1992 REPORT OF THE SUPREME COURT COMMITTEE ON CIVIL PRACTICE

January 31, 1992

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I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendments to R. 1:2-1 -- Proceedings in Open Court; Robes

The Committee was asked by the Supreme Court to consider a rule providing guidelines for closing proceedings and sealing records. The Committee agreed that the subject of open court rooms is adequately covered by current R. 1:2-1. With respect to the issue of sealing a record made in open court, the Committee took the position that the current practice, whereby records may be sealed in the discretion of the judge upon a showing a good cause, should not be changed, and recommended amendments of R. 1:2-1 specifically to articulate this practice as the standard for sealing records. In reaching this conclusion, the majority of the Committee rejected a suggestion that the standard for sealing records should be "in extraordinary circumstances." Further, the Committee is of the view that R. 4:10-3 as currently worded is adequate to deal with material that is not part of the record. See section II.O., below.

The proposed amendments to R. 1:2-1 follow:

1:2-1. Proceedings in Open Court; Robes

All trials, hearings of motions and other applications, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute. If a proceeding is required to be conducted in open court, no record of any portion thereof shall be sealed by order of the court except for good cause shown which shall be set forth on the record. Settlement conferences[, however,] may be heard at the bench or in chambers. Every judge shall wear judicial robes during proceedings in open court.

Note: Source -- R.R. 1:28-6, 3:5-1 (first clause), 4:29-5, 4:118-5, 7:7-1, 8:13-7(c); amended to be effective .

B. Proposed Amendments to R. 1:4-1 -- Caption: Name and Addresses of Party and Attorney; Format

The Committee endorses the suggestion of an attorney and Committee member to address the problem of pro se parties whose addresses and/or telephone numbers change during the course of litigation. Although attorneys ordinarily do advise the court and adverse parties of such changes, the proposed amendment nevertheless requires them, as well as pro se parties, to do so.

The proposed amendments to R. 1:4-1 read as follows:

1:4-1. Caption: Name and Addresses of Party and Attorney; Format

(a) ...no change

(b) Format; Addresses. At the top of the first page of each paper filed, a blank space of approximately 3 inches shall be reserved for notations of receipt and filing by the clerk. Above the caption at the left-hand margin of the first sheet of every paper to be filed there shall be printed or typed the name of the attorney filing the paper, [his] office address and telephone number or, if a party is appearing pro se, the name of such party, [his] residence address and telephone number. No paper shall bear an attorney's address out of the State or an attorney's post office box number in lieu of a street address. An attorney or pro se party shall advise the court and all other parties of a change of address or telephone number if such occurs during the pendency of an action. Papers filed in the trial courts shall have no backer or cover sheet.

Note: Source - R.R. 4:5-8, 4:10-1, 5:5-1(e), 7:5-2(a) (first two sentences); paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (a) redesignated as paragraph (a)(1) and paragraph (a)(2) added November 7, 1988 to be effective January 2, 1989; paragraph (b) amended to be effective .

C. Proposed Amendments to R. 1:6-2 -- Form of Motion; Hearing

At its July 9, 1991 Administrative Conference, the Supreme Court reviewed the recommendations of the Committee on Civil and Family Motion Practice and approved, among others, the recommendation that would require all civil and family motions in a case to be heard by a single "pre-trial judge". The Court asked that the Civil Practice Committee review the form and wording of the amendment to R. 4:25-1 drafted by the Motions Committee to carry out the "pre-trial judge" procedure.

The Committee concluded that since the procedure recommended by the Motions Committee and approved by the Court deals with motions in both civil and family matters, it would be more appropriate to amend R. 1:6-2, the rule of general application concerning motions, than R. 4:25-1, as originally proposed.

Accordingly, the Committee recommends amending R. 1:6-2(d) to provide that, insofar as is possible, all subsequent motions in a case will be heard by the judge who handles the first motion, with the exception of motions directly affecting the calendar, which shall be heard by the Presiding Judge or his or her designee.

The proposed amendments to R. 1:6-2(d) read as follows:

1:6-2. Form Of Motion; Hearing

(a) ...no change

(b) ...no change

(c) ...no change

(d) Civil and Family Part Motions - Oral Argument. Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to all other motions, the request shall be granted as of right. Except as otherwise provided by paragraph (b) and insofar as is practicable, all subsequent motions in the cause, other than motions directly addressed to the trial or arbitration calendar, shall be heard by the same judge who heard the first motion in the cause.

(e) ...no change

(f) ...no change

Note: Source -- R.R. 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978;

former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended to be effective .

D. Proposed Amendments to R. 1:7-4 -- Findings by the Court in Non-Jury Trials

When a motion is decided on the papers, it often happens that 10 days from the date the order is entered pass before the order is received by the attorneys involved in the case. While this delay is outside the attorneys' control, it puts them beyond the time limit set forth in R. 4:49-2 for moving to alter or amend the order.

The Committee proposes that Rules 1:7-4 and 4:49-2 be amended to date the 10-day period within which a motion to alter or amend an order must be filed from the date of service of the order by the party seeking relief; the date of service can be proved by affidavit. See section I.Z., below, for the proposed amendment to R. 4:49-2.

In addition, the Committee would amend the title of the rule to reflect its application to decisions on motions.

The proposed amendments to R. 1:7-4 read as follows:

1:7-4. Findings by the Court in Non-Jury Trials and on Motions

In civil actions tried without a jury and on every motion decided by written orders which are appealable as of right, the court shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon. In criminal, quasi-criminal and juvenile actions tried without a jury, the court shall make a general finding and shall, in addition, on request find the facts specially. The court shall thereupon direct the entry of the appropriate judgment. Upon motion made not later than 10 days [after entry of final order or judgment] after service of the final order or judgment upon all parties by the party obtaining it, the court may grant a rehearing or may, on the papers submitted, amend or add to its findings and may amend the final order or judgment accordingly, but the failure of a party to make such motion or to object to the findings shall not preclude [his] that party's right thereafter to question the sufficiency of the evidence to support the findings. The motion to amend the findings, which may be made with a motion for a new trial, shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred. Motions for reconsideration of interlocutory orders shall be determined pursuant to R. 4:42-2.

Note: Source - R.R. 3:7-1(c), 4:53-1, 4:53-2, 8:7-2(c); caption and text amended November 1, 1985 to be effective January 2, 1986; caption and text amended November 5, 1986 to be effective January 1, 1987; amended November 7, 1988 to be effective January 2, 1989; caption and text amended to be effective .

E. Proposed Amendments to Rules 1:20-1, 1:20B-2, 1:21-6, 1:28-1 and 1:35-1 -- re New Jersey Lawyers' Fund for Client Protection

With the name of the former Clients' Security Fund having been changed in 1991 to the New Jersey Lawyers' Fund for Client Protection, the Committee recommends amending the appropriate rules to reflect this change.

