Appointed Physician May Be Wrong*

Medicine, so the argument goes, is not an exact science. It follows that differences of opinion can exist. These differences can be genuine, and even the most competent, scrupulously objective physician might be wrong. It is with some glee that the proponents of this he-might-be-wrong approach point to the physician called by the court during the trial of women accused of witchcraft at Bury St. Edmonds in 1644. We are told that a Doctor Browne of Norwich testified for the court that the defendants were bewitched. Their conviction followed. This is an interesting historical incident, and if it is cited for the proposition that even the best informed man in a given field can be wrong, it proves its point. However, when this example is cited as a reason not to call well-qualified, objective experts to assist in the fact-finding process, then we have a *non-sequitur* if ever there was one.

4. Plans which forbid the use of the name "impartial" at trial, which forbid calling the impartial as a witness, which forbid explaining to the factfinder the impartial's function are, I submit, the trial lawyer's attempt to retain for himself an "edge." It might be called his way of protecting his "constitutional right" to fool the fact finder.

The mere fact that an impartial might be wrong does not itself prove anything. If the proponents of this approach were able to support either the proposition that an impartial will more often be wrong than right or the proposition that juries without impartials to help them have a better chance of deciding correctly than juries with impartials, then they would have something. But this writer has not seen anyone make a real try to support either of those propositions. Either system might produce a wrong result. The question is, which is the more likely to get the truth?[5] In short, to argue that we should not have court-appointed experts because they might be wrong is no more persuasive than to argue that neither side should be permitted to call medical witnesses because they might be wrong.

Of course, to be realistic, one must accept the fact that the opinion of the court-appointed expert will necessarily be given great weight by the jury or by the judge sitting without a jury. This is as it should be. If one accepts a fundamental precept of the impartial system, that the courts and the medical societies will see to it that only the best qualified will be asked to serve, the examiners' opinions should necessarily be given great weight. This is a far cry from saying that an impartial opinion becomes the medical fact in a given case. Even if it did (and as the reader will see from the latter portion of this article this writer firmly believes that experience has already shown us that such is not the case), a great deal could be said in favor of using the impartial expert as a substitute for the present system as it operates in so many of the large metropolitan areas. Day after day we see as witnesses the same parade of paid partisans who have examined an injured party for the sole purpose of enabling them to testify to their opinions concerning the physical condition and its expected future course. It is indeed a sad thing to see the greatest system ever devised by man for settling disputes, the Anglo-American jury system, being used as the basis for reaping rewards from inaccuracy and exaggeration. Today all trial lawyers know that juries are being fooled. One will hear hotly contested debates about the extent of it all, but no one will deny that it happens. The case of the working man who has been declared by his examining doctors to be totally and permanently disabled but who recovers miraculously after a large verdict is not, sadly enough, a figment of someone's imagination. This is the extreme, but short of this extreme are many, many cases where it must be apparent to the experienced observer that disability which to the nonlitigant would seem only temporary and routine, something to take in his stride, is being magnified in the courts by imaginative lawyers

5. If this does not seem to you to be a rhetorical question, consider the example at p. 408, *infra*.

and doctors to the point where an "adequate award" necessary to compensate must be astronomical indeed.

If there were forced upon us the necessity of deciding which was better, retaining our present system or transferring the finding of medical facts to an impartial panel, this writer would vote for the latter. Absent statistics, which would be almost impossible to correlate even if we had them, the judgment of those intimately associated with the trial of cases on a day-by-day basis must be our guide post. My conviction is that trial lawyers today have educated themselves about the intricacies of medical theory beyond the point of no return. They know more than enough medicine to present on direct plausible theories about the relationship between accidents and disability in even the most outlandish cases.[6] They know more than enough to chop convincingly at medical theories during the process of cross-examination. The end result is either confusion or a prolonged trial. The cost to the taxpayer is tremendous. Trials take longer, the back-log of cases grows, and boards of judges quite justifiably *cry louder and louder for additional* appointments to help them catch up.

To those lawyers who really contend seriously that an adversary trial is the best way to resolve medical disputes I put this hypothetical:

> Assume your son has been hit by an automobile and is lying on a hospial bed. Resident A thinks the boy's leg should be amputated. Resident B thinks it can, at some risk to the boy's life, be saved by treatment. Assume also that you have plenty of time to cogitate and act. You can go near-by and get twelve members of society whose minds are uncluttered with any information about the medical problem and get them to decide who's right, A or B. In the process you can freely use all your years of learning and experience fully to examine and cross-examine before your twelve "jurors" both Doctor A and Doctor B. On the other hand you have the alternative of following the opinion of one of the city's leading experts on the very medical dilemma which you face, a man who has spent his life studying and working with it, a man whom the State Medical Society tells you is as knowledgeable on the intricacies of the problem as anyone they have to suggest. Which method of solving your problem are you going to adopt?

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6. In addition to cases involving strict mechanical injuries, the writer has taken part in trials where accidents were said to have caused hypothyroidism, hyperthyroidism, pulmonary emphysema, diabetes, cancer of the liver, cancer of the rectum, lung cancer, coronary occlusion, myocardial infarct, emboli lodged in internal auditory artery, hernia, epilepsy, impotence, alcoholism, atrophy of brain and spinal cord, schizophrenia, paranoia, peptic ulcer, aneurysm of Circle of Willis, dermatitis, hypertension, and iliitis, to say nothing of those common personality disorders seen daily in court, anxiety neurosis and conversion hysteria. If proof of causation is seemingly impossible, there is always aggravation. Little wonder that today trial and preparation for trial is a fantastically time-consuming business.

Fortunately, it is not necessary to solve today the question which is the more important to society, maintenance of the traditional form of jury trial or adoption of an entirely new system of resolving medical disputes. The impartial medical plan works within the framework of jury trial as we know it. It adds a very healthy leavening element, something which has become necessary because lawyers and judges have permitted abuses of the traditional system to creep into the day-by-day operation of our judicial process.

An impartial may be wrong. He probably will not be. In most cases the parties will recognize that fact in their settlement negotiations. If they do not, the fact finder can evaluate the impartial's opinion in light of all the evidence in the case. That gives us a much better chance of doing justice than we do now with trial by jury run rampant.

3. *The criticism that under impartial systems chance only determines the outcome of cases involving medical questions about which there is more than one school of medical thought*

One of the criticisms of the impartial medical system, and curiously a criticism which some judges in administering the plan have taken quite seriously, is that it is unfair to select a court-appointed witness to testify upon a medical question about which the medical profession is not in unanimity. Starting with the thesis that great weight must necessarily be given the opinion of the impartial medical witness, the argument proceeds that it is basically unfair to one side or the other if a single court-appointed witness, a witness who must necessarily belong to one of the different schools of medical thought, expresses his opinion. The mere fact that he belongs to the school he does will be a strong factor in convincing the fact finder to believe that that particular school has the correct approach.

The trouble with this argument is that it assumes too much. The proponents of the argument would like to have us think in terms of two equally balanced schools of thought. However, if there are such divisions among members of the medical profession, they are few and far between. This discussion is already too general. Let's be specific. Can a single blow, a single trauma as it is commonly referred to in the courts, cause a cancer? There used to be doctors, some rather well-known ones, who did not consider the possibility outlandish. There are doctors today who are quite ready to testify in court that such a thing can happen. However, the overwhelming weight of competent medical authority this day and age is that a cancer cannot be caused by a single blow. I think it is fair to say that no knowledgeable expert in this field now holds the view that such accidents either

do or can cause cause a malignant tumor. Where does this leave the two-school argument? There is no real difference of opinion, yet there is an "opposite school" of thought.[7] If we follow the criticizers, their argument requires that a court-appointed expert never be selected in a case where the plaintiff contends that a single blow caused a cancer. Since there is a doctor who thinks that such a thing can happen (if there were not, the case would not have reached the stage of considering an impartial), the lawyer seeking to establish his 100 to 1 shot will argue that it is wrong to appoint an impartial because he "might" belong to the "opposite school."[8] Yet, if there is a case which cries out loud for objective, dispassionate explanation to the fact finder about what modern medicine really thinks on a medical subject, the so-called traumatic cancer case is the one. If left to the device of the adversary system, the jurors might well get the impression that they must resolve a major dispute within the medical profession. The plaintiff's expert would explain how an accident caused the plaintiff's cancer. The defendant's expert would explain that it could not happen and that the medical profession would not accept the thesis that it could happen. When the jurors went to the jury room they could well be in a coin-tossing situation. Given exactly the same case with a medical witness whom the jurors could respect for his learning, his objectivity, and his lack of pecuniary interest, they would be informed by someone they could trust about the actual convictions of the learned members of the medical profession. The impartial could explain, although concern for the sensibilities of those sitting in the austere surroundings of a court might lead him to temper his language, that doctors holding the view that cancer is caused by a single blow are, for want of a better term, crackpots. He can explain that among contemporary research experts there is unanimity of opinion, and he can give to the fact finder a real basis for appraising what is by modern day medical knowledge a farfetched and somewhat ridiculous claim.

Thus, the two-school argument can be most deceiving. There may be circumstances where the claim of a connection between accident and eventual disease will raise a more controversial question in

7. The bill of goods which some lawyers have sold other lawyers is quite apparent in a recent (November 1, 1960) REPORT OF SUBCOMMITTEE ON IMPARTIAL MEDICAL TESTIMONY OF THE DISTRICT OF COLUMBIA STATE COMMITTEE SECTION OF JUDICIAL ADMINISTRATION, A.B.A. There it is flatly stated, "The medical profession is divided on the question of whether cancer can be brought about by a single trauma." The ability to laugh at ourselves when we drop the ball is the most healthy ability God gave us, so fellow lawyers, let's laugh! The statement just quoted is so naive it's funny.

8. The writer has no doubt at all that he "will" belong to the opposite school. That is a necessary corollary of the belief already expressed that the two-school idea is the brain-child of lawyer-advocates. It has no sound basis in competent medical thought.

the minds of knowledgeable medical men than the trauma-cancer example, but it is hard to conceive of a situation where a true 50-50 split exists. Even if it did, an expert who by hypothesis is both well informed and objective will freely explain to the fact finder exactly what the split is and will explain also the reasons that the split exists. The risk that the overpowering personality of the particular impartial called to the witness stand will cause the jurors to accept his school of thought over the other school, even in a hypothetical 50-50 situation, is a small enough price to pay in order to obtain reliable information to use as a basis for reaching a fair evaluation of the particular medical problem involved in the particular case at issue.

All of this leads to a warning to judges and other administrators of plans for impartial examinations: beware the two-school argument! If you buy its basic tenant, you are accomplishing two potential evils: (1) depriving the parties of objectivity where it may be needed the most, and (2) putting yourselves in the uncomfortable spot of having to decide which controversy is controversial enough to make it too "dangerous" to have impartials. You will find that heated advocacy does not help much to resolve that, so you'll have to turn to the medical profession. Logically you'll need an impartial panel to decide what medical topic is one worthy of impartial consideration. The best way to avoid this kind of nonsense is to recognize the two-school argument for what it is, a lawyers' device to avoid impartial examinations in areas where they might trim the sails of clever advocacy. Forget the argument and leave to the panel of experts the job of worrying about any splits of thought which exist among the doctors.

4. *The Criticism That the Impartial's Opinion Becomes Once and for All the Medical Fact*

The loudest wail of all, the strongest criticism, is that impartial witnesses deprive a litigant of the right of cross-examination. This argument is fundamental. It is a starting point for the other arguments against the plan, for unless one visualizes the impartial system as a substitute for adversary fact finding of medical questions, it makes little difference that the impartial witness might be wrong or that he belongs to a particular school of medical thought. If there were any basic truth in the position that facts are necessarily what the impartial makes them, there would be real reason for persons dedicated to preserving the benefit of the adversary system to pause long and hard before accepting the impartial concept. But the contention that a lawyer cannot effectively cross-examine an impartial is fiction, not fact.

The fact is that with the arrival of the impartial witness there has returned to the trial arena the *art* of cross-examination. True, some hitherto effective attacks on the motives of the person testifying may be totally ineffective with a court-appointed witness, but that is all to the good. The important thing is that a carefully conceived cross-examination, capitalizing on the impartial's objectivity, can serve the purpose history has ascribed to our system, the bringing out of the truth. While the prospect of cross-examining effectively has therefore been enhanced, not impeded, lawyers must nevertheless be willing to adopt a method and approach of truth-finding suitable for the new situation.

Cross-examination has two basic approaches, the attack on the merits and the collateral attack. Little mileage can be made with the latter when the lawyer is examining a court-appointed expert. What good is there in employing the techniques we have learned to bring out the lack of good faith, the incompetence, the interest of the partisan witness when the man on the witness stand is there in all good faith, he's highly competent, he has no pecuniary interest, and the jury knows it? Certainly the kind of cross-examination which attacks the individual had better be forgotten. And a breath of fresh air is stirred by the realization that the cries of "cheat", "fraud" and "money mad" need not be echoing through the court rooms. It is hard to conceive of anything more distasteful to the man who has reached the top of his profession than to have his honor and integrity openly attacked in a court proceeding. Yet many a doctor, wholly undeserving of it, has felt the unfair sting of innuendo, sarcasm and belittling from counsel table. For that very reason alone many a badly needed expert has refused, and quite justifiably so, to testify. It is truly a boon to litigation that under this relatively new system of court referrals backbiting collateral attacks are neither necessary nor called for.

The extremes to which lawyers will go to retain the tools of their trade is evident in plans recently adopted in Cleveland and San Francisco—impartial plans where generally speaking it is not proper to tell the jury who asked the doctor to examine or how he happens to be there. This is a neat compromise to give innuendo, the collateral attack, at least a chance to rear its ugly head. This same variation has been suggested by a medico-legal sub-committee of Philadelphia lawyers headed by Temple's lawyer-doctor, Samuel Polsky. Frankly, it is difficult to see any real reason for the limitation other than a desire to kill the impartial plan. It is an attempt to preserve the right to deceive. A single example should suffice. One of the most abortive cross-examinations this writer ever heard was an hour devoted to

a misleading examination of all the articles written by the witness to show that many, many of the matters he had written about were not specifically on the point of the particular medical issue being tried. The examination was abortive because the witness was from the District Court impartial panel. The jury knew what the panel was and why the witness had been chosen by the court. However, if the jury had not been told, if they had not been given the basis for realizing they could trust the man, if it had appeared that he had been called by the opposite party, the collateral attack might well have been successful. I can hear the jury speech now:

> Ladies and gentlemen, why did they bring in Dr. X, a doctor who by his own admission has written reams of articles *not on this subject?* Why did they pay all that money to produce a glib talker *who wrote on other things,* etc., etc.

An argument like that, however clearly it was pointed out to the jury that Dr. X was in fact the most experienced physician in the state in examining and treating the disease in question, might nevertheless cause jurors to disregard Dr. X's testimony. That is the collateral attack cleverly but misleadingly used. If we are looking for objective, truth-producing litigation, we are lucky to have the impartial system which minimizes the risk of a jury's being fooled by a misleading collateral attack of that sort.

Upon the merits of a case cross-examination of the impartial can be helpful and effective, helpful in discovering the truth and effective when compared with cross-examination of the professional who spends his life in the witness box. The partisan, professional witness is playing games with the cross-examiner, and, if he knows his stuff, the cross-examiner is in turn playing games with the doctor. What ensues is often an interesting "chess" match with the prize going to the one who has been better able to second-guess where the other is going. The contest may be a fascinating one, but it may have little to recommend it from the standpoint of scientific accuracy. With the witness from the impartial panel most of this sparring is abolished. The impartial witness will fairly answer the examiner's questions in an objective and scientific way. It follows that if there are points in the cross-examiner's medical case which are favorable to his point of view, he can bring those points home to the fact finder by examining the impartial about them. He will not get a lot of double talk and erudite nonsense, and he can count on a fair, honest answer to what we trust is a fair, pertinent question. This is not theory; it is fact. Here is the start of an actual cross-examination of an impartial medical witness

who had testified on direct that the plaintiff was suffering from a disabling postconcussion state and that the prognosis for further improvement was poor:[9]

> Q. Doctor, at least one thng is clear: Your only function here is to try to arrive at an objective determination based on the background that you received and the history that the plaintiff gave you?
>
> A. That is correct.
>
> Q. You have no pros and cons on either side of this particular case?
>
> A. That is correct.
>
> Q. It is fair to say, is it not, Doctor, that this problem of evaluating a so-called postconcussion syndrome is not the easiest problem?
>
> A. I agree.
>
> Q. And is it fair to say that the reason for that is, especially where your clinical examination is negative as it is here—
>
> A. That is correct.
>
> Q. —that you have to evaluate the personality of the individual who is involved as well as what you have in the way of prior history?
>
> A. That is correct.
>
> Q. And your conclusion which you have given here is in turn based—well, if not *in toto,* at least in great part, on the accuracy of this background history as you understand it?
>
> A. That is correct.
>
> Q. Now, Doctor, my concern is that there may be some things in this history which might not be factually accurate, and I want to find out whether any of these things might change your opinion if they were to prove contrary to the way you have them in your report. Do you follow me, sir?
>
> A. I understand, yes.

The examination then proceeded to discuss the basis of the doctor's opinion. The doctor quite frankly admitted that fact A was critical, that fact B was important, and so on. This helped the cross-examiner; it did not hurt him in the slightest. In the last analysis the jurors did not agree with the impartial's opinion, not because they did not believe him but because they did. When he told them that his opinion would be different if fact A was different, they did what lay jurors are fully capable of doing. They examined the evidence to see if fact A was as represented. When they found that it was not, the impartial was

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9. This case is cited partly for the benefit of the Washington, D.C. Subcommittee, footnote 6, *supra.* That group stated, ". . . in all the literature about the plan, not one instance has been cited of jury disagreement with the independent expert." Now they have one. It is, incidentally, one of several such disagreements in the Eastern District of Pennsylvania under its relatively recent plan.

converted into a defense witness. Here, then, is the very essence of the adversary system. If lawyers will only stop writing about how an impartial cannot be cross-examined and cross-examine a few, they will find that through the panel members truth is more readily ascertainable than through professional witnesses who are trying to win cases for their "clients".

Before completing this discussion about the rejuvenated potential for effective cross-examination a word about technique is in order. Since under most plans the trial lawyer is not permitted to discuss the case with the member of the impartial panel, extreme care is necessary in presenting the case. The lawyer must be well informed about current medical knowledge concerning the problem at issue, or he may find himself asking questions on direct or on cross which will embarrass his case. In many respects this puts an added burden on the trial lawyer. So long as he is inquiring about accepted current medical thought he is on safe grounds. When he starts inquiring about the obtuse, sometimes farfetched theories which are not too uncommon in courts today, he may be in trouble. This also is all to the good. It means that as trial lawyers we must confine ourselves to medical fact and not to farfetched theories. Nothing could be more healthy from a litigation standpoint, and we should be thankful that the impartial medical plans are here to help us keep our feet on the ground.

Conclusion

This writer does not go along with the attempts that have been made by so many of the members of the bar to water down the basic elements of the impartial plan. The system cannot be really helpful unless it gives the fact finder the chance for fair evaluation. Fair evaluation means that where objectivity exists the fact finder should know about it. Where the medical profession is willing to help lawyers and judges do justice between litigants, it is not right for us to devise detours to make our professional road easier and the road of the dedicated medical man more difficult. In the jurisdiction where I try cases I have found that the plan has sometimes hurt my clients and has sometimes helped them. In my judgment its overall effect has been an extremely healthy one.

II. PROBLEMS IN CIVIL CASES - DURING AND AFTER TRIAL

II PROBLEMS IN CIVIL CASES - DURING AND AFTER TRIAL

1. Control by Trial Judge

a. Voir dire examination

Rule

4:48–1. Examination of Jurors

The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper.

Note: Formerly Rule 3:47–1.

2A:78–4. Examination of jurors. Upon the trial of any cause, civil or criminal, all parties may, within the discretion of the court, question any person summoned as a juror, after his name is drawn from the box and before he is sworn as a juror, and without the interposition of any challenge, to elicit information for the purpose of determining whether or not to interpose a peremptory challenge, and of disclosing whether or not there is cause for challenge. In all cases in which a death penalty may be imposed, the examination as to competency shall be under oath, but in other cases it shall be made without putting the juror under oath. Such questions shall be permitted for the purpose of disclosing whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted under the supervision and control of the trial judge and in open court.
Source. R. S. 2:92–4; 2:92–10.

Excerpt from Springdale Park v. Andriotis, 30 N.J. Super 257, 262-265 (App. Div. 1954)

[1–3] The statute and the rule permitting an examination of a prospective juror as to his qualifications are *N. J. S.* 2*A*:78–4 and *R. R.* 4:48–1. *N. J. S.* 2*A*:78–4 provides:

"Upon the trial of any cause, civil or criminal, all parties may, within the discretion of the court, question any person summoned as a juror, after his name is drawn from the box and before he is sworn as a juror, and without the interposition of any challenge, to elicit information for the purpose of determining whether or not to interpose a peremptory challenge, and of disclosing whether or not there is cause for challenge. In all cases in which a death penalty may be imposed, the examination as to competency shall be under oath, but in other cases it shall be made without putting the juror under oath. Such questions shall be permitted for the purpose of disclosing whether or not the juror is qualified, impartial and without interest in the result of the action. The questioning shall be conducted under the supervision and control of the trial judge and in open court."

R. R. 4:48–1 provides:

"The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper."

Ballentine's Law Dictionary (*2d ed.* 1948), defines *voir dire* as follows:

"To speak the truth. The oath is so called which is administered to a prospective juryman or a witness as a preliminary step immediately prior to an examination of him relative to his qualifications as a juror or a witness."

See also, 31 *Am. Jur., Jury, secs.* 104, 107 and 108, *pages* 635, 636 and 638. That a party to litigation may examine into the qualifications, attitudes and inclinations of jurors, before they are impanelled and sworn to try a case, it being a necessary incident to the practice of challenging, is unquestioned. It is only by such an examination that the information or suspicion to constitute a basis for intelligent and practical exercise of challenges to accomplish the end desired—exclusions from the jury of those who would act from prejudice or interest or without qualifications to judge soundly—may be discovered.

"The usual practice is to put those jurors who have been called, into the jury box, on their *voir dire* or oath to tell the truth, and then for counsel or the court to question them. Counsel challenges when he thinks that cause is apparent. The court either sustains the challenge, tells the challenged juror to step aside, and another juror is called, or the court overrules the challenge." 31 *Am. Jur., Jury, sec.* 104, *p.* 635.

It is the settled rule that for complete knowledge of all material and relevant matters essential to a fair and just exercise of the right to challenge either for cause or peremptorily, it becomes the duty of a juror to make full and truthful answers to such questions as are propounded to him. 31 *Am. Jur., supra.*

[4] It seems clear that the general rule applicable to examination of jurors on their *voir dire* is that such examinations should be made of each juror individually and separately and not as a group. This conclusion is supported by our former Supreme Court in the case of *Heuser v. Rothenberg*, 121 *N. J. L.* 14 (1938), where Chief Justice Brogan, author of the opinion, stated:

"* * * But, in our view, the statute authorizes counsel or party to examine jurors separately and not in the wholesale fashion exhibited here. 'It does not authorize an omnibus examination of all of the 12 men whose names have been previously drawn from the general panel.' *Boyd v. Husted*, 3 *N. J. Misc.* 225, 227."

In *Boyd v. Husted*, 3 *N. J. Misc.* 225 (*Sup. Ct.* 1925), it was stated at *p.* 227:

"* * * The right conferred by the statute is the questioning of a single juror, and this must be done separately, if the right is desired to be exercised with reference to more than one, for the purpose of eliciting from the member of the panel who is questioned the matters referred to in the statute. It does not authorize an omnibus examination of all of the 12 men whose names have been previously drawn from the general panel. For this reason, the ruling of the trial court was entirely proper."

While the tenant argues that there are no New Jersey cases directly in point, he calls attention to the cases of *Stephens v. State*, 53 *N. J. L.* 245 (*Sup. Ct.* 1891), and the recent case of *Panko v. Flintkote Co.*, 7 *N. J.* 55 (1951). It is to be observed that an examination of the two cases cited by the tenant, reveals that neither is apposite to the case *sub judice*. In the *Stephens* case, there was a specific challenge to a juror who had sat on a previous trial of the defendant and the challenge was sustained. In the *Panko* case, the issue of the qualifications of a juror was not involved, but was one which dealt solely with the subject of misconduct of one of the jurors.

[5] In examining the omnibus question addressed to the jurors, it will be noted that actually there were nine questions in one; that that part of the question pertaining to knowledge of the issue between the parties, clearly was confined to the subject of the present action and there was no implication that it had any reference to the previous action between the parties. A repetition of that part of the question will clearly demonstrate this conclusion. It reads: "Are any of you familiar with the situation between these two parties with reference to these repairs? Does anybody have any personal knowledge of it?" It is undisputed that the subject of the prior action was entirely unrelated to the action at bar. With the exception of one juror, it is significant to note that counsel for the appellant never insisted upon a specific answer from the jurors in response to his omnibus question and seems to have been content with the silence of the jurors. However, we think that if counsel were desirous of obtaining answers to the congregated questions from the individual jurors, he should have specifically requested same. The one juror who indicated he knew the parties was not challenged, because he conveyed the assurance that his knowledge would not interfere with his impartial consideration of the evidence. Counsel for appellant contends that the silence of the other 11 jurors, and in particular the three jurors in question, misled him into accepting them. We think that the appellant's counsel created the situation about which he now complains; that such a situation could have been readily avoided by requesting a specific answer from the jurors or, by an examination of each juror separately.

[6, 7] At all events, even if we were to assume that the three jurors misled the tenant in its efforts to ascertain their qualifications, the burden falls upon it to establish that it was harmed or prejudiced thereby. *Vide Lindsley's Case*, 46 *N. J. Eq.* 358 (*Ch.* 1890); *De Mateo v. Perano*, 80 *N. J. L.* 437 (*E. & A.* 1910). There is a complete dearth of proof that the jurors in question were guilty of any conduct indicating that their votes for the verdict returned were the result of bias or prejudice or that they were in any way influenced by their knowledge of the parties or the previous litigation. In fact, at the argument it was conceded that in the prior law suit a unanimous and favorable verdict was returned for the tenant, and that the two jurors in question and the husband of the other juror supported that verdict. Such a situation would not justify an implication that the jurors were in any way antagonistic to the tenant or in any way biased or prejudiced against it.

Additional reading material: Wright v. Bernstein, 23 N. J. 284, 129 A. 2d 19 (1957); State v. Huff, 14 N. J. 240, 102 A. 2d 8 (1954); State v. Grillo, 16 N. J. 103, 106 A. 2d 294 (1954); Paradossi v. Reinauer Bros. Oil Co.,Inc., 53 N. J. Super. 41, 146 A. 2d 515 (App. Div.1958); Heuser v. Rothenberg, 121 N. J. L. 14 (Sup.Ct. 1938).

b. Openings

Rule

4:44–1. Openings

In all trials, unless otherwise provided in the pretrial order, before any evidence is offered the plaintiff shall make an opening statement and immediately thereafter the defendant shall make an opening statement.

Note: Adopted December 7, 1950. Formerly Rule 3:43–A1.

Excerpt from Passaic Valley Sewerage Com'rs v. Geo. M. Brewster, etc. Inc., 32 N.J. 595, 605-607, (1960)

[1, 2] Opening statements are mandatory under our practice, unless the pretrial order provides otherwise. *R. R.* 4:44–1. The fundamental purpose thereof is a most important factor in considering a question of legal adequacy. That purpose is "to do no more than inform the jury in a general way of the nature of the action and the basic factual hypothesis projected, so that they may be better prepared to understand the evidence." *Farkas v. Middlesex County Board of Chosen Freeholders*, 49 *N. J. Super.* 363, 367–368 (*App. Div.* 1958); *Shafer v. H. B. Thomas Co.*, 53 *N. J. Super.* 19, 26 (*App. Div.* 1958). The judge already knows what the case is all about from the pretrial order. Counsel must be summary and succinct. Proposed evidence should not be detailed and it will be little more than an outline, quite frequently a fairly indefinite one by reason of the nature of the case. In no sense can it be argumentative or have any of the attributes of a summation. Nothing must be said which the lawyer knows cannot in fact be proved or is legally inadmissible. *Paxton v. Misiuk*, 54 *N. J. Super.* 15, 20 (*App. Div.* 1959); *Shafer v. H. B. Thomas Co., supra.*

[3] Our practice has always permitted, however, dismissal of a complaint on a plaintiff's opening, *Kelly v. Bergen County Gas Co.*, 74 *N. J. L.* 604 (*E. & A.* 1907), and even a direction of a verdict for a plaintiff after both openings. *Carr v. Delaware, Lackawanna and Western Railroad Co.*, 78 *N. J. L.* 692 (*E. & A.* 1910); *Alexander v. Manza*, 132 *N. J. L.* 374 (*E. & A.* 1945); *Ross v. Orr*, 3 *N. J.* 277 (1949). But even prior to the introduction of the new practice in 1948, the then nonsuit would only be granted where it was clearly evident that no cause could be made out after accepting as true all facts stated and all proper inferences to be drawn therefrom. *Weidenmueller v. Public Service Interstate Transportation Company*, 129 *N. J. L.* 279 (*Sup. Ct.* 1942); *Rotman v. Levine*, 131 *N. J. L.* 205 (*E. & A.* 1944).

While the practice still exists, we have become even more cautious since 1948, and properly so, because such a dismissal is now a final adjudication on the merits (*R. R.* 4:42-2(*b*)), precluding the commencement of another action which was permissible under the former nonsuit practice. *Reti v. Vaniska, Inc.*, 8 *N. J. Super.* 275, 278 (*App. Div.* 1950). Moreover, there is little reason for the use of this kind of motion today with our pretrial procedure, discovery and summary judgment and other motion practice, which, when properly and effectively used, can clear away and settle in advance of actual trial most matters formerly sought to be raised on openings. Any purpose the opening served of specifying the issues has long since disappeared with the advent of the pretrial order. Even a reason for more liberal use of the device given in some jurisdictions not having our modern procedural methods, *e. g.*, see *Best v. District of Columbia*, 291 *U. S.* 411, 415, 54 *S. Ct.* 487, 78 *L. Ed.* 882, 885 (1933), that it "is convenient in saving time and expense by shortening trials," has, especially in these days of heavily congested calendars, little appeal in New Jersey where the parties have the fullest opportunity to determine such issues before the valuable time of judicial personnel and lawyers and the money of litigants and the public is expended in preparation, summoning witnesses and jurors and commencing the actual trial.

[4] While this court has not previously had the opportunity to speak on the matter, recent decisions in the Appellate Division have been most positive in expression, with which we thoroughly agree. "Our present practice does not favor a dismissal on plaintiff's opening to the jury. A motion for dismissal should never be granted unless the facts are undisputed and the law free from doubt." *Farkas v. Middlesex County Board of Chosen Freeholders, supra* (49 *N. J. Super.*, at *page* 367). "* * * [T]he trial court is justified in exercising a most liberal discretion in disposing of the matter. The case is rare indeed where the interests of justice will not be served by withholding action on or by denying the motion and receiving the plaintiff's proof." *Sherman v. Josephson*, 44 *N. J. Super.* 419, 426 (*App. Div.* 1957). See also *Nelson v. Great Atlantic and Pacific Tea Co.*, 48 *N. J. Super.* 300 (*App. Div.* 1958).

[5, 6] Such a motion admits the truth of all the facts outlined and gives a plaintiff the benefit of every possible favorable inference which can be logically and legitimately deduced. Study of the handful of cases, both before and after 1948, in which dismissals or directed verdicts in openings have been sustained, contrasted with the large number over the years in which the granting of such motions has been reversed or the denial thereof affirmed, supports the conclusion that dismissal action is appropriate only when legally determinative facts are in effect stipulated or are admittedly uncontrovertible and the result thereby becomes inevitable as a matter of law.

Ross v. Orr, supra (3 *N. J.* 277); *Pitaresi v. Appello*, 20 *N. J. Super.* 432 (*App. Div.* 1952), affirming 17 *N. J. Super.* 278 (*Law Div.* 1952); *Corbett v. Warner*, 137 *N. J. L.* 281 (*Sup. Ct.* 1948); *Rotman v. Levine, supra* (131 *N. J. L.* 205); *Alexander v. Manza, supra* (132 *N. J. L.* 375); *Lake v. Rosenberg*, 131 *N. J. L.* 19 (*Sup. Ct.* 1943); *McCourt v. Public Service Coordinated Transport*, 122 *N. J. L.* 419 (*E. & A.* 1939); *Taggart v. Bouldin*, 111 *N. J. L.* 464 (*E. & A.* 1933); *Berkman v. Cohn*, 111 *N. J. L.* 229 (*E. & A.* 1933); *Lennon v. Atlantic City Railroad Co.*, 107 *N. J. L.* 297 (*E. & A.* 1930); *Carey v. Gray*, 98 *N. J. L.* 217 (*E. & A.* 1922). It is difficult to conceive of a case in which such a motion may now properly be granted where the same result would not have followed by the use of the more appropriate and desirable means of a motion made prior to trial for summary judgment, for judgment on the pleadings or to dismiss for failure to state a claim.