The proposed amendments to Rules 1:20-1, 1:20B-2, 1:21-6, 1:28-1 and 1:35-1 read as follows:

1:20-1. Disciplinary Jurisdiction; Annual Fee and Registration

(a) ...no change

(b) ...no change

(c) To facilitate the collection of the annual fee provided for in paragraph (b), every attorney admitted to practice law in this state shall, beginning March 1, 1984, and thereafter annually on or before February 1 of every year, file initially with the [Clients' Security Fund] New Jersey Lawyers' Fund for Client Protection (hereinafter referred to as the Fund) together with the attorney's annual fee a registration statement, on a form prescribed by the Administrative Director of the Courts with the approval of the Supreme Court. All registration statements shall be filed by the Fund with the Administrative Office of the Courts which may destroy the registration statements after one year. Each lawyer shall file with the Fund a supplemental statement of any change in the home, primary bona fide law office and court notice addresses and the telephone numbers thereof previously submitted, either prior to such change or within 30 days thereafter. All lawyers first becoming subject to these rules by admission to the practice of law before the courts of this state after February 1, 1984 shall file the statement required by this rule prior to or within 30 days of the date of admission.

(d) ...no change

Note: Adopted February 23, 1978 to be effective April 1, 1978. Any matter pending unheard before a County Ethics Committee as of April 1, 1978 shall be transferred, as appropriate, to the District Ethics Committee or the District Fee Arbitration Committee having jurisdiction. Any matter heard or partially heard by a county Ethics Committee on April 1, 1978 shall be concluded by such Committee and shall be reported on in accordance with these rules; amended July 16, 1981 to be effective September 14, 1981. Caption amended and first two paragraphs amended and redesignated as paragraph (a); new paragraphs (b), (c) and (d) adopted January 31, 1984 to be effective February 15, 1984; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended _____ to be effective _____.

1:20B-2. Appointment

The Supreme Court shall appoint nine members of the Bar of this state to act as the Financial Committee. Such membership shall be as follows:

(a) the Chief Justice of the Supreme Court, the Administrative Director of the Courts, the Chair of the Disciplinary Review Board and the Chair of the [Clients' Security Fund] New Jersey Lawyers' Fund for Client Protection, or a designee of such members, each of whom shall serve without specified term at the pleasure of the Supreme Court;

(b) ...no change

(c) ...no change

Note: Adopted January 31, 1984 to be effective February 15, 1984; paragraph (a) amended _____ to be effective _____.

1:21-6. Recordkeeping; Sharing of Fees; Examination of Records

(a) Required Bank Accounts. Every attorney who practices in this state shall maintain in a financial institution in New Jersey, in the attorney's own name, or in the name of a partnership of attorneys, or in the name of the professional corporation of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed:

(1) a trustee account or accounts, separate from any business and personal accounts and from any fiduciary accounts that the attorney may maintain as executor, guardian, trustee, or receiver, or in any other fiduciary capacity, into which trustee account or accounts funds entrusted to the attorney's care shall be deposited; and

(2) a business account into which all funds received for professional services shall be deposited.

Other than fiduciary accounts maintained by an attorney as executor, guardian, trustee, or receiver, or in any other similar fiduciary capacity, all trustee accounts, whether general or specific, as well as all deposit slips and checks drawn thereon, shall be prominently designated as an "Attorney Trust Account." Nothing herein shall prohibit any additional descriptive designation for a specific trust account. All business accounts, as well as all deposit slips and all checks drawn thereon, shall be prominently designated as [either] an

"Attorney Business Account," an "Attorney Professional Account" or an "Attorney Office Account."

The names of institutions in which such accounts are maintained and identification numbers of each account shall be recorded on the annual registration form filed with the annual payment, pursuant to R. 1:20-1(b) and R. 1:28-2, to the Ethics Financial Committee and the [Clients' Security Fund of the Bar of New Jersey] New Jersey Lawyers' Fund for Client Protection. Such information shall be available for use in accordance with paragraph (g) of this rule.

An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether [or not] the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon 30 days notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by said financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2)

in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within 5 banking days of the date of presentation for payment against insufficient funds. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records upon receipt of a subpoena therefor. Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable cost of producing the reports and records required by this rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(b) ...no change

(c) ...no change

(d) ...no change

(e) ...no change

(f) ...no change

(g) ...no change

(h) ...no change

(i) ...no change

Note: Source - R.R. 1:12-8A(a)(b)(c). Caption amended and paragraph (d) adopted July 1, 1970 effective immediately; paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended April 2, 1973 to be effective immediately; paragraph (c) amended July 17, 1975 to be effective September 8, 1975; caption and paragraph (a) amended July 29, 1977 to be effective September 6, 1977. Paragraphs (a) and (b) amended, new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated and amended February 23, 1978 to be effective April 1, 1978; paragraphs (b), (c) and (h) amended November 22, 1978 to be effective January 1, 1979; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b), (c), (g) and (h) amended January 31, 1984 to be effective February 15, 1984 except that the amendments to paragraph (a)(2) regarding designations to be placed on trust and business accounts shall not be effective until July 1, 1984; effective date of amendment to paragraph (a)(2) deferred on June 15, 1984 from July 1, 1984 to September 1, 1984; paragraphs (a)(1) and (2), (e)(1) and (h) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a), (e) and (f) amended November 1, 1984 to be effective March 1, 1985; paragraphs (b) and (c) amended and paragraph (i) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended to be effective .

RULE 1:28. [CLIENTS' SECURITY FUND]
NEW JERSEY LAWYERS' FUND FOR CLIENT PROTECTION

1:28-1. Purpose; Administration; Appointments

(a) Administration. The Supreme Court shall appoint 6 trustees to administer and operate, in accordance with these rules, the [Clients' Security Fund of the Bar of New Jersey] New Jersey Lawyers' Fund for Client Protection, whose purpose is the reimbursement, to the extent and in the manner provided by these rules, of losses caused by the dishonest conduct of members of the bar of this State.

(b) ...no change

(c) ...no change

(d) ...no change

(e) ...no change

(f) ...no change

Note: Source -- R.R. 1:22A-1(a)(b)(c)(d)(e); paragraphs (a)(b), and (c) amended and paragraph (f) adopted June 29, 1990 to be effective September 4, 1990; paragraph (a) amended to be effective _____.

1:35-1. The Judicial Conference of New Jersey

(a) ...no change

(b) Membership. The membership of the conference shall be as follows:

(1) ...no change

(2) ...no change

(3) ...no change

(4) The Attorney General, the Public Advocate, the Administrative Director of the Courts, the clerks of the Supreme, Superior and Tax Courts, the [chairman] chair of the Board of Bar Examiners, the [chairman] chair of the Committee on Character, the [chairman] chair of the Advisory Committee on Professional Ethics, the [chairman] chair of the Committee on the Unauthorized Practice of Law, the [chairman] chair of the trustees of the [Clients' Security Fund] New Jersey Lawyers' Fund for Client Protection, the [C]chair of the Ethics Financial Committee, 3 trial court administrators to be selected by the Supreme Court, and the deans of all accredited law schools in New Jersey.

(5) ...no change

(6) ...no change

(7) ...no change

(8) ...no change

(c) ...no change

(d) ...no change

(e) ...no change

(f) ...no change

Note: Source - R.R. 1:23-1(a)(b)(c)(d)(f)(g); paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (b)(1), (2), and (4) and paragraph (b)(8) adopted April 2, 1980 to be effective immediately; paragraphs (b)(1), (2), and (4) amended July 8, 1980 to be effective July 15, 1980; paragraph (e) amended July 22, 1983 to be effective September 12, 1983; paragraph (b)(2) amended July 26, 1984 to be effective September 10, 1984; paragraph (b)(4) amended November 5, 1986 to be effective January 1, 1987; paragraph (b) amended to be effective _____.