Additional reading material: Poland v. Parsekian, 81 N. J. Super. 395, 399 (App. Div. 1963); Farkas v. Middlesex Board of Freeholders, 49 N. J. Super. 363, 367 (App. Div. 1957); Henry v. Haussling, 114 N. J. L. 222 (Sup. Ct. 1935).

c. Summations

Excerpt from Wimberly v. Paterson, 75 N.J. Super 584, 604-605 (App. Div. 1962.)

[15] Counsel in his summation is allowed wide latitude. He may argue from the evidence to any conclusion which the jury is free to arrive at. He may draw conclusions although such inferences are improbable, illogical, erroneous, or even absurd, unless they are couched in language transcending the bounds of legitimate argument or there are no grounds for them in the evidence. *Botta v. Brunner*, 42 *N. J. Super.* 95, 108 (*App. Div.* 1956), modified in 26 *N. J.* 82 (1958); *Vorhies v. Cannizzaro*, 66 *N. J. Super.* 551, 558 (*App. Div.* 1961). Here, counsel for the defendants engaged in the misuse of evidence concerning the decedent's asserted moral qualities—evidence which had been introduced and allowed solely as bearing on the question of the *quantum* of damages. Such misuse was equivalent to referring to testimony which was not in the case.

Nor did the highly improper remarks of the defendants' counsel with reference to the morals of the plaintiff administrator bear relation to any issue in the case. We have held

that such an attack by counsel upon a litigant's character or morals, when they are not in issue, is a particularly reprehensible impropriety. *Paxton v. Misiuk*, 54 *N. J. Super.* 15, 22 (*App. Div.* 1959). The remarks made invited the jury to judge the decedent's claim not upon the law applicable but rather upon whether his father lived up to the jurors' standards for the behavior of a moral married man. *Id.* We have no doubt as to the prejudicial effect of these remarks. It is difficult to conceive why they were made if such a result was not intended. *Haid v. Loderstedt*, 45 *N. J. Super.* 547, 551 (*App. Div.* 1957); *Paxton v. Misiuk, supra,* at *p.* 23.

[16] But it is urged that counsel for the plaintiff did not object to these passages, either during the summation or immediately thereafter. We note that there is no indication on the record that any specific objection was interposed at either time. When an improper remark is made by counsel in the course of summation, it is the duty of the party aggrieved to immediately voice his objection to the court and if the remarks have been of such a nature as not to be rectifiable by further instructions, then to make a motion for a mistrial. *McCray v. Chrucky*, 66 *N. J. Super.* 124, 134–135 (*App. Div.* 1961). He cannot for tactical reasons allow objectionable remarks or conduct to pass unnoticed and subsequently claim injury therefrom. *Id.*

Additional reading material: As to procedure and duty of trial judge to confine counsel to issues and proofs bearing thereon. See Panko v. Grimes, 40 N. J. Super. 588, 598 (App. Div. 1956); Wimberly v. Paterson, 75 N. J. Super. pp. 605 to 607 (App. Div. 1962). As to money value ofpain and suffering, see Botta v. Brunner, 26 N. J. 82, pp. 95 to 103 (1958). As to use of blackboard during summation, see Cross v. Robert E. Lamb,Inc., 60 N. J. Super. 53/at pp. 72 to 76 inclusive. (App.Div.1960)

2. JUDGE'S PARTICIPATION IN TRIALS

a. Examination and Cross-Examination of Witnesses. Rules

4:44–2. Oral Testimony

(a) In all trials the testimony of witnesses shall be given orally and taken stenographically in open court, unless otherwise provided by law or by these rules. In jury trials the opening and closing statements shall also be taken stenographically in open court, but shall not be included in the transcript on appeal unless a question with respect thereto is to be raised on appeal.

(b) The testimony of a witness, whether or not a party, taken at the trial of a civil action by the official stenographer of the court in which the action is tried, may be admitted at a new trial of the action if the witness is dead or unavailable and the interests of justice so require, having due regard to the importance of presenting the testimony of witnesses orally in open court.

Note: Paragraph (a) formerly Rule 3:43–1.

4:44–3. Record of Excluded Evidence

In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request may permit the evidence and any cross-examination relating thereto or evidence in rebuttal thereof to be taken down by the court reporter in full, or otherwise preserved, unless it clearly appears to the court that the evidence is not admissible on any ground or that the witness is privileged.

Note: Formerly Rule 3:43–2.

4:44–5. Record on Rulings

The reasons of the trial judge for granting or refusing any motion made by a party during the course of the trial shall be taken stenographically and shall become a part of the record, so that in case of appeal the appellate court may be informed of the grounds of the decision.

Note: Adopted December 7, 1950. Formerly Rule 3:43–4.

who had due notice thereof, provided the court finds: (1) that the witness is dead; or (2) that the witness is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition; or (3) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (5) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered, and any party may offer any other parts.

Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any court of this State, of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

Note: Amended January 6, 1949; January 1, 1953. Formerly Rule 3:16–4.

Additional reading material: As to appearance of attorney as witness. Metalsalts Corp. v. Weiss, 71 N. J. Super. 360 (App. Div. 1962), 76 N. J. Super. 291 (Chan. Div. 1962). As to admissibility of written statement of witness. Miller v. Henderson, 41 N. J. Super. 15, 24 (App. Div. 1956). As to examination of notes of witness. Hess v. Hess, 83 N. J. Super. 583 (App. Div. 1964). As to hypothetical question. Stanley Co. of America v. Hercules Powder Co., 16 N. J. 295, 305 (1954); Dalton v. Gesser, 72 N. J. Super. 100 (App. Div. 1962); Zaklukiewicz v. Western Electric Co., 16 N. J. Super. 189, 197 (App. Div. 1951); State v. Doyle, 77 N. J. Super. 328, 338-339 (App. Div. 1962). As to weighing relevancy of testimony as against prejudice possibly induced. Wimberly v. Paterson, 75 N. J. Super. 584 (App. Div. 1962). As to what constitutes judicial discretion. See Wasserstein v. Swern & Co., 84 N. J. Super. 1, 6 (App. Div. 1964).

As to use of sound recordings (criminal case). See State v. Driver, 38 N. J. 255, pp. 287, 288 (1962). As to right to compel expert testimony. Hull v. Plume, 131 N. J. L. 511, 517 (E. & A. 1944); Braverman v. Braverman, 21 N. J. Super. 367 (Ch. Div. 1952); Stanton v. Rushmore, 112 N. J. L. 115 (E. & A. 1934). Evidence as to possibility. Vorhies v. Cannizzaro, 66 N. J. Super. 551, 559 (App. Div. 1961). Use of summary of figures taken from books of party. Associated Metals, etc., Corp. v. Dixon, 82 N. J. Super. 281 (App. Div. 1964). Use of learned treatisies and safety codes. McComish v. DeSoi, 42 N. J. 274, 281-282 (1964); Ruth v. Fenchel, 21 N. J. 171, 176 (1956). Use of x-rays. Robinson v. Payne, 99 N. J. L. 135 (E. & A. 1923); Greco v. Schmidt, 101 N. J. L. 554 (E. & A. 1925). As to what constitutes "not able to find witness" as bearing upon use of deposition. Carimeco v. Ferrigno, 83 N. J. Super. 426 (App. Div. 1964). As to testimony by plaintiff as to bills paid by him. Brodsky v. Red Raven Rubber Co., 111 N. J. L. 453; Keber v. American Stores Co., 116 N. J. L. 437 (E. & A. 1936); Sanders v. Hudson and Manhattan R. R. Co., 121 N. J. L. 406, affirmed 122 N. J. L. 376. Evidence as to telephone calls. Manzueto v. Fackler, 109 N. J. L. 374 (1932).

b. Questioning of witnesses by court - calling of witnesses by court.

As to examination and cross-examination of witnesses, see State v. Guido, 40 N. J. 191, 199-203 (1963), and State v. Riley, 28 N. J. 188, 200-205 (1958). As to calling of witnesses by court, see Band's v. Fairlawn Boro, 62 N. J. Super. 522, 544-550 (App. Div. 1960).

c. Evidence whose admissibility involves possible prejudice etc.

Excerpt from Stoelting v. Hauck,
32 N. J. 87, 103-105 (1960)

[11, 12] There is no doubt that it is generally within the discretion of the trial court to exclude remotely relevant evidence whose probative value is offset by the danger of undue prejudice, unfair surprise, undue consumption of trial time, or the possible confusion of issues attendant on the introduction of collateral matters. *Iverson v. Prudential Ins. Co.*, 126 *N. J. L.* 280 (*E. & A.* 1941); *Dolan v. Newark Iron & Metal Co.*, 18 *N. J. Super.* 450 (*App. Div.* 1952). See *McCormick, Evidence*, § 152 (1954). This discretion to exclude evidence should be exercised, however, only where its probative value is clearly outweighed by the dangers its introduction would create. The search for truth is ordinarily best served by the fullest disclosure of relevant facts and circumstances, *In re Richardson*, 31 *N. J.* 391 (1960), and any evidence which would aid the jury in that search, unless some specific rule forbids it, should ordinarily be admitted. As was said by Justice Wachenfeld for this Court in *Miller v. Trans Oil Co.*, 18 *N. J.* 407, at *page* 413 (1955):

> "Justice and common sense, fused by enlightened reasoning, engender a legal philosophy embodying the abolition of all obstacles having a tendency to deprive the jury of any facts, however remotely relevant or from whatever source, which gravitate toward assisting them in arriving at a correct solution of the factual equation confronting them. Intellectual productiveness is not increased nor is the truth maintained by withholding circumstances which may shed some helpful light."

We have concluded that if a jury were to believe the evidence of the plaintiff's alleged conduct it could determine that the plaintiff in continuing to remain in an area of known danger was unreasonably careless of his own safety. His conduct, therefore, is not a collateral issue. The

relevance of his conduct may be considered "remote" only in the matter of time, *i. e.*, in that the alleged physical relationship ended some eleven months before the shooting. But the defendants offered to prove that the plaintiff threatened Sandra with harm to herself and her mother about a month before the shooting. The extended time pattern alleged may be considered by the jury, but it is not such that the circumstances should be removed entirely from their consideration.

[13, 14] The real danger the plaintiff sought to avoid by the exclusion of the proffered evidence is that the jury might disregard the issues of the case and base their verdict on their reaction to the picture that evidence might portray of the plaintiff's character. We must assume, until in a particular case the contrary be shown, that every jury will base their verdict strictly on the merits of the case before them. See *State v. Collins*, 2 *N. J.* 406, at *page* 411 (1949). That assumption is the basic justification of fact-finding by jury—one of the peculiar excellences of our legal system. As we have said above, all relevant matter not barred by a specific rule of evidence should be considered by the jury unless its probative value is clearly outweighed by its tendency to divert the jury from their fair determination of the issues properly before them. Here the proffered evidence is a vital part of the defendants' case. Indeed, if believed, it would show that Stoelting had far greater knowledge than the elder Haucks of the dangerous atmosphere that enveloped him. Its probative value is shown by the fact that the trial judge, having excluded it, then felt bound to take the issues of contributory negligence and assumption of risk away from the jury. Had that evidence been admitted and believed, the jury could reasonably have found against the plaintiff on the ground that his remaining in the Hauck household in the circumstances was imprudent and was a contributing cause of his injury. Evidence so central to the legitimate issues in a case cannot be excluded for fear that it might put one of the parties in a bad light before the jury. "That evidence is shrouded with unsavory implications is no reason for exclusion when it is a significant part of the proof." *State v. West*, 29 *N. J.* 327, at *page* 335 (1959). See *In re Vince*, 2 *N. J.* 443, at *page* 457 (1949). We therefore must conclude that the trial judge in excluding the proffered evidence mistakenly exercised his discretion.

Additional reading material: As to necessity for prompt and accurate cautionary instructions, see Dolan v. Newark Iron & Metal Co., 18 N. J. Super. 450, 456 (App. Div. 1952); Wimberly v. Paterson, 75 N. J. Super. 584, 608-610 (App. Div. 1962); Trenton Passenger & Ry. Co. v. Cooper, 60 N. J. L. 219 (E. & A. 1897); Massari v. Accurate Bushing Co., 8 N. J. 299, 316, 317(1951); Clark v. Piccillo, 75 N. J. Super. 123 (App. Div. 1962).

d. Jurors Taking Notes.

Suggested reading material: There is an absence of New Jersey cases bearing upon this point, but it is generally suggested that individual jurors be not permitted to take notes on the evidence. The reason generally given for this is that few jurors would take complete notes and fragmentary notes would result in attaching undue weight to certain facts to the exclusion or slighting of others. Experience has shown that it is better to depend upon the combined recollection of all the jurors. See Commonwealth v. Fontaine 183 Pa. Super. 45, 128 A. 2d 131 (Sup. Ct. 1956); Thornton v. Weaber, 380 Pa. 590, 112 A. 2d 344 (Sup. Ct. 1955); United States v. Davis, 103 F. 457 (W.D. Tenn. 1900), aff'd 107 F. 753 (6 Cir. 1901); but see: United States v. Carlisi, 32 F. Supp. 479 (E.D.N.Y. 1940); Chicago & N. W. Ry. Co. v. Kelly, 84 F. 2d 569 (8 Cir. 1936); Harris v. United States, 261 F. 2nd 792 (9 Cir. 1958); Toles v. United States, 308 F. 2nd 590 (9 Cir. 1962); United States v. Campbell, 138 F. Supp. 344 (N. D. Iowa 1956); Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127 (Sup. Ct. 1905); Thomas v. State, 90 Ga. 437, 16 S.E. 94 (Sup. Ct. 1892); Denson v. Stanley, 17 Ala. App. 198, 84 So. 770 (Ct. of App. 1919, reversed on other grounds, 203 Ala. 408, 84 So. 770 (Ct. of App. 1918); reversed on other grounds 203 Ala. 408, 84 So. 773 (Sup. Ct. 1919).

e. Motions for Mistrial

Effect of Mention of Insurance

Excerpt from Runnacles v. Doddrell, 59 N. J. Super 363, 365-369, (App. Div. 1960)

[1] The first point made by appellants is that the court erred in denying a motion for mistrial after mention by a witness of the words "insurance company." It appears that James Wilson when called as a witness by the defendants testified that he had reported the accident to the police by telephone. He also testified to facts concerning the operation of plaintiffs' car shortly before the accident from which the jury might have inferred that the driver was negligent. On cross-examination he was asked whether he had reported these facts to the police during the telephone conversation; he replied that he had not. The following then took place:

"Q. As a matter of fact, you never told the police up to this very day about the happening by the dumps, about the car pulling out in front of you, the green Packard, did you?

A. I told Chief Geffken.

Q. When did you tell him? Now, isn't it a fact—

Mr. Connolly: Let him answer, you have asked him a question.

Q. When did you tell him?

A. It was sometime after the accident.

Q. Isn't it a fact that it was only within the past several weeks that the Chief found out that you had this information that you speak of?

A. What was that?

Q. Isn't it a fact that the Chief only found out within the past few weeks about this information that you are supposed to have?

A. I don't believe so; I believe I didn't make a formal report of this at the police station because it wasn't required at that time.

Q. I see. As a matter of fact, you never made a formal report, did you?

A. *To the insurance company.*

Q. *To the insurance company.* Now, you never made a formal report to the police, did you?

A. By phone and they said they would contact me if they wanted anything more.

Q. But you never signed a report for the police?

A. I never signed a report for the police." (Emphasis added.)

Counsel for the defendants entered no objection to the underscored portions of the examination nor did he seek to have them stricken or to have the jury instructed to disregard them. However, after the witness had stepped down and a brief recess had been taken, counsel out of the presence of the jury moved as follows:

"Mr. Connolly: The defendant respectfully moves for mistrial on the ground that there was mention of the word insurance in the cross examination of a witness by Mr. Wimmer.

The defendant feels as though his position in this case is prejudiced thereby."

And the Court ruled:

> "Well, the Court denies this motion due to the fact that it was not one of the parties, and it was mentioned rather casually and without trying to influence the Court or anybody else."

Preliminarily, it is settled that the ruling on a motion for mistrial is discretionary with the trial judge and, unless such discretion is abused, it will not be disturbed. *Bradley v. D. E. Cleary Co.*, 86 *N. J. L.* 338 (*E. & A.* 1914); *Hansson v. Catalytic Construction Co.*, 43 *N. J. Super.* 23 (*App. Div.* 1956); *Hurley v. Sternick*, 3 *N. J. Misc.* 1048 (*Sup. Ct.* 1925).

In jurisdictions where the precise question has been raised it has been held that a mistrial may not properly be granted where the challenged utterances do not tend to establish that the defendant was covered by insurance any more than they tend to establish that the plaintiff was insured, *Annotation*, 4 *A. L. R.* 2*d* 761, 819 (1949). Typical of this rule is *Jimmie Guest Motor Co. v. Olcott*, 26 *S. W.* 2*d* 373 (*Tex. Civ. App.* 1930) where it was held that a response to a question which disclosed that a statement had been made to an insurance company's adjustor was not prejudicial because the remark supplied no connection between the adjustor and the controversy under consideration, and because there was no indication that it referred to the appellant as the person covered by the insurance. Accord *Siratt v. Worth Constr. Co.*, 263 *S. W.* 2*d* 842 (*Tex. Civ. App.* 1953). Likewise in *Crawford v. Alexander*, 259 *S. W.* 2*d* 476 (*Ky. Ct. App.* 1953) the Kentucky court held that an accidental reference to insurance was not prejudicial error when the jury was instructed to disregard it and where the remark could have referred as well to an accident insurance adjustor as to an automobile indemnity insurance representative. See *Huling v. Finn*, 67 *R. I.* 369, 24 *A.* 2*d* 620 (1942).

[2] Since there were two automobiles involved in the occurrence from which this action arose and since the unwitting remark of the witness, unsolicited by the cross-examiner, could have had reference to the "insurance company" of either party the denial of the motion for mistrial could be sustained on the sound rationale of the cited cases.

[3] However, we prefer to rest our decision on broader grounds. The exercise of judicial discretion in ruling on a motion for mistrial involves the appraisal by the trial court of the probable effect of the objectionable utterance on a fair trial. It is undesirable that a trial be aborted and

that the parties be required to incur the expense attendant upon retrial. By the same token expedition should not be served at the expense of crippling the cause of one party or the other by permitting the intrusion of evidence which will serve to confuse the jury or cause it to reach its verdict by emotion rather than by reason.

[4] But the exercise of the discretionary power to grant or deny a mistrial, merely because the fact that defendant is insured is revealed, should be guided by a consideration of the probable effect of such showing on jurors of the present day, in the light of the experience which they bring with them to the jury box. In these days the juror who is neither automobile owner or operator is a rarity. All who obtain registration of their vehicles know that they must either carry liability insurance or contribute to the unsatisfied judgments fund. And it seems likely that if they do think of it, jurors assume in every automobile case that some financial responsibility exists over and above defendant's ability to satisfy a judgment. This fact has been noted by Professor McCormick who says:

"Under the pressure of the enactment of more and more stringent financial responsibility laws, the practice of securing insurance protection against liability is rapidly becoming almost universal. In 1950 in seven states and the District of Columbia 90% or more of the vehicles were insured. In the same year throughout the country 73% were insured. When the rule against the disclosure of insurance originated doubtless the existence of such protection for defendants was exceptional and a 'hush, hush' policy could be effective. But when we consider the ways in which the fact of insurance may be properly disclosed in evidence or suggested at the beginning of the trial upon the examination of jurors, and the fact that insurance has become usual rather than exceptional, it seems likely today that in nearly all cases the jury will either be informed of the fact of insurance or will consciously assume that the defendant is so protected. The rule against the introduction of evidence of insurance thus becomes a hollow shell, except as it incidentally protects the defendant against improper argument that the jury should be influenced in their finding of liability or damages by the fact of insurance." *McCormick, Evidence*, § 168, at *p.* 357 (1954).

The decline of the supposed risk of prejudice arising from the disclosure of insurance coverage has also been noted in cases of other jurisdictions. In *Odegard v. Connolly*, 211 *Minn.* 342, 1 *N. W. 2d* 137 (*Sup. Ct.* 1941) it was said:

"We think too much is made of the fact that parties to an automobile collision carry insurance. It is safe to assert that the majority of every jury, called to try such a case in the Twin Cities, comes from families owning cars carrying liability insurance. Every person fit to be a juror knows that none but the wholly irresponsible and reckless fail to carry liability insurance on the car they own or drive. Owners of cars for the protection of their families and guest passengers carry such insurance. So long as the insurance is not featured or made the basis at the trial for an appeal to increase or decrease the damages, the information would seem to be without prejudice." 1 *N. W. 2d*, at *page* 139.

Likewise, in *Takoma Park Bank Inc. v. Abbott*, 179 *Md.* 249, 19 *A. 2d* 169 (*Ct. App.* 1941), the Maryland court in deciding that evidence indicating that the appellant bank was insured was not prejudicial said:

> "Moreover, in view of the presumptive knowledge on the part of present day jurors that public liability insurance is required to be carried by persons engaged in certain lines of endeavor, as well as the knowledge on the part of jurors that persons of business prudence and discretion often carry such insurance, the present day tendency is toward the relaxation of the strictness of the rule first announced." 19 *A. 2d*, at *page* 176.

See *Connelly v. Nolte*, 237 *Iowa* 114, 21 *N. W. 2d* 311, 320 (*Sup. Ct.* 1946). We are in accord with these views. We believe that a mistrial should be ordered only when the court in the realistic exercise of its sound discretion concludes that in the *special circumstances of the case* a party thereto is likely to have suffered prejudice by the mention of insurance. The mere inadvertent mention of insurance seldom meets this test and in our opinion did not in the case under review.

Irregularity or Impropriety by Jury

Excerpt from Clark v. Piccillo, 75 N. J. Super. 123, 128-130 App. Div. 1962)

On the morning of the last day of trial, one of the jurors asked the court officer if it was all right to show the other jurors a picture of a fork lift truck in a pamphlet that he had with him, stating that he had already shown this picture to some of the jurors. The court officer reported the incident to the trial judge who thereupon called all the attorneys into his chambers for a conference. The trial judge suggested that a statement be placed on the record by the juror to see how far he had gone with this pamphlet and picture. The attorneys were advised that the test of impropriety in such a case was the capacity of the irregular matter to influence the jury. Counsel for Acme thereupon moved for a mistrial. Counsel for Piccillo made no motion. The plaintiff's attorney advised the court that he did not want a mistrial and expressed the belief that the picture would not influence the particular juror. He wanted that juror called in to be questioned and given individual instruction. This was done in the presence of all counsel, the plaintiff, and the court reporter. The juror stated that he had shown the picture to two ladies and two gentlemen on the jury, had no further conversations with them regarding the picture, and that the picture would not influence any determination by him as to the outcome of the case. Plaintiff's attorney then suggested that the trial court address the whole panel, but the trial judge replied that

he would first examine the other jurors to whom the picture had been shown. Accordingly, they were brought in and questioned. They admitted that the picture had merely been exhibited to them, that they had not paid very much attention to it, and would not be influenced by it. The trial judge asked the plaintiff if he had heard what was going on, and he responded in the affirmative, and said that whatever his attorney said would be all right with him. His attorney then stated that he would have preferred a mistrial to the calling in of the first juror. However, he had opposed Acme's motion for a mistrial before that was done and had requested the interrogation of the first juror. The trial judge denied Acme's motion for a mistrial and the case proceeded. Later, in charging the jury, the trial court made it clear to all the jurors that "any document not introduced into evidence in the formal course should not be used by you during your deliberations."

[1] We are satisfied that there was no prejudicial error in the conduct of the trial court in this respect; in fact, the plaintiff does not assert that he was prejudiced by the action of the individual juror in exhibiting the picture of the fork lift truck. If this evidence were prejudicial, the prejudice was rather to Acme than to the plaintiff. The plaintiff had testified concerning a fork lift truck and that it should have been used at the Bound Brook terminal in moving heavy items. One basis of his complaint was that Acme had not furnished suitable equipment, since it had given for use only a two-wheel hand truck, a dolly, and a 2x4; and, although that had been the customary practice at the Bound Brook terminal, other equipment, including a fork lift, had been used at Acme's other terminals.

[2] It is proper procedure for a trial judge, when such a matter is brought to his attention, to conduct a complete investigation to determine whether the irregularity has any tendency to prejudice the rights of any of the parties to the litigation, and if he determines that no prejudice has resulted or will likely result therefrom, he may properly deny a motion for a mistrial and order the case to proceed. *Lawrence v. Tandy & Allen*, 14 *N. J.* 1 (1953); *Gail v. New York and New Brunswick Auto Express Co.*, 131 *N. J. L.* 346 (*Sup. Ct.* 1944); *Maulsbury v. Shure*, 12 *N. J. Misc.* 137, 140, 170 *A.* 41 (*Sup. Ct.* 1934). The plaintiff relies upon *Palestroni v. Jacobs*, 10 *N. J. Super.* 266 (*App. Div.* 1950), but that case is not apposite. The *Palestroni* case involved the introduction into the jury room by the trial judge without the knowledge or consent of counsel of a dictionary which had not been introduced into evidence.

Under all the circumstances, we conclude that the trial court acted properly in handling this matter and that the plaintiff was in no way prejudiced by the showing of the picture of the fork lift truck and especially in view of the cautionary charge of the judge to the jury.

Additional reading material: Bradley v. Cleary Co., 86 N. J. L. 338 (E. & A. 1914); Hansson v. Catalytic Construction Co., 43 N. J. Super. 23 (App. Div. 1956); Dalton v. Gesser, 72 N. J. Super. 100, 104-106 (App. Div. 1962); Bethanis v. Siegel, 9 N. J. Misc. 21 (Sup. Ct. 1930).

f. Charge and Supplemental Charge.

Rule

4:52-1. Instructions to Jury; Objection

Either before or at the close of the evidence, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. No party may urge as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of the objection. Opportunity shall be given to make the objection in open court but out of the presence of the jury.

Note: Amended January 1, 1952. Formerly Rule 3:51-1.

Suggested reading material: As to necessity that trial court charge fundamental law applicable. Gabriel v. Auf Der Heide-Aragona, Inc., 14 N. J. Super. 558, 565 (App. Div. 1951). As to sufficiency of charge. Batts v. Joseph Newman, Inc., 3 N. J. 503, 510 (1950); Leone v. Rutt's Hut, Inc., 55 N. J. Super. 485, 492 (App. Div. 1959).

As to effect of failure to call witness. State v. Clawans, 38 N. J. 162, 170 (1962); O'Neill v. Bilotta, 18 N. J. Super. 82 (App. Div. 1952), aff'd 10 N. J. 308 (1952). Failure of defendant to take stand. Hickman v. Pace, 82 N. J. Super. 483 (App.Div. 1964). Failure of husband to take stand. Goldstein v. Northwestern National Ins. Co., 4 N. J. Misc. 669 (Sup. Ct. 1926). Failure of doctor to take stand. Denbleyker v. Public Service, 11 N. J. Misc. p. 101 (Sup. Ct. 1933).

As to necessity of objection to charge. Abramsky v. Felderbaum, 81 N. J. Super. 1 (App. Div. 1963); Harpell v. Public Service, 20 N. J. 309 (1956); Lippman v. Ostrum, 22 N. J. 14 (1956).

As to the necessity of withdrawal of erroneous charge in addition to giving correct law applicable. Cosgrave v. Malstrom, 127 N. J. L. 505 (Sup. Ct. 1941); Friel v. Wildwood Ocean Pier Corp., 129 N. J. L. 376 (E. & A. 1943); J. D. Loizeaux Lumber Co. v. O'Reilly, 104 N. J. L. 510 (E. & A. 1928).

Further deliberations by jury. In re Stern, 11 N. J. 584 (1953); Botta v. Brunner, 42 N. J. Super. 95, 109 (App. Div. 1956); State v. Williams, 39 N.J. 471, 481 (1963).

g. Submission of Interrogatories to Jury. Rule

4:50-2. General Verdict Accompanied by Answer to Interrogatories

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court

Suggested reading material: As to purpose of rule. Marchese v. Monaco, 52 N. J. Super. 474 (App. Div. 1958). As to application of rule. Keiffer v. Food Products Trucking Co., 73 N. J. Super. 285 (App. Div. 1962).

h. Verdict-Polling Jury. Rules

4:40-4. Return of Verdict to the Judge

In every trial by jury the verdict shall be returned by the jury to the judge in open court.

Note: Adopted June 27, 1955 to be effective September 7, 1955.

4:49–1. Stipulation as to Jury of Less Than 12 or Majority Verdict

(a) The parties may stipulate that the jury shall consist of any number less than 12 or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

(b) In any cause wherein a jury of 12 shall be impaneled and sworn, the parties shall be deemed to have stipulated that, in the event 1 or 2 jurors are excused, the trial shall proceed and a verdict may be rendered by 10 or more of the jury agreeing, unless, at the time the jury was drawn, any party, by statement on the record, refuses so to stipulate.

Note: Effective September 9, 1953; designated paragraph (a) and a new paragraph (b) adopted December 6, 1962 to be effective January 2, 1963. Formerly Rule 3:48–1, caption adopted January 1, 1952.

4:49–2. Polling of Jury

Where a verdict is rendered by less than the entire jury, the jury shall be polled. In any civil action wherein a verdict may be rendered by five-sixths of the jury, the jury shall not be discharged for its inability to agree upon a verdict, unless the court is satisfied that agreement by five-sixths thereof is not attainable.

Note: Adopted January 1, 1952. Formerly Rule 3:48–2.

4:50–1. Special Verdicts

The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issues so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Note: Caption of Rule amended January 1, 1952. Formerly Rule 3:49–1.

Suggested reading material: Olivo v. Strand Engineering, Inc., 30 N. J. Super. 544 (App. Div. 1954); Botta v. Brunner, 42 N. J. Super. 95 (App. Div. 1956) as modified and affirmed in 26 N. J. 82; Nylander v. Rogers, 78 N. J. Super. 566 (App. Div. 1963) affirmed 41 N. J. 236; Fekete v. Schipler, 80 N. J. Super. 538 (App. Div. 1963); Terminal Construction Corp. v. Bergen County Hackensack River Sanitary Sewer District Authority, 18 N. J. 294, 319 (1955); Bd. of Education, Asbury Park v. Hoek, 66 N.J. Super. 231, 236 (App. Div. 1961); State v. Smith, 27 N. J. 433 (1958).

1. Unsatisfied Claim and Judgment Fund Cases

Statutes

39:6-65. Notice of accident and intention to file claim. Any qualified person, or the personal representative of such person, who suffers damages resulting from bodily injury or death or damage to property arising out of the ownership, maintenance or use of a motor vehicle in this State on or after April 1, 1955, and whose damages may be satisfied in whole or in part from the fund, shall, within 90 days after the accident, as a condition precedent to the right thereafter to apply for payment from the fund give notice to the board, the form and contents of which shall be prescribed by the board, of his intention to make a claim thereon for such damages if otherwise uncollectible; provided, any such qualified person may, in lieu of giving said notice within said time, make proof to the court on the hearing of the application for the payment of a judgment (a) that he was physically incapable of giving said notice within said period and that he gave said notice within 90 days after he became physically capable to do so or in the event he did not become so capable, that a notice was given on his behalf within a reasonable period, or (b) that he gave notice to the board within 15 days of receiving notice that an insurer had disclaimed on a policy of insurance so as to remove or withdraw liability insurance coverage for his claim against a person or persons who allegedly caused him to suffer damages. A copy of the complaint shall be furnished to the board if an action has theretofore been brought for the enforcement of such claim. Such person shall also notify the board of any action thereafter instituted for the enforcement of such claim within 15 days after the institution thereof and such notice shall be accompanied by a copy of the complaint.

The director is hereby authorized and empowered, the provision of any other law relating to the confidential nature of any reports or information furnished to or filed with the Division of Motor Vehicles notwithstanding, to furnish to the board upon its request, for such use, utilization and purposes as the board may deem reasonably appropriate to administer this act and discharge its functions hereunder, any reports or information filed by any person or persons claiming benefits under the provisions of this act,[1] that the director has with regard to any accident, and any operator or owner of a motor vehicle involved in any accident, and as to any automobile or motor vehicle liability insurance or bond carried by any operator or owner of any motor vehicle.

Source. L. 1958, c. 99.

[1]Sections 39:6-61 to 39:6-91.