F. Proposed Amendments to R. 1:21-1(c) -- Who May Practice; Appearance in Court

In July 1990, a Tax court judge proposed that R. 1:21-1(c) be amended to extend the prohibition on pro se appearances by corporations to general and limited partnerships. The Committee sought the views of the Committee on the Unauthorized Practice of Law, which reviewed the issue in March 1991. The UPL Committee saw no distinction between corporations and partnerships, either general or limited, and recommended that R. 1:21-1(c) be amended to apply to all partnerships.

The Committee then sought the views of the Special Civil Part Practice Committee, as the issue of pro se partnership appearances is likely to arise in landlord-tenant matters. That group agreed that in most tenancy actions lay representation by a member of the landlord-business entity should be prohibited. The Special Civil Part Practice Committee, however, would make an exception for general partnerships with four or fewer rental units.

Accordingly, the Committee would amend R. 1:21-1(c) to prohibit pro se appearances by any business entity other than a sole proprietor, and with the exception carved out by the Special Civil Part Practice Committee incorporated into the rule.

The proposed amendments to R. 1:21-1(c) read as follows:

1:21-1. Who May Practice; Appearance in Court

(a) ...no change

(b) ...no change

(c) Prohibition on [Corporation] Business Entities. Except as otherwise provided by paragraph (d) of this rule and by R. 1:21-1A (professional corporations), R. 6:10 (appearances in landlord-tenant actions), R. 6:11 (appearances in small claims actions), R. 7:4-2(b) (pleas in municipal court), R. 7:4-4(a) (presence of defendant in municipal court) and by R. 7:7-4 (municipal court violations bureau), a [corporation shall not practice law in this State, nor shall it] business entity other than a sole proprietor shall not appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State. The fact that an officer, trustee, director, agent or employee of a corporation shall be an attorney authorized to practice in this State shall not be held to entitle such individual or corporation to do any act prohibited by these rules.

(d) ...no change.

(e) ...see section I.G. of this report.

Note: Source - R.R. 1:12-4(a)(b)(c)(d)(e)(f). Paragraph (c) amended by order of December 16, 1969 effective immediately; paragraphs (a) and (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraph (a) amended September 21, 1981 to be effective immediately; paragraph (c) amended and paragraph (d) adopted July 15, 1982 to be effective September 13, 1982; paragraph (a) amended August 13, 1982 to be effective immediately; paragraph (e) adopted July 22, 1983 to be effective September 12, 1983; paragraph (c) amended November 1, 1985 to be effective January 2, 1986; paragraph

(a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended to be effective _____.

G. Proposed Amendments to R. 1:21-1(e) -- Who May Practice; Appearance in Court

At the end of the 1988-90 committee term, the Civil Practice Committee considered a request by the Office of Administrative Law (OAL) that R. 1:21-1(e) be amended specifically to authorize representation of parents of handicapped children by non-lawyer education specialists in special education proceedings before the OAL. Such an amendment is responsive to the decision in Arons v.New Jersey Board of Education, 842 F.2d 58 (3d Cir. 1988), which held that representational services by such specialists -- a fairly common practice in New Jersey -- is impermissible under R. 1:21-1(e) as it is currently written.

To permit the Committee to study this important question fully, the Supreme Court issued an order temporarily relaxing R. 1:21-1(e) to permit the continued appearance by non-attorney specialists at special education hearings before the OAL. The order expires on September 1, 1992.

The proposed amendment, which has been approved by the Hon. Jaynee LaVecchia on behalf of the OAL and by the Office of the Public Advocate, makes it clear that no fee may be received for such lay representation. The Committee further determined that the issue of the qualifications of or limitations on non-lawyers appearing as representatives is fully covered in the administrative regulations implementing R. 1:21-1(e).

1:21-1. Who May Practice; Appearance in Court

(a) ...no change

(b) ...no change

(c) ...see section I.F. of this report

(d) ...no change

(e) Appearances Before Office of Administrative Law. Subject to such limitations and procedural rules as may be established by the Office of Administrative Law, an appearance by a non-attorney in a contested case before the Office of Administrative Law may be permitted, on application, in any of the following circumstances:

(1) ...no change

(2) ...no change

(3) ...no change

(4) ...no change

(5) ...no change

(6) ...no change

(7) ...no change

(8) to represent parents or children in special education proceedings, provided the non-attorney has knowledge or training with respect to handicapped pupils and their educational needs so as to enable the non-attorney to facilitate the presentation of the claims or defenses of the parent or child.

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney

nor by any person who receives any fee for such representation.

Note: Source - R.R. 1:12-4(a)(b)(c)(d)(e)(f). Paragraph (c) amended by order of December 16, 1969 effective immediately; paragraphs (a) and (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraph (a) amended September 21, 1981 to be effective immediately; paragraph (c) amended and paragraph (d) adopted July 15, 1982 to be effective September 13, 1982; paragraph (a) amended August 13, 1982 to be effective immediately; paragraph (e) adopted July 22, 1983 to be effective September 12, 1983; paragraph (c) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (e)(8) adopted _____ to be effective _____.

H. Proposed Amendment to R. 1:21-1A -- Professional Corporations for the Practice of Law

The proposed amendment is a housekeeping change to update the obsolete reference to former DR 2-105 to current RPC 7.5.

The proposed amendment reads as follows:

1:21-1A. Professional Corporations for the Practice of Law

(a) ...no change

(b) ...no change

(c) The corporate name of the professional corporation shall comply with the provisions of [DR 2-105] RPC 7.5 and shall contain only the full or last names of one or more of its shareholders or members of a predecessor firm, whether the shareholder or member be living, deceased or retired. Wherever the corporate name of the professional corporation is used it shall be followed by the phrase "A professional corporation," or by any other phrase or abbreviation authorized by N.J.S.A. 14A:17-14 to indicate that it is a professional corporation. The corporate name shall be used on all pleadings, correspondence or other documents. Correspondence, pleadings and other documents executed in connection with the practice of law shall be executed on behalf of the corporation by one of its attorney employees. Corporate documents executed other than in connection with the practice of law may be executed on behalf of the corporation by an authorized employee who is not licensed to practice law.

(d) ...no change

(e) ...no change

(f) ...no change

Note: Adopted December 16, 1969 effective immediately; paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; paragraphs (a), (b), (c), (d) and (e) amended and paragraph (f) adopted July 16, 1981 to be

effective September 14, 1981; paragraph (c) amended January 16, 1984, to be effective immediately; paragraph (c) amended to be effective .

I. Proposed Amendments to R. 1:21-2 -- Appearances Pro Hac Vice

The Committee was asked to consider several aspects of the pro hac vice rule during the course of the 1990-92 term. With respect to its study of the operation and practical effect of the rule, see section V.F., below. The Committee was also asked to clarify whether attorneys admitted pro hac vice must pay annual assessments to the New Jersey Lawyers' Fund for Client Protection until the matter for which they were admitted is concluded, or whether they must pay only for the year or years in which an in-person appearance in the case is made. The Committee concluded unanimously that the out-of-state attorney must pay to the Fund annually during the period of viability of the pro hac vice order. The proposed amendment to R. 1:21-2(a) reflects this determination.

Further, in light of Fuller v. Diesslin, 868 F.2d 604 (3d Cir. 1989), which establishes a single criterion for pro hac vice admission in criminal cases, namely, "unless considerations of judicial administration supervene," the Civil Practice Committee and the Criminal Practice Committee join in proposing an amendment to R. 1:21-2(a)(3) distinguishing civil and criminal matters as to the criteria for admission.

The proposed amendments to R. 1:21-2 read as follows:

1:21-2. Appearances Pro Hac Vice

(a) Conditions for Appearance. An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual or a member or employee of a partnership or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this state, of good standing, who does not maintain in this state a bona fide office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this state who is domiciled in and maintains a bona fide office for the practice of law in this state or maintains in this state the attorney's principal office for the practice of law and who is therefore, pursuant to R. 1:21-1(a), authorized to practice in this state. No attorney shall be admitted under this rule without annually complying with R. 1:20-1(b) and R. 1:28-2 during the period of admission. An application for admission pro hac vice shall be made on motion to all parties in the matter [and]. In both civil and criminal actions, the motion shall be supported by an affidavit or certification of the attorney stating that:

(1) ...no change

(2) the attorney is associated in the matter with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1; and

(3) the client has requested to be represented by said attorney[; and].

In criminal actions a motion so supported shall be granted unless the court finds, for specifically stated reasons, that there are supervening considerations of judicial administration. In civil actions the motion shall be granted only if the court finds, from the supporting affidavit, that [(4)] there is good cause for such admission, which shall include at least one of the following:

(i) ...no change

(ii) ...no change

(iii) ...no change

(iv) ...no change

(v) ...no change

(vi) ...no change

(b) ...no change

(c) ...no change

(d) ...no change

Note: Source - R.R. 1:12-8. Amended December 16, 1969 effective immediately; caption and text amended November 27, 1974 to be effective April 1, 1975; amended January 10, 1979 to be effective immediately; former rule amended and redesignated as paragraphs (a) and (b) and paragraph (c) adopted July 22, 1983 to be effective September 12, 1983; paragraph (a) amended January 31, 1984 to be effective February 15, 1984; new paragraph (c) adopted and former paragraph (c) redesignated as paragraph (d) November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended to be effective .

J. Proposed Amendments to R. 1:28-2 -- Payment to Fund; Enforcement

The Committee unanimously approved the suggestion of an attorney and Committee member to revise R. 1:28-2 to exempt full-time sitting judges, as well as attorneys who are employed full-time by the court system and thus are precluded from otherwise practicing law, from the requirement to make annual payment to the New Jersey Lawyers' Fund for Client Protection.

In amending the rule to accommodate this recommendation, the Committee reorganized the text so that all exceptions are now incorporated into a new subsection (b). In the event the judicial exception is rejected by the Court, the Committee continues to recommend the structural reorganization of the rule.

The proposed amendments to R. 1:28-2 read as follows:

1:28-2. Payment to the Fund; Enforcement

(a) Generally. Except as hereinafter provided, each holder of a plenary license to practice law in the State of New Jersey shall pay annually to the treasurer of the Fund a sum that shall be determined each year by the Supreme Court. [No holder of a plenary license shall be required to make payment in respect to any calendar year during which he will be (1) on full-time active duty with the armed forces, VISTA or Peace Corps and not engaging in any way in private practice; or, (2) retired completely from the practice of law; but he shall be considered in all respects an inactive New Jersey attorney. Newly admitted attorneys shall not be required to make such payments for the balance of the calendar year of their plenary admission and for the next succeeding calendar year, but they shall be considered in all respects active New Jersey attorneys. Attorneys who have been admitted to practice for fifty years or more shall not be required to make such payment but shall be considered in all respects active New Jersey attorneys.] The treasurer shall annually report the names of all attorneys failing to comply with the provisions of this Rule to the Supreme Court for inclusion on the list of those attorneys deemed ineligible to practice law in New Jersey by order of the Court. An attorney shall be removed from the Ineligible List without further order of the Court upon payment to the Fund of the amount due for every year plus an additional fee of $25 if the attorney's name is

being removed from one calendar year's Ineligible List or $50 if the attorney's name is being removed from two or more calendar years' Lists.

For the purpose of annual assessment all members of the Bar shall report changes of address as they occur and thus keep their billing address current with the Fund at all times.

Any member of the Bar who receives a billing notice addressed to another member of the Bar shall either forward the notice to the intended recipient or return it to the Fund.

(b) Exceptions. The following categories of plenary license holders shall be exempt from payment:

(1) Justices of the Supreme Court, and full-time judges of any court, including Administrative Law Judges, who are not permitted to practice law;

(2) Attorneys who are employed full-time by the court system and who are precluded by their employment from otherwise practicing law;

(3) Newly admitted attorneys, for the balance of the calendar year of their plenary admission and for the next succeeding calendar year.

(4) Attorneys who have been admitted to practice for fifty years or more.

(5) Attorneys on full-time active duty with the armed forces, VISTA or the Peace Corps and not engaging in any way

in private practice, but they shall be considered in all respects inactive New Jersey attorneys; and

(6) Attorneys who have retired completely from the practice of law, but they shall be considered in all respects inactive New Jersey attorneys.

Note: Source - R.R. 1:22A-2; amended July 17, 1975 to be effective September 8, 1975; amended January 31, 1984 to be effective February 15, 1984; amended June 29, 1990 to be effective September 4, 1990; new caption and redesignated paragraph (a) amended and paragraph (b) adopted _____ to be effective _____.

K. **Proposed Amendments to Rules 2:2-3, 2:5-1; 2:5-2, 2:5-3, 2:6-2, 2:6-4, 2:6-6, 2:6-7, 2:6-10, 2:6-11, 2:8-1, 2:11-6, 2:12-2, 2:12-7 and 2:12-8 -- re Appellate Practice**

The Committee recommends a package of amendments to numerous rules governing appellate practice. The Appellate Division Rules Committee, the Clerk of the Supreme Court, the Clerk of the Appellate Division, and in many cases, the Appellate Practices Study Committee of the State Bar were consulted in the drafting of these rules.

- R. 2:2-3(a)(3): the proposed amendment would make it clear that an order appointing a statutory or liquidating receiver is appealable as of right. See section I.AA., below, for the proposed companion amendment to R. 4:53-1.

- R. 2:5-1(h): the proposed change would conform appellate practice to trial practice (as reflected in R. 4:28-4(a)) by requiring notice to the Attorney General if the validity of a state rule or regulation is questioned on appeal.

- R. 2:5-2: the proposed changes would make it clear that an applicant moving for leave to appeal need not pay the $300 fee required to answer the costs of the appeal until the motion is granted.

- R. 2:5-3(a) and (e): the proposed changes would eliminate the requirement in (a) that the transcript request form, and the requirement in (e) that the transcript delivery certification, be sent to the AOC's Chief of Court Reporting Services.