39:6-67. Defense of actions against motorists. The insurer to whom any action has been assigned may through counsel enter an appearance on behalf of the defendant, file a defense, appear at the trial or take such other steps as it may deem appropriate on the behalf and in the name of the defendant, and may thereupon, on the behalf and in the name of the defendant, conduct his defense, take recourse to any appropriate method of review on behalf of, and in the name of, the defendant, and all such acts shall be deemed to be the acts of such defendant; provided, however, that nothing contained herein shall deprive defendant of the right to also employ his own counsel and defend the action. All expenses incurred by such insurer in connection with any review prosecuted or defended by it from a judgment rendered in such action, shall be borne by the fund, and its attorneys' fees in connection therewith shall be subject to approval by the court.

Source. L. 1952, c. 174.

39:6-69. Application for payment of judgment. When any qualified person recovers a valid judgment in any court of competent jurisdiction in this State, against any other person, who was the operator or owner of a motor vehicle, for injury to, or death of, any person or persons, or a similar valid judgment in such court against such a defendant for an amount in excess of $100.00, exclusive of interest and costs, for damages to property, except property of others in charge of such operator or owner or such operator's or owner's employees, arising out of the ownership, maintenance or use of the motor vehicle in this State on or after April 1, 1955, and any amount remains unpaid thereon in the case of a judgment for bodily injury or death, or any amount in excess of $100.00 remains unpaid thereon in case of a judgment for damage to property, such judgment creditor may, upon the termination of all proceedings, including reviews and appeals in connection with such judgment, file a verified claim in the court in which the judgment was entered and, upon 10 days' written notice to the board may apply to the court for an order directing payment out of the fund, of the amount unpaid upon such judgment for bodily injury or death, which does not exceed, or upon such judgment for damage to property which exceeds the sum of $100.00 and does not exceed—

(a) The maximum amount or limit of $10,000.00, exclusive of interest and costs, on account of injury to, or death of, 1 person, in any 1 accident, and

(b) The maximum amount or limit, subject to such limit for any 1 person so injured or killed, of $20,000.00, exclusive of interest and costs, on account of injury to, or death of, more than 1 person, in any 1 accident, and

(c) The maximum amount or limit of $5,000.00, exclusive of interest and costs, for damage to property in any 1 accident.

Source. L. 1958. c. 99.

39:6-70. Hearing on application for payment of judgment. The court shall proceed upon such application, in a summary manner, and, upon the hearing thereof, the applicant shall be required to show

(a) He is not a person covered with respect to such injury or death by any workmen's compensation law, or the personal representative of such a person,

(b) He is not a spouse, parent or child of the judgment debtor, or the personal representative of such spouse, parent or child,

(c) He was not at the time of the accident a person (1) operating or riding in a motor vehicle which he had stolen or participated in stealing or (2) operating a motor vehicle without the permission of the owner, and is not the personal representative of such a person.

(d) He was not at the time of the accident, operating or riding in an uninsured motor vehicle owned by him or his spouse, parent or child, and was not operating a motor vehicle in violation of an order of suspension or revocation,

(e) He has complied with all of the requirements of section 5,[1]

(f) The judgment debtor at the time of the accident was not insured under a policy of automobile liability insurance under the terms of which the insurer is liable to pay in whole or in part the amount of the judgment,

(g) He has obtained a judgment as set out in section 9 of this act, stating the amount thereof and the amount owing thereon at the date of the application,[1]

(h) He has caused to be issued a writ of execution upon said judgment and the sheriff or officer executing the same has made a return showing that no personal or real property of the judgment debtor, liable to be levied upon in satisfaction of the judgment, could be found or that the amount realized on the sale of them or of such of them as were found, under said execution, was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application thereon of the amount realized,

(i) He has caused the judgment debtor to make discovery under oath, pursuant to law, concerning his personal property and as to whether such judgment debtor was at the time of the accident insured under any policy or policies of insurance described in subparagraph (f) of this section,

(j) He has made all reasonable searches and inquiries to ascertain whether the judgment debtor is possessed of personal or real property or other assets, liable to be sold or applied in satisfaction of the judgment,

(k) By such search he has discovered no personal or real property or other assets, liable to be sold or applied or that he has discovered certain of them, describing them, owned by the judgment debtor and liable to be so sold and applied and that he has taken all necessary action and proceedings for the realization thereof and that the amount thereby realized was insufficient to satisfy the judgment, stating the amount so realized and the balance remaining due on the judgment after application of the amount realized,

(l) The application is not made by or on behalf of, any insurer by reason of the existence of a policy of insurance, whereby the insurer is liable to pay, in whole or in part, the amount of the judgment and that no part of the amount to be paid out of the fund is sought in lieu of making a claim or receiving a payment which is payable by reason of the existence of such a policy of insurance and that no part of the amount so sought will be paid to an insurer to reimburse or otherwise indemnify the insurer in respect of any amount paid or payable by the insurer by reason of the existence of such a policy of insurance,

(m) Whether or not he has recovered a judgment in an action against any other person against whom he has a cause of action in respect of his damages for bodily injury or death or damage to property arising out of the accident and what amounts, if any, he has received by way of payments upon the judgment, or by way of settlement of such cause of action, in whole or in part, from or on behalf of such other person.

Whenever the applicant satisfies the court that it is not possible to comply with 1 or more of the requirements enumerated in subparagraphs (h) and (i) of this section and that the applicant has taken all reasonable steps to collect the amount of the judgment or the unsatisfied part thereof and has been unable to collect the same, the court may dispense with the necessity for complying with such requirements.

The board or any insurer to which the action has been assigned may appear and be heard on application and show cause why the order should not be made.

Source. L. 1961, c. 19.
[1]Section 39:6-65.
[2]Section 39:6-69.
Effective July 1, 1958.

39:6-71. Order for payment of judgment. The court shall make an order directed to the treasurer requiring him to make payment from the fund of such sum, if any, as it shall find to be payable upon said claim, pursuant to the provisions of and in accordance with the limitations contained in this act, if the court is satisfied, upon the hearing:

(a) Of the truth of all matters required to be shown by the applicant by section 10,[1]

(b) That the applicant has fully pursued and exhausted all remedies available to him for recovering damages against all persons mentioned in subparagraph (m) of section 10 by

(1) Commencing action against all such persons against whom the applicant might reasonably be considered as having a cause of action in respect of such damages and prosecuting every such action in good faith to judgment and

(2) Taking all reasonable steps available to him to collect on every judgment so obtained and by applying the proceeds of any judgment or recovery so obtained towards satisfaction of the amount due upon the judgment for payment of which the claim is made.

Any amount which the plaintiff has received or can collect by way of payments upon the judgment or by way of settlement of the cause of action, in whole or in part, from or on behalf of any person other than the judgment debtor, described in subparagraph (m) of section 10, shall be deducted from the amount due upon the judgment for payment of which claim is made.

Source. L. 1958, c. 98.
[1]Section 39:6-70.
Effective date and applicability of amendment by L. 1958, c. 98, p.—, see note under 39:6-70.

39:6-72. Settlement of actions against motorists. (a) In any action against an operator or owner of a motor vehicle for injury to or death of any person or for damage to property arising out of the ownership, maintenance or use of said vehicle in this State on or after April 1, 1955, pending in any court of competent jurisdiction in this State, the plaintiff may upon notice to the board file a verified petition with the court alleging

(1) the matters set forth in subparagraphs (a), (b), (c), (d), (e) and (f) of section 10;[1]

(2) that the petition is not presented on behalf of an insurer under circumstances set forth in subparagraph (1) of section 10;

(3) that he has entered into an agreement with the defendant to settle all claims set forth in the complaint in said action and the amount proposed to be paid to him pursuant thereto;

(4) that said proposed settlement has been consented to by the board;

(5) that the defendant has executed and delivered to the board a verified statement of his financial condition;

(6) that a judgment against the defendant would be uncollectible;

(7) that the defendant has undertaken in writing to repay to the treasurer the sum that he would be required to pay under such settlement, if approved by the court, and has executed a confession of judgment in connection therewith.

If the court be satisfied of the truth of the allegations in said petition and of the fairness of such proposed settlement, it may enter an order approving the same and directing the treasurer, upon recepit of the undertaking and confession of judgment mentioned in subparagraph (7) of this section, to make payment to the plaintiff of the amount agreed to be accepted.

(b) An insurer to whom a claim has been assigned may settle any claim involving the the payment of less than $2,500.00 with the approval of the director and any other 1 member of the board, or any claim involving a payment between $2,500.00 and $5,000.00 with the approval of the board, without court approval, if satisfied

(1) that the claimant is not a person of the character described in subparagraphs (a), (b), (c), (d), (e) and (f) of section 10;

(2) that the settlement is not made on the behalf of an insurer under circumstances set forth in subparagraph (1) of section 10; and

(3) that a judgment against the owner or operator of the motor vehicle involved in the accident would be uncollectible, and that such owner or operator has consented to such settlement, executed and delivered to the board a verified statement of his financial condition and undertaken in writing to repay to the treasurer the sum to be paid under the settlement, and executed a confession of judgment in connection therewith. Any settlement so made shall be certified by the board to the treasurer, who shall, upon receipt of said undertaking to repay and confession of judgment, make the required payment to claimant out of the fund.

Source. L. 1958, c. 99.
[1]Section 39:6-70.
Effective July 1, 1958.

39:6-74. Default and consent judgments. No claim shall be allowed and ordered to be paid out of the fund if the court shall find, upon the hearing for the allowance of the claim, that it is founded upon a judgment which was entered by default, unless (1) the claimant shall have complied with the requirements of section 5,[1] and (2) prior to the entry of such judgment the board shall have been given notice of intention to enter the judgment and file a claim thereon against the fund and shall have been afforded an opportunity to take such action as it shall deem advisable under section 15.[2]

If the court upon a hearing for the allowance of any claim against the fund finds that it was a claim which was not assigned by the board to an insurer in accordance with section 6,[2] or that the action upon such claim was not fully and fairly defended, or that the judgment thereon was entered upon the consent or with the agreement of the defendant, the court shall allow such claim but shall order it to be paid only in such sum as the court shall determine to be justly due and

payable out of the fund, on the basis of the actual amount of damages for which the defendant was liable to the plaintiff under the cause of action, upon which the judgment was rendered and reduced by any amount received from any person mentioned in subparagraph (m) of section 10,[4] notwithstanding that the judgment is for a greater amount.

Source. L. 1955, c. 1.
[1]Section 39:6-65.
[2]Section 39:6-75.
[3]Section 39:6-66.
[4]Section 39:6-70.

39:6-78. "Hit-and-run" cases. When the death of, or personal injury to, any person arises out of the ownership, maintenance or use of a motor vehicle in this State on or after April 1, 1955, but the identity of the motor vehicle and of the operator and owner thereof cannot be ascertained or it is established that the motor vehicle was at the time said accident occurred, in the possession of some person other than the owner without the owner's consent and that the identity of such person cannot be ascertained, any qualified person who would have a cause of action against the operator or owner or both in respect to such death or personal injury may bring an action therefor against the director in any court of competent jurisdiction, but no judgment against the director shall be entered in such an action unless the court is satisfied, upon the hearing of the action, that—

(a) The claimant has complied with the requirements of section 5,[1]

(b) The claimant is not a person covered with respect to such injury or death by any workmen's compensation law, or the personal representative of such a person.

(c) The claimant was not at the time of the accident operating or riding in an uninsured motor vehicle owned by him or his spouse, parent or child, and was not operating a motor vehicle in violation of an order of suspension or revocation,

(d) The claimant has a cause of action against the operator or owner of such motor vehicle or against the operator who was operating the motor vehicle without the consent of the owner of the motor vehicle,

(e) All reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator thereof and either that the identity of the motor vehicle and the owner and operator thereof cannot be established, or that the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established,

(f) The action is not brought by or on behalf of an insurer under circumstances set forth in paragraph (1) of section 10.[2]

Source. L. 1958, c. 99.
[1]Section 39:6-65.
[2]Section 39:6-70.
Effective July 1, 1958.
Applicability of amendment by L. 1958, c. 99, p. —, see note under 39:6-69.

39:6-79. Other "hit-and-run" cases. When in an action in respect to the death of, or personal injury to, any person, arising out of the ownership, maintenance or use of a motor vehicle in this State on or after April 1, 1955, judgment is rendered for the defendant on the sole ground that such death or personal injury was occasioned by a motor vehicle—

(a) The identity of which, and of the owner and operator of which, has not been established, or

(b) Which was in the possession of some person other than the owner or his agent without the consent of the owner and the identity of the operator has not been established, such cause shall be stated in the judgment and the plaintiff in such action may within 3 months from the date of the entry of such judgment make application for authority to bring an action upon said cause of action against the director in the manner provided in section 18.[1]

Source. L. 1958, c. 99.
[1]Section 39:6-78.
Applicability of amendment by L. 1958, c. 99, p. —, see note under 39:6-69.

39:6-84. Judgment against director. When a judgment is obtained against the director, in an action brought under this act, upon the determination of all proceedings including appeals and reviews, the court shall make an order directed to the treasurer directing him to pay out of the fund to the plaintiff in the action the amount thereof which does not exceed $10,000.00, exclusive of interest and costs, on account of injury to, or death of, 1 person and, subject to such limits for the death of, or injury to, any 1 person, does not exceed $20,000.00, exclusive of interest and costs, on account of the injury to, or death of, more than 1 person, in any 1 accident, provided that such maximum amount shall be reduced by any amount received or recovered by the plaintiff as specified in subparagraph (m) of section 10.[1] L. 1952, c. 174, as amended L. 1955, c. 1, L. 1958, c. 99.

Source. L. 1958, c. 99.
[1]Section 39:6-70.
Effective July 1, 1958.
Applicability of amendment by L. 1958, c. 99, p. —, see note under 39:6-69.

Suggested reading material:
As to construction and operation of statute. Proskurnja v. Elder, 73 N. J. Super. 466 (Law Div. 1962); Giacobbe v. Gassert, 29 N. J. 421 (1959).

As to requisites of notice of intention. Russo v. Forrest, 52 N. J. Super. 233 (App. Div. 1958).

As to who may give notice. Corrigan v. Gassert, 27 N. J. 227, 239 (1958); Giles v. Gassert, 23 N. J. 22,

34 (1956); Trevorrow v. Boyer, 52 N. J. Super. 215 (Law Div. 1958).

As to incapacity which excuses filing of timely notice. Russo v. Forrest, 52 N. J. Super. 233 (App. Div. 1958); Greene v. Director of Div. of Motor Vehicles, 65 N. J. Super. 242 (App. Div. 1961); Trevorrow v. Boyer, 52 N. J. Super. 215 (Law Div. 1958).

Rule as to infants. Moore v. Truesdale, 48 N.J. Super. 257 (App. Div. 1958).

As to effect of Soldiers and Sailors Relief Act of 1940. Murray v. Rogers, 78 N. J. Super. 163 (Hudson Cty Ct. 1962).

As to assumed insurance coverage as bearing on time to file notice of intention. Danisi v. Thuemling, 72 N. J. Super. 118 (App. Div. 1962). See also Parrot v. Chiselko, 74 N. J. Super. 138 (App. Div. 1962).

As to efforts required to determine identity under "hit and run" section of act. Nash v. Iamurri, 76 N. J. Super. 167 (Law Div. 1962); McGainey v. Cable, 65 N. J. Super. 202 (App. Div. 1961).

1. PROCEDURES FOR HANDLING CLAIMS UNDER THE NEW JERSEY UNSATISFIED CLAIM AND JUDGMENT FUND LAW

Introduction

Claim handling under the Unsatisfied Claim and Judgment Fund Law is similar to that of the ordinary insured automobile claim with certain exceptions. These exceptions arise out of the fact that the Fund Law does not provide the uninsured motorist with insurance coverage but is instead a Fund of last resort when the uninsured is at fault and is not able to pay the claim or judgment obtained against him. Since payment is predicated upon the uninsured's fault, the investigation conducted should be the same as conducted by companies in claims made against their insureds.

The law provides for investigation and defense of claims by insurance companies or their representatives (R.S. 39:6-66) at their expense upon assignment to them. Claims may be settled under the law with a payment from the Fund if the uninsured will agree and the assigned insurance company is satisfied that the uninsured cannot pay it himself and the settlement is reasonable.

The object here is to set forth various procedures as they affect the handling of the Unsatisfied Claim and Judgment Fund cases and where they may differ from normal claim handling. It is just as important in Fund cases to have a complete investigation as it is in any insured accident case.

Initiating a Claim

A person to become eligible to collect from the Fund (provided the uninsured is financially irresponsible) must file with the Board a Notice of Intention to Make Claim within ninety days of the accident. This is to be filed on a form prescribed by the Board. Form UCJ-201, "Notice of Intention to Make Claim" has been made available at all police stations and local motor vehicle agents in New Jersey. The Board's office will mail a supply to any person upon request. Any other writing received by the Board that purports to be a Notice of Intention and contains elements of a Notice will be processed as a required notice even though it is not on the prescribed form. (UCJ Board Regulation No. 1)

The Board's office processes each Notice of Intention as it is received. The question of insurance coverage on all vehicles in the accident is the key to the processing. This is determined by the Security Responsibility Section of the Division of Motor Vehicles from the Accident Reports (SR-1) submitted. Experience has shown that the usual time required to assemble these is about thirty days from the date of accident. For this reason the Board's office usually does not process a Notice for a claim assignment until the thirtieth day after the accident. If the information submitted on the Notice of Intention indicates a claimant may be qualified under the law and there is no insurance on the other car, a claim number will be will be assigned and an acknowledgment card mailed to the claimant or his attorney. However, if it appears from the Notice that the claimant would not be qualified or if it is determined the other vehicle was insured, then no claim is set up.

Investigation of Claims

The law (R.S. 39:6-66) provides that the Board must assign for investigation Hit and Run cases and cases wherein a notice of intent to take a Default Judgment has been received. The Board may assign other cases for investigation.

The assignments are to insurance companies or their delegated agencies. The cost of investigation and/or defense is borne by the company to whom the case is assigned. The insurance companies are to investigate the cases as they would their own. (R.S. 39:6-66(c))

Present policy of the Board is to assign all cases except those involving property damage only of $400 or less. These are not assigned in view of the deductible requirement on property damage payments from the Fund and since the bulk of these claims are cleared up under the Security Responsibility Law requirements. The Security Responsibility Law calls for the suspension of a person's license privileges if uninsured and if they do not meet one of the following requirements:

1. File a Security Deposit in the amount of evaluated damages.
2. Produce a Release from the other party.
3. Produce a Settlement Agreement with the other party.

A letter is sent to the claimant by the Board's office advising him of this and if he does not reach an agreement with the uninsured to so advise the Board and the case will be assigned to an insurer.

The Board will assign a claim number using prefix "UCJ". One number is assigned per accident and suffix letters are used for each claimant where there are multiple claimants. The Board uses a number before the prefix "UCJ" to designate the insurer to which assigned.

The Board acknowledges receipt of Notice of Intention to claimant, or his attorney. It uses a standard form (UCJ 202) for assigning claims to insurers for investigation. The insurer will acknowledge the assignment, on the 60 Day Report form (UCJ 238) sixty days after receipt of the assignment. The insurer should set and report the reserve on this form.

The Board will prepare a list of cases monthly that are assigned to an insurer. This list will be composed of cases six months, 12 months, 18 months, etc. old so that one sixth of the cases assigned will appear in each monthly list. This claim list will be mailed to the companies on the first of each month and should be returned by the companies prior to the 10th of each month. The company should insert on the list opposite each case number, the reserve for each claim and indicate whether there is or is not a change in the reserve.

Company investigators in addition to their normal automobile accident investigations should also look for the following points:

1. The financial ability of the uninsured to satisfy the claim.
2. Whether the claimant is qualified and eligible to collect from the Fund his claim or judgment if the uninsured is financially irresponsible. (R.S. 39:6-70)
   a. Is the claimant or his personal representative covered by any workman's compensation law for his injuries or death.
   b. Is the claimant or his personal representative the spouse, parent or child of the potential judgment debtor.
   c. Was the claimant at the time of the accident a guest occupant in a motor vehicle owned or operated by the judgment debtor.
   d. Was the claimant at the time of the accident riding in an uninsured motor vehicle owned by him or his spouse, parent or child.
   e. Was the claimant at the time of the accident operating a motor vehicle in violation of an order of suspension or revocation.

If the answers to any of these five points is affirmative, then it would appear that the claimant would not be eligible to collect from the Fund.

Company investigators will find occasionally that they will be unable to locate an uninsured. In those cases the investigator should advise the claimant or his attorney of this fact. The claimant or the attorney may be able to throw some light on the uninsured's present whereabouts or the local police departments may be able to aid the investigator. If the uninsured cannot be located the claim cannot be disposed of. The claimant should institute suit against the uninsured driver so that when he is located service

of the summons and complaint can be made upon him.

Where the uninsured defendant cannot be located after service upon him of the summons and complaint, the company should investigate all other aspects of the claim so they can defend the case without the uninsured's presence if necessary.

Settlement of Claims

An assigned company may recommend a claim file to the Board for settlement if it appears the uninsured is agreeable to the settlement and cannot himself satisfy the claim. It is suggested that the Adjuster contact the uninsured early in his investigation to determine his financial status and his attitude as to liability. The company should submit the investigation file to the Board using form UCJ 205 as a covering sheet for the submission. The file should also contain the uninsured's agreement to repay the Treasurer UCJ 210 (Bond), Warrant for Confession of Judgment UCJ 211, Statement of Financial Status and Consent to Settlement UCJ 214 and the Settlement Agreement signed by the claimant and uninsured UCJ 216 if settlement for less than $5000 or UCJ 208 if settlement is $5000 or over.

The law provides for three procedures in approving settlements, dependent upon the amount to be paid from the Fund. In all procedures it is necessary for the Board's office to review and brief the case for the consideration of the approval authority. The file should contain sufficient information to justify the proposed settlement both as to liability and amount.

Where the settlement calls for a payment of less than $2500 from the Fund the approval authority (R.S. 39:6-72b) is the Director of Motor Vehicles and one Board Member (Insurance). If they approve, they sign the Treasurer's voucher, (Form #100-5) and a certificate of approval. The Board then advises the company submitting the case of the approved settlement sending them the Treasurer's voucher, (Form #100-5) to be signed by the claimant and his attorney if he is represented by counsel. This voucher is to be returned to the Board for submission to the State Treasurer for payment. The company will then close their file and return it to the Board for storage.

Those settlements calling for a payment from the Fund of $2500 up to $5000 are to be approved by the Board (R.S. 39:6-72b). The Board meets monthly on the third Thursday. Cases calling for their approval should be in the Board's office no later than the second Wednesday of the month so they can be briefed and submitted to the Board Members prior to the meeting for their review. Those files are acted on at the monthly meeting and a certificate of approval is prepared. The Board's office after the meeting will advise the companies submitting the proposed settlements of the Board's action. If approved, a Treasurer's voucher, (Form #100-5) also goes to the company.. This voucher is to be signed by the claimant and his attorney, if represented by counsel, and returned to the Board for submission to the State Treasurer for payment.

If the settlements falling in the above categories involve minors as claimants, the additional requirement of a Friendly Judgment must be accomplished. Treasurer's vouchers are not forwarded to the companies in those cases when they are advised of the approval of the proposed settlement. They are advised that a Friendly Judgment should be processed. The Friendly Judgment should be entered as in all other infant cases. There is an additional requirement of a court order in Unsatisfied Claim and Judgment Fund Cases directing payment of the judgment from the Fund. This court order should recite the entry of the Friendly Judgment, and its amount. The order paragraph should set forth the amounts of any deductibles and direct the net payment from the Fund. An additional order paragraph should be incorporated permitting the uninsured defendant to repay the judgment to the State Treasurer by installments setting forth the amount as it appears in the uninsured's Bond (Form UCJ-210). The judgment should be assigned to the Director of Motor Vehicles using form UCJ-209.

In those cases where a Friendly Judgment is required or where a court must approve of a settlement, it is advisable for both the plaintiff and the defendant's counsel to appear in court with sufficient evidence for the court to make its determination. Some of the courts require affidavits and others require the appearance of the plaintiff and his medical witnesses. Counsel should determine from the court ahead of time which is required.

Where a settlement calls for the payment from the Fund of $5000 or more the law, R.S. 39:6-72a requires consent of the full Board and the approval of a court. The Board after acting on the proposed settlements will return the file to the company with a letter setting forth the Board's action. Here again sufficient evidence should be given to the court so that it can make its determination. If the court approves of the settlement, then an order should be entered reciting the court's approval of the settlement and directing the amount of the settlement less any deductions to be paid from the Fund by the State Treasury. If the settlement involves an infant a judgment will also be entered.

A "True Copy" of the order directing payment should be mailed to the Board's office so that payment can be processed.

Hit and Run cases can be settled, (R.S. 39:6-82). These are settled by agreement with the Board and a court's approval. The claim files must be submitted to the Board for review and their action. After approval or disapproval the file is returned to the company with a letter advising of the Board's action. If approved, the case is then to be presented to the court for its approval under R.S. 39:6-82. If approved by the court, the statute directs that a judgment be entered against the Director of Motor Vehicles with a paragraph directing its payment from the Fund less any deductibles.

The Unsatisfied Claim and Judgment Fund Law does not grant any special court procedures. If a suit has not been started in cases requiring a court's approval, then a Summons and Complaint must be filed with the court before it can be petitioned under R.S. 39:6-72a and R.S. 39:6-82 for approval of any settlement. In Hit and Run cases where the Board has consented to the settlement suit can be started in a District Court (within that court's jurisdiction) and the Board's office will accept service by mail, in behalf of the Director of Motor Vehicles, of the Summons and Complaint.

Suits

Where an uninsured will not agree to a claim being settled, the plaintiff or his counsel should be so informed by the company handling the claim. In other words, they are to be advised that they must establish their case by obtaining a judgment against the uninsured.

A plaintiff must submit a copy of his complaint to the Board within 15 days after instituting his suit (R.S. 39:6-65). The Board will then transmit the suit to the company assigned the investigation, with a caution note not to enter an appearance until it is ascertained the defendant has been served. (This can be checked at the court clerk's office or with the defendant himself).

The law at R.S. 39:6-67 provides that a company may through counsel appear in behalf of the defendant. The insurer's main duty is the protection of the Fund and if a defendant does not attempt to protect himself by personal counsel then the company may do so.

The company will have to determine if the case is one that should be defended and also if the defendant has personal counsel. If there is personal counsel the company should contact him and make their investigation available for the defense in return for the personal counsel keeping them posted with copies of the pleadings and the status of the suit.

Where the defendant does not have personal counsel and the case is one for defense either as to liability or damages the company should assign counsel to defend in order to protect the Fund. The cooperation of an uninsured defendant may be obtained by court order (R.S. 39:6-68) if necessary.

If a defendant cannot be located for answering of interrogatories or for trial, the court should be so informed and also advised that it is a Fund case. Many of the Fund cases have gone on for trial without the presence of the defendant and fair results obtained both as to damages and liabilities. The plaintiff gets his day in court and the Fund is protected by the defense interposed by assigned company counsel. (R.S. 39:6-75)

The Board desires a trial report (UCJ 223) from all companies when a case has been tried either by personal counsel or assigned counsel. This report is used by the Board to levy points under the point evaluation plan and also to have a status report of the case.

If after suit has been started and the uninsured has been served and he is in default, the plaintiff's attorney should refer to R.S. 39:6-74 and 75. In other words, plaintiff should notify the Board in writing that the defendant is in default and he intends to enter a default judgment. In those cases where the company has determined (after investigation) that there is no question of liability or of the amount of damages claimed, they may conclude not to defend, being satisfied that the Fund is protected. It is suggested that the plaintiff's attorney contact the company for their intended action. If there is any question of liability or of damages, then the company will, under R.S. 39:6-75, enter an appearance and defend in behalf of the uninsured defendant.

Judgments

Once a judgment is obtained against an uninsured motorist the judgment creditor must levy against any assets of the judgment debtor. If the judgment or a part of the judgment cannot be satisfied by the judgment debtor, then an application can be made of the court for a payment from the Fund subject to the statutory limits. This application is made by way of a Notice of Motion with ten days written notice being given to the Board (R.S. 39:6-69). This notice should be accompanied by the affidavit of the judgment creditor and his attorney as to the facts called for in R.S. 39:6-70. If the facts set forth in the affidavits are the same as known to the Board and the company handling the case, then most likely an order of the court directing payment from the Fund may be entered by consent. However, if there is a question of fact or of law, then the motion may be contested by the Board (R.S. 39:6-70).

The Board's office will acknowledge receipt of the Notice of Motion and at the same time forward the Notice of Motion to the assigned company. It is the duty of the assigned company to review the Notice of Motion and its supporting affidavit in addition to the review made by the Board's office. The assigned company should pass on to its counsel any instructions from the Board as well as any of its own relative to contesting the entrance of an order directing payment from the Fund since it is familiar with the uninsured's financial condition through its investigation.

The order of the court directing the State Treasurer to make a payment from the Fund should follow R.S. 39:6-71(a) and (b). It should recite the amount of the judgment and costs, the amount remaining unpaid, the amount recovered as other indemnity or benefits, and the amount recovered from others because of other judgments from the same accident as well as the information called for in subsection (a) and (b) of R.S. 39:6-71. The order clause should direct the payment of the judgment less the deductible, if any, and less the other indemnity or benefits or judgments recovered from others, plus interest and costs, if any. Interest, if any, should only be on the amount to be paid from the Fund and for a reasonable period after entrance of judgment to signing of the order.

It is suggested that to facilitate payment that plaintiff submit a "true copy" of the order directly to the Board's office after it has been signed along with the assignment of judgment in triplicate. Forms for the assignment of judgment may be obtained from assigned defense counsel, assigned insurance company or the Board's office. No payments can be made until the judgment is assigned to the Director of Motor Vehicles, (R.S. 39:6-77). The assignment of judgment must be signed by the plaintiff. If plaintiff is acting as Guardian, Administrator or Executor, then a certificate from the Surrogate should accompany the assignment of judgment showing his authority to sign. The statute R.S. 39:6-77 provides that the full amount of

the unsatisfied judgment be assigned to the Director of Motor Vehicles. If more should be recovered from the judgment debtor, than was paid out of the Fund, the excess recovered will be paid over to the judgment creditor.

Consent Judgments

The statute at R.S. 39:6-74 protects the Fund against consent judgments. In view of this a procedure can be followed in those cases that are on trial where the parties are in attendance and are desirous of settling. This procedure is suggested in order to work with the courts in disposing of cases expeditiously. The amount of settlement should be discussed with the judge hearing the case. If he deems it to be fair, then the uninsured defendant should be placed on the stand under oath so he can be questioned as to agreeing to the settlement. While he is on the stand the plaintiff can obtain discovery of the defendant as to any assets he has to satisfy the judgment. The court then enters a Consent Judgment in the agreed amount. The plaintiff will have to levy on any assets of the defendant. If the assets are insufficient to satisfy the judgment, then the plaintiff by Notice of Motion (R.S. 39:6-69) may apply to the court (R.S. 39:6-70) for payment of the unsatisfied portion or all of the judgment from the Fund. The order directing payment should be the same as in normal judgment cases. (R.S. 39:6-71) In those cases where the defendant has testified that he wants to undertake installment repayments to the Fund, an additional paragraph should be incorporated in the order. This paragraph should recite the amount of the installment repayment as well as the frequency of the repayments.

Hit and Run

The Unsatisfied Claim and Judgment Fund Law has special provisions for Hit and Run accidents (R.S. 39:6-78 to 87). These provisions only apply to personal injury claims where the responsible party for the operation of the vehicle is not known. As in other claims to be made against the Fund a Notice of Intention to Make Claim must be filed within 90 days of the date of the accident or of becoming physically capable to do so.

The law requires all Hit and Run claims to be assigned to insurance companies for investigation and defense. The companies are to investigate to determine if it was a Hit and Run accident, the liability of the Hit and Run driver and the extent of injury and damages sustained by the victim.

The victim by R.S. 39:6-78, 79 is permitted to bring suit against the Director of Motor Vehicles. These suits are assigned to the investigating insurance company for defense. The Director of Motor Vehicles appears by counsel for the company (R.S. 39:6-81).

Hit and Run cases may be settled upon agreement with the Board (R.S. 39:6-82). The investigating company sends its file to the Board with its recommendations. The Board will consider the cases at their monthly meetings. If approved, the Board so notifies the compony and the plaintiff should proceed by verified petition as provided for in R.S. 39:6-82.

The plaintiff must start suit even in those Hit and Run cases that are settled. The Board's office will accept service in behalf of the Director in those cases involving settlements of $3000 or less where the suit is started in the District Courts.