- R. 2:6-2: a new subsection (d) is proposed to make it clear that a respondent/cross appellant is to file a single brief, both addressing the cross appeal and answering the appellant's brief.

- R. 2:6-4: a new subsection (e) is proposed to make it clear that the brief of the appellant/cross respondent is to include any reply brief deemed necessary.

- R. 2:6-6(b): the proposed amendments specify the color of the covers of the respondent/cross appellant's and the appellant/cross respondent's briefs.

- R. 2:6-7: the proposed changes eliminate the smaller size printed brief, and impose page limits for the respondent/cross appellant's and the appellant/cross respondent's briefs.

- R. 2:6-10: the proposed amendments eliminate the distinction between documents printed or "otherwise reproduced"; clarify spacing and type size requirements; and clarify binding requirements.

- R. 2:6-11(a) and (b): the proposed amendments to subsection (a) would require the appellant to file and serve the transcript within 10 days after receipt of the complete set; the proposed amendments to subsection (b) cross-reference the brief requirements incorporated in the proposed amendments to R. 2:6-2(d) and R. 2:6-4(e), and specify that, when a cross appeal is taken, the responsibility for ordering, filing and serving the transcript lies with the party who first appeals.

- R. 2:8-1: the proposed changes eliminate any distinction between printed and typed briefs.

- R. 2:11-6(a): the proposed changes eliminate any distinction between printed and typed briefs.

- R. 2:12-2(a): the proposed changes eliminate any distinction between printed and typed briefs.

- R. 2:12-7(a): the proposed changes require that the notice of petition for certification be annexed to the petition for certification.

- 2:12-8: the proposed changes eliminate any distinction between printed and typed briefs.

The proposed amendments to Rules 2:2-3, 2:5-1, 2:5-2, 2:5-3, 2:6-2, 2:6-4, 2:6-6, 2:6-7, 2:6-10, 2:6-11, 2:8-1, 2:11-6, 2:12-2, 2:12-7 and 2:12-8 read as follows:

2:2-3. Appeals to the Appellate Division From Final Judgments, Decisions, Actions and From Rules; Tax Court

(a) As of Right. Except as otherwise provided by R. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by R. 8:2 (tax matters) and matters governed by R. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;

(3) in such cases as are provided by law.

Final judgments of a court, for appeal purposes, shall also include those referred to by R. 4:42-2 (certification of interlocutory order), R. 4:53-1 (order appointing statutory or liquidating receiver), R. 5:8-6 (final custody determination in bifurcated matrimonial action), and R. 5:10-6 (order on preliminary hearing in adoption action).

(b) ...no change

Note: Source - R.R. 2:2-1(a)(b)(c)(d)(f)(g), 2:2-4, 2:12-1, 3:10-11, 4:88-7, 4:88-8(a) (first sentence), 4:88-10 (first sentence), 4:88-14, 6:3-11(a). Paragraph (a) amended July 14, 1972 to be effective September 5, 1972; paragraph (b) amended November 27, 1974 to be effective April 1, 1975; caption and paragraph (a) amended June 20, 1979 to be effective July 1, 1979; paragraph (a) amended July 8, 1980 to be effective July 15, 1980; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(1) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (b) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended to be effective .

2:5-1. Notice of Appeal; Order in Lieu Thereof; Case Information Statement

(a) ...no change

(b) ...no change

(c) ...no change

(d) ...no change

(e) ...no change

(f) ...no change

(g) ...no change

(h) Attorney General and Attorneys for Other Governmental Bodies. If the validity of a [statute, executive order, franchise or constitutional provision] State constitutional provision or of a statute, rule, regulation, executive order or franchise of this State is questioned on an appeal, the party raising the question shall mail notice of the appeal to the Attorney General unless he or she is a party to the appeal or has received notice of the action in the court below. If the validity of an ordinance, regulation or franchise of a governmental subdivision, affecting the public interest, is questioned on an appeal, the party raising the question shall mail notice of the appeal to the attorney or chief legal officer of such subdivision unless he or she is a party to the appeal or has received notice of the action in the court below. The notice shall specify the provision thereof that is challenged and shall be mailed within 5 days after the filing of the notice of appeal, but the appellate court shall have

jurisdiction of the appeal notwithstanding a failure to give the notice required by this rule.

Note: Source - R.R. 1:2-8(a) (first, second and fifth sentences) (b) (c) (d) (h), 1:4-3(a) (second sentence), 4:61-1(d), 4:88-8 (second sentence), 4:88-10 (second, third and fourth sentences), 6:3-11(b), 7:16-3. Paragraph (f) amended and paragraph (h) adopted July 7, 1971 to be effective September 13, 1971; paragraphs (a), (b), (e) and (f) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended October 5, 1973 to be effective immediately; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (b) and (f) amended July 29, 1977 to be effective September 6, 1977; paragraph (f) amended July 24, 1978 to be effective September 11, 1978; paragraph (e) amended and paragraph (f)(1) adopted and (f)(2) amended July 16, 1981 to be effective September 14, 1981; paragraph (d) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a), (f) and (g) amended March 22, 1984, to be effective April 15, 1984; caption, paragraphs (a), (b), (e), (f)(1) and (f)(2) amended November 1, 1985 to be effective January 2, 1986; paragraphs (f)(1) and (f) (2) amended November 7, 1988 to be effective January 2, 1989; paragraph (h) amended to be effective .

2:5-2. Deposits for Costs; Application for Dismissal for Default

In all civil appeals the appellant shall, within 30 days after filing the notice of appeal or after entry of an order granting leave to appeal, deposit with the clerk of the appellate court $300 to answer the costs of the appeal. [On the filing of a motion for leave to appeal in a civil action, the applicant shall deposit with the clerk of the appellate court $300 to answer the costs of the application and the costs of the appeal if leave is granted.] The party making the deposit shall give notice thereof to all other interested parties. If the deposit is not made within the time stated herein the appeal [or application for leave to appeal] may be dismissed with costs on the application of any party. No deposit for costs shall be required where an appeal is taken [or application for leave to appeal is made] by the State or any agency, officer or political subdivision thereof, or by an appellant who has filed a supersedeas bond or made a deposit in lieu thereof pursuant to R. 1:13-3(c), or if leave is granted to appeal as an indigent pursuant to R. 2:7-1.

Note: Source -- R.R. 1:2-10, 2:2-3(b), 2:2-5 amended July 16, 1981 to be effective September 14, 1981; amended to be effective .

2:5-3. Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

(a) Request for Transcript; Prescribed Form. Except as otherwise provided by R. 2:5-3(c), if a verbatim record was made of the proceedings before the court, agency or officer from which the appeal is taken, the appellant shall, no later than the time of the filing and service of [his] the notice of appeal, serve a request for the preparation of an original and copy of the transcript, as appropriate, (1) upon the reporter who recorded the proceedings and upon the reporter supervisor for the county if the appeal is from a judgment of the Superior Court, or (2) upon the clerk of the court if the appeal is from a judgment of the Tax Court or a municipal court, or (3) upon the agency or officer if the appeal is from administrative action. The appellant may, at the same time, order from the reporter, court clerk, or agency the number of additional copies [he will be] required by R. 2:6-12 to file and serve. If the appeal is from an administrative agency or officer which has had the verbatim record transcribed, such transcript shall be made available to the appellant on [his] request for reproduction for filing and service. The request for transcript shall state the name of the judge or officer who heard the proceedings, the date or dates of the trial or hearing and shall be accompanied by a deposit as required by R. 2:5-3(d). The request for transcript shall be in a form prescribed by the Administrative Director of the Courts. A copy of the

request for transcript shall be mailed to all other interested parties[,] and to the clerk of the appellate court [and to the Chief, Court Reporting Services, Administrative Office of the Courts]. The provisions of this paragraph shall not apply if the original and first carbon of the transcript have already been prepared and are on file with the court.

(b) ...no change

(c) ...no change

(d) ...no change

(e) Preparation and Filing. The court reporter, clerk, or agency, as the case may be, shall promptly prepare or arrange for the preparation of the transcript in accordance with standards fixed by the Administrative Director of the Courts. The person preparing the transcript shall deliver the original to the appellant and a copy to the court reporter supervisor in the case of an appeal from the Superior Court, to the clerk of the court in the case of an appeal from the Tax Court or a municipal court, or to the agency in the case of an administrative appeal. The person preparing the transcript shall also forthwith notify all parties of such deliveries. When the last volume of the entire transcript has been delivered to the appellant, the court reporter supervisor, clerk or agency, as the case may be, shall certify its delivery on a form to be prescribed by the Administrative Director of the Courts. That transcript delivery certification and a complete set of the transcripts shall be forwarded immediately

to the clerk of the court to which the appeal is being taken. A copy of the certification shall also then be sent to the appellant [and the Chief, Court Reporting Services, Administrative Office of the Courts]. The appellant shall serve a copy of the certification on all other parties within seven days after receipt and, if the appeal is from the conviction of an indictable offense, on the New Jersey Division of Criminal Justice, Appellate Section. The appellant shall file proof of such service with the clerk of the court to which the appeal has been taken.

(f) ...no change

Note: Source -- R.R. 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88-10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended to be effective .

2:6-2. Contents of Appellant's Brief

(a) ...no change

(b) ...no change

(c) ...no change

(d) Respondent/Cross Appellant's Brief. The respondent/cross appellant shall file a single brief both addressing the cross appeal and answering the appellant's brief.

Note: Source - R.R. 1:7-1(a)(b)(d)(e)(g); amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended, former paragraphs (a)(b)(c) and (e) redesignated subparagraphs (1)(2)(3) and (5), subparagraph (4) and paragraphs (b) and (c) adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended January 10, 1979 to be effective immediately; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(5) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and (b) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; new paragraph (d) added to be effective .

2:6-4. Contents of Respondent's Brief; Statement in Lieu of Brief; Responsibility to File

(a) ...no change

(b) ...no change

(c) ...no change

(d) ...no change

(e) Appellant/Cross Respondent's Brief. On a cross appeal, the brief of the appellant/cross respondent answering the points raised in support of the cross appeal shall also include a reply brief, if any is deemed necessary.

Note: Source -- R.R. 1:7-4(a)(1)(2)(4)(5)(7)(b); text deleted and paragraphs (a)(b)(c) and (d) adopted July 29, 1977 to be [effected] effective September 6, 1977; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraphs (a)(b)(c) and (d) amended November 2, 1987 to be effective January 1, 1988; paragraph (e) adopted _____ to be effective _____.

2:6-6. Covers of Briefs and Appendices

Except as otherwise provided by R. 2:6-2(b), covers of briefs and appendices shall be as follows:

(a) ...no change

(b) Color[; Weight]. The covers of appellant's brief and appendix, respondent's brief and appendix, and appellant's reply brief and appendix shall be white, blue and buff, respectively. On a cross appeal, the respondent/cross appellant's brief filed pursuant to R. 2:6-2(d) shall have a blue cover, and the appellant/cross respondent's response thereto, filed pursuant to R. 2:6-4(e), shall have a buff cover, as shall any permitted subsequent brief of any other party. Covers of all briefs and appendices shall be of a firm material but not glassine.

Note: Source - R.R. 1:7-6(a) (b) (c) (d) (e) (f). Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; first sentence adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended _____ to be effective _____.

2:6-7. Length of Briefs

The initial briefs of parties shall not exceed [50 pages if printed or] 65 pages [if typed or otherwise reproduced] and reply briefs shall not exceed [15 pages if printed or] 20 pages [if typed or otherwise reproduced]. The brief of a respondent/cross appellant filed pursuant to R. 2:6-2(d) shall not exceed 90 pages, and the brief of an appellant/cross respondent filed pursuant to R. 2:6-4(e) shall not exceed 65 pages. These page limitations shall be exclusive of tables of contents and citations and may be relaxed by leave of court.

Note: Source - R.R. 1:7-7; amended November 7, 1988 to be effective January 2, 1989; amended _____ to be effective _____.

2:6-10. Format of Briefs and Other Papers

All briefs, appendices, petitions, motions, transcripts and other papers may [either] be [printed or] reproduced by any [other] method capable of providing plainly legible copies.[, such as typed carbon copies, mimeograph, multigraph, multilith, ditto, photocopy or electrostatic copies.] Paper shall be of good quality, opaque and unglazed. Coated paper may be used. Where the method of reproduction permits, color of paper shall be India eggshell. Copy may be printed on both sides provided duplicating or text paper of not less than 50 lb. weight is used. [If copy is typed, type size shall be pica or larger and double spaced.] Papers [if printed shall be approximately 6 inches by 9.25 inches and if otherwise reproduced] shall be approximately 8.5 inches by 11 inches and shall contain no more than 26 double-spaced lines of no more than 65 characters including spaces, each of no less than 10-point type. Footnotes and indented quotations may, however, be single-spaced. Margins shall be approximately one inch. The stenographic transcript or other papers on file or in evidence may be reproduced without retyping in which event the page size, but not the margin requirements, shall be observed. Papers shall be securely fastened, either bound along the left margin or stapled in the upper lefthand corner. [Papers should be bound or stapled along the left margin or in the upper lefthand corner.] Covers shall conform to R. 2:6-6(b).

Note: Source - R.R. 1:7-10. Amended July 7, 1971 to be effective September 13, 1971; amended _____ to be effective _____.

2:6-11. Time for Serving and Filing Briefs; Appendices; Transcript; Notice of Custodial Status

(a) Time Where No Cross Appeal Taken. The transcript shall be filed pursuant to 2:5-3(e) and served by appellant within 10 days after the appellant's receipt of a complete set. Except as otherwise provided by R. 2:9-11 (sentencing appeals), the appellant shall serve and file [his] a brief and appendix[, and the transcript,] within 45 days after the delivery to [him] appellant of the transcript, if a verbatim record was made of the proceedings below; or within 45 days after the filing of the settled statement of the proceedings, if no verbatim record was made of the proceedings below; or within 45 days of the filing of the notice of appeal if a transcript or settled statement has been filed prior to a filing of the notice of appeal or if no transcript or settled statement is to be filed; or, on an appeal from a state administrative agency, within the time stated above or within 45 days after the service of the statement of the items comprising the record on appeal required by R. 2:5-4(b), whichever is later. The respondent shall serve and file an answering [his] brief and appendix, if any, within 30 days after the service of the appellant's brief. The appellant may serve and file a reply brief within 10 days after the service of the respondent's brief.