A judgment against the Director is entered and an order is issued by the Court directing payment from the Fund. This can be contained in one document and should recite the Courts approval of the settlement and the Court's being satisfied that the plaintiff has met the requirements of R.S. 39:6-78, or 79 as the case may be.

A "True Copy" of the order to pay should be sent to the Board for processing. A plaintiff will be required to assign the judgment to the Director. Form UCJ 209 may be used for this purpose.

Security Deposits

Uninsureds will occasionally make a security deposit with the Director of Motor Vehicles in order to preserve their driving privileges under the Security-Responsibility Law. These deposits are in an amount set by the Director of Motor Vehicles and are to be used by the Director to pay a judgment obtained by the person for whose benefit the deposit was made. Normally an uninsured who makes a deposit feels he was not at fault for the accident -- otherwise he would most likely have used the same money to settle.

Where a deposit is made in a property damage case the deposit is usually adequate to take care of any judgment obtained against the uninsured. Since the uninsured is financially responsible the assigned company can close their file after advising the claimant of the deposit.

Security Responsibility will advise the Board's office when a deposit is made by the uninsured. The Board's office in turn passes this information along to the assigned company.

Generally those deposits made on injury cases will not be adequate to cover the claim as they are based on evaluations taken only from the physician's report. These cases should be held open by the companies assigned and their investigation and adjusting continued. The deposit should be kept in mind in the event of a settlement or a judgment in favor of the claimant. To obtain a payment of the deposit over to the claimant in settlement cases a "Disbursement Authorization" should be signed by the uninsured. This form is available upon request to the Board or the Security Responsibility Section of the Division of Motor Vehicles. In the event of a judgment against the uninsured the claimant should send a certified copy, obtained from the Clerk of Court, to the Security-Responsibility Section of the Division of Motor Vehicles for a disbursement to claimant and his attorney of the deposit. These moneys should be credited against the judgment and the payment from the Fund will be the unsatisfied part of the judgment, less deductibles, assuming that it is otherwise uncollectible.

Restoration of Driving Privileges Where the Fund Has Made a Payment

If there is nothing else against a person's driving privileges they may be restored in Settlement cases when the Fund files the Settlement Agreement with the Security-Responsibility Section. This is done after approval of the settlement. The privileges are subject to being suspended if the uninsured fails to make his repayment to the Fund as agreed to in the Bond (UCJ-210).

In judgment cases the judgment debtor can apply to the court for an installment order and if granted can have his privileges restored after filing proof of financial responsibility for the future. R.S. 39:6-87 provides for ten days notice of the motion to the Board. If the Board's office is supplied the supporting affidavits to the motion it can after review advise the applicant's attorney whether or not it will appear on the return date. The installment order should be for the full judgment plus interest and costs. True copies of the installment order should be sent both to the Division of Motor Vehicles and to the Unsatisfied Claim and Judgment Fund Board.

Repayments under Settlement Agreements and Installment Court Orders should be made payable to the State Treasurer and mailed to the Unsatisfied Claim and Judgment Fund Board at 215 West State Street, Trenton, New Jersey.

STATE OF NEW JERSEY

UNSATISFIED CLAIM AND JUDGMENT FUND BOARD
25 South Montgomery St.
Trenton, New Jersey

November 20, 1961

BULLETIN No. 14

To: ALL COMPANIES HANDLING UNSATISFIED CLAIM AND JUDGMENT FUND CASES AND INVESTIGATING AGENCIES

Re: Settlements Reached in Court Involving the Unsatisfied Claim and Judgment Fund Law

In Bulletin No. 12, a procedure for the settlement of cases reached for trial was set forth. The procedure was suggested to assist the courts in reducing the number of cases on their dockets and reduce the expenses of handling. This "consent judgment" procedure has been used successfully in a number of our cases. There is, however, one point which is not spelled out in Bulletin No. 12 which should be clarified.

Before a case is submitted to the court for the entry of the consent judgment, the proposed settlement figure must be agreed to by the assigned carrier and the Board's office.

The approval of the Board's office may be obtained on the telephone by either the assigned carrier or the assigned carrier's attorney.

After the judgment by consent is entered, plaintiff should then follow R.S. 39:6-69, 70 and 71 for an order directing payment from the Fund. This order should contain a paragraph as to the installment repayments to be made by the uninsured defendant.

Be sure that the Consent Judgment is entered in the Court Clerk's office.

W. Lewis Bambrick
Manager

State of New Jersey

UNSATISFIED CLAIM AND JUDGMENT FUND BOARD

25 SOUTH MONTGOMERY STREET
TRENTON, NEW JERSEY

March 4, 1964

BULLETIN No. 17

To: ALL COMPANIES HANDLING UNSATISFIED CLAIM AND JUDGMENT FUND CASES AND INVESTIGATING AGENCIES

Re: Suits Defended by the Uninsured's Personal Counsel

The Unsatisfied Claim and Judgment Fund law provides that nothing therein shall deprive an uninsured defendant of the right to also employ his own counsel and defend the action brought against him. Our Courts generally will recognize one attorney of record per litigant. As a result many companies assigned the handling of Unsatisfied Claim and Judgment Fund cases go slow on assigning counsel to defend an uninsured, permitting the uninsured to appear through his personal attorney.

There is no problem where the assigned company and the personal counsel of the uninsured defendant work together. Usually in these situations the assigned company investigates and turns their investigation over to the personal counsel who defends the action in behalf of the uninsured at the uninsured's expense.

A problem does arise where the assigned company and the personal attorney fail to work together. Usually what happens is that the personal attorney, not having been paid by his client or not having the benefit of an investigation, will, when the case is set down for trial, ask the Court to be relieved of the defense. The Courts have been permitting the withdrawal of the personal counsel, leaving the assigned company holding the bag as far as the defense of the uninsured defendant is concerned. The assigned company is then faced with assigning counsel at the last minute to defend the case.

It is suggested that the assigned company, where a personal counsel is defending the uninsured, complete their investigation as soon as possible and offer it to the personal counsel.

This can be in exchange for copies of the pleadings and status reports. It is further suggested that the case be placed on a 30 day diary so that a telephone call can be made to the personal attorney as to the status of the suit and that the call be followed with a confirming letter. If this action is followed, personal counsel may well defend the uninsured fully and to the termination of the litigation. It would probably induce a Court to grant additional time to defend where it is inclined to enter an Order permitting personal counsel to withdraw at the last minute.

The problem of personal counsel withdrawing after settling an affirmative claim for the uninsured leaving open the defense of the uninsured will be placed before the Advisory Committee on Professional Ethics.

W. Lewis Bambrick

W. Lewis Bambrick
Manager

k. Cases Under the Joint Tort Feasors Contribution Act

Statutes

2A:53A-1. "Joint tortfeasors" defined. For the purpose of this act [chapter] the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. A master and servant or principal and agent shall be considered a single tortfeasor.

Source. L. 1952, c. 335, §1, p. 1075. Approved June 18, 1952, effective immediately.

2A:53A-2. Right of contribution. The right of contribution exists among joint tortfeasors.

Source. L. 1952, c. 335, §2, p. 1075. Approved June 18, 1952, effective immediately.

2A:53A-3. Contribution upon payment of judgment. Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act [chapter] from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought.

Source. L. 1952, c. 335, §3, p. 1075. Approved June 18, 1952, effective immediately.

2A:53A-4. Application of chapter. This act [chapter] shall apply to all actions for contribution commenced, and to all judgments recovered, after the effective date hereof irrespective of the time of the commission of the wrongful act or acts by the joint tortfeasors; provided, that it shall not apply with respect to payments made prior to the effective date hereof.

Source. L. 1952, c. 335, §4, p. 1075. Approved June 18, 1952, effective immediately.

2A:53A-5. Short title. This act [chapter] shall be known and may be cited as the "joint tortfeasors contribution law."

Source. L. 1952, c. 335, §5, p. 1076. Approved June 18, 1952, effective immediately.

4:13–6. Cross-Claim Against Co-Party; Claim for Contribution Under Joint Tortfeasors Act

(a) A pleading may state as a cross-claim any claim by one party against a co-party, including a claim that the latter is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

(b) A defendant in a tort action may assert a claim for contribution under the Joint Tortfeasors Contribution Act, N.J.S. 2A:53A, against any party to the action, by inserting in his answer, above the signature and under the heading "Claim for Contribution", a general demand for contribution from them, naming them, without setting forth the facts upon which the claim is based. Where a claim for contribution is made, (1) the answer shall be served upon the parties against whom such relief is sought and no responsive pleading thereto need be filed, and (2) a motion for dismissal of the complaint as against any such codefendant shall be held in abeyance until the conclusion of the entire case and at that time the granting of the motion or the submission to the jury of the claim of contribution shall constitute an adjudication upon the merits of such claim.

Note: Effective September 9, 1953; paragraph (b) adopted July 15, 1960 to be effective September 7, 1960; amended December 9, 1963 to be effective January 2, 1964. Paragraph (a) formerly Rule 3:13–6.

4:13–7. Additional Parties May Be Brought In

When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of the counterclaim or cross-claim, the court shall order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

Note: Formerly Rule 3:13–7.

4:13–8. Separate Trials; Separate Judgment

If the court orders separate trials as provided in Rule 4:43–2, judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 4:55–2, even if the claims of the opposing party have not been dismissed or otherwise disposed of.

Note: Formerly Rule 3:13–8.

Excerpt from Judson v. Peoples Bank and Trust Co. Westfield, 17 N. J. 67, 92-94 (1954).

We turn, then, to the bearing of the settlement upon the contribution rights of the remaining defendants if they suffer a verdict for damages.

[19] The basic purpose of the statute is to achieve the "sharing of the common responsibility according to equity and natural justice," *Sattelberger v. Telep,* 14 *N. J.* 353, 367 (1954); *Pennsylvania Greyhound Lines, Inc. v. Rosenthal,* 14 *N. J.* 372, 386 (1954). This end is attained by allowing actions among the joint tortfeasors to assure that none pays in excess of his *pro rata* share of the total damage. When one tortfeasor settles with the injured party for an amount which is less than the settler's *pro rata* share, equality between him and his co-wrongdoers may be realized in one of two ways: *first,* the injured person may be required to credit upon any verdict against the others not the consideration received in settlement but the settler's *pro rata* share of the amount of the verdict, or, *second,* the injured party may have a judgment for his total damage less the consideration received in settlement, and the judgment tortfeasor who pays in excess of his *pro rata* share may have his action against the settler for contribution.

[20] The second alternative is the one adopted in sections 4 and 5 of the draft of uniform law. It may lead to some undesirable results: If the injured party is required to credit only the amount received in settlement, *Gelsmine v. Vignale,* 11 *N. J. Super.* 481 (*App. Div.* 1951), he may be tempted to make collusive settlements, a mischief incident to the denial of contribution which was one of the strongest reasons for the statutory change allowing a right of contribution. Also, the settlement then lacks finality because the settler cannot count on his adjustment with the injured person as ending the matter but must apprehend a suit at the hands of his co-tortfeasors. This would have a stifling effect upon efforts at compromise and settlement, contrary to the policy of our law which strongly favors disposition of disputes by compromise and settlement. *Rynar v. Lincoln Transit Co., Inc.,* 129 *N. J. L.* 525, 528 (*E. & A.* 1942).

If, then, as said by Justice Rutledge, "The problem is to blend the themes of compromise and contribution, maintaining the essential integrity of each as far as possible," *McKenna v. Austin, supra,* the first alternative is clearly preferable. Collusive settlements are wholly ineffective when a credit of the settler's *pro rata* share is the required result of any settlement, and this helps attain one of the objectives of the contribution statute. And, thereby the settling tortfeasor is assured of the finality of his settlement, and impairment of the public policy favoring compromise is avoided. The injured party should not be discouraged from settlement

by such a rule. He cannot complain of unfairness, since "* * * the reduction would be a direct result of his own act in accepting less than [the settler's *pro rata* share of] the total recoverable damages in settlement with the compromising wrongdoer." *McKenna v. Austin, supra.* Thus, if the settlement is not collusive, he makes it upon the basis of his own appraisal of the risks of recovery and will hardly be deterred from it because it may later eventuate that he accepted less than the settler's *pro rata* share.

Our Legislature's rejection of sections 4 and 5 of the draft act clearly indicated its preference for the first alternative. True, the statute contains nothing whatever expressly dealing with the effect of a settlement, but the first alternative is a logical incident of the created right of contribution and no provision expressly stating that effect was necessary. The aim of the statute to make a settler responsible for his *pro rata* share is realized when the credit on the total damage is in the amount of that *pro rata* share, and provisions for a right of action against him at the hands of his co-tortfeasors were unnecessary. Any remaining problems of contribution are limited to such as may arise among the non-settling defendants when the payment by any one of them upon the reduced joint judgment exceeds his *pro rata* share of the total damage.

[21] *Pro rata* shares are to be determined on the basis of the number of tortfeasors commonly liable who are available, that is, not beyond the reach of process, and are solvent. This has been the principle followed in our cases. *Johnson v. Tennessee Oil, etc., Co.*, 75 *N. J. Eq.* 314, 316 (*Ch.* 1909). The option offered by section 2(4) of the draft act permitting apportionment of the common liability among the joint tortfeasors according to their relative degrees of fault was not adopted by our Legislature.

To illustrate the operation of our statute: If plaintiffs herein obtain a verdict against the three non-settling defendants for the claimed damages of $315,000, the *pro rata* shares of the five defendants, assuming none is shown to be insolvent (they have all been served with process and that element of the equity rule does not concern us in this case) will be $63,000 each. The credit upon the judgment to be entered upon the assumed verdict of $315,000 of total damage will be $126,000, the sum of the *pro rata* shares of the two defendants who settled. If the *pro rata* shares are adjusted by reason of the proved insolvency of any one or more of the defendants (an issue, if raised, more properly to be determined in a proceeding conducted subsequent to the verdict and before the final entry of the judgment) the credit will be adjusted accordingly.

Reversed.

Suggested reading material:

As to effect of settlement by sole defendant upon his right to contribution from joint tort feasor impleaded by him. Nilson v. Moskal, 70 N. J. Super. 389 (Middlesex Cty. Ct. 1961).

As to effect of settlement by one of two joint tort feasors upon amount of plaintiff's recovery against remaining joint tort feasor and as to effect of such settlement on right of contribution between joint tort feasors. Oliver v. Russo, 29 N. J. 418 (1959); Smootz v. Ienni, 37 N. J. Super. 529 (Essex Cty Ct. 1955), but see Hoeller v. Coleman, 73 N. J. Super. 502 (App. Div. 1962), as to effect of settlement where person settling is no more than a potential joint tort feasor.

As to effect on plaintiff's verdict of failure of defendant to make claim for contribution against a joint tort feasor with whom plaintiff had made settlement. Gottfried v. Temel's Restaurant, Inc., 69 N. J. Super. 163 (App. Div. 1961).

3. Post Trial Procedures
a. Relief from alleged jury misconduct- examining jurors after verdict.

Excerpt from State v. Levitt, 36 N. J. 266, 270-273 (1961).

Courts continually strive to protect the basic right to an impartial jury thereby sustaining the jury system, the very foundation of criminal justice. The law is "always zealous to protect every accused from a jury verdict prejudiced by the taint of extraneous influence." *State v. Kociolek*, 20 *N. J.* 92, at *p.* 96 (1955). As we said in *Wright v. Bernstein*, 23 *N. J.* 284, at *pp.* 294–295 (1957):

> "The jury is an integral part of the court for the administration of justice, and on elementary principles its verdict must be obedient to the court's charge based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences. The parties to the action are entitled to have each of the jurors who hears the case impartial, unprejudiced and free from improper influences."

See *Panko v. Flintkote Co.*, 7 *N. J.* 55, at *p.* 62 (1951), where we said, "In order that there may be confidence in trial by jury it is necessary that parties are to feel sure that verdicts are based upon an honest consideration of the evidence and not upon prejudice or sympathy." Though *Wright* and *Panko* involved civil trials, the standards for the jury in a criminal trial cannot be less demanding. See *State v. Rios*, 17 *N. J.* 572, 590 (1955).

[1, 2] Where there are sufficient allegations that the jury's verdict was discolored by improper influences, the trial judge should investigate the truth of the charges so that he may determine whether a new trial is warranted. And it makes no difference whether the improper influences occurred inside or outside the jury room. *Wright v. Bernstein, supra; Panko v. Flintkote Co., supra; Palestroni v. Jacobs*, 10 *N. J. Super.* 266 (*App. Div.* 1950); *Capozzi v. Butterwei*, 2 *N. J. Super.* 593 (*Law Div.* 1949). Though the trial judge cannot examine the thought processes of jurors in reaching their verdict, he can receive jurors' evidence as to the existence of conditions or the occurrence of events to determine whether they showed an adverse prejudice bearing on the verdict. *State v. Kociolek, supra*, 20 *N. J.*, at *p.* 100; see Note, 56 *Colum. L. Rev.* 952 (1956).

[3] In the present case the trial judge decided to set aside the jury's verdict and order a new trial after a hearing and full consideration of the affidavits and statements of the jurors. Because of the delicacy of the questioning

of jurors, we think the proper practice would be for the trial judge to take the testimony of the jurors himself in the presence of counsel, rather than expose jurors to questioning by others. See *Wright v. Bernstein, supra,* 23 *N. J.,* at *p.* 297; *Palestroni v. Jacobs, supra,* 10 *N. J. Super.,* at *p.* 276. Moreover, he will be in a better position to pass upon the merits of the allegations. However, since the parties agreed to the procedure followed by the trial judge, and the State does not dispute the truth of the initial affidavit in the question involved in this appeal, we need not pursue the matter further.

[4] In any cause pending before him the trial judge has broad power to see that justice is done. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where he believes the ends of justice so require. *R. R.* 3:7–11. And if he finds a verdict is tainted by prejudice, it makes no difference that evidence which was presented at the trial brought this prejudice to the surface.

[5] Motions for a new trial "are addressed to the sound discretion of the court; and the exercise of the discretion will not be interfered with on appeal unless a clear abuse of it is shown." *State v. Smith,* 29 *N. J.* 561, 573 (1959); *State v. Bunk,* 4 *N. J.* 482, 485 (1950).

[6] The trial judge had before him proof that religion was introduced into the jury room. After considering the affidavits and statements he concluded that the remarks belittled the integrity of all adherents to the Jewish faith and exhibited an adverse prejudice in the jury's deliberations. Other jurisdictions have recognized that remarks of a juror evincing racial or religious bias are grounds for impeaching the jury's verdict. In *Commonwealth v. Thompson,* 328 *Pa.* 27, 195 *A.* 115 (*Sup. Ct.* 1937) the court said a remark by a juror disparaging Negroes generally would show disrespect for defendant's race and render the juror incompetent and void the verdict. In *Evans v. Galbraith-Foxworth Lumber Co.,* 31 *S. W.* 2*d* 496 (*Tex. Civ. App.* 1929) one of the parties was Jewish. The court held anti-Semitic remarks of one juror during the jury's deliberations were grounds for granting a new trial. It said, "The verdict of the jury should have been set aside by the trial court on the motion for new trial because of the feeling and racial prejudice displayed by the juror Young during the deliberation of the jury upon its verdict." *Id.,* at *p.* 500. See *People v. Leonti,* 262 *N. Y.* 256, 186 *N. E.* 693 (*Ct. App.* 1933); see also *Impeachment of Jury Verdicts,* 25 *U. Chi. L. Rev.* 360, 369 (1958); 15 *Texas L. Rev.* 101, 106 (1936). If the trial judge found even one juror was so biased as to prevent him or her from objectively weighing the evidence, it was sufficient

to set the verdict aside. See *Panko v. Flintkote Co., supra,* 7 *N. J.,* at *p.* 61.

The trial judge did not examine the affidavits and statements in a vacuum; he viewed them against the backdrop of the entire case. Several grounds for granting a new trial had been advanced. He considered the injection of religion was "one more facet added to the whole complexity of this situation." We cannot overlook the factor that the judge who presided at the trial and the hearing was in a better position than this court, which sees only the cold record, to appraise the entire situation and determine whether the defendant's basic rights were violated. As we have stated, our concern is whether the trial court abused its discretion in setting aside the verdict and granting a new trial. In the absence of such abuse, we do not substitute our judgment for that of the trial court. See *Natale v. Automobile Finance Co.,* 133 *N. J. L.* 253, 255 (*E. & A.* 1945). Since the trial judge could find, as he did, that the element of religious prejudice had contaminated the jury verdict, we hold he did not abuse his discretion. It is unnecessary for us to consider whether any other ground, standing alone, was sufficient to warrant the granting of a new trial.

Excerpt from Panko v. Flintkote Co., 7 N. J. 55, 61, 62 (1951).

[2–4] The fundamental right of trial by a fair and impartial jury is jealously guarded by the courts. A jury is an integral part of the court for the administration of justice and on elementary principles its verdict must be obedient to the court's charge, based solely on legal evidence produced before it and entirely free from the taint of extraneous considerations and influences. A jury can act only as a unit and its verdict is the result of the united action of all the jurors who participated therein. Therefore, the parties to the action are entitled to have each of the jurors who hears the case, impartial, unprejudiced and free from improper influences. *Payne v. Burke,* 236 *App. Div.* 527, 260 *N. Y. S.* 259 (*N. Y. App. Div.* 1932); *Clyde Mattox v. United States,* 146 *U. S.* 140, 13 *S. Ct.* 50, 150, 36 *L. ed.* 917 (1892); 66 *C. J. S., New Trial,* § 47, *p.* 162; *Ibid.* § 61, *p.* 188.

[5, 6] It is well settled that the test for determining whether a new trial will be granted because of the misconduct of jurors or the intrusion of irregular influences is whether such matters could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge. If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect. The test is not whether the irregular matter actually influenced the result, but whether it had the capacity of doing so. The stringency of this rule is grounded upon the necessity of keeping the administration of justice pure and free from all

suspicion of corrupting practices. It is said to be "imperatively required to secure verdicts based on proofs taken openly at the trial, free from all danger by extraneous influences." *Lamphear v. MacLean*, 176 *App. Div.* 473, 162 *N. Y. Supp.* 432 (*N. Y. App. Div.* 1916); *Gall v. N. Y. & New Brunswick Auto Express Co.*, 132 *N. J. L.* 466, 468 (*E. & A.* 1944); *In re Phelan*, 126 *N. J. L.* 410, 411 (*Sup. Ct.* 1941); *Den ex dem. Cox v. Tomlin*, 19 *N. J. L.* 76, 80 (*Sup. Ct.* 1842); *Consumers Coal Co. v. Hutchinson*, 36 *N. J. L.* 24, 26, 28 (*Sup. Ct.* 1872); *Sloan v. Harrison*, 1 *N. J. L.* 123 [Reprint page 145] (*Sup. Ct.* 1792); *In re Collins*, 18 *N. J. Misc.* 492, 497 (*Cape May Cty. Cir. Ct.* 1940); *York v. Wyman*, 115 *Me.* 353, 98 *A.* 1024 (*Me. Sup. Jud. Ct.* 1916); 39 *Am. Jur.*, *New Trial*, § 96, *p.* 111.

Additional reading material:

As to jurors' unauthorized viewing of scene of accident. Capozzi v. Butterwei, 2 N. J. Super. 593 (Law Div. 1949).

As to effect of juror's subsequent insanity. Iverson v. Prudential Insurance Co., 126 N. J. L. 280, 285 (E. & A. 1941).

As to use of deposition of juror to sustain verdict. Douglass v. Kabalon, 22 N. J. Misc. R. 200 (Sup. Ct. 1944).

As to extent, manner and form of questioning of jurors after verdict. Brandimarte v. Green, 37 N. J. 557, 562-565 (1962); Wright v. Bernstein, 23 N. J. 284, 297 (1957); State v. Kociolik, 20 N. J. 92 (1955).

As to examination of jurors by parties. R. R. 1:25A; State v. La Fera, 42 N. J. 97, 105-108 (1964).

III. PROBLEMS IN CRIMINAL CASES - BEFORE AND DURING TRIAL

III. PROBLEMS IN CRIMINAL CASES - BEFORE AND DURING TRIAL

Introduction and Suggested Reading Material

This topic was discussed at the September 1963 Seminar. However, most of the included problems are still with us. In addition, during the last year the law as to some of those problems has changed in greater or lesser degree, and, in some instances, new problems have been created. Therefore it is suggested that the "Advance Reading Material" supplied for the 1963 Seminar be re-examined and that, in addition, the following cases decided since September 1963 be read:

UNITED STATES SUPREME COURT

Escobedo v. Illinois, --- U.S. --- (Decided June 23, 1964)
Malloy v. Hogan, --- U.S. ---, 12 L. Ed. 2d 653, 84 S. Ct. ---
Murphy v. Waterfront Commission, --- U.S. ---, 12 L. Ed. 2d 678, 84 S. Ct. ---
Rugendorf v. United States, --- U.S. ---, 11 L. Ed. 2d 887, 84 S. Ct. ---
Preston v. United States, 376 U.S. 364, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964)
Wong Sun v. United States, 371 U.S. 471, --- L. Ed. 2d ---, 83 S. Ct. 407

NEW JERSEY SUPREME COURT

State v. Hutchins, --- N.J. --- (July 7, 1964)
State v. Ray, --- N.J. --- (July 7, 1964)
State v. Coolack, --- N.J. --- (July 7, 1964)
State v. Doyle, 42 N.J. 334 (1964)
State v. Farmer, --- N.J. --- (July 7, 1964)
State v. Pollack, --- N.J. --- (July 7, 1964)
State v. Moffa, 42 N.J. 258 (1964)
In re Garafone, 42 N.J. 244 (1964)
State v. Scharfstein, 42 N.J. 354, affirming 79 N.J.Super. 236
State v. Burnett, 42 N.J. 377 (1964)
State v. Currie, 41 N.J. 531 (1964)
State v. Berry, 41 N.J. 547 (1964)
State v. Dolce, 41 N.J. 422 (1964)
State v. Miller, 41 N.J. 65 (1964)
State v. Reynolds, 41 N.J. 162 (1964)

APPELLATE DIVISION

State v. King, 84 N. J. Super. 297 (1964)
State v. Tanzola, 83 N. J. Super 40 (1964)
State v. Bibbo, 83 N. J. Super. 36 (1964)
State v. Garcia, 83 N. J. Super. 345 (1964)
State v. Parsons, 83 N. J. Super. 430 (1964)
State v. Naturile, 83 N. J. Super. 563 (1964)
State v. Searles, 82 N. J. Super. 210 (1964)
State v. Kirkland, 82 N. J. Super. 409 (1964)
State v. Ratushny, 82 N. J. Super. 499 (1964)
State v. Ashby, 81 N. J. Super 350 (1964)
State v. Padavano, 81 N. J. Super 321 (1964)
State v. Taylor, 81 N. J. Super. 296 (1964)
State v. Papitsas, 80 N. J. Super. 420 (1964)
State v. Von Atzinger, 81 N. J. Super 509 (1964)

It is hoped that the discussions of the "problems in criminal cases--before and during trial" will be of the "bread and butter" variety--that is, that the judges will come prepared to ask specific questions troubling them, and ready to help in seeking solutions to the questions presented by their brethren. The panelists will be there not to give definitive answers but to stimulate and direct the discussion.

Some of the questions already suggested for discussion are contained in the following outline. However, this outline does not exclude other questions which any judge may wish to present at the sessions.

1. Bail

(a) How shall we handle defendants who cannot raise the bail fixed by the magistrate, before counsel is assigned? After counsel is assigned?

(b) Bail for those with bad records: Should bail be refused for one arrested for a new offense while on bail, where the evidence is clear or the presumption great that he did commit the new offense?

(c) Speedy trial for serious cases, especially those of public notoriety, and for recidivists, even though out on bail.

2. Search and Seizure; Arrest

(a) The procedure on issuance of search warrants; the desirability of interrogating the applicant under oath in addition to taking the affidavit which he usually presents.

(b) The procedure on motions to suppress; the desirability of hearing the defendant's testimony, as well as the state's, in full; the necessity of proper findings of fact and conclusions of law; proof of a valid arrest when a search under a warrant is under attack.

(c) Have any significant changes occurred or trends developed in the law of arrest and search and seizure since our 1963 seminar?

3. Problems arising out of defendant's failure to cooperate with assigned counsel, and out of assigned counsel's failure to cooperate with the court; how to ease the burden on assigned counsel; right of counsel to out-of-pocket disbursements.

4. Trials of defendants serving sentences in other jurisdictions.

5. Motions addressed to the Indictment:

A. On the grounds that:

(a) The Grand Jury heard no evidence, incompetent evidence, or evidence illegally obtained (e.g. involuntary confessions or illegally seized evidence).

(b) Double jeopardy.

(c) Other grounds.

6. Particulars

(a) Copies of testimony before the Grand Jury (1) of defendants, (2) of others

(b) Copies of statements given to police (1) by defendants, (2) by others

(c) Pre-trials in criminal cases

(d) Right of indigent defendants to state-paid investigators, experts, etc.

7. Joinder, consolidation and severances

Bearing of confession by one defendant implicating co-defendant.

8. Taking a plea of guilty

(a) Before trial (b) At trial.

9. Waiver of jury. Does defendant have absolute right to waive? May court permit waiver over objection of prosecutor? Should court ever refuse waiver when both sides agree?

10. The Voir Dire: How may it be shortened? Control of type, manner and length of questioning; questioning by the court. Shall remainder of panel be excused during questioning? Sequestration of jurors during and after selection.

11. The Opening: Control of length, content and form of openings; improper remarks by prosecutor or defense counsel; should prosecutor or defense counsel be permitted to say that defense counsel is assigned?

Preliminary instructions by the court?

12. The Trial:

(a) The judge's attitude and demeanor; interrogation by the judge; comments by the judge about witnesses; manner of ruling; explanation of rulings to the jury when necessary; reception of proffers of proof; side bar and chamber conferences; stipulations.

(b) The judge's obligation to maintain dignity and decorum, prevent or correct improprieties by counsel, jurors, court officers, spectators and witnesses, and prevent injustice.

(c) The problems of the judge vis-a-vis inexperienced counsel.

(d) Special problems of evidence: for example, pleas of guilty and other admissions before magistrate; reputation evidence; prior identification; prior complaint or declarations by victim; confessions; admissions by silence.

(e) Entrapment.

13. Motions for dismissal and for judgment of acquittal; rules for evaluating the sufficiency of the State's case.

14. Summations

See XIII; should court advise counsel beforehand what it intends to charge on crucial points in dispute?

15. The Charge:

(a) Should the judge require counsel to submit requests to charge?

(b) Form and content; necessity for clarity and simplicity; should evidence be reviewed; relating the law to the factual contentions of the parties; should excerpts of cases be read?

(c) Common essential charges: accomplice; alibi; confessions; failure to testify; failure to produce witnesses; flight; implied admissions; other special charges.

(d) The judge's right to comment on the evidence; how that right may be exercised.

(e) Exceptions to the charge; how they should be heard and ruled upon; "blanket" exceptions.

(f) Should counsel be excused after jury retires?

(g) Questions from jury and their answers; rereading testimony; restating portions of the charge; questions by jury as to punishment.

(h) Sending back jury for further deliberation; how long may or should a jury be held out; discharge without consent of defendant.

(i) Polling the jury; molding the verdict; receipt of verdict as to some counts and returning the jury to the jury room for further deliberations as to the remainder.

IV. PROBLEMS IN CRIMINAL CASES - AFTER TRIAL

IV PROBLEMS IN CRIMINAL CASES - AFTER TRIAL

(Reread the 1963 New Jersey Judicial Seminar material, pages III-1 et. seg. "Criminal Procedure: Post-Conviction Proceedings and read Rule 3:10A Post-Conviction Relief.)

1. Interrogation of Jurors

Except from State v. La Fera, 42 N. J. 97, 99, 100, 105-111 (1964)

The opinion of the court was delivered by

WEINTRAUB, C. J. Defendants were convicted of a conspiracy to rig bids on a public project. They appealed. Before the appeal was argued, defendants obtained a remand to permit them to apply to the trial court for a new trial on the ground that a juror was biased and prejudged the case. After a hearing, the trial court ordered a new trial. The State was granted leave to appeal. We certified both that appeal and the appeals from the judgments of conviction before argument in the Appellate Division.

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B.

The defense launched a post-conviction investigation of the jury without leave of court. The State charges a violation of *R. R.* 1:25A and contends the product of that investigation should be suppressed as a necessary sanction to discourage such conduct. *R. R.* 1:25A provides:

> "No attorney shall himself or through any investigator or other person acting for him interview, examine or question any juror with respect to the verdict or deliberations of the jury in any action except on leave of court granted upon good cause shown."