(b) Time Where Cross Appeal Taken. Except as otherwise provided by R. 2:9-11 (sentencing appeals), if a cross appeal

has been taken, the party first appealing, who shall be designated the appellant/cross respondent, shall serve and file the first brief and appendix[, and the transcript,] within 30 days after the service of the notice of cross appeal or within the time prescribed for appellants by R. 2:6-11(a), whichever is later. Within 30 days after the service of such brief[,] and appendix [and transcript], the [opposing party] respondent/cross appellant shall serve and file an answering brief and appendix, if any, which shall also include therein the points and arguments on the cross appeal [his answering brief and appendix, if any, which shall also include therein the points and arguments on his own appeal.] Within 30 days thereafter, the [party filing the first brief and appendix shall serve and file his reply brief, which shall also include the points and arguments answering the opposing party's brief.] appellant/cross respondent shall serve and file a reply brief, which shall also include the points and arguments answering the cross appeal. Within 10 days thereafter, the [opposing party] respondent/cross appellant may serve and file a [his] reply brief. No other briefs shall be served or filed without leave of court. If a cross appeal has been taken, the appellant/cross respondent shall be responsible for ordering and filing the transcript pursuant to R. 2:5-3(e) and for serving it pursuant to paragraph (a) of this rule and R. 2:6-12(a).

(c) ...no change

(d) ...no change

(e) ...no change

Note: Source -- R.R. 1:7-12(a) (c), 1:10-14(b), 2:7-3. Paragraph (b) amended by order of September 5, 1969 effective September 8, 1969; paragraph (a) amended July 7, 1971 to be effective September 13, 1971; caption and paragraphs (a) and (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended May 8, 1975 to be effective immediately; paragraphs (c), (d) and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended and titles of paragraphs (c) (d) and (e) added November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended to be effective .

2:8-1. Motions

(a) Contents; Form of Brief and Appendix. Every motion shall be accompanied by a brief, conforming either to the requirements of R. 2:6-2(a) (formal brief) or (b) (letter brief), and by an appendix and shall be in the form and [printed or] reproduced as provided by R. 2:6-10. The brief shall explain clearly the nature of the action, the relief the moving party seeks and why [he] the moving party is entitled thereto. It may, for purposes of clarity, summarize pleadings and other undisputed papers or records which do not accompany the brief. The appendix shall include the judgment or order and the opinion or statement of findings and conclusions below and, where essential, the transcript of the testimony, depositions or other discovery, pleadings or other portions of the record, including the portions thereof upon which the movant should reasonably assume the opposing party will rely. If the transcript cannot be obtained in time for the motion, an affidavit may be filed in lieu thereof giving the substance of such testimony. If the motion is opposed, the opposing party shall file an answering brief setting forth with equal explicitness the grounds of opposition, annexing an appendix containing copies of any papers relied on which are not in the moving party's appendix. On motion for leave to appeal the brief shall include argument on the merits of the issues sought to be appealed. If no opposing brief is filed the court may consider the motion unopposed. Without leave of the

court, which may be applied for ex parte, supporting and answering briefs shall not exceed [20 pages if printed and] 25 pages [if otherwise reproduced or typed], exclusive of tables of contents, table of citations and appendix.

(b) ...no change

(c) ...no change

(d) ...no change

(e) ...no change

Note: Source -- R.R. 1:7-10(b), 1:11-1, 1:11-2(a) (b), 1:11-3, 2:11-1, 2:11-2, 2:11-3, 4:61-1(c). Paragraph (a) amended, paragraph (c) adopted and former paragraph (c) redesignated (d) July 24, 1978 to be effective September 11, 1978; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) and (d) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended to be effective .

2:11-6. Motion for Reconsideration

(a) Service; Filing; Contents; Argument. Within 10 days after entry of judgment, unless such time is enlarged by court order, a party may apply for reconsideration by serving 2 copies of a motion on counsel for each of the opposing parties and filing 9 copies thereof with the Supreme Court, or 5 copies thereof with the Appellate Division, as appropriate. One filed copy shall be signed by counsel. The motion shall not exceed [20 pages in length if printed and] 25 pages [if otherwise reproduced or typed,] and shall contain a brief statement and argument of the ground relied upon and a certificate of counsel that it is submitted in good faith and not for purposes of delay. An answer shall be filed only if requested by the court, and within 10 days after such request or within such other time as the court fixes therein. The motion will not be argued orally.

(b) ...no change

(c) ...no change

Note: Source - R.R. 1:9-4(a) (b) (c). Caption, paragraph (a) and paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended to be effective .

2:12-2. Certification of Appeals Pending Unheard in Appellate Division

(a) Filing and Service of Motion. A motion for certification of an appeal pending unheard in the Appellate Division shall be served and filed with the Supreme Court and the Appellate Division within 10 days after the filing of all briefs with the Appellate Division. Within 5 days after service of the motion an opposing party may serve and file a statement in opposition. The motion and statement shall not exceed [3 pages each if printed or] 5 pages [if otherwise reproduced or typed]. Nine copies thereof shall be filed with the Supreme Court.

(b) ...no change

Note: Source - R.R. 1:10-1A(a), 1:10-14(c); paragraph (a) amended _____ to be effective _____.

Note language in brackets is to be deleted.

2:12-7. Form, Service and Filing of Petition for Certification

(a) Form and Contents. A petition for certification shall be in the form of a brief, conforming to the applicable provisions of R. 2:6 and not exceeding [15 pages if printed or] 20 pages [if otherwise reproduced or typed,] exclusive of tables of contents, citations and appendix. It shall contain a short statement of the matter involved, the question presented, the errors complained of, the reasons why certification should be allowed, and comments with respect to the Appellate Division opinion. It shall have annexed the notice of petition for certification; the written opinions of the courts below; a copy of the transcript of any relevant oral opinions or statements of findings and conclusions of law and in the case of a sentencing appeal heard by the Appellate Division pursuant to R. 2:9-11, the transcript of the oral argument, which shall be requested from the Chief, Reporting Services in the Appellate Divison [Supervisor, Sound Recording Services in the Administrative Office of the Courts]. The petition shall be signed by petitioner's counsel who shall certify that it presents a substantial question and is filed in good faith and not for purposes of delay.

(b) ...no change

Note: Source - R.R. 1:10-9, 1:10-10(a). Paragraph (a) amended March 5, 1974 to be effective immediately; paragraph (a) amended November 7, 1988 to be effective January 2, 1989;

paragraph (a) amended January 20, 1989 to be effective February 1, 1989 paragraph (b) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended to be effective _____.

2:12-8. Respondent's Brief and Petitioner's Reply Brief

The respondent shall, within 15 days of the service of the petition, serve 2 copies of [his] the brief in opposition to certification and file 9 copies thereof together with 9 copies of [his] the answering Appellate Division brief and appendix with the Clerk of the Supreme Court. The brief shall be direct and concise, shall conform to the applicable provisions of R. 2:6 and shall not exceed [15 pages if printed or] 20 pages [if otherwise reproduced or typed], exclusive of tables of contents, citations and appendix. Within 10 days of such service, the petitioner may serve 2 copies and file 9 copies of a reply brief not exceeding [9 pages if printed or] 10 pages [if otherwise reproduced or typed], exclusive of tables of contents, citations, and appendix.