Defendants concede that upon nothing more than a sense of shock induced by the verdict of guilty, they engaged a private investigator named Klay to search for something to impeach the verdict. There is no doubt that the investigation was intended to probe the verdict and the deliberations of the jury. Klay was instructed by counsel not to interview a juror because of *R. R.* 1:25A and none was interviewed, but Klay and as many as 12 or 13 others retained by him moved in and out of the affairs of the jurors, contacting relatives, friends, and associates under a multitude of guises, in the hope that something useful would emerge. This extraordinary investigation was conducted from January to December 1962, at a cost of $21,500. It bore no fruit until Klay learned that a juror, whom we shall call juror V., had left his place of employment, whereupon Klay, abandoning all pretenses, ques-

tioned the juror's former co-employees directly upon the topics of prejudice and prejudgment. Klay thereby obtained affidavits that juror V. strongly disliked people of Italian descent and had expressed his belief in the defendants' guilt before the trial started. It was upon those affidavits that the court undertook the inquiry.

[5, 6] Defendants say the quoted rule does not embrace what happened here since no juror was interviewed. Literally this is true, but we have no doubt the spirit of the rule was offended.

A jury deliberates in secrecy to encourage each juror to state his thoughts, good and bad, so that they may be talked out. "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States*, 289 *U. S.* 1, 13, 53 *S. Ct.* 465, 77 *L. Ed.* 993, 999 (1932). Some will recall the furor a few years ago when a jury's deliberations were secretly recorded, notwithstanding that the recording was made in a controlled study and the anonymity of the individual juror was completely assured. Ferguson, "Legal Research on Trial," 39 *J. Am. Jud. Soc'y*, 78 (1955).

For the juror's individual protection, the law raises a privilege against disclosure of his communications during deliberations, a privilege which will yield only to some greater public need. 8 *Wigmore, Evidence* (*McNaughton rev.* 1961) § 2346, *p.* 678; *Clark v. United States, supra* (289 *U. S.* 1, 53 *S. Ct.* 465, 77 *L. Ed.* 993). It is true that no settled rule bars extrajudicial, post-trial disclosures by a juror of his own views even though in cases of public interest the trial judge not infrequently cautions against such disclosures. Yet one of twelve may not be able to disclose his own part without revealing something the other jurors are entitled to have protected. Moreover the public too has a stake in the promise of secrecy to insure free debate in cases to come. In these circumstances it is appropriate to protect all the jurors against efforts of others to browse among their thoughts in search of something to invalidate their verdict. This *R. R.* 1:25A seeks to do.

We see no difference between an intrusion upon a juror personally of which the rule speaks literally and an intrusion into the juror's private relationships with others. If anything, an investigation conducted among others may be even more disturbing in that it tends to suggest to those who are interviewed that something is already known to be amiss. Hence it is unfair to jurors to permit a disappointed litigant to pick over their private associations in search of something to discredit them and their verdict. And it would be unfair to the public too if jurors should understand that they cannot convict a man of means without risking an inquiry of that kind by paid investigators, with, to boot, the distortions an inquiry of that kind can produce.

But defendants say that due process of law is denied them if they may not probe to find out whether the verdict was vulnerable. They do not go so far as to say that a proceeding for discovery should lie in which the jurors, their families, friends, and associates may be produced by subpoena, but they do assert a right to search on their own. The State disputes the claim of right and adds with much force that if such a right exists, then every indigent defendant may demand the State furnish him the wherewithal to conduct the far-flung exploration here made.

It may appear odd to recognize a ground for the invalidation of a verdict while denying a litigant a chance to find out whether such an event perchance did occur. The fate of a defendant is thus made to depend upon sheer luck, that the wrongful event somehow comes to light. The weight of the criticism is appreciated, but when contending values clash in their demands, a balance must be struck, and the balance struck is not shown to be a poor one because in some unknowable cases there may be an injustice. Overall the instances of invalidating misbehavior are exceedingly few. And even within that limited group, a new trial may be a windfall for the defendant, since if the misconduct is capable of tainting the verdict, the verdict will be set aside without inquiry into the actual impact of that misconduct upon the result. *State v. Kociolek*, 20 *N.J.* 92, 100 (1955); *State v. Levitt, supra* (36 *N. J.*, at *p.* 271). Thus there is but a small factor of possible hurt. Against this must be weighed the substantial interest of the public and of defendants as a group, in the full and free debate in the jury room. We think the approach of our rule is correct. In any event we see no constitutional difficulty.

We do not question the good faith of counsel, for we recognize that prior to our expression in this case another view of the reach of our rule could sincerely be held. In these circumstances we need not consider the State's proposal that the product of an offending investigation be suppressed as a suitable sanction.

C.

After taking testimony the trial court rejected the charges advanced in the moving affidavits. Specifically the trial court found that juror V. spoke of all men in rough terms only because such was his manner and as well the fashion of his environs rather than because he harbored the prejudice his words might suggest in someone else. And as to the charge of prejudgment, the trial court discounted the testimony of the affiants after listening to them. However, in the course of the hearing the trial court examined other jurors and it was the disclosures by two of them, first made during the hearing, which led to the order for a new trial upon a finding that juror V. had reached "a final verdict of guilt, prior to the completion of the case, prior to the argument of counsel, and prior to the charge of the Court."

We are troubled by that thesis. A man inevitably reacts to what he hears as he hears it. He cannot avoid current impressions however much he wills to resist them. And although he may think those impressions are final, he cannot really know that they will endure. We may assume that many jurors begin the deliberations with strong convictions as to how the case should go, and then yield them to persuasion in the jury room. We instruct jurors to refrain from premature discussion in the hope that they will enter upon their deliberations with a maximum capacity to consider the views of others, but we cannot say a juror is guilty of misconduct because he reaches a conclusion before ideally he should.

We have found no case in which a verdict was disturbed merely because a juror reached what proved to be his final view prior to the conclusion of the proof. The cases turn, not upon the proposition that a juror misbehaves if he reaches a premature conviction, but rather upon the circumstances in which he disclosed it. In cases in which a verdict was set aside, it appeared the juror informed third parties of the vote he would cast or otherwise revealed his conviction to a public view. *Ostrom v. Clapp*, 6 *Indian Terr.* 203, 90 *S. W.* 478 (*Ct. App.* 1905); *York v. Wyman*, 115 *Me.* 353, 98 *A.* 1024 (*Sup. Jud. Ct.* 1916); *Cooper v. Carr*, 161 *Mich.* 405, 126 *N. W.* 468 (*Sup. Ct.* 1910); *Norcross v. Willard*, 82 *Vt.* 185, 72 *A.* 820 (*Sup. Ct.* 1909); *cf. Schonhardt v. City of Pittsburgh*, 340 *Pa.* 155, 16 *A. 2d* 421 (*Sup. Ct.* 1940). We need not decide whether to subscribe to those cases. It probably is more difficult for a juror to change his position after stating it to some third person, and in any event such disclosures may tend to unsettle public confidence in the integrity of the verdict. But statements by a juror to a fellow juror do not present the same problem, and they have been held not to justify a new trial. *Blakeney v. Alabama Power Co.*, 222 *Ala.* 394, 133 *So.* 16 (*Sup. Ct.* 1931); *State v. Cook*, 52 *La. Ann.* 114, 26 *So.* 751 (*Sup. Ct.* 1899); *Kaul v. Brown*, 17 *R. I.* 14, 20 *A.* 10 (*Sup. Ct.* 1890); *cf. Bates v. Siebrand Bros. Circus & Carnival*, 71 *Idaho* 318, 231 *P. 2d* 747 (*Sup. Ct.* 1951).

[7] It may well be that a motion for a mistrial can be granted in a court's discretion if it learns that a juror has expressed his view with apparent finality to fellow jurors or persists in premature discussions with them despite the court's instruction. But here we are concerned with a verdict already rendered. The finding, as we read the court's opinion, that juror V. reached what proved to be his final view sometime during the trial and communicated that view to two of his fellow jurors, does not warrant a new trial.

With respect to the charge of anti-Italian bias, the trial court, as we said earlier, found the charge was not proved. Defendants urge that it was. We need not decide the question, but we feel obliged to comment upon the topic.

[8] It is a vicious thing to convict a man out of bigotry, and hence, despite the strong policy against probing the motivations which inhere in a jury's verdict, 8 *Wigmore, Evidence* (*McNaughton rev.* 1961) § 2349, *p.* 681, we will hear a charge that a juror manifested such bias in his consideration of the case. *State v. Levitt, supra* (36 *N. J.* 266). The inquiry should not, however, be ordered without a sufficient preliminary showing that a juror carried his prejudice into the jury room. It is with respect to the required showing that we wish to say a word of caution.

It may be doubted that twelve jurors can be found who are free of all shades of bigotry in all of their worldly affairs. Biases vary widely in intensity and demand. Some are satisfied within purely social areas where they may assume the attitude of individual preferences. At the other pole is a sick, insatiable hate. Fortunately most of our citizens, whatever their bent in other things, would think it abhorrent that bigotry should prevail in the halls of justice. In recruiting jurors, we cannot expect to find men with the strength of a saint in all matters; we must be content with men minded to leave their prejudices on the courthouse steps and to decide a case on the merits alone. We must assume a juror is equal to his oath. If, however, a juror proves unequal to it, the conviction should be set aside, but as we pointed out in *Levitt*, the proof must show that the juror revealed that prejudice in the trial of the case. We want to stress that it would rarely, if ever, be enough to justify an inquiry to show that in some unrelated circumstances at some time before or after the trial a juror evidenced bias against the group to which a defendant belongs. In this connection see annotation of the *Levitt* case in 91 *A. L. R. 2d* 1120 (1963), where the problem is discussed briefly, at *pp.* 1121 and 1126.

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2. Post-Conviction Attack on Adequacy of Representation by Counsel

Excerpts from United States v. Handy, 203 F.2d. 407, 409, 410, 413-418, 421, 422, 425-428 (3rd Cir. 1952)

PER CURIAM.

The majority of the court is of the opinion that the relator must be afforded the opportunity to prove the allegations set out in his petition for habeas corpus insofar as they relate to the alleged atmosphere of hysteria and prejudice prevailing at his trial, including any issues raised by Judge Boyer's asserted visits to the courtroom during Darcy's trial, since the undisputed and incontrovertible facts as shown by the record do not countervail the allegations of hysteria and prejudice. See Walker v. Johnston, 312 U.S. 275, 284, 61 S.Ct. 574, 85 L.Ed. 830.

The court has considered the allegations of the petition concerning the conduct of Darcy's counsel and the entire record upon this issue. It is the opinion of a majority of the court that the District Court was justified in deciding against the petitioner on this issue without taking testimony.

All members of the court are of the opinion that the affidavits of members of the jury must be stricken from the relator's petition.

The respective views of the members of the court are set out in the opinions which follow this per curiam opinion.

The judgment of the court below will be reversed with the direction to enter an order staying Darcy's execution until the disposition by the court below of the instant case on remand on the issue of alleged hysteria and prejudice. The court below will be directed to strike from the petition for habeas corpus the jurors' letters attached thereto. The stay order entered by this court will be vacated.

* * * * *

BIGGS, Chief Judge.

The question presented by the instant case is whether the Commonwealth of Pennsylvania denied to the relator, Darcy, due process of law as guaranteed to him by the Fourteenth Amendment during his trial for first degree murder. Darcy was charged with murder in the first degree because a bystander, Kelly, was shot and killed by one of Darcy's companions in the course of the armed robbery of the Feasterville Tavern, near Doylestown, Pennsylvania. Two of Darcy's co-actors in the robbery, Foster and Zeitz, were tried just before Darcy by the same court which later tried him. Foster and Zeitz were found guilty of first degree murder and the penalty was fixed at death. Darcy also was found guilty of first degree murder, and was sentenced to death.

A history of the proceedings prior to this appeal follows. Darcy was tried, convicted and sentenced in the Court of Oyer and Terminer of Bucks County, Pennsylvania, at No. 37 February Term 1948. A petition for a new trial was filed and was denied by that court, Darcy's conviction and sentence being affirmed. An appeal was taken to the Supreme Court of Pennsylvania and the judgment of the court below was affirmed, Mr. Justice Jones dissenting. See Commonwealth v. Darcy, 362 Pa. 259, 66 A.2d 663. An application for certiorari to the Supreme Court of the United States was denied. See 338 U.S. 862, 70 S.Ct. 96, 94 L.Ed. 528.

(Opinion sets forth steps in subsequent review including denials of habeas corpus in Pennsylvania Supreme Court certiorari in United States Supreme Court, certiorari in Pennsylvania Supreme Court, and habeas corpus in United States District Court, from which latter present appeal is taken.)

> The allegations of the petition may be summed up as follows: (1) that the relator was tried in an atmosphere of hysteria and prejudice, ***
>
> and (2) that Darcy was defended by counsel so lacking in diligence and competency[9] that his trial was no trial at all, no change of venue having been requested and Darcy not having been permitted to testify in his own defense or to call witnesses as to his "background, personal history, mental condition, prior good behavior, character and reputation. * * *"

* * * * *

I point out also that the conclusion expressed by the trial court as to "(2)", as set out in a preceding paragraph of this opinion, viz., that Darcy's counsel conducted his trial in the Court of Oyer and Terminer in a reasonably competent manner cannot be sustained on the present record. The allegation is that Darcy's counsel did not properly prepare his case and was guilty of such negligence and incompetency as to render the trial a sham.[10] Neither the court below nor this court can do more than speculate as to the course followed by Darcy's counsel at the trial. Speculation cannot serve in lieu of findings.

There is another most difficult problem in respect to the conduct of counsel in this troublesome case. Was the failure of Darcy's counsel to present evidence of his alleged previous good character and as to his mental condition due to incompetency or lack of preparation, or was it a part of a well thought out plan of defense? It was suggested by Judge Murphy in the court below and by the present writer in the argument before this court that perhaps the reason why Darcy's counsel, a lawyer of long experience at the bar, did not call Darcy or other witnesses on his behalf at his trial in the Court of Oyer and Terminer was because had he done so he would have lost the benefits of the Act of July 3, 1947, P.L. 1239, amending the Act of March 15, 1911, P.L. 20, 19 P.S.Pa. § 711. To state the matter baldly and perhaps to oversimplify it, if the Act of July 3, 1947, was constitutional and Darcy and other persons had been called as witnesses in his defense, as to the matters hereinbefore referred to, Darcy's counsel could have concluded that Darcy thereby would have lost the benefits of the Act of 1947. It must be borne in mind that Darcy's counsel had already concluded that the Court of Oyer and Terminer had committed error in admitting in evidence testimony as to the armed robbery perpetrated by Darcy and his companions shortly subsequent to their robbery at the Feasterville Tavern. Darcy's counsel had saved an exception to the ruling of the Court of Oyer and Terminer admitting such evidence and had moved for the withdrawal of a juror. If the Act of 1947 was constitutional and Darcy went on the witness stand or others did on his behalf, Darcy might have lost the benefit of what Darcy's counsel may have considered a valid exception. Darcy's counsel also would have lost what he believed to be his right to a closing argument to the jury, and, most important of all, would have opened the door to the Commonwealth to prove Darcy's bad character or reputation and any pertinent criminal record which he may

have possessed. There is no question but that had Darcy's counsel put him or witnesses on his behalf on the stand that the Commonwealth would have been entitled to prove bad character or reputation and criminal record.

It must also be remembered that at the time of Darcy's trial before the Court of Oyer and Terminer the decision of the Supreme Court of Pennsylvania in Commonwealth v. DePofi, 1949, 362 Pa. 229, 66 A. 2d 649, declaring the whole of the Act of 1947 unconstitutional, Mr. Justice Jones dissenting, had not been handed down. The state of the rules of evidence following the amendments to the Act of 1911 effected by the Act of 1947 was a very confused one as the Presiding Judge at Darcy's trial in the Court of Oyer and Terminer stated. Darcy by virtue of the decision of the Supreme Court of Pennsylvania in the DePofi case was in effect tried under rules which were changed substantially during the course of the proceedings. Compare the circumstances presented by a criminal proceeding in a United States District Court in Sunal v. Large, 332 U.S. 174, 67 S.Ct. 1588, 91 L.Ed. 1982. See also the dissenting opinions by Mr. Justice Frankfurter and Mr. Justice Rutledge. Bear in mind that an unconstitutional statute was involved: not an interpretation of a constitutional statute, albeit by the Supreme Court of the United States as in Sunal. The situation presented is the reversed image of that set out in Ex parte Yarborough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, where conviction was had under a statute alleged to be unconstitutional. But should counsel for a defendant in a capital case be compelled to speculate as to the constitutionality of a statute which purported to afford the defendant substantial rights? To say that the Pennsylvania Act of 1947 deals only with the admission of evidence, and therefore is of a procedural rather than of a substantive nature, is to deal again with the wearisome clichés of where form ends and substance begins. Reliance upon the 1947 Act, if there was such reliance, struck to the heart of the question as to whether Darcy should live or die. As Judge Learned Hand said in United States ex rel. Kulick v. Kennedy, 2 Cir., 157 F.2d 811, 813, the writ of habeas corpus is available not only to determine points of jurisdiction, *stricti juris*, but also "* * * whenever else resort to it is necessary to prevent a complete miscarriage of justice." Under the circumstances of Darcy's trial Darcy's counsel may have been lead into a trap created by the statute respecting the vital issues of the degree of murder and the penalty, whether life imprisonment or death, to be imposed by the jury under Section 701 of the Pennsylvania Act of June 24, 1939, P.L. 872, 18 P.S.Pa. § 4701. If so, there was a miscarriage of justice. Certainly Darcy's counsel could have had good reasons for concluding that the 1947 Act was constitutional. Compare the opinions of Chief Justice Maxey and Justice Jones in the DePofi case.[11]

Is there a constitutional issue insofar as the case at bar is concerned presented by the amendments of the Act of 1947 to the Act of 1911 in the light of the decision of the Supreme Court of Pennsylvania in DePofi? If such a question is presented, is it ripe for disposition by this court on the instant record? Suppose Darcy's counsel did not call Darcy or witnesses on his behalf because Darcy's counsel was negligent or because he was so incompetent that he was unaware that a defendant on trial for murder had such a right.[12] Would a constitutional question then be presented? Would there be no constitutional question if Darcy's counsel did not offer evidence on his behalf in furtherance of a plan of calculated risk based on the assumption, subsequently demonstrated to be invalid, that the Act of 1947 was constitutional? The time to answer these questions is not yet ripe.

Darcy was entitled to be competently defended by counsel learned in the law. Though questions of degrees of competency and learning may always be present there is assuredly a level below which the courtroom performance of counsel representing a defendant in a capital case may not sink or the Fourteenth Amendment will be encountered. It is not necessary here to discuss or determine questions of degree, what degree of negligence or incompetence may be sufficient, or what insufficient, to void a criminal trial. If Darcy's counsel was so negligent or incompetent that he was deprived thereby of a valid defense or suffered the imposition of a penalty of death, a constitutional question is presented. See Tompsett v. State of Ohio, 6 Cir., 146 F.2d 95, 98–99, and the authorities therein cited; United States ex rel. Feeley v. Ragen, 7

Cir., 166 F.2d 976, 980–981; Jones v. Huff, 80 U.S.App.D.C. 254, 152 F.2d 14, 15–16; United States v. Wight, 2 Cir., 176 F.2d 376, 378–379; United States v. Bergamo, 3 Cir., 154 F.2d 31, 34–35; Abraham v. State, 228 Ind. 179, 184, 91 N.E.2d 358, 360; Miller v. Hudspeth, 164 Kan. 688, 707, 192 P.2d 147, 162. See Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L. Ed. 1461, and Miller v. Hudspeth, 10 Cir., 176 F.2d 111. See in particular Commonwealth v. O'Brien, 312 Pa. 543, 546, 168 A. 244, 245; Commonwealth v. Balles, 160 Pa. Super. 148, 154, 50 A.2d 729, 732, and Commonwealth v. Jodlowsky, 163 Pa.Super. 284, 286, 60 A.2d 836, 837. Nor should it be deemed to be a pertinent distinction that the defendant's counsel is selected by himself or by members of his family or his friends rather than appointed by the court. See Sanchez v. State, 199 Ind. 235, 157 N.E. 1.

If, on the other hand, Darcy's counsel exercised his judgment and concluded for sufficient reasons that he could rely on the constitutionality of the Act of 1947, another question also relating to Darcy's rights under the Fourteenth Amendment comes before the court. See Patterson v. Colorado, 205 U.S. 454, 461, 27 S.Ct. 556, 51 L. Ed. 879. Cf. Boyd v. State, 94 U.S. 645, 24 L.Ed. 302; Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969; Ross v. Oregon, 227 U.S. 150, 33 S.Ct. 220, 57 L. Ed. 458, and United States v. General Electric Company, D.C.S.D.N.Y., 80 F.Supp. 989, 1004. The two questions, however, have different operative facts and in the absence of a finding by the court below as to why Darcy's counsel offered no testimony on his behalf an opinion which might be purely advisory should not be hazarded. See the concurring opinion of Mr. Justice Stone and Mr. Justice Cardozo in Borden's Farm Product Co. v. Baldwin, 293 U.S. 194, 213, 55 S.Ct. 187, 193, 79 L.Ed. 281.[13] These and kindred matters should also be examined by the court below on remand and appropriate findings of fact and conclusions of law should be made.

* * * * *

(A majority of the 7-man court agreed with the views of Judge Maris of the issue of adequacy of representation. The relevant portions of that opinion follows.)

It is settled that in determining whether a petition for a writ of habeas corpus presents a prima facie case for the issuance of the writ a federal court must look not only to the face of the petition itself but also to the record of the proceeding which constitutes the basis for the petitioner's detention and of any prior applications by him for habeas corpus.[1] This appears to be what the district court did in this case. The question which is presented for determination accordingly is whether, upon the consideration by the district court of the allegations of the petition and of the facts appearing in the record of the relator's trial in the Court of Oyer and Terminer of Bucks County and of the subsequent proceedings on appeal and by way of petitions for habeas corpus, the court erred in concluding that the relator had not made allegations sufficient to entitle him to a hearing at which he might offer evidence in support of his application. The determination of this question requires the consideration, in the light of certain incontrovertible facts appearing in the record, of the allegations contained in the relator's petition in order that it may be determined whether these allegations, if established by evidence, would entitle him to the issuance of the writ.

The basic allegation of the relator's petition is that he was denied by the Commonwealth of Pennsylvania a fair and impartial trial in violation of the Fourteenth Amendment. The reasons he alleges for this assertion fall into two main categories.

* * * * *

I turn then to the second category of reasons alleged by the relator for the grant of the writ. This is that his counsel committed prejudicial errors in conducting his defense. The relator alleges that he was not permitted by his counsel to testify in his own defense, that his counsel did not produce any witnesses as to his background, personal history, mental condition, prior good behavior, character and reputation, although such evidence was available and would have assisted him, that his counsel failed to have him examined by a psychiatrist whose testimony, if such an examination had been made, would also have been helpful to him, and that the failure of his counsel in these respects denied him a fair and impartial trial in violation of the Fourteenth Amendment.

[10] In support of these allegations the petition avers that a number of the members of the jury which convicted the relator have since been interviewed and have stated that if the relator's prior good character had been presented to them as a defense it would have influenced their verdict with respect to the imposition of the death penalty. These statements by the trial jurors ought not to be considered, however, since it was wholly improper to have obtained them. For a strong public policy prohibits such subsequent interrogation of jurors with respect to their actions as jurors or as to what their actions might have been under other circumstances. To tolerate such procedure would be to permit a body blow at the integrity of the jury system itself. This court has recently had occasion to refer with disapproval to a somewhat analogous practice with respect to a trial juror in a criminal case in United States ex rel. Daverse v. Hohn, 3 Cir., 1952, 198 F. 2d 934. The Supreme Court of Pennsylvania has repeatedly condemned the practice of interviewing jurors after verdict and obtaining from them ex parte unsworn statements in answer to undisclosed questions and representations by the interviewers. Its condemnation of the practice was reiterated in its opinion denying the relator's second petition for a writ of habeas corpus filed in that court. Commonwealth ex rel. Darcy v. Claudy, 1951, 367 Pa. 130, 133–134, 79 A.2d 785, 786, certiorari denied 342 U.S. 837, 72 S.Ct. 61, 96 L.Ed. 632. The practice cannot be tolerated if the integrity of the jury system is to be preserved.[7]

In considering the relator's allegations with respect to the asserted errors and inadequacy of his counsel, we should do so in the light of the fact appearing in the record of his trial that he was represented by two members of the Bucks County bar in good standing who, as his present counsel stated at our bar, were retained by him through a member of his family and were not appointed for his defense by the court. It is also to be observed from the record that his trial counsel participated actively in the examination on their voir dire of the persons called to serve as prospective jurors and in every later stage of the trial.

[11, 12] The concept of due process of law contained in the Fourteenth Amendment unquestionably involves the right to have the assistance of counsel for one's defense in a criminal case.[8] The amendment, however, is directed only to action by a state and its command in this regard accordingly is that the state through its officers shall not deny to a defendant in a criminal case the effective assistance of counsel for his defense. This may well impose a definite obligation upon the state through its courts to appoint competent counsel for indigent defendants in criminal cases.[9] There is, however, as Judge Huxman pointed out in Hudspeth, Warden v. McDonald, 10 Cir., 1941, 120 F.2d 962, 968, "a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel." It is the latter only for which the state is responsible, the former being normally the sole responsibility of the defendant who selected his counsel. And so where, as in the case now before us, a defendant in a criminal case has retained counsel of his own choice to represent him it is settled by an overwhelming weight of authority that the commission by his counsel of what may retrospectively appear to be errors of judgment in the conduct of the defense does not constitute a denial of due process chargeable to the state.[10]

[13, 14] When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. For while he is an officer of the court his allegiance is to his client whose interests are ordinarily diametrically opposed to those of the state. It necessarily follows that any lack of skill or incompetency of counsel must in these circumstances be im-

puted to the defendant who employed him rather than to the state, the acts of counsel thus becoming those of his client and as such so recognized and accepted by the court unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel.[11]

Judge Minton well expressed the rule in United States ex rel. Weber v. Ragen, Warden, 7 Cir., 1949, 176 F.2d 579, 586, when he said:

> "As to the requirement under the Fourteenth Amendment, the services of counsel meet the requirements of the due process clause when he is a member in good standing at the bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and his service is of such character as to preserve the essential integrity of the proceedings as a trial in a court of justice. He is not required to be infallible. We know that some good lawyer gets beat in every law suit. He made some mistakes. The printed opinions that line the walls in our offices bear mute testimony to that fact. His client is entitled to a fair trial, not a perfect one."

[15, 16] It is true, as the relator urges, that a denial of due process of law by the state would result if the representation of a defendant by his counsel should be so lacking in competence or good faith that it would become the duty of the trial judge or the prosecutor, as officers of the state, to observe and correct it. For in such a trial the defendant would be practically without representation and it would, therefore, be but a farce and a mockery of justice. It is the duty both of the trial judge[12] and the prosecutor[13] to see that the essential rights of the defendant are preserved. As officers of the state their failure to do so is imputed to the state. But they, and through them the state, may not be convicted of a denial to the defendant of due process of law in this regard unless the incompetence of the defense is so apparent as to call for intervention between counsel and client.

[17] Here, however, there is no suggestion by the relator of anything more than that his counsel made mistakes of judgment in not calling the relator to the witness stand in his own defense, in not calling witnesses to his past life and character, and in not subjecting him to a psychiatric examination. These were all questions of the type which trial counsel in criminal cases are continually called upon to meet and which they must decide under the pressure of the trial and in the light of their best judgment at the time. The fact that after the event and in the light of all that has subsequently transpired other counsel now regard as wrong the decisions thus made by relator's trial counsel cannot be made the basis for convicting the state of a denial of due process. For unless the trial judge had interrupted the trial to interrogate the relator's counsel as to the reasons for their decisions on trial strategy the judge could have had no possible basis for concluding that those decisions were ill advised. Moreover it might well be that such intervention by the trial judge in the management of the defense by the relator's counsel would itself have amounted to a denial of due process of law. For the effective assistance of counsel for one's defense involves the right of counsel and client to plan defense strategy in privacy and independently of interference or dictation by the court.

[18] In the absence of such gross incompetence or faithlessness of counsel as should be apparent to the trial judge and thus call for action by him it would be destructive of the relationship of counsel and client as we know it either to permit the trial judge to dictate to counsel his trial strategy in defending his client's interests or to permit the defendant after conviction to question that strategy and in effect to put his counsel on trial with respect to it. There is no suggestion in the relator's petition that his counsel's conduct was such as to have required the intervention of the trial judge in his behalf during his trial. On the contrary, as I have already indicated, the alleged errors of which the relator now complains involved questions of defense strategy as to which experienced counsel frequently differ. The position taken by relator's trial counsel with respect to them was not so apparently unreasonable as to call for critical examination by

the trial judge. For the same reason we should not be called upon to appraise the merits of counsel's actions. I conclude, therefore, that the allegations of the petition with respect to the relator's counsel, if proved, would not afford a basis for the issuance of a writ of habeas corpus.

* * * * *

Excerpts from Abraham v. State, 228 Ind. 179, 91 N. E. 2d 358 (S. Ct. 1950)

EMMERT, Judge.

This is an appeal from an order and judgment denying relief on appellants' petition for writ of error coram nobis. The appellants, who are Negroes, were jointly charged by affidavit in the Criminal Court of Lake County with the offenses of robbery, and the infliction of a physical injury with a deadly weapon in the commission of a robbery, alleged to have been committed the 31st day of December, 1945. Abraham was arrested that night or early morning in Gary, and the other three appellants were arrested in Chicago within a day or so, and upon waiving extradition were brought to the City Jail in Gary. The record does not disclose when the charge was filed, but the evidence is uncontradicted that they were not brought before any magistrate or court until January 31, 1946, at which time, upon advice of counsel, they each pleaded guilty to the second count, and were sentenced to imprisonment for life.

It will not be necessary to discuss the contentions made by appellants that while in custody of the Gary police department several hundred dollars of their funds were unlawfully converted by various members of that police department, nor the conflicting evidence on the beatings alleged to have been received by Abraham and Mitchell. * * * * *

The record here does not disclose any reason for the undue delay in bringing appellants before some magistrate or court.[1]

But the morning they were brought in open court and for the first time informed of the charges filed against them, was the first time they had benefit of counsel. Harland was represented by counsel from Chicago who had been employed by his sister, whose only advice to his client, in the presence of the other appellants and their pauper counsel, was that his client's statement that the Gary police beat him up "Don't mean nothing," and that he should plead guilty.

Mitchell, Abraham and Herbert requested the court to appoint counsel for them, and this was done. Immediately before arraignment their pauper counsel stated he understood all the defendants would plead guilty to inflicting injury in the perpetration of a robbery, which carried a life sentence. Upon interrogation by the court each appellant said he was informed of the nature of the crime and what the penalty was, and then each pleaded guilty. Thereupon the state moved to dismiss count one, which charged the same robbery.

[2] The only advice of counsel had by any appellant was during the conference at one of the counsel tables in the courtroom, which lasted not to exceed twenty minutes. The pauper counsel read to all appellants a signed confession, which is now alleged to have been obtained by physical coercion. Neither counsel made any attempt to determine how the confession had been obtained, or whether it would be admissible upon trial. Appellants were not advised as to their rights to have a jury trial, nor were they advised that the charge of inflicting an injury during the robbery included the offenses of robbery, grand larceny, and petit larceny.[2] They were not told they had the right to require the state to prove them guilty beyond a reasonable doubt of some offense charged before they could be convicted. They were not asked to relate their version of the alleged offense, nor was any effort made to ascertain what witnesses would know about the alleged offense, nor was any investigation made as to what their testimony would be. Apparently the pauper counsel assumed that he was exercising a judicial function. Upon cross-examination at the hearing he said: "I would first try to determine whether or not a man is guilty, if he admits his guilt, then I advise him to go before the Court and admit it to the Court and tell the Court the whole truth about the matter. Then if I don't think he is guilty I plead him not

guilty and exert all of my efforts to see that he is properly defended and given a fair trial."

[3, 4] The guilt or innocence of an accused does not determine whether or not he should plead guilty or stand trial. He is entitled to be advised as to all his legal rights involved under the law and the facts, and even though guilty he has the right to require the state to prove every material allegation of the offense charged. He has the right to expect that his court-appointed counsel will make such investigation of the facts as the circumstances require. Neither counsel in this case made sufficient investigation of the facts to be in a position to understandingly advise appellants on entering pleas of guilty. They failed to advise their clients as to their legal rights. An accused has the right to elect as to whether he will stand trial or plead guilty. If he elects to stand trial his counsel should vigorously present every legal defense and represent him with his utmost skill and ability. Anything short of this is not adequate, competent or effective representation by counsel which the Constitution commands shall be afforded.

The right to be heard by counsel provided by § 13 of Article 1 of the Constitution of Indiana, as well as the due process clause of the Fourteenth Amendment cannot be nullified by the appointment of incompetent counsel who give merely perfunctory or casual representation. Rhodes v. State, 1927, 199 Ind. 183, 156 N.E. 389; Castro v. State, 1925, 196 Ind. 385, 147 N.E. 321; Wilson v. State, 1943, 222 Ind. 63, 51 N.E.2d 848; Bradley v. State, Ind. 1949, 84 N.E.2d 580; Sanchez v. State, 1927, 199 Ind. 235, 157 N.E. 1; State ex rel. White v. Hilgemann, 1941, 218 Ind. 572, 34 N.E.2d 129; Knox County Council v. State ex rel. McCormick, 1940, 217 Ind. 493, 29 N.E.2d 405, 130 A.L.R. 1427; Powell v. Alabama, 1932, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527, supra.

[5, 6] This right is not defeated merely because an accused himself employs incompetent counsel who affords inadequate representation. Sanchez v. State, supra. Nor is this constitutional protection waived because the accused may in fact be guilty. "The safeguards erected by the Constitution are intended to protect the rights of all citizens alike. They protect the rights of the guilty as well as those of the innocent." Batchelor v. State, supra, 189 Ind. 69, 125 N.E. 778; see also Beard v. State, supra; Rhodes v. State, supra. As was stated by Chief Justice Stone, "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty. Ex parte Milligan, supra, 4 Wall. 2, 119, 132, 18 L.Ed. 281, [295, 299]; Tumey v. Ohio, 273 U.S. 510 [535], 47 S.Ct. 437, 445, 71 L.Ed. 749 [759], 50 A.L.R. 1243; Hill v. Texas, 1942, 316 U.S. 400 [406], 62 S.Ct. 1159, 1161, 1162, 86 L.Ed. 1559 [1563]." Ex parte Quirin, 1942, 317 U.S. 1, 25, 63 S.Ct. 2, 9, 87 L.Ed. 3, 11.

Judgment reversed, with instructions to the trial court to grant the petition, and to permit the appellants to withdraw their pleas of guilty.

STARR and YOUNG, JJ., not participating.

Added Reading - Annotation: Incompetency of Counsel Chosen by Accused as Affecting Validity of Conviction, 74 A. L. R. 2d 1390 (1960). There is some discussion therein as to distinction where counsel is assigned or appointed by the court, p. 1406 et seq.

3. Relationship between Defendant and Assigned Counsel in Post-Conviction Proceedings

Excerpts from State v. Edgar Smith, (N.J. Sup. Ct. July 7, 1964, A-144)

At the outset we refer to defendant's efforts to dismiss assigned counsel. The phenomenon is not new. See State v. Rinaldi, 58 N. J. Super. 209, 214 (App. Div. 1959), cert. den. 366 U. S. 914, 6 L. ed. 2d 238 (1961). Too often defendants who petition for counsel on the plea that they are indigent and unable to represent themselves seek to supervise assigned counsel and even question his integrity if his performance does not satisfy the defendant's critical eye. From time to time counsel so situated understandably ask to be relieved. It is our policy to refuse such requests. We appreciate that untutored defendants insist upon urging points which are so frivolous as possibly to reflect upon an attorney who presses them, but counsel may be assured the courts understand and will not charge inanity to them. Our rule dealing with post-conviction relief provides in R. R. 3:10A-6(d):

> "The court will not substitute new assigned counsel at the request of defendant while assigned counsel is serving. Assigned counsel may not seek to withdraw on the ground of lack of merit of the petition. Counsel should not be reluctant to advance any grounds insisted upon by defendant notwithstanding he deems them without merit."

Counsel of course may properly acknowledge that a point is contrary to existing law and leave it to the court to decide whether there should be a departure from it.

In addition, in these situations we permit a defendant to file his own brief as well. Accordingly when we denied defendant's motion to dismiss assigned counsel (we need hardly add that defendant's complaint was wholly unwarranted), we informed defendant that he could file an additional brief and adjourned the argument date to that end. Defendant did file his own brief of 25 pages and after the oral argument sent a letter commenting upon the course of the oral argument as someone reported it to him. We understand defendant applied to the United States District Court for the District of New Jersey for an order restraining assigned counsel from appearing before us, which application the District Court denied.

We note that in the brief defendant himself filed he advances the question "Does this Court have the authority to deny a person the right to retain private counsel, or act as counsel for himself, and to force upon him the counsel of the Court's choice?" The question is so phrased as to suggest that defendant had retained counsel of his own. No such representation was made in defendant's efforts to have assigned counsel relieved and no such assertion is affirmatively made in defendant's own brief. At the oral argument, assigned counsel stated in response to our question that he had no information to that effect.

* * * * *

4. Post-Conviction Proceedings: Scope of Review

Excerpts from State v. Edgar Smith, supra.

PER CURIAM.

On March 4, 1957 Victoria Zielinski, a 15-year-old girl was murdered. Defendant was convicted of the crime and sentenced to death on June 4, 1957. The judgment was affirmed on June 25, 1958. State v. Smith, 27 N. J. 433 (1958). On August 8, 1958 defendant moved for a new trial. His motion was denied and we affirmed the order on May 4, 1959. State v. Smith, 29 N. J. 561 (1959). The United States Supreme Court denied certiorari on October 19, 1959. Smith v. New Jersey, 361 U. S. 861, 4 L. ed. 2d 103.

On November 19, 1959 defendant applied to the United States District Court for a writ of habeas corpus. The proceedings there were concluded by an opinion dated January 18, 1962. United States ex rel. Smith v. New Jersey, 201 F. Supp. 272 (D. N. J. 1962). The United States Court of Appeals affirmed on July 24, 1963 and denied a rehearing on September 9, 1963. 322 F. 2d 810 (3 Cir. 1963). Certiorari was denied by the United States Supreme Court on February 17, 1964. Smith v. New Jersey, ___ U. S. ___ 11 L. ed. 2d 623.

The United States District Court in the proceedings just referred to declined to consider eight points on the ground that defendant had not presented them to the state courts and hence had not exhausted his state remedy. On March 18, 1964 defendant petitioned the trial court for post-conviction relief, asserting the points just mentioned, together with still others. Defendant asked that counsel be assigned and that application was granted. Assigned counsel added additional claims. The trial court denied relief after argument, and that action is now before us for review. * * * * *

Before dealing with the individual points, we should note two principles, one or the other of which disposes of most of the questions raised. One principle is that a post-conviction proceeding may not be used as a substitute for an appeal from the judgment of conviction. All alleged errors inhering in a trial must be asserted in a direct review from the conviction, the sole exception being an error which denies fundamental fairness in a constitutional sense and hence denies due process of law. The second principle is that an issue, even of such constitutional dimensions, once decided, may not be relitigated. These principles are stated in R. R. 3:10A-2, 3, 4, and 5.

* * * * *

(3) The trial court submitted the case to the jury on the theory of a "willful, deliberate and premeditated killing." N.J.S.A. 2A:113-2. The trial court overruled the State's position that the case should also go to the jury on the theory of a felony-killing in the course of an attempted rape. The complaint now is that the trial court should have affirmatively instructed the jury that that thesis was not before it. There was no request to charge or objection on behalf of defendant. We see no room for misunderstanding since the trial court, after reading the statute, expressly confined the issue to the single theme. Finally, the issue is not a constitutional one and could have been advanced only on direct appeal.

(4) The next point appears to be that testimony offered in the absence of the jury on the voluntariness of the confession was not repeated in the presence of the jury. The opportunity to do so was not denied defendant. His then counsel, a seasoned lawyer

with much experience in criminal matters, made a policy decision not to repeat it. The reason probably was that voluntariness was not really disputed. We see no constitutional question and hence the issue is foreclosed because it was not raised on appeal. We add that if the complaint is here advanced as part of the challenge to the validity of the confession, the topic has been fully adjudged in the state and federal courts.

(5) The next point was submitted by counsel for defendant by a letter addendum to his brief. The complaint is that the trial judge informed the jury he had found the confession to be voluntary. This objection is not of constitutional dimensions and may not be raised in a post-conviction proceeding. In any event, there was no error. * * * * *

(6) Defendant says the trial court should have submitted the issue of manslaughter to the jury. There was no such issue projected in the trial, no request to charge, nor any objection to the charge, and surely the alleged error could not be deemed of fundamental reach in view of the finding of murder in the first degree. In any event, there was no evidence whatever to support a finding of manslaughter, there being neither proof of conduct by the deceased constituting provocation, nor proof in the State's case or in the defense that defendant killed the deceased in a heat of passion induced by such provocation, see State v. King, 37 N. J. 285, 300 (1962). Hence there was no issue for the jury. See State v. Di Paolo, 34 N. J. 279, 298-99 (1961); State v. Moynihan, 93 N. J. L. 253, 255-56 (E. & A. 1919).

(7) It is alleged that the trial court's charge to the jury was prejudicial, inflammatory and virulent in the extreme. The portions criticized are largely a repetition of the testimony and comments upon it in relation to the essential ingredients of the crime. A trial judge has considerable latitude in this area. State v. Begyn, 34 N. J. 35, 53 (1961). We see no issue in terms of fundamental unfairness. At most the question would be one of misuse of discretion, an issue which could be raised only in an original appeal.

(8) Defendant asserts his motion for a new trial should have been granted. The issues on the motion were fully adjudged, State v. Smith, 29 N. J. 561 (1959), cert. den. 361 U. S. 861, 4 L. ed. 2d 103 (1959). That determination is conclusive.

(9) For the first time defendant protests that a pair of pigskin gloves were obtained by an illegal search and seizure.

* * * * *

This case was tried before Mapp v. Ohio, 367 U. S. 643, 6 L. ed. 2d 1081 (1961), was decided. That case held the state courts must reject evidence obtained by an unreasonable search in violation of the Fourth Amendment. The question is whether fundamental fairness demands that that decision must be given retroactive effect in a collateral attack upon a prior judgment which is no longer subject to direct appeal.

Most courts have held that Mapp does not thus apply retroactively. United States ex rel. Angelet v. Fay, ___ F. 2d ____ (2 Cir. June 11, 1964); United States v. Walker, 323 F. 2d 11 (5 Cir. 1963); Gaitan v. United States, 317 F. 2d 494 (10 Cir. 1963); Commonwealth v. Rundle, 412 Pa. 109, 194 A. 2d 143 (Sup. Ct. 1963); Villasino v. Maxwell, 174 Ohio St. 483, 190 N. E. 2d 265 (Sup. Ct. 1963); Moore v. State, 41 Ala. 657, 146 So. 2d 734 (Ct. App. 1962); People v. Muller, 11 N. Y. 2d 154, 182 N. E. 2d 99 (Ct. App. 1962), cert. den. 371 U. S. 850, 9 L. ed. 2d 86 (1962); contra, Hall v. Warden, Maryland Penitentiary, 313 F. 2d 483 (4 Cir. 1963), cert. den. 374 U. S. 809, 10 L. ed. 2d 1032 (1963); Hurst v. People of State of California, 211 F. Supp. 387 (N. D. Cal. 1962), affirmed 325 F. 2d 891 (9 Cir. 1963).

We subscribe to that view. State v. Kaiser, 80 N. J. Super. 176 (App. Div.), certif. denied 41 N. J. 200 (1963), cert. den. ___ U. S. ____, ___ L. ed. 2d ____ (1964); State v. McNulty, 84 N. J. Super. 30 (App. Div. May 27, 1964). Our reasons are stated at length in State v. (James) Smith, 37 N. J. 481 (1962),

* * * * *

(12) Defendant asserts for the first time that the trial court's charge with respect to the jury's role on punishment was inadequate. The criticism is that the court did not directly say that if the jury failed to recommend life imprisonment, the death penalty would be imposed. There was no objection or request to charge. We do not see how the jury could have had the slightest misunderstanding either as to their responsibility or as to the meaning of a verdict in which the recommendation was omitted.

Moreover, although it may be that a total failure to charge would constitute a denial of fundamental fairness remediable upon a post-conviction proceeding, disputes as to the clarity of a charge must be asserted upon a direct appeal.

* * * * *

(14) Defendant says the trial court failed to charge on the subject of alibi, citing State v. Searles, 82 N. J. Super. 210 (App. Div. 1964). Obviously this is the kind of an alleged error that can be asserted only on a direct appeal. At any rate there is no substance to the claim. Defendant did not assert an alibi at trial in the sense of a claim that he was at some precise place at the time of the murder and hence could not physically have committed the crime. See State v. Mucci, 25 N. J. 423, 431 (1957). Rather defendant simply denied that he killed the deceased, asserting she was alive when he last saw her in the area where she was slain. There was therefore no occasion for a special charge as to alibi, none was requested, and no objection was made to its omission. The trial court of course charged that the State had to prove guilt beyond a reasonable doubt, and this charge was wholly adequate.

* * * * *

(16) Defendant himself adds the point that at the trial counsel of his own choice, in the cross-examination of a detective, asked whether defendant had not offered to submit to a lie detection test, to which the witness answered that defendant

had not and in fact had declined to do so. Perhaps counsel was attempting to make capital of the "truth serum" examination mentioned above, Although the State itself could not have made that inquiry, State v. Driver, 38 N. J. 255, 260 (1962), a defendant cannot complain if his counsel ventures into a difficult area and gets a disappointing answer. We add that counsel at that point suggested by his further questioning that the result of such a test would not be evidential. We note also that the prosecutor did not refer to the subject in his summation. We see no error of such constitutional stamp as will support a collateral attack.

(17) By letter dated June 22, 1964 addressed to the Chief Justice, defendant stated:

> "Today, June 22nd, the United States Supreme Court handed down a new, far-reaching decision on this very important question. The Court has declared inadmissible in State prosecutions those confessions obtained before the accused is permitted to confer with counsel. While I have not as yet read the Court's opinion, I do know that the question presented fits exactly my case. * * * "

Defendant asks that we delay determination of the present appeal until he prepares a further brief.

Defendant refers to Escobedo v. Illinois, 32 U. S. L. Week 4605 (U. S. June 22, 1964), where it was found that the prosecution had refused to permit the accused to consult with counsel and where the majority concluded "We hold only that when the process shifts from investigatory to accusatory -- when its focus is on the accused and its purpose is to elicit a confession -- our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer."

We see no reason to delay this matter, but we will deal with the issue as tendered in defendant's letter to the end that there will be no question as to whether he has exhausted his state remedy in that regard.

Defendant does not say he was denied a request to see counsel at any point prior to his confession. Rather defendant appears to say only that he in fact did not see a lawyer before he confessed, a circumstance which would not invoke Escobedo. The testimony at the trial shows that defendant was not held incommunicado. Before he confessed he was visited by his wife, and at his request a priest of his own choice met with him privately. Although at one time the rule may have been otherwise, see State v. Murphy, 87 N. J. L. 515, 527-32 (E. & A. 1915), it was settled as of the time of defendant's trial that a refusal of counsel (assuming defendant now asserts such refusal) was a relevant fact on the issue of voluntariness, Cicenia v. La Gay, 357 U. S. 504, 509, 2 L. ed. 2d 1523, 1528 (1958); State v. Grillo, 11 N. J. 173, 180-81 (1952); cf. State v. Pierce, 4 N. J. 252, 263 (1950), and hence evidence to that effect was admissible under the state of the law when defendant was tried. Accordingly defendant had a full opportunity to offer such proof if in truth it had any reality. Such an assertion being part and parcel of the issue of voluntariness, it is concluded by our prior judgment and as well by the judgment in the federal courts upholding the confession. We need not consider the further question whether

Escobedo must be applied retrospectively in a collateral attack upon a judgment which antedates it.

The order is accordingly affirmed. The stay of execution heretofore granted is vacated.

5. Conditions and Termination of Probation

2A:168-2. Conditions of probation. The court shall determine and may, at any time, modify the conditions of probation, and may, among others, include any of the following: That the probationer shall avoid injurious, immoral or vicious habits; shall avoid places or persons of disreputable or harmful character; shall report to the probation officer as directed by the court or probation officer; shall permit the probation officer to visit him at his place of abode or elsewhere; shall answer all reasonable inquiries on the part of the probation officer; shall work faithfully at suitable employment; shall not change his residence without the consent of the court or probation officer; shall pay a fine or the costs of the prosecution, or both, in one or several sums; shall make reparation or restitution to the aggrieved parties for the damage or loss caused by his offense; shall support his dependents.
Source. R. S. 2:199-2.

2A:168-4. Termination or extension of probation; violation of conditions; arrest and detention; sentence; powers of judge other than trial judge. Upon a report from the chief probation officer that the probationer has complied with the conditions of probation and that the best interests of the public and the probationer will be subserved thereby or for other good cause, the court may, at any time, discharge a person from probation, or may extend the probation period within the limits of the maximum period provided by section 2A:168-1 of this title.

At any time during the probation period the court may issue a warrant and cause the probationer to be arrested for violating any of the conditions of his probation, or any probation officer, police officer, or other officer with power of arrest, upon the request of the chief probation officer, may arrest the probationer without a warrant; and a commitment by such probation officer setting forth that the probationer has, in his judgment, violated the conditions of his probation shall be sufficient warrant for the detention of such probationer in the county jail, house of detention or local prison, when designated in the commitment, until he can be brought before the court. Such probation officer shall forthwith report such arrest or detention to the court and submit to the court a report showing the manner in which the probationer has violated his probation. Thereupon the court, after summary hearing, may continue or revoke the probation and the suspension of sentence, and may cause the sentence imposed to be executed or impose any sentence which might originally have been imposed. If the trial judge dies or goes out of office all of his powers and duties under this section shall be exercised by his successor in office, or by any other judge of the trial court, as fully as if duly exercised by the trial judge and as if the trial judge were in office at the time of such action, and all such action shall be as valid and effectual as if such action were duly taken by the trial judge and he were in office at the time thereof.

Nothing in this section shall be deemed as indicating that, prior to the passage of this act, probation could not be revoked, for violation of the terms thereof, by some other judge of the trial court in cases where the trial judge had died or gone out of office before the expiration of the probation period.
Source. R. S. 2:199-4, as am. L. 1939, c. 284, p. 705, §1; L. 1947, c. 121, p. 591, §1.

Excerpt from State v. Pollastrelli, 29 N.J. Super 327, 330, 331 (App. Div. 1954)

[2] The point predominantly emphasized on behalf of the defendant is that there was in the summary hearing an absence of legally competent evidence that Christy was at the time of the associations a "known gambler." The probationary obligation of the defendant was to "keep away from evil associates," (Rules, Exhibit S–4), and "to avoid places or persons of disreputable or harmful character," (*N. J. S. 2A*:168–2), whether such persons were known gamblers or convicts of other criminal offenses. The defendant acknowledged that he was aware of Christy's conviction of criminal contempt. Were not his previous associations with Christy circumstantially productive of a logical inference that he also knew of Christy's convictions for the criminal offenses of gambling and atrocious assault and battery? The defendant and Christy had been personal friends, and in the year 1953 the defendant resided for a period of six months in Christy's home with him. Proof of the violation beyond a reasonable doubt was not required.

[3] We regard the inquiry accorded to the defendant adequate in its range to conform with the requirements of the statute and conclude that the credible evidence with the inferences reasonably deducible therefrom was sufficient to justify the action of the trial judge in the exercise of the judicial discretion conferred upon him by the statute.

The order under review is affirmed.

Excerpt from State v. Moretti, 50 N.J. Super 223, 237, 249 (App. Div. 1958)

The law favors the liberty of individuals. Nevertheless, a breach of the conditions of probation and the unfitness of the probationer to enjoy his liberty are not required to be established beyond a reasonable doubt as is the rule which prevails in ordinary criminal proceedings. *State v. Pollastrelli, supra* (29 *N. J. Super.* at *page* 330); *Sparks v. State*, 77 *Ga. App.* 22, 47 *S. E.* 2*d* 678 (*Ct. App.* 1948). It is only necessary that the judge shall have reason to believe them to be true from the report of the probation officer, or otherwise. No particular source, manner or degree of proof is required by our statute. *State v. Pascal*, 1 *N. J.* 261, 262–263 (1949). See also *Ex parte Young*, 121 *Cal. App.* 711, 10 *P.* 2*d* 154, 156 (*Dist. Ct. App.* 1932).

[10] The evidence at a hearing for revocation of suspension of sentence or probation does not have the same objective as that taken at a criminal trial, its purpose being to satisfy the conscience of the court as to whether the conditions of the suspended sentence have been violated. *Brill v. State*, 159 *Fla.* 682, 32 *So.* 2*d* 607 (*Sup. Ct.* 1947).

[11] *R. R.* 1:5–4(*b*) provides:

"On a review of any cause, criminal or civil, involving issues of fact not determined by the verdict of a jury, new or amended findings of fact may be made, but due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

[17] We hold that the ends of justice require (a) the setting aside of the order of revocation, and (b) reinstituting defendant to probation. *Smith v. Smith, supra* (17 *N. J. Super.* at *page* 133). However, we impose as additional and supplemental conditions those provisions of our order of December 16, 1957 requiring defendant to report for psychiatric treatment to Dr. Lederer once a week and permitting defendant to report to any private doctor for consultation or treatment as he may determine. We add these requirements as the result of a letter report, dated March 27, 1958, received by us from Dr. Lederer.

Excerpt from Adams v. McCorkle, 13 N.J. 561, 567-569 (1953)

In 1950 Adamo was fairly tried and convicted of having committed misdemeanors for which he could then have been imprisoned and fined. *R. S.* 2:103–6—now *N. J. S.* 2*A*:85–7. Instead of confining him then, as it might well have done, the court pronounced its judgment that he be placed on probation for five years. As his brief on appeal now seems to concede, that was "in effect a suspension of the imposition of a sentence"; it constituted the final judgment appealable as such. See *Korematsu v. United States*, 319 *U. S.* 432, 63 *S. Ct.* 1124, 87 *L. Ed.* 1497 (1943); *Berman v. United States*, 302 *U. S.* 211, 58 *S. Ct.* 164, 82 *L. Ed.* 204 (1937). *Cf. R. R.* 1:2–4. The use of formal language of suspension was not indispensable since the judgment that the defendant "be put on probation for a period of five years" necessarily meant that the imposition of sentence was being suspended. *Cf. Ex Parte DeAngelo*, 50 *F.* 2*d* 847 (*C. C. A.* 6 1931). That was undoubtedly understood by the defendant and his counsel and no objection thereto was voiced. The period of probation was fixed at five years within *R. S.* 2:199–1, and after it was announced the court properly proceeded with terms which constituted the conditions of probation in strict accordance with *R. S.* 2:199–2. Thus it directed that the defendant report weekly to the probation officer; comply

with the rules of the probation office and observe the laws; not leave the State without permission; and pay a fine of $500. The manner in which the court rendered its judgment discloses beyond peradventure that the fine was simply one of the several conditions of the probation, and it is inconceivable that anyone then contemplated or understood that upon payment of the fine, which might have been made immediately, the five years' probation and all the remaining conditions would automatically terminate.

Acceptance of the defendant's contention that the fine was the sentence and that upon its payment the probation immediately expired would nullify the trial court's considered judgment of probation for five years and would disregard the beneficent purposes of our act which expressly provides that the court may impose various probation conditions including a fine. It would retard rather than advance justice and would represent a reversion to technicalities which are in nowise essential as safeguards of liberty and which have so often in the past discredited the administration of criminal justice.

In the instant matter the defendant received, in full measure, not only the protection of our firmly embedded concepts of due process and fair play, but also the benefits of the current penological approaches. He had a fair trial and was convicted of assault. He was not then imprisoned but, in lieu thereof, was placed on five years' probation which he willingly accepted. He was duly advised of the conditions of the probation and made no objection thereto. He was fairly tried for violating his probation and upon unquestioned proof was found guilty. Although he paid the fine, the other conditions which he violated were, from society's viewpoint, much more important, and for such violation he was sentenced, under the express power conferred by *R. S.* 2:199–4, to a term of imprisonment well within that which could have originally been imposed upon him. It seems to us that it would make a mockery of justice to nullify the sentence of imprisonment at this time and we find neither reason nor authority compelling such action.

The judgment entered in the Appellate Division is reversed and the Law Division's order discharging the writ of *habeas corpus* is reinstated.

For reversal—Chief Justice VANDERBILT, and Justices BURLING, JACOBS and BRENNAN—4.

For affirmance—Justices HEHER, OLIPHANT and WACHENFELD—3.

Excerpt from Rubin, The Law of Criminal Correction, (1963) Conditions Governing Behavior, pp 202-204

Conditions Governing Behavior

Certain activities by the probationer are forbidden and certain behavior is required by a variety of conditions. One of the basic conditions—so basic in fact that perhaps it is implied—is that the probationer permit the probation officer to visit him. Together with a requirement that he report to the probation officer either periodically or on notice, it is essential to supervision. The modern concept of supervision is not surveillance, "policing" the offender, but a constructive relationship between the officer and the probationer, effected mainly through interviews.[122]

The commission of another crime is a violation of a condition, implied or specified, that the defendant lead a law-abiding life.[123] The court may also impose a condition that is relevant to the kind of crime of which the defendant was convicted and hence is related to a plan of rehabilitation and public protection. Thus a defendant convicted of sodomy was held lawfully subject to a condition forbidding association with young boys.[124] Other conditions upheld forbade the practice of medicine,[125] holding office in a labor union or organization,[126] and interstate employment.[127]

Conditions that have no relation to public protection or a plan of rehabilitation may be held invalid; e. g., a condition requiring the defendant to donate blood.[128] Hospitalization may be required as a condition.[129] But is it valid to require a defendant convicted of rape to submit to a vasectomy? It has been held that it is,[130] a sound conclusion only if the sterilization will contribute to improvement of the defendant's behavior, which is doubtful.[131]

Should a condition of probation always be essential to a rehabilitative plan or to protection against repetition of the crime? It would seem so, in the light of the basic principle of protecting the liberty of individuals. A condition that does not possess this quality is a burden and an impediment to rehabilitation.[132] However, conditions that do not meet this test are nevertheless upheld—for example, forbidding the probationer to drive an automobile [133] in a case where the crime had no relationship to this condition. If the probationer's employment depends on his driving a car, the condition is an obstacle to rehabilitation and is not justified. Other conditions that are commonly imposed but are justifiable only when the regulated behavior is related to the crime are abstention from the use of intoxicants or staying away from places where intoxicants are served; avoidance of disreputable persons, ex-convicts, and disreputable places; and continuous employment.[134] A condition requiring the defendant to disclose information regarding confederates in his crime has been upheld, but it has been criticized as going beyond the function of the court in the probation process.[135]

The requirement that a defendant leave the jurisdiction as a condition of his probation is not justified (since it is unrelated to any plan of treatment) and has generally been held invalid as an unwarranted restriction on the liberty of the individual.[136] A condition that a probationer move out of a bad neighborhood might be defended as rehabilitative, but it was held invalid.[137]

V. JUVENILE AND DOMESTIC RELATIONS COURT PROBLEMS

V JUVENILE AND DOMESTIC RELATIONS COURT PROBLEMS

1. Report of the New Jersey Supreme Court's Committee on Juvenile and Domestic Relations Courts dated June 4, 1964

To: The Honorable, The Chief Justice And The Associate Justices of the Supreme Court of New Jersey:

There is submitted herewith the report of the Committee on the Juvenile and Domestic Relations Courts.

In our report of March 14, 1963, submitted last year, we suggested that consideration be given to the question of whether the hearing procedures in all juvenile delinquency cases should be stated in more detail in the rules. We pointed out that such provisions may be of importance in cases where delinquency is denied.

The Committee has considered this question and has concluded that, because of the unique nature of the juvenile court and the largely uncharted area of what a fair hearing therein requires, the rule should not be changed in this respect at present. It is suggested, rather, that the Court review the suggestions of the Committee hereinafter set forth and indicate its approval, disapproval or modification thereof by directive to the juvenile court judges. It is hoped that this plan will give sufficient direction to the judges as to desirable practices in hearing procedures, and at the same time permit some experimentation by the judges in the light of the directive. At a later date, perhaps, after there has been sufficient experience, the matter of whether and to what extent additional requisites of a fair hearing in the juvenile court should be formalized by rule might again be considered. In addition, it is submitted that some of the questions involved in assessing the requirements of a fair hearing - e.g., the privilege of a juvenile not to testify against himself - are fraught with so many conflicting policy considerations as to make it desirable that they be determined by the Court on a case to case basis after being fully briefed and argued by the respective parties.

This report also discusses two additional matters: (1) the procedure to be used on a defense of insanity in the juvenile court; and (2) whether the juvenile court should make available to school authorities information with respect to action taken by the court in cases in which their pupils are involved.

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I
THE HEARING PROCEDURE IN JUVENILE COURT

Introduction

The court hearing juvenile delinquency cases is **sui generis.** It is not a criminal court - yet, a child before it may be committed to a correctional institution or otherwise be deprived of his liberty. It is not strictly a civil court - yet, its **parens patriae** jurisdiction over children, with its broad equitable powers designed for the adjudication of cases involving children, is not unlike that of the Court of Chancery. It is not a court concerned generally with adverse parties - i.e., the State against a defendant. By statutory prescription, its approach is therapeutic in nature - its proceedings are not **against** the child but **in his interest,** its aim is to rehabilitate, not to punish. Towards this end it treats the individual child, with the view of eliminating or minimizing the causes of his misbehavior. Individualized treatment and justice is its goal. The child before the court is a ward of the state and the court, to be "protected accordingly". The statute creating the court provides that it "shall be liberally construed to accomplish its purposes". **N.J.S. 2A:4-1, 2, 34; R.R. 6:8-1; State v. Tuddles,** 38 N.J. 565, 571, 573 (1963).

It is apparent from the foregoing that the problem of what constitutes a fair hearing in the juvenile court must be viewed and determined in the perspective of the uniqueness of the court and its statutory policy. Analogizing its procedures to those in the criminal or civil courts obviously is not the proper approach. To import wholesale the procedures of the traditional courts is to overlook basic differences in philosophy of such courts and the juvenile court. Thus, to label a juvenile proceeding as non-criminal in nature does not necessarily mean that its procedures should be the same as those of the civil courts. Nor should the fact that a juvenile may be committed to a correctional institution necessarily mean that he should be surrounded with all of the constitutional and other protections given the adult defendant in a criminal case.

We submit that the criteria for a fair hearing in the juvenile court must be determined solely in the context of, and in furtherance of the purposes of, the juvenile court statute.

In a juvenile case the very hearing itself can be, and many times is, a therapeutic tool, which, more often than not, may go a long way towards rehabilitating the offender. The usual proceeding involves more than hearing evidence, making findings and entering an appropriate disposition. It can provide a meaningful experience to the child and his parents that will help him (and them) grow and mature. It can have a significant impact upon the child by helping him face up to what he has done, to feel something about it, to learn that he will be held responsible for his actions and to realize that certain behavior will have certain unhappy consequences. Much of the import of the hearing depends upon the manner in which the judge conducts it, including the extent of its formality and the judge's own attitude, personality, patience, warmth and authority. The degree of formality he requires may vary from case to case, from offender to offender, and according to his judgment as to what kind of hearing would be most effective with this juvenile or this juvenile's parents. To endeavor to encase the hearing in inflexible rules of procedure would be to dilute substantially its role as a part of the rehabilitative process.

Moreover, in a juvenile case, because of the dominant position of the judge, the tone and manner of the hearing he conducts, his patience or impatience, and his tolerance or intolerance, a fair hearing may require more than the technical prerequisites of due process. A "hearing conducted in accordance with the dictates of due process may, on occasion, still withhold from the child and his family the essence of fairness while preserving the facade".[1]

It is important, therefore, that the judge at all times be cognizant of and apply such legal principles as are inherent in a fair hearing for a juvenile offender. Because these principles in large measure have not yet been delineated, it has been said that the juvenile court judge's "legal knowledge and alertness must not only match but hopefully should exceed that of his fellow judges in the criminal and civil courts of ancient origin whose judicial courses are so carefully charted".[2]

The rules already deal adequately with such elements of a fair hearing as the adequacy and amendment of the complaint, due notice of the hearing, and the right to counsel and assignment of cousel. Some of the other important matters involved in the hearing process are discussed below.

It is assumed in the following discussion that the juvenile, after having had the complaint charging delinquency read to him, denies guilt, either expressly or by refusing to admit or deny guilt, and the question of his guilt or innocence is in issue. If he admits guilt, the discussion below (except as to Part D, "Rules of Evidence") would be inapplicable, since the only issue

1. *Procedure and Evidence In The Juvenile Court* (National Council on Crime and Delinquency, 1962), at p. 4.
2. Ibid, at p. 3.

then before the court would be that of the appropriate disposition to be made.

A

Quantum of Proof

There is some confusion in the cases as to what quantum of proof should be required for a finding of guilt in a juvenile delinquency case. Because of the non-criminal aspect of the juvenile court, many courts and statutes have considered its proceedings as civil in nature and have adopted the preponderance of evidence as the standard for a finding of delinquency.[3] However, because of the gravity of the adjudication of delinquency, including the deprivation of liberty which it might entail, the criminal law test of proof beyond a reasonable doubt has been applied by other courts.[4] California has adopted a hybrid civil-criminal test by providing (sec. 701 of California Juvenile Court Law) that a "preponderance of evidence, legally admissible in the trial of criminal cases" must be adduced to support a finding of delinquency.

As above indicated, the juvenile court is sui generis, with a resemblance to both the civil and criminal courts but not exactly like either.

In view of the serious effects that an adjudication of delinquency may have on a child and with a view towards adhering to the principle that juvenile proceedings are non-criminal, we recommend the adoption of the standard of "clear and convincing proof" for an adjudication of delinquency. This is the test used in civil cases as to issues of special gravity or public importance - e.g., to rebut the presumption of constructive fraud by a fiduciary. In re Gavel, 22 N.J. 248, 262 (1956). Clear and convincing evidence is a standard of proof between ordinary civil and criminal standards. Such evidence should produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. Aiello v. Knoll Golf Club, 64 N.J. Super. 156 (App. Div. 1960).

The suggested standard "seems well-adapted to juvenile court proceedings. The issue is not a private one of injury or damage by another, as in most civil litigation, but here public interest is involved, and the issue lies in the sufficiency of evidence to cause the community, through the juvenile court, to act".[5]

B

Swearing of Witnesses

Although the swearing of witnesses may detract from the informality of the proceeding, where guilt is denied, we recommend that generally, except as indicated below, all witnesses, including the juvenile charged with delinquency, give their testimony under oath. The oath "stimulates greater accuracy in the testimony . . . [and] instills a greater feeling of solemnity and thus a more careful weighing of words and recollections. Furthermore, there might be a plus-

3. *New York Family Court Act*, sec. 744; *Wisconsin Juvenile Court Act*, sec. 48.26 (3); *State ex rel. Berry v. Superior Court*, 139 Wash. 1, 245 Pac. 400 (1926); *People v. Lewis*, 260 N.Y. 171, 183 N.E. 353 (1932); *Garner v. Wood*, 188 Ga. 468, 4 S.E. 2d 137 (1939); *Robinson v. State*, 204 S.W. 2d 981 (Tex. 1947). The U.S. Children's Bureau supports the preponderance of evidence rule. See *Comment* to sec. 19 of the *Standard Juvenile Court Act* (6th ed. 1959), at p. 50.

4. *Jones v. Commonwealth*, 185 Va. 335, 342, 38 S.E. 2d 444, 447 (1946). In *re Lewis*, 14 N.J. 217, 221 (1953), our Supreme Court assumed, because the State so conceded, that the criminal test of proof beyond a reasonable doubt applied to juvenile proceedings. But Justice Brennan compared this concession to the preponderance of evidence rule adopted in *State ex rel Berry v. Superior Court*, cited in footnote 3.

5. *Procedure and Evidence In The Juvenile Court*, cited above, at p. 69. But see *In re Lewis*, *supra*, discussed in footnote 4, where Justice Brennan cited a Washington case supporting the preponderance of evidence standard in juvenile proceedings.

value even from the therapeutic standpoint in administration of the oath to all the participants in the adjudication, for it may help indicate to the child and his parents that an adjudication is treated with gravity". The judge, however, should have discretion in administering the oath to a particular child when he believes that it will be meaningless to him, or may actually inhibit him from testifying fully and freely.[6]

6. Ibid. at p. 36.

C

Privilege Against Self-Incrimination

Where applicable, the constitutional or statutory privilege against self-incrimination means not only that a person need not take the stand when he is a defendant in a criminal case, but also that he need not answer in a non-criminal proceeding when the answers might lead to a criminal prosecution against him or could be used against him in a criminal proceeding. Since juvenile delinquency is not a crime and commitment of a child to an institution or his removal from parental custody is not a criminal penalty, the authorities are practically unanimous that the privilege against self-incrimination does not apply to testimony in juvenile court proceedings where only the usual consequences thereof are at stake. It applies, however, where the evidence the child is called upon to give could be used against him in a criminal prosecution.[7]

Notwithstanding the fact that the privilege is not required either by constitution or statute in juvenile proceedings as such, it is important to consider whether, as a matter of fairness or otherwise, it would be desirable policy to accord the privilege in such proceedings.

The following are some of the arguments advanced in favor of granting the privilege: (1) As in the case of adults, requiring a person to give testimony adverse to himself detracts from the dignity and self-respect of the individual and also tempts him to falsehood[8]. (2) If the juvenile proceeding is conducted in a formal atmosphere, the juvenile may be so overwhelmed as to admit untruths, become forgetful, or be too timorous to rebut ambiguous inferences or explain compromising circumstances. (3) The stigma attached to an adjudication of delinquency and the possibility of deprivation of liberty by commitment to correctional institutions which, in fact, do not rehabilitate because of insufficient program, staff or funds, dictate that at the very least the juvenile should be surrounded with this protection against self-condemnation, thereby assuring that such a commitment would be effected only if the other evidence against him warrants a finding of guilt.[9]

The New York Family Court Act and the Standard Juvenile Court Act appear to have adopted the view that the privilege should apply to juvenile court proceedings. It would require the judge to explain to the child and the parents "that the child will not be required to be a witness against himself".[10]

On the other hand, it has been recognized that the therapeutic approach of the hearing might be seriously undermined if the privilege is transplanted in its present form to juvenile court proceedings. "To establish rapport with the child, it is of course essential that the judge encourage him to talk freely. The court can often create an atmosphere that induces him to talk even if he is initially reluctant."[11] Accordingly, the U. S. Children's Bureau has suggested an attempted preservation of the value of both schools of thought by the adoption of a rule under which, although the judge would not inform the child or the parents that the child need not testify, the child would not be required to testify "over the objections of his parents, guardian or counsel." In support of this position it has been said: "If the child, or his parent speaking for him, express an objection to the child's testifying and continues to object despite the judge's efforts to make him feel greater confidence in the court, requiring him to testify would hardly be therapeutic. If, instead, evidence is produced to support the charge and the child is not forced to testify, this procedure is likely to decrease his feeling of victimization and increase his belief in the fairness of the court. This approach may lead to a greater sense of rapport between himself and the judge, and confidence in the court generally." The criticism that such a rule would benefit only the person sophisticated in the ways of courts who will know that he can raise the objection "is not meritorious. If an objection is made, it is honored, under the recommended practice, only because this is advisable from the standpoint of the court's objectives".[12]

7. *Ibid*, at pp. 26-27 and cases cited therein in footnotes 6 and 7, at p. 32.
8. Ibid, at p. 28.
9. *Antieau, Constitutional Rights in Juvenile Cases*, 46 Cornell Law Quarterly 387, 407-408 (1961).

10. N.Y. *Family Court Act*, sec. 741; *Comment* to sec. 19 of the Standard Juvenile Court Act (6th Ed., 1959), at p. 48. This is also the view of the *Guides for Juvenile Court Judges* (published in 1957 by the National Probation and Parole Association and the National Council of Juvenile Court Judges), at p. 60.
11. *Procedure and Evidence in the Juvenile Court*, cited above, at p. 28.
12. *Ibid*, at pp. 28-29. *Comment* to section 19 of the *Standard Juvenile Court Act* (6th Edition, 1959), at p. 50.

It has also been suggested that a differentiation be made in this connection between juveniles under 16 and those 16 or over: that those under 16 be denied the privilege against self-incrimination in furtherance of the rehabilitative purposes of the juvenile court statute, but that those 16 or over be afforded the same privilege as that given adult criminals. This differentiation, it is stated, is justified by the statutory differences in treatment of those over 16, which permit them under certain circumstances to be tried as adult criminals, as well as the peculiar fact that in New Jersey juveniles 16 or 17 years of age may be committed to Annandale, Bordentown and Clinton Reformatories, which also house inmates over 17 years of age. [12a]/ In effect, therefore, it would appear that the juvenile so committed is thereafter treated like an adult offender.[12b]/

We recommend that none of the foregoing suggested rules be adopted.

We submit that, while the Juvenile Court Act is on the books, it must be assumed that in due course the court will be given sufficient thearapeutic tools with which to accomplish its purposes. To say that, because of present lack of proper facilities for rehabilitation, the juvenile court will never be given such facilities or a real opportunity to prove its effectiveness is to adopt an unwarranted defeatist and negative attitude. The fact that progress in this area has been slow and often discouraging does not mean that efforts along these lines are fruitless or unavailing. Recent events testify to the sympathetic awareness and positive approach to the problem of better institutions by both the executive and legislative branches of the State Government.

12a. R.S. 30:4-147, as amended by L. 1963, c. 65; 30:4-154. Prior to the 1963 amendment Annandale housed those males 15 to 21 (R.S. 30:4-151) and Bordentown those 16 to 30 (R.S. 30:4-147).

12b. The Supreme Court has, however, held that, in determining a juvenile offender's eligibility for release, the paroling authority must use the standard of rehabilitation rather than punishment or deterrence. *In re Smigelski*, 30 N.J. 513, 527 (1959); *State in re Stoenback*, 34 N.J. 89, 100 (1961).

We submit that full credence and effect must be given to the philosophy of the juvenile court, as expressed in the Juvenile Court Act, namely, that the court's purpose is to rehabilitate and to be a guardian and friend of the child. To regard the present lack of facilities for treatment and the present public tendency to stigmatize those adjudicated delinquent as sufficient reasons for diluting the purposes and philosophy of the court is to consider wholly extraneous factors which should have no substantial bearing on the issue at hand.

The therapy of the juvenile hearing consists of more than the developing of a rapport with the child. As part of the rehabilitative process, the court should be permitted to require that the juvenile tell the truth. One of the primary functions of the court is to endeavor to impose a decent moral code on juveniles, particularly where this may be lacking because of parental failure or otherwise. Part of this moral code should be the insistence that the child be open and be completely truthful with the court. Children expect to and should be expected to tell the truth. It is important that the child not be given the impression that the responsibility for his acts may be legally avoided by reason of a rule which protects him from testifying against himself. Certainly the juvenile court, as a guardian of children interested in their future welfare, should be in a position to point out the importance of their being honest, open and frank with the court. Otherwise, lack of respect for the law and the court may be encouraged.

The situation is entirely different from that in the criminal court. There, among other things, the policy consideration is the protection of the defendant against the great force of the State. This is not the policy of the juvenile court. In addition, the habits of truth-telling and moral standards of adults are already formed. Children's habits

and standards are still in the formative stage and may still be changed for the better.

Moreover, we submit, the concern that the child will become so overwhelmed by the juvenile court proceedings as to admit things he did not do or become forgetful or fail to rebut ambiguities overlooks the control that the judge has over the hearing and his own concern for the child. It is the judge's role to create an atmosphere which will not have the feared effect and carefully to question and probe so that the child's testimony may be as accurate as possible and ambiguities may be cleared up. If, nevertheless, because of the specific juvenile's make-up, the judge believes the child cannot tell the whole story properly, or should not be compelled to testify, he may dispense with such testimony entirely or stop further questioning and may even disregard what the child has already testified to.

The conflict of the philosophy of the court with the extension of the privilege to juveniles has already become evident in the New York Family Court. The relatively new statute creating that court requires the court to inform the juvenile of his right to be silent and provides for counsel (designated as "law guardian") to be assigned in indigency cases. Justice Justine Wise Polier, Judge of the New York Family Court, in a recent study of that court, stated:

> "Several problems have already emerged which require careful study. To what extent should the law guardian serve in the same role as private counsel? . . . To what extent is it his duty to advise the child to remain silent and to do everything in his power to secure a dismissal even when he knows that the child has committed the act and is a danger to himself or the community? . . . The question of the responsibility of the law guardian requires clarification. Some . . . advise the children to take the stand and speak the truth. They disregard the responsibility to do everything possible to avoid . . 'adjudication and disposition' as inappropriate in a juvenile court, holding that the ultimate interest of the child requires full disclosure of the evidence so that appropriate services or treatment will be provided. Others take the position that their loyalty and responsibility belong exclusively to the child. They make maximum use of the 'right to remain silent' even when the parents would prefer to have the child speak and the child himself wants to. They see their role as counsel for the defense whose task is to secure a dismissal by every legal means, including the right to remain silent. Sometimes this position is defended on the ground that the facilities for treatment and rehabilitation available to the court are so inadequate that a finding of delinquency may lead to inappropriate detention or placement more likely to injure the child than to help him." [13]

13. *Polier, A View From The Bench - The Juvenile Court* (National Council on Crime and Delinquency, 1964) at pp. 56-57.

After weighing the various policy considerations, we have concluded and suggest that the proper role of the privilege against self-incrimination in the juvenile court should be as follows:

1. If a juvenile 16 or 17 years of age is charged with a heinous offense or as a habitual offender, and a preliminary hearing is held, under **N.J.S.** 2A:4-15 and **R.R.** 6:9-7, to determine whether the matter should be referred to the prosecutor to be handled as an adult criminal case, the juvenile should be advised of his right not to testify at that hearing. We so recommend even though **R.R.** 6:9-7 (b) provides that his admissions in that hearing "shall not be held against him in any criminal proceedings that may follow such referral to the prosecutor"; for his admissions or testimony may nevertheless give the prosecutor clues or leads to other evidence which may be used against him at the criminal trial. Even though technically the privilege against self-incrimination may not apply to the preliminary hearing because of the provisions of **R.R.** 6:9-7 (b), in view of where the testimony at that hearing may lead, fairness

would seem to require that it be so applied.[14]

2. Except at the preliminary hearing, and except in those special cases where, because of psychological, emotional or other cogent reasons, the judge, in his discretion, deems that justice to the child otherwise requires, the privilege against self-incrimination should not apply at all in juvenile delinquency proceedings.

3. A juvenile of 16 or 17 years of age, who is charged with what would be an indictable offense if he were 18 or older and who indicates a desire at any stage of the juvenile delinquency proceeding (other than the preliminary hearing) to claim the privilege against self-incrimination should be deemed thereby to have elected to be treated as an adult charged with a crime under N.J.S. 2A:4-15 and R.R. 6:9-6, even though he had theretofore waived indictment and trial by jury. In that event the juvenile delinquency proceeding should be halted, any prior waiver of indictment and trial by jury should be deemed revoked, and the entire matter should be referred to the prosecutor for handling as a criminal case as provided in R.R. 6:9-6. The adoption of this approach would recognize the difference in treatment accorded juveniles under 16 and those over 16 years of age by our Juvenile Court Act and in our correctional institutions, and would leave the privilege against self-incrimination in this respect where it belongs - as a protection against an adult defendant's self-condemnation in a criminal case. If a juvenile 16 or 17 years of age desires the protection of this privilege given adults, he would be thus required to be treated in every respect as an adult charged with a crime.

D

1. The Adjudicatory Phase of the Hearing

The issue of guilt or innocence must be determined at the adjudicatory phase of the hearing since the juvenile has denied the charge of juvenile delinquency.

Delinquency adjudications in the juvenile court are often more grave in their consequences than adjudications in other courts; the need for careful fact-finding based on proper evidence is certainly as great. The usual rules of admissibility and competency of evidence in the criminal and civil courts should, therefore, apply to the juvenile court to the maximum extent consistent with the purpose of the Juvenile Court Act. The judge should take as his starting point that these usual rules apply; he should depart therefrom only in exceptional situations where special reasons called for by a specific juvenile proceeding so warrant. Indeed, in the interest of protecting the juvenile, in some cases he may want to adopt a stricter rule of admissibility.

Thus, hearsay evidence not admissible in the ordinary judicial proceeding should not be competent in the juvenile court; if it is admissible under an exception to the hearsay rule, it should be received in the juvenile court. Again, the juvenile court might refuse to admit a pretrial admission or confession of the juvenile or to base an adjudication on it, even though it could pass muster on competency in a criminal proceeding. For example, because of the juvenile's age or other factors, the court may deny admission to, or if admitted, refuse to rely on, an otherwise acceptable extra-judicial admission of guilt by the juvenile (who now denies guilt) where the statement was given outside of the presence of his parent.[15]

Obviously, also, probation reports should not be admissible in the adjudicatory phase of the hearing.

2. The Disposition Phase of the Hearing

The disposition phase of the hearing is not reached until after guilt has been admitted or adjudicated. Here, reports of probation investigations, of the schools, of psychiatric diagnosis and evaluation, and the like, are all acceptable aids to appropriate disposition. R.R. 6:9-1 (c); 6:9-9; 6:9-10.

Should these reports, or the contents thereof, be made available to the juvenile, his parents or counsel or a hearing held in connection therewith?

14. See *Harling v. United States*, 295 F 2d 161 (D.C. Circ. 1961), discussed in 46 *Minn. L. Rev.* pp. 967-974, indicating the rule of exclusion at the subsequent criminal trial applies to *all* statements connected in any way with the juvenile proceeding.

15. The New York Family Court Act (sec. 744) provides that only evidence that is "competent, material and relevant" may be admitted in an adjudicatory hearing. It also precludes an adjudication of delinquency based solely on an uncorroborated confession.

In a criminal proceeding, presentence reports are not now made available to defendants nor is there a hearing thereon. The rule is to the contrary with respect to psychiatric diagnosis reports under the Sex Offender Act. **State v. Wingler, 25 N.J. 161, 178-179 (1957).**

It should be noted that the philosophy underlying the Sex Offender Act has been stated to be "in many ways analogous to the scheme intended by the philosophy and statutes pertinent to the handling of juvenile offenders . . ." **In re Smigelski, 30 N.J. 513, 528 (1959).** Moreover, there is already precedent for making available to a juvenile information known to the court so that he can admit, deny or disprove it.

Thus, at a preliminary hearing under **R.R. 6:9-7 (a)** to determine whether the juvenile should be treated as an adult offender, the juvenile court must "afford the juvenile an opportunity to be heard with respect to the facts which the court has received from the sources available to it and upon which it is inclined to relinquish jurisdiction". **State v. Van Buren, 29 N.J. 548, 557 (1959).** Again, in custody proceedings where, as in delinquency proceedings, the proper custody or placement of a child is in issue, the probation office's report of investigation is made available to the parties and the probation officer who made the report is subject to cross-examination. **R.R. 4:98-8 (d).**

We submit that fairness to the child and the importance to him, his parents, and the community, of a proper disposition based on accurate information, require that the information and reports which the court has before it for disposition purposes be made available to the child, his parents and his counsel, if any, and that they be permitted to controvert and refute any statements therein which they claim to be untrue. Some degree of discretion, however, must be permitted to remain with the judge as to whether special reasons dictate that the contents of a report be summarized and explained by him instead of being inspected by the child, his parents or his counsel - e.g., where the juvenile or his parents would be unable to understand a psychiatric report.

E
Conclusion

As stated at the beginning of this report, we recommend no rule change at this time with respect to juvenile court hearing procedures. We suggest only that consideration be given to the foregoing and that the Court may wish to issue a directive to the juvenile court judges as to guide lines to be followed in connection with the matters discussed. Experience in operating under these guide lines may later suggest whether it is desirable to enact rules to cover one or more of these matters. In addition, it may be desirable, before formalizing any further rules in this regard, to await the determination by the Court of actual cases involving some of the issues discussed above after the conflicting policy considerations have been fully briefed and argued.

II
THE ISSUE OF INSANITY IN JUVENILE DELINQUENCY PROCEEDINGS

A question has been raised as to the appropriate procedure to be followed in the juvenile court where (1) there is a claim of insanity at the time of the hearing - i.e., the juvenile lacks capacity to defend, and/or (2) there is a defense of insanity at the time the offense was committed.

It is assumed that both the claim of lack of capacity to defend and the defense of insanity are available to the juvenile offender, just as they are to the adult charged with a crime. It is also assumed for present purposes that the substantive tests of what constitutes insanity in either situation are the same as those applicable to a defendant in a criminal case.[16]

There is legislation setting forth the procedure for a finding of insanity of either type in a criminal proceeding. **N.J.S. 2A:163-2 (before trial); 2A:163-3 (after a trial); Aponte v. State, 30 N.J. 441, 450 et seq.**

16. These tests in a criminal case are discussed in *Aponte v. State*, 30 N.J. 441, 450 et seq. (1959). It is submitted, however, that the applicability of such substantive standards to juvenile delinquency cases is of sufficient importance to be given intensive study by a properly qualified committee - perhaps one consisting of members appointed by all 3 branches of the Government.

N.J.S. 2A:163-2 permits a hearing before trial to determine insanity at the time of hearing, and if the defendant is found to be so insane, further to determine if he was insane at the time of the offense. **Aponte, supra,** at 455. The judge may try these issues with or without a jury, in his discretion, but ordinarily should try the question of insanity at the time of hearing without a jury. **Aponte, supra,** at 455. The statute provides that the assignment judge or county judge may institute an inquiry and take proofs on the mental condition of "any person in confinement under commitment, indictment or other process" who shall appear to be insane. A juvenile offender in confinement technically may be considered as a person covered by the statute. If so, the juvenile court would be required to transfer the proceedings to the Superior or County Court for the sanity hearing.

It is difficult to conceive that the legislature intended the anomalous situation of having this part of a juvenile proceeding tried in the Superior or County Court. Nevertheless, there appears to be no statute or rule covering a hearing on the insanity issues in the juvenile court.

We suggest the enactment of a statute, patterned generally after N.J.S. 2A:163-2 and 2A:163-3, but providing that these issues of insanity in a juvenile delinquency hearing be tried by the juvenile court without a jury. It should also contain provisions similar to those in the foregoing statutes for commitment to an appropriate psychiatric facility until the juvenile's sanity is restored.

Meanwhile, until the proposed legislation is enacted, we suggest the adoption of a rule or directive which would provide that the procedures set forth in N.J.S. 2A:163-2 and 2A:163-3 should be used, with appropriate modifications, in the juvenile court.

III
JUVENILE COURT REPORTS TO SCHOOLS

A question has been raised as to whether the juvenile court should make available to the school authorities information with respect to the action taken by the court in cases in which their pupils are involved.

We submit that the existing rules do, and quite properly, permit such information to be given o the appropriate school authorities. They would permit a representative of the schools to attend the hearings, or a probation officer to brief the school authorities with respect to the action taken in a case, or the court to send a confidential report to the school principal, psychologist or guidance counsellor.

R.R. 6:2-11 (c) makes all procedural and social records in juvenile causes available to others, in the judge's discretion, whenever the best interest or welfare of a child or other good cause makes such action desirable. R.R. 6:9-1 (a) provides that a juvenile delinquency hearing "shall be conducted in private with only such persons in attendance as have a direct interest in the proceedings".

It would seem reasonably clear that normally the welfare of the child would require that the school be aware of his problems and what program or disposition the court has effected to help him. The school's cooperation in assisting the court and the child in fulfilling the dispositional program established by the court is often essential if it is to be at all effective. Contrari-wise, ignorance of the child's difficulties and needs, as revealed to the court, may impel a course of action by the school which may be harmful to the child. Rehabilitation of a school child must be a joint effort of all persons and agencies dealing with him.

In view of the foregoing, there seems little doubt, in our view, that the disposition order or the basis thereof is a "record" under R.R. 6:2-11 (c) which the court, in its discretion, may make available to the school; or that the school has a sufficient "direct interest" in proceedings affecting one of its pupils to warrant the attendance of a school representative at the hearing, under R.R. 6:9-1 (a).

The only question which we have is as to which of the school personnel should be given the information or be permitted to attend the hearing. Should it be the principal, school psychologist, disciplinarian or guidance counsellor? Although we voice no strong opinion in the matter, we would suggest the following order of preference: (1) the school psychologist, (2) the guidance counsellor, (3) the principal or his representative. We so suggest because usually the first two persons are those dealing with behavior problems. We suggest also that the principal be consulted by the juvenile court as to the person he wishes to use to act as liaison with the court.

In any event, whoever receives the information or attends the hearing should be advised that what is disclosed to him must be considered confidential.

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Dated June 4, 1964

2. Excerpt from the 1962 Report of the New Jersey Supreme Court's Committee on Juvenile and Domestic Relations Courts

7| What, if anything, should be done in order to strengthen the functioning of Juvenile Conference Committees?

There appears to be common agreement that Juvenile Conference Committees, appointed by each Juvenile and Domestic Relations Court for the municipalities in its county pursuant to R.R. 6:2-2, "are useful tools in the administration of justice but that there are areas where improvements and changes are called for" in order to make them function more effectively. (N.J. L.J. Aug. 17, 1961, Editorial). The Committees help to relieve the court of cases involving minor offenses which can be treated to better advantage at a local level. They also can serve as vehicles for creating local awareness of community youth problems and delinquency breeding areas, as a consequence of which municipal prevention programs may be initiated.

We have given consideration to what, if anything, needs to be done to strengthen this local arm of the court so that it can be utilized with maximum effectiveness. We suggest the following:

(1) Each Juvenile and Domestic Relations Court should be required by direction (rather than by rule) of the Supreme Court:

(a) To appoint Committees for each municipality, as now required by R.R. 6:2-2, and, in addition, to see to it that the Committees actively function.

(b) To make a complete review of every appointed committee's status and activity, and, where required, to appoint new committees or reconstitute existing committees by the appointment of those persons really willing to serve and to whom this job is the important community function.

(c) To determine to what extent there should be one Committee for a number of adjacent municipalities as permitted by the existing rule - for example, where the municipalities are sparsely populated, or the number of probable cases per municipality may be so low as not to warrant a separate Committee, or where a municipality indicates a lack of desire to have a Committee functioning. We do not believe in the creation of a county-wide Committee, since it would do violence to the neighborhood concept which is one of the basic reasons for the rule authorizing the creation of the Committees.

(d) To appoint as least one person whose primary job would be the detailed supervision of the functioning of every Committee. He would be paid a salary (by the Board of Freeholders) and would be part of the court personnel, serving under the jurisdiction of the court. He might be considered an administrative assistant to the judge in charge of Juvenile Conference Committees. He would have to have sufficient administrative and executive ability not only to set up and supervise proper procedures and records but also to visit, meet with and counsel with the Committees and their members. It is contemplated that, among other things, he would serve as the liaison between the Committees and the court, coordinate the work of all of the Committees in the County, see to it that they file required reports, keep necessary records, prepare reports and statistics in connection with their total operations, act as the clearing house for them - e.g., advise whether the offense is within or without their jurisdiction or whether a juvenile is a first offender - , determine why a Committee is not functioning

and advise the court accordingly, sit in at Committee meetings, and make recommendations to the court as to how to improve the quality of their operations. In short, we conceive the functions of the person in charge of the County's Juvenile Conference Committees as similar - in a much more limited sense, of course, - to those now being performed by the Administrative Director of the Courts in connection with the entire judicial system. To the extent the person so appointed need not devote his full time to his Juvenile Conference Committees job, he may be used by the court to perform other court functions. To the extent that additional personnel is needed in the larger counties to assist the person so appointed, the court should be permitted to appoint and pay such personnel. The virtue of requiring the appointment of salaried personnel to supervise the Committees is that it relieves the judges of this time-consuming task. The heavy case loads of the judges - which, of course, must be given preference, make it impossible for them to give the Committees the attention required for their effective functioning.

(e) To file, where such an administrator has been appointed, periodic statistical reports with the Administrative Director of the Courts on the activities of the Committees in the County.

(f) To set forth clearly (i) the nature of the Committee's functions; (ii) offenses over which the Committees have jurisdiction without court referral and offenses over which they may have jurisdiction by specific court referral; (iii) the procedures to be used by the Committees, including the filing of complaints with the Committees, notice of hearings, hearings, post-hearing procedures, and reports to be filed with the court; and (iv) that necessary mail, telephone and secretarial expenses should be borne by the municipality. We recommend that the Administrative Director of the Courts and a group of juvenile and domestic court judges have a series of meetings to review the existing Juvenile Conference Committee procedural manual or guide which the Administrative Director issued some years ago with a view towards making it the authoritative manual for use in every county by direction or rule of the Supreme Court.

(g) To set up at least one workshop conference of all Committee members, or, in rural counties, to set up a regional meeting of such members covering two or more counties. Such meetings, as shown by the experience in Essex and Monmouth Counties, will serve to educate and stimulate interest in Committee members.

(2) Certain other suggestions made with respect to these Committees, we believe, may be taken care of without any direction or rule of the Supreme Court:

(a) The Committee members, under R.R. 6:2-2, serve not for a term, but at the pleasure of the court appointing them. Hence, there is no need to fix staggered terms of office for them. Those who show no interest or capability may be replaced at any time by the court. We recommend no change in the existing rule in this regard, since it permits needed flexibility of appointment.

(b) The court and the Committees should give appropriate publicity to the existence of the Committees and the service they are prepared to give the community.

(c) The judges should be encouraged to meet with the police chiefs of the county to inform them of the Committee's existence and to advise them of what complaints should be filed directly with the Committee. They might also send letters to the police chiefs requesting their cooperation in making the Committee work. Ample copies of the proposed Committee manual should be furnished them so that they know the Committee jurisdiction and procedures. If the police refuse to cooperate, the court might well refer complaints

within Committee jurisdiction but filed with it to the Committees for hearing. As has been pointed out elsewhere, interest is sustained only when the Committees have cases to keep them busy.

(d) The composition of the Committees should be left to the discretion of the appointing judge. However, it should be emphasized that, wherever possible, the membership should consist of an attorney who will be able to advise the Committee on the law and legal procedures; if available, a social worker or a probation officer; a member of the police department; and a representative of the schools. The membership of the Committees should not exceed 7 in number, with a quorum of 5 being able to act on behalf of the Committee. We believe that any larger number may be unwieldy and, as has been stated, may "divide the individual responsibility of its members to the point where all responsibility is dissipated".

* * * *

We would like to point out that the above recommendation as to a paid administrative assistant to each court is at the heart of all of the other recommendations made in this part of the report. Without such personnel, we believe, the other suggestions may not have the desired effect.

* * * *

3. SUMMARY OF VIEWS OF THE SUPREME COURT ON RECOMMENDATIONS OF THE COMMITTEE ON JUVENILE AND DOMESTIC RELATIONS COURTS, SUBMITTED IN REPORT DATED JUNE 4, 1964.

I

THE HEARING PROCEDURE IN JUVENILE COURT

The Court concurred in the Committee's recommendations that no inflexible rules as to the elements of the hearing procedure discussed in the report be adopted at this time. Instead, it gave its views on the Committee's specific suggestions as guidelines to be followed by the Juvenile court judges hereafter in juvenile proceedings. Actual rules of procedure in these respects may await the test of actual experience by the judges in applying these procedural guides. The views of the Court on the specific Committee recommendations follow.

A

QUANTUM OF PROOF

The Committee recommended that the quantum of proof required to sustain a charge of juvenile delinquency be that of "clear and convincing evidence" - a standard of proof between ordinary civil and criminal standards.

The Court was of the view that, in view of the serious consequences of a finding of delinquency, the standard of proof

should be that used in a criminal proceeding - proof beyond a reasonable doubt.

B

SWEARING OF WITNESSES

The Court approved the recommendation of the Commiteee that all witnesses should be sworn, except where the judge believes that the oath may be meaningless to a particular child or may actually inhibit him from testifying fully and freely.

C

PRIVILEGE AGAINST SELF-INCRIMINATION

The Court approved the recommendation of the Committee that the privilege against self-incrimination not apply at all in juvenile delinquency proceedings, except in the following instances:

1. The privilege may be invoked by the judge on behalf of the child in special situations where, because of psychological, emotional or other cogent reasons, the judge deems that justice to the child so requires.

2. If a juvenile 16 or 17 years of age is charged with a heinous offense or as a habitual offender, and a preliminary hearing is held, under N.J.S. 2A:4-15 and R.R. 6:9-7, to determine whether the matter should be referred to the prosecutor to be handled as an adult criminal case, the juvenile should be advised of his right not to testify at that hearing.

3. A juvenile of 16 or 17 years of age, who is charged with what would be an indictable offense if he were 18 or older and who indicates a desire at any stage of the juvenile delinquency proceeding (including the preliminary hearing) to claim the privilege against self-incrimination should be deemed thereby to have elected to be treated as an adult charged with a crime under N.J.S. 2A:4-15 and R.R. 6:9-6, even though he had theretofore waived indictment and trial by jury. In that event the juvenile delinquency proceeding should be halted, any prior waiver of indictment and trial by jury should be deemed revoked, and the entire matter should be referred to the prosecutor for handling as a criminal case as provided in R.R. 6:9-6.

D

EVIDENCE

1. THE ADJUDICATORY PHASE OF THE HEARING

This is the part of the hearing where the court determines whether the juvenile is guilty of the offense charged, the juvenile having previously denied guilt.

The Court approved the Committee recommendation that (1) the usual rules of admissibility and competency of evidence in the criminal and civil courts generally should apply to delinquency proceedings; and (2) the judge should depart from such rules only where special reasons called for by a specific juvenile proceeding

so warrant. Thus, the usual hearsay rules and rules as to pretrial confessions and admissions should in general apply to juvenile proceedings. Indeed, more stringent rules may be applied in juvenile cases. For example, the court might refuse to admit a confession now repudiated by the juvenile where it was taken in the absence of his parents or if there is any doubt as to the circumstances under which it was taken. Although the Court did not discuss or consider the matter, it is assumed that the usual rules as to search and seizure might also apply to juvenile delinquency proceedings.

The Court appeared also to approve the recommendation that probation reports not be admissible or used in the adjudicating phase of the hearing. There was some question raised as to whether it was not desirable to continue probation pre-hearing investigations in those counties where this is now done. Apparently, there may be no objection to the continuation of this practice, provided the judge in fact does not consider the report in determining the issue of guilt or innocence.

2. THE DISPOSITION PHASE OF THE HEARING

The Court approved the Committee recommendation that probation, school and psychiatric and other reports or information used by the court in determining the appropriate disposition of the juvenile offender, should be made available, in the discretion of the court, prior to disposition, to the juvenile, his parents and counsel, and that they be permitted to be heard if they contest any statements contained therein. In any event, however, the judge would have dis-

cretion, where special reasons so dictate, to summarize and explain the contents of a report, rather than to permit it to be inspected or read.

II

THE ISSUE OF INSANITY IN JUVENILE DELINQUENCYE PROCEEDINGS

The Committee recommended that legislation be adopted, similar to N.J.S. 2A:163-2 and 2A:163-3 (which requires all insanity questions in adult criminal cases to be tried in the superior or county courts), permitting insanity issues in juvenile delinquency cases to be tried in the juvenile court. The insanity issues which concerned the Committee were: (1) a claim of insanity at the time of the hearing - i.e., that the juvenile lacks capacity to defend; and (2) a defense of insanity at the time the offense was committed.

The Court did not approve the Committee's recommendation, being of the view that the problem raised should not be a juvenile court problem at all. In view of the treatment and rehabilitative philosophy of the juvenile court, it was suggested that if either issue of insanity is projected in a delinquency case, the court should nevertheless proceed to determine whether, in fact, the child has committed the act charged and, if it so finds, then it should consider evidence of insanity at the time of hearing or at the time of the offense, or both, but solely for the purpose of determining the proper disposition to be made. Thus, the juvenile court would

not be involved in such questions as to whether the M'Naughton rule is the test of insanity as a defense in the juvenile court, and the procedures governing adult criminal offenders (N.J.S. 2A:163-2 and 2A:163-3) would not be applicable to juvenile proceedings. Compare the concurring opinion of Chief Justice Weintraub in State v. Lucas, 30 N. J. at 82, et seq.

III

JUVENILE COURT REPORTS TO SCHOOLS

The Court approved the Committee's interpretation of R. R. 6:2-11(c) and 6:9-1(a) as authorizing (1) the juvenile court to make available to school authorities information with respect to action taken by a court in cases involving their pupils and (2) the juvenile court to permit a school representative to attend the hearing. The Court likewise approved the suggestion of the Committee that school personnel be given the information or be permitted to attend the hearing in the following order of preference: (1) the school psychologist (2) the guidance counsellor (3) the principal or his representative.

Dated: July 23, 1964.

MARTIN J. KOLE
CHAIRMAN, SUPREME COURT COMMITTEE ON THE JUVENILE AND DOMESTIC RELATIONS COURT

4. Address by Earl Warren, Chief Justice of the United States at the Annual Conference National Council of Juvenile Court Judges on June 22, 1964

I value highly the invitation to take part in this most instructive meeting of Juverile Court Judges. Each year your number and the important role you play in the administration of justice has grown. As you know, for many years before coming to the Court, my career led me into pathways in which I was confronted by and sought means of solving many of the problems with which you must wrestle each day. I should like at the very outset to acknowledge to you the great debt which I share with my fellow citizens for your patient but persistent concern with the problems of young men and women, and your intelligent efforts to find the ways to reduce the proportions of a national problem.

As the late John F. Kennedy so appropriately observed ". . . Juvenile delinquency and youth offenses diminish the strength and vitality of our Nation. They present serious problems to all the communities affected, and they leave indelible impressions upon people involved which often cause continuing problems . . . ."

President Kennedy was aware, as we all are, of the mounting proportions of our juvenile and youth problems when he transmitted to the Congress the proposal which was enacted in September 1961 as the Juvenile Delinquency and Youth Offense Control Act. Just a few days ago the House of Representatives approved a three-year extension of the program. I know that you join me in hoping that before Congress adjourns this decededly worthwhile effort to aid local communities in stemming the rising tide of juverile delinquency will be approved by both House of Congress and be implemented by the necessary appropriations.

President Kennedy was aware, as many of you are, that the annual rate of referrals of delinquency complaints to juvenile courts had passed the staggering half million mark. He was also aware of the implications of a million school dropouts annually; of the fact that the rate of unemployment for 16 to 21 year-olds is three times greater than that for the rest of the population; that of 1.8 million young people under the age of 21 who will enter the labor market in 1964, more than one-third lack a high school diploma, an almost indispensable key to finding steady employment. I understand that the President's Committee on Youth Employment now estimates that within the next five years the number of idle young people in our society, largely of course in our great urban centers, will nearly double unless effective means are found to halt the trend, and reach a total of more than a million and a half. This rather gloomy forecast constitutes both a challenge and an opportunity for you who know so well how "idle hands are the devil's workshop."

In my native State of California, recent figures compiled by the Youth Authority show that almost 40% of the State's population is under the age of 20, and 85% of these young people live in the cities. While the rate of delinquency has remained relatively stable from year to year, the numbers of delinquents have grown steadily with the increases in the youth age group in the population.

Each year for each 100,000 children in California's population between the ages of 10 and 17:

6,000 are arrested

2,600 are referred to probation departments

2,300 are detained in juvenile halls

1,000 are made juvenile court wards

165 are committed to the Youth Authority.

The Youth Authority figures show, unmistakably, that delinquency strikes most frequently among the low socio-economic groups, a fact which gives special urgency to President Johnson's compelling call for a broad frontal attack upon the problems of poverty in our country.

There are those, of course, who question the wisdom of federal expenditures for delinquency prevention and control. This to me is a shortsighted economy in the face of our knowledge that the annual bill which we pay for delinquency is two and a half billion dollars, and the further fact that every person who turns to a life of crime will cost us an estimated $85,000 in his lifetime. But the costs in dollars are of little real significance measured against the toll in shattered human hopes and aspirations, in pain and suffering in sorrow and in futility.

It is against this background that I turn to the issue which you have asked me to discuss - - "equal justice for juveniles." Were I to undertake a discussion of "equal justice" as it applies to the adult criminal, I believe that I could approach my task with somewhat greater confidence. Where the adult is concerned, the concept conjures up the image of an objective, evenhanded administration of the law, in which the basic rights of each individual are zealously and jealously safeguarded, with no regard to the rank or status of the defendant before the bar.

Surely, the child who is the subject of a delinquency complaint is entitled to comparable, if not greater, safeguards. And indeed the task of the juverile court judge would be a less complicated one if his responsibility began and ended with fulfilling the "nice quillets of the law." But the juvenile court is more than an instrument of justice; since its inception, more than 50 years ago, this court has been recognized as an instrument of social policy. Hence, the juvenile court judge must give equal attention both to the needs of the child and the adequate protection of society. As you know, the dual roles of the court have given rise to vexing problems in defining its function and establishing appropriate limits upon its authority.

In the early history of the court, the tendency was to regard its social welfare and "parens patriae" functions as of primary importance. During the past twenty-five years, however, there has been evidence of a mounting concern about the need for the court to pay greater attention to safeguarding the legal rights of the child. As is perhaps inevitable under such circumstances, extremist points of view have been espoused by partisans of the two opposing concepts. In one camp are those who maintain that the juvenile court, as a court of law, must surround the juvenile with all the legal processes which would be available to him were he tried as an adult. The opposing view is that the social, emotional, educational, health and economic needs are paramount and the task of the court is to meet these requirements without concerning itself too greatly with legal niceties.

I have, of course, exaggerated somewhat the respective positions, but that a wide difference exists in the concept of the role of the court cannot be denied. Its existence places the conscientious judge squarely upon the horns of a dilemma. Most reasonable observers will agree that the primary effort of any court is not to punish the offender but rather to assist him in overcoming his limitations and disabilities. In the case of the Juvenile Court, its sole objective and aim is the protection and well-being of the child and punitive measures can be taken, if at all, only when they may reasonably be expected to reverse a harmful behavior pattern or are necessary for the protection of the public. You, I am sure, accept these fundamental tenets but there are many who question its validity.

It is for this reason that the court must function within the framework of law and that in the attainment of its objectives it cannot act with unbridled caprice.

You are lawyers first of all and pledged to follow the statutes under which you operate and of course observe basic constitutional rights.

It would not be proper and I know you would not wish me to say here whether I think, for instance, that every child brought before the court must be represented by counsel. That will have to wait until proper cases come before the court. I can say, however, that I think lawyers can be most useful and helpful to the court. Nor can I say here whether strict rules of evidence must be followed but I can suggest that a reasonable adherence to orderly presentation of the facts in a particular case will prevent miscalculations and minimize the possibilities of miscarriage of justice.

To what extent the rules of criminal procedure applied in adult courts should be followed in juvenile court is, as you know, a matter of controversy. It does seem to me, however, that it is altogether possible to develop and draft practical, straightforward, and understandable procedures applicable to juvenile courts.

There also is a growing awareness on the part of the courts and the public of the right of each individual, whether child or adult, to a full and fair hearing. To be sure, the formal and sometimes awesome trappings of a criminal trial can be avoided and the informal atmosphere of the conference achieved, without sacrificing the fundamental purpose of the proceeding. Above all, the hearing should be such that no one can justify and fairly call it a "Star Chamber" proceeding.

One can see the change in attitude with regard to the hearing and procedural requirements by looking at two cases which originally arose in the District of Columbia. One of them occurred back in 1902 when a young girl of 15 years who had been charged by her father as an incorrigible was committed to the Reform School for Girls without notice, hearing, or opportunity to speak. Through a friend, this young girl sought a writ of habeas corpus alleging illegal detention. The Court of Appeals for the District of Columbia told her that her commitment did not violate due process of law stating: "The child herself,

having no right to control her own action and to select her own course of life, had no legal right to be heard in these proceedings."

This attitude is to be contrasted with another case arising more than 50 years later when the Court of Appeals for the District of Columbia stated that: "the constitutional safeguards vouchsafed a juvenile in such proceedings are determined from the requirements of due process and fair treatment, and not by the direct application of the clauses of the Constitution which in terms apply to criminal cases."

Other changes in attitudes with respect to safeguarding basic rights of the juvenile delinquent are occurring, I judge from my conversations with some of you. Certainly yours is an area of the law that is undergoing changes in its methods while continuing its basic concept. As time goes on, we will come to grips and resolve finally such questions as to whether, as a matter of right, a juvenile delinquent is entitled to trial by jury, whether the privilege of confrontation, self incrimination, proof beyond a reasonable doubt, admission to bail, and so on applies.

These are vexing problems which must be solved without striking at the heart of the juvenile court idea or subjecting the child to traumatic experiences and degrading treatment of a kind that may warp irrevocably his character and his potentialities for becoming a self-respecting and law-abiding citizen.

After all, what we are striving for is not merely "equal" justice for juveniles. They deserve much more than being afforded only the privileges and protections that are applied to their elders. A niggardly and indiscriminate granting of concepts of justice applied to adults will stunt the growth of the juvenile court and handicap the progess of future generations. We can also afford to spend more time, effort and money on our young people than on those whose life patterns are fixed. The courts that deal with them should be better staffed, more generously financed and held to higher standards than many other courts. Probation services should be superior and institutions for treatment of juveniles should provide every reasonable facility for schooling, trade training and character building.

When I say this I do not forget some of my experiences with the realities of life when I had to do what I could to uphold the law in

Alemeda County and as Governor. No boy or girl of whatever age can be permitted to run roughshod over the rights and property of others. He must be dealt with sternly but patiently, calmly and understandingly, mindful always of his rights as an individual human being.

If we are to be true to our own ideals and concerns for our young people we must rededicate ourselves to the discovery of the good and the just way of life. Thus can we vindicate the oft-repeated, but I am afraid yet to be proved, statement that the juvenile court is the most outstanding improvement in the administration of criminal justice since the Magna Charta.

5. 12 Buffalo Law Review 442 (1962 - 1963)

INTAKE AND THE FAMILY COURT

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FROM the standpoint of any probation service, one of the most interesting facets of the Family Court Act of the State of New York is its provision for preliminary procedure in matters involving neglect, delinquency, persons in need of supervision, support, and family offenses. Specifically, the probation service is authorized to confer with any person seeking to file a petition, the potential respondent, and other interested persons concerning the advisability of filing a petition and to attempt, through conciliation and agreement in proper situations, to adjust suitable cases before a petition is filed over which the court apparently would have jurisdiction.[1]

HISTORICAL REVIEW OF INTAKE

The concept of a preliminary procedure, particularly in juvenile courts, is not new. This procedure is more familiarly known as intake. Basically, it involves the process of screening cases and effecting adjustments in some matters without the necessity for judiciary intervention.

A brief examination of the history of intake reveals that intake, under one name or another, has been practiced in various ways in juvenile courts since such courts were first organized in this country. The following statement was made by Judge Ben Lindsey in 1904 about the Juvenile Court in Denver: "The result is that in Denver all complainants must first submit their case to the probation officers or the district attorney. The district attorney has properly turned all such cases over to the probation officers. It is then investigated and *often settled out of court*."[2] (Emphasis added.)

In 1916, various communities in the United States made reports to the National Probation Association describing the organization of their courts and probation service. The Juvenile Court of Philadelphia reported:

> The complaint department, as its name implies, takes all complaints as they come into the probation department. All petitions are filed there and through it all investigations are conducted. . . . I am very glad to say there is an increasing use of the complaint department for police business of this kind and in many instances satisfactory settlements are made without it being necessary to bring the children to hearings of any kind.[3]

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1. N.Y. Family Ct. Act §§ 333 (neglect), 424 (support), 734 (juvenile delinquency), 823 (family offenses).

2. Lindsey, *Additional Reports on Methods and Results*, Children's Courts in the United States 61 (U.S. Gov't Printing Office 1904). These reports were prepared for the International Prison Commission.

3. Parris, *The Organization of a Probation Force in a Large City*, National Probation Association Proceedings 51 (1916).

At the same time, the Domestic Relations Court of Philadelphia referred to intake as the "application unit."[4] The Municipal Court of Chicago reported:

> Outside the court itself we have a social secretary who has with her a number of assistants. . . . This department of our court is fully as important, needful and useful in my opinion as the court itself, . . . and it is remarkable how many cases can be settled in that department without ever at all coming to the attention of the court.[5]

The movement toward informal adjustment of cases developed spontaneously throughout the United States to the extent that its growth and impact was studied by the Committee on Juvenile Courts of the National Probation Association. The report of this Committee, made in 1922, begins in this fashion:

> With the approval of the General Secretary the Chairman undertook as the work of your committee an inquiry into a special field of work associated with juvenile courts, namely unofficial treatment of quasi-delinquents. As far back as 1910, the bulk and unstandardized methods of this extra-legal case-work were to be noticed. In 1913, when a first-hand study of leading courts was made, it was found that nearly every probation office visited had spontaneously developed some practice of this sort, in several courts to a considerable extent. Ever since the organization of the juvenile court in Chicago, some unofficial work has been carried on there, according to the statement of several police officers. One officer, the first to file a petition in a juvenile court in America, stated that he has always handled some complaints without court action. Thus, unofficial work is not new in the sense that it lately came into practice; it is merely receiving closer attention.[6]

Many factors led to the practice of adjusting certain cases informally. Prominent among them was the recognition that some offenses brought to the attention of the courts were too trivial to warrant any action other than a warning not to repeat the act. Moreover, there were other situations which merely required advice or direction rather than the disciplinary intervention of the courts; and still others in which favorable home conditions and responsible parents augured well for favorable results without the formality of a court hearing and adjudication of delinquency. The rationale for the practice of informally adjusting cases has not changed substantially through the years.

As with all other social movements and changes, intake was not without its critics. Herbert H. Lou reported in 1927 some arguments against it: "Such work will interfere with the official duties of the court, lower its efficiency by taking such additional work, and weaken authority in formal cases, or that it will be done in a haphazard and unscientific fashion and so fail to reach the

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4. *Id.* at 71.
5. Hopkins, *The Domestic Relations Court, Its Organization, Development and Possibilities*, National Probation Association Proceedings 63 (1916).
6. Report, Committee on Juvenile Courts, *The Unofficial Treatment of Children Quasi-Delinquent*, National Probation Association Proceedings 68 (1922).

underlying problems that may be serious."[7] Lou himself believed that the practice was to be commended and wherever possible it should be utilized if there be an efficient and trained staff of probation officers. He commented "the development of the practice is but another step in socializing the juvenile court procedure."[8]

Difficulties were encountered when intake was defined in different ways by the various courts, and practices and procedures varied. In some jurisdictions, intake expanded its scope to include so-called unofficial probation. The MANUAL FOR PROBATION OFFICERS, 1918 edition, published by the New York Probation Commission, recognized the term and defined unofficial probation as "cases referred to probation officers for oversight and help for which persons are not brought before the court or judge at all. Unofficial cases usually arise through the desire of the parent, teacher, or someone else especially interested in having the wayward tendencies or habits of a child or an adult overcome without notoriety or other harmful effects which might follow an arrest or appearance in court. . . . Although this kind of work on the part of probation officers is *without legal sanction or authority*, it is from a humanitarian standpoint commendable, provided it does not interfere with the performance of their official duties."[9] (Emphasis added.) This definition was repeated in the third edition of the Manual (1925)[10] and again in the fourth edition (1926).[11]

The first edition of the Standard Juvenile Court Law, published in 1926 by the National Probation Association, recognized and attempted to remedy this defect. Article II, section 6 of this Act reads: "Any person having information that a child is within the provision of this act, may give such information to the court, and any peace officer having such information shall give it to the court. Thereupon the court shall make preliminary inquiry to determine whether the public interests or the interests of the child require that further action be taken . . . ."[12] The explanatory material that follows that section is particularly noteworthy:

> The act follows the procedure in many of the best juvenile courts by providing for a preliminary inquiry and investigation before a petition is filed. It proceeds upon the theory that it is better for as many cases as possible to be adjusted without a formal court hearing. The system of handling cases informally, usually through the probation department, is well recognized and in many courts half or more of the cases are adjusted in this way. This can be done without explicit

7. Lou, Juvenile Courts in the United States 127 (North Carolina Press 1927).
8. *Ibid.*
9. New York State Probation Commission, Manual for Probation Officers in New York State 57 (2d ed. 1918).
10. New York State Probation Commission, Manual for Probation Officers in New York State 58 (3d ed. 1925).
11. New York State Probation Commission, Manual for Probation Officers in New York State 58 (4th ed. 1926).
12. National Probation Association, A Standard Juvenile Court Law 14 (1926).

> statutory authority, the court having an inherent right to exercise discretion as to taking official jurisdiction, but the system has grown so wide-spread and is so generally recognized as beneficial that the committee believes it should be recognized in the law.[13]

The language and intent of this Standard Juvenile Court Law with respect to preliminary investigations and inquiries were incorporated in the juvenile court laws of a number of states. In theory, then the practice of informal adjustment of cases was legally recognized. Criticism continued but in a different vein, now focusing on the violation of the rights of the child and the family under due process.

Studies of various juvenile courts indicated that the complaints were not without validity. Thus, some courts and probation personnel misunderstood the term "preliminary inquiry." This term means merely an inquiry to determine whether the best interest of the child or of the public require the filing of a petition. It was mistakenly interpreted to mean the making of social studies to help the court arrive at a disposition. As a result, full probation investigations were made before any determination of delinquency; indeed they were often made even when parents and children denied the allegations of the petition.

Even more widespread abuses were found in juvenile courts which delegated to the probation staff such wide latitude in handling informal cases that children were held in detention for periods ranging from a few days to several months, and subsequently released without ever coming to the official notice of the court. Equally questionable was the propriety of keeping children under probation supervision for one, two or even three years without any judicial determination that an act of delinquency had been committed.

The basic value of intake continued to be recognized, and advocates of the socialized procedure of juvenile courts were giving thoughtful attention to rectifying abuses. STANDARDS FOR SPECIALIZED COURTS DEALING WITH CHILDREN was one of the early national publications concerning itself with this problem. This publication discussed at length the arguments for and against intake. It set forth that informal adjustments should be limited to the following:

1. Referral of the child or the family to a social agency offering services which may be of help. Such a referral should not be compulsory or cause the child or family to feel obligated. Rather, it should be considered as advice as to where help is available in the community.
2. A conference between the complainant and the child or his family or, in the case of non-support, between the parents. The purpose of such a conference should be to make adjustments that will obviate the filing of a petition. Attendance at a conference cannot be enforced, nor can conditions be imposed on the child or his family as a result of it. It should be offered simply as a service which may help to adjust matters without the necessity of formal

13. *Id.* at 15.

> action by the court. When the matter warrants the filing of a petition, the intake worker may, however, authorize such filing if the child and his family ignore the call to the conference, or if the conference discloses that there is need for the child to be brought before the court.[14]

The use of the term "unofficial probation" continued to be a matter of concern and was a subject for discussion by the Advisory Council of Judges of the National Probation and Parole Association at its meeting in 1954. Those judges, representing a cross section of juvenile courts throughout the country, stated in a resolution that: "The granting of probation is a judicial function to be exercised only by a court after adjudication in accordance with the law, and probation is not to be confused with the official but non-judicial service of limited duration that may be rendered to a juvenile by the same court."[15]

The phrase "non-judicial service" more precisely describes the work of screening and effecting informal adjustment. Significantly, this term has been used since 1957 by the U. S. Department of Health, Education and Welfare in reporting juvenile court statistics.

The concept and delineation of non-judicial service was further explored in GUIDES FOR JUVENILE COURT JUDGES. This book presented, for the first time, criteria for the determination of which cases required judicial handling and which did not. It stated:

> The jurisdictional foundation for non-judicial cases rests upon the voluntary acceptance of this disposition by the family and child concerned. This means that, in all cases handled non-judicially, the intake worker must first make certain that the fact of delinquency or neglect is not disputed and the parents and child must be aware of the fact that they have the right to judicial hearing if they so desire.[16]

It was stated further that the court had responsibility for establishing controls, which would include the maximum time for the non-judicial cases to be held open. Recommendation was made that no non-judicial case should extend beyond three months without review by the court.[17]

PRELIMINARY PROCEDURE UNDER THE FAMILY COURT ACT

The Family Court Act of the State of New York is unique in the fact that not only does it make provision in a general way for preliminary

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14. U.S. Children's Bureau, Standards for Specialized Courts Dealing with Children 44 (U.S. Gov't Printing Office 1954). These materials were prepared in cooperation with the National Probation and Parole Association and the National Council of Juvenile Court Judges.
15. Minutes, National Probation and Parole Association, Advisory Council of Judges, Second Annual Meeting, May 14-15, 1954.
16. National Probation and Parole Association, Advisory Council of Judges, Guides for Juvenile Court Judges 40 (1957). This was prepared in cooperation with the National Council of Juvenile Court Judges.
17. *Id.* at 41.

procedure or intake but it describes in considerable detail the procedural requirements which must be observed. These requirements in turn incorporate many of the sound basic principles which have been evolved through the years. Section 333 of article 3, section 424 of article 4, section 734 of article 7, section 823 of article 8, and article 9 provide that the rules of court *may* authorize the probation service to undertake preliminary procedures.[18] The Rules of the Family Court as adopted by the Administrative Board of the Judicial Conference of the State of New York, effective September 1, 1962, provide that the probation service *shall* undertake these preliminary procedures. Under these provisions, the probation officer at intake in the Family Court will confer with any person seeking to file a petition, with the potential respondent and with any other interested person concerning the advisability of filing a petition.

If the facts presented do not appear to place the matter within the court's jurisdiction, the person bringing the matter to the attention of the court will be so informed. Should the prospective petitioner be insistent about his right to file a petition, an opinion will be sought from the judge there presiding.

If a matter does appear to be within the court's jurisdiction, the person bringing the matter to court must be informed of his right to file a petition if he so desires. This principle is derived from the statutory provision and safeguard that "the probation service may not prevent any person who wishes to file a petition under this article from having access to the court for that purpose."[19]

When the matter appears to be within the court's jurisdiction and there is a basis for believing that the matter may be adjusted suitably without the filing of a petition, the consent of all interested persons should be obtained. Many students and leaders in the field of probation believe that this includes securing the consent of a minor if he is of the age of 13 years or over. The service performed by intake in adjusting suitable cases without the filing of a petition rests upon the voluntary acceptance of this disposition by all parties involved, including the family and the child. This is one of the principles enunciated in GUIDES FOR JUVENILE COURT JUDGES which points out that in cases being handled without judicial action, the intake worker must first determine that the facts alleged are not disputed and that the family or the parents are aware of the fact that they have the right to a judicial hearing if they so desire.[20]

By statutory provision, the probation service may not compel any person to appear at a conference, produce any papers or visit any place. For example,

18. Article 9 of the Family Court Act calls for preliminary procedure in conciliation matters but only *after* the filing of a petition. Although adjustment procedures are involved, in the opinion of the authors the preliminary procedure in conciliation does not conform to the classical pattern of intake. For this reason, this paper does not address itself to preliminary procedure in conciliation cases.

19. N.Y. Family Ct. Act §§ 333(b), 424(b), 734(b), 823(b).

20. See National Probation and Parole Association, *op. cit. supra* note 16.

if the need for psychological, psychiatric, or physical examination should arise at a point in the adjustment process, the consent and cooperation of the individuals toward securing such examinations or referrals must be secured.

This statutory provision is particularly significant when contrasted with the statement made by Lou: "The weapon used in informal adjustment of cases is moral suasion, backed by the potential authority of the court."[21] Too often that moral suasion became "either-or else" and the children and families were then forced to subject themselves to informal adjustment against their wills. The provisions in the new Family Court Act will prohibit any such actions.

There is a further protection in the Family Court Act which provides that no statements made during the preliminary conference at intake may be admitted into evidence at any adjudicatory hearing under this act or in any criminal court at any time prior to conviction.[22]

The probation officer at intake will attempt, by a variety of techniques, to adjust suitable cases as an alternative to the filing of a petition in matters in which the court would appear to have jurisdiction. Efforts at adjustment under articles 3, 4, 7, and 8 may not extend for a period of more than two months without leave of a judge of the court, who may extend the period for an additional sixty days.[23]

Decision Making at Intake

The process of screening cases which go to the court occurs at several levels. A potential petitioner will have studied or examined the merits of going to court before he decides to seek to file a petition. Police departments which present the bulk of petitions in family and children's courts have more or less clearly defined intra-departmental criteria by which they determine which child will be dealt with at the police level and which child shall be referred to court.

In courts which do not have provision for preliminary procedure, the next level of screening is done by the clerk who prepares the petition and whose decision would be made largely in relation to whether the court has jurisdiction, rather than in terms of the needs of the child and/or the community. The final level of screening in any court is that done by the judge at the point of hearing.

The provision of the Family Court Act of the State of New York, and the Rules of Court thereof, that the preliminary procedure shall be executed by the probation service, presents probation services everywhere in this State with an enormous challenge to provide the kind of staff that can meet this grave responsibility. The individuals chosen for this type of assignment must have not only superior knowledge and skill in interviewing, knowledge of the law and familiarity with community resources, but they must have as well

21. Lou, *op. cit. supra* note 7, at 124.
22. N.Y. Family Ct. Act §§ 334, 735, 824.
23. N.Y. Family Ct. Act §§ 333(c), 424(c), 734(c), 823(c).

the ability to gain a client's confidence quickly and the capacity to make sound decisions on the basis of short contacts and limited information.

Decision making at intake is very important and cannot be overemphasized. Two basic decisions must be made at the point of intake. The first is a relatively simple one—the intake worker must decide whether the matter appears to be within the jurisdiction of the court. To give an example, if the situation involves a delinquency and the child was 16 years of age when the act was committed, there is clearly no jurisdiction in the matter. The potential petitioner can be so advised and can be given information regarding alternate courses of action.

If there is jurisdiction, the next decision is crucial—is the authority and intervention of the court itself necessary? When the answer is in the affirmative, the probation officer at intake is obligated to have a petition filed as expeditiously as possible. The referral should be accompanied by all available material which may assist the court in making a disposition after the judge makes his finding of fact.

When referral for petition is not indicated, the intake officer has three alternatives:

a. that there be no further proceedings;
b. that the matter be referred to a public or voluntary agency;
c. that an attempt should be made on a short term voluntary basis to make an adjustment without the filing of a petition.

The success of probation in implementing intake will depend not only upon the assignment of skilled staff but also upon the training in case selection which is given to the staff involved. Lacking necessary objective criteria, individual staff members may develop their own subjective criteria. When this occurs, the basic criterion may be the nature of the act alleged and its significance to that officer. The story is told of a probation officer in another state whose car had been stolen and who subsequently referred all cases involving automobile theft for petition and judicial action.

Some criteria are basic to all matters handled at intake whether in neglect, delinquency, persons in need of supervision, support, or family offense.[24] The following are situations which should be referred for the filing of a petition and judicial determination:

1. cases in which there is dispute about the allegations of the petition;
2. cases in which either party clearly indicated a desire to appear before the court;
3. cases in which one or more of the parties involved refuse normal cooperation;

24. The criteria suggested in this and the following paragraphs are based on Guides for Juvenile Court Judges, *op. cit. supra* note 16 at ch. VI, "Intake." A staff directive on intake to the Family Court Division, Office of Probation for the Courts of New York City provides additional criteria, as noted in the text.

4. cases in which the welfare and protection of the community is involved.

The following additional criteria requiring filing of a petition in cases of neglect, delinquency, and persons in need of supervision are suggested:

1. cases in which the child has been temporarily removed from his home and not returned thereto or in which the child has been detained prior to the appearance at intake;
2. cases in which a recommendation for temporary removal or detention is indicated;
3. cases in which there is reason to believe that placement or commitment will be necessary;
4. cases in which two or more children are involved in the same delinquent act and in which it has already been decided that one of the respondents must be referred to court on petition.

In cases involving support or family offense, the following criteria are suggested as additional guides in determining which matters should be handled judicially:

1. cases involving emergency;
2. cases in which it appears that the safety of the petitioner or other person is in danger;
3. cases in which there is reason to believe that the respondent is about to leave the jurisdiction.

Two criteria for selecting cases which should be handled without the filing of a petition are common to all matters handled at intake. These criteria are:

1. cases in which the problem presented indicates a need for a relatively short period of service;
2. cases in which the matter has not had a serious impact on the community or does not present an emergency situation.

Intake and Detention

The detention of problem children is always a serious and vexing problem facing juvenile and family courts. Basically, children have a right to be at home with their parents. However, certain circumstances require that some children must be detained pending exploration of their total situation.

Several studies have indicated that children are often unnecessarily detained. This conclusion was also reached by the Joint Legislative Committee on Court Reorganization which prepared the basic legislation for the Family Court Act.[25] As a result, the Act contains the provision that any child alleged to be delinquent or a person in need of supervision is to be released to his parents "unless there is a *substantial probability* that he will not appear in court on the return date or unless there is a *serious risk* that he may before

25. N.Y. Joint Legis. Committee on Court Reorganization, Rep. II, (The Family Court Act) 10 (1962).

the return date do an act which if committed by an adult would be a crime."[26] (Emphasis added.)

The preliminary procedure through which the child has passed before the filing of a petition may be very helpful to the judge in making a sound decision regarding detention, after he has found that the allegations of the petition were sustained. The probation officer can provide the judge with background material secured from the family, school, social agencies, etc. Thus, his decision can be based on the total situation rather than on the offense and whatever information can be educed in a courtroom.

The Challenge Ahead

Intake under the Family Court Act is now underway. It is too early to give reports or to make predictions. What can be said is that intake has given to the probation service the opportunity to determine for and with each person coming to the threshold of the Family Court the services most appropriate and required for his individual needs. It remains for probation to demonstrate that it can satisfactorily discharge this grave responsibility.

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26. N.Y. Family Ct. Act § 728(b)iii (before filing of petition). A similar provision after filing of a petition is found in § 739.

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See also Professor Monrad G. Paulsen's article: Fairness to the Juvenile Offender in 41 Minnesota Law Review 547 (1956 - 57)