Note: Source - R.R. 1:10-11, 1:10-12; amended to be effective .

L. Proposed Amendments to R. 3:19-2 -- Acquittal by Reason of Insanity

In response to I.M.O. Commitment of Edward S., 118 N.J. 118 (1990), a joint subcommittee of the Criminal Practice and Civil Practice Committees, chaired by the Hon. Barbara Villano, was formed to consider whether any rule changes were necessitated by the decision. Edward S. holds that a review hearing of a person charged with murder, where the original commitment was based on a verdict of not guilty by reason of insanity, should be conducted in open court, absent compelling reasons for an in camera proceeding. At present, R. 4:74-7(e) calls for all review hearings to be held in camera.

The joint subcommittee proposes amending R. 3:19-2 to provide for review hearings of defendants acquitted by reason of insanity to be held in open court unless good cause is shown for an in camera hearing. See section I.EE., below, for the proposed companion amendment to R. 4:74-7(e).

The proposed amendments to R. 3:19-2 read as follows:

3:19-2. Acquittal by Reason of Insanity

If a defendant interposes the defense of insanity and [the defendant] is acquitted after trial on that ground, the verdict and judgment shall so state.

[Upon the return of a verdict of "Not Guilty by Reason of Insanity" or entering of judgment to that effect by a court sitting without a jury, t]The procedure for disposition of the defendant shall be as provided by N.J.S.A. 2C:4-8 and 2C:4-9 and by R. 4:74-7, except that all hearings pursuant to R. 4:74- 7(e) shall be in open court unless good cause is shown for a hearing in camera.

Note: Source -- R.R. 3:7-9(e); amended August 28, 1979 to be effective September 1, 1979; amended to be effective .

M. Proposed Amendments to Rules 4:4-3, 4:4-4 and 4:4-7 -- re Service of Process

In the 1988-90 committee term, Philip Geron, President of Guaranteed Subpoena Service, Inc., had written to many judges, the Administrative Director and the Committee proposing a rule change to permit private service of process as an option for attorneys and litigants. (At present, although there is no legislative prohibition against private service, the rules permit such service only with a court order, or if an acknowledgement of service is obtained from the defendant.) In discussion, several members noted that private service might be cheaper and more efficient than Sheriff's service and that healthy competition might improve Sheriff's service. However, the Committee had no hard information on how long Sheriff's service took in the various counties and had no sense that the bar believed such service to be inefficient. Other members observed that Sheriffs, who are constitutional officers, are on the public payroll and thus may be more accountable to provide efficient service than a private company. Also to be considered is the theory that the defendant will be more likely to be impressed with the gravity of the event if service is made by a uniformed officer.

As reported in the 1990 Report to the Supreme Court, the Committee voted against any change in the rules, at that time, to permit the option of private service of process.

The issue was raised again in the current term. Mr. Geron, who also serves as Director of the National Constables Association, requested an amendment to R. 4:4-3 to permit service of process by municipal constables.

Committee members expressed some dissatisfaction with service by Sheriff's officers. Many serve process only during normal business hours; thus, it may be fairly easy for defendants to avoid service. The consensus was that the entire area of service of initial process should be studied, with a view toward making service procedures more effective. Accordingly, the Subcommittee on Service of Process, chaired by the Hon. Murry Brochin, was appointed to look into the matter in more depth.

To address the issues of unauthorized persons serving process and of possibly dilatory or ineffective Sheriff's service, the subcommittee recommended, and the full Committee endorsed, with some revisions, changes to Rules 4:4-3, 4:4-4 and 4:4-7.

As to R. 4:4-3, the Committee seeks to make it clear that only individuals expressly authorized by court rule to do so may serve civil process. The change is intended to remove any confusion that may currently exist as to who may serve process.

Further, the Subcommittee on Service of Process found some problems -- e.g., delay, service not effected -- with the current system of personal service by Sheriffs, and that such

problems have resulted in some members of the bar turning to private process servers. However, as stated in the subcommittee's report (see Appendix A), the consensus was that "service of process by uniformed officers under the control of public officials is preferable to private service of process." No sweeping changes to this system should be made without undertaking a survey of Sheriffs and the bar as to the timeliness and effectiveness of Sheriff's service. The subcommittee will undertake such a survey (see section V.D., below) and report its results to the Committee in the 1992-94 term.

In the interim, the subcommittee proposed that if Sheriff's service is not effected within 40 days, plaintiff or plaintiff's attorney be specifically permitted the option of substituted service by certified or registered and regular mail. The Committee would expand upon this proposal and so recommends amending R. 4:4-3 to provide that if the Sheriff has returned the summons and complaint unserved, or has not made a return of service within 40 days, plaintiff has the option of mail service or personal service by any competent adult not having a direct interest in the case; this option may be exercised without court order.

The Committee also would amend R. 4:4-4 to make reference to the new service provision of R. 4:4-3 and R. 4:4-7 to deal with the effect of the proposed change to R. 4:4-3 on the return of service procedure.

The 11/4/91 report of the Subcommittee on Service of Process is attached as Appendix A.

The proposed amendments to Rules 4:4-3, 4:4-4 and 4:4-7 read as follows:

4:4-3. By Whom Served; Copies

(a) Generally. Summonses and writs shall be served, together with a copy of the complaint, by the sheriff [or other officer authorized by law] or by a person specially appointed by the court for that purpose or by a person otherwise authorized by these rules. The plaintiff shall furnish the person making service with the summons and as many copies thereof, each with a copy of the complaint annexed, as there are persons to be served, and in Superior Court actions, with one additional copy of the summons. Wherever service by mail is permitted by these rules, such mailing may be made by the attorney or a party appearing pro se. Return of service shall be made as provided by R. 4:4-7.

(b) Failure of Sheriff's Service. If the sheriff has returned the summons and complaint to plaintiff or plaintiff's attorney unserved or if 40 days have elapsed after delivery of the summons and complaint to the sheriff without plaintiff or plaintiff's attorney having received a sheriff's return of service, service may be made within this State (1) personally, by plaintiff's attorney or the attorney's agent or any other competent adult not having a direct interest in the litigation, or (2) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, to the defendant's usual place of abode or, with postal instructions to deliver to addressee only, to defendant's place of business or employment. If the addressee refuses to claim or accept

delivery of registered or certified mail, service may be made by ordinary mail addressed to the defendant's usual place of abode. The party making service may, at the party's option, make service simultaneously by registered or certified mail and ordinary mail, and if the addressee refuses to claim or accept delivery of registered mail and if the ordinary mailing is not returned, the simultaneous mailing shall constitute effective service. Return of service shall be made as provided by R. 4:4-7.

Note: Source - R.R. 4:4-3, 5:5-1(c), 5:2-2; amended to be effective .

4:4-4. Summons; Personal Service; In Personam Jurisdiction

Service of summons, writs and complaints shall be made as follows:

(a) Individuals Generally.

(1) Personal Service. Upon an individual other than [an infant] a minor under 14 years of age or an incompetent person, by delivering a copy of the summons and complaint to [him] the individual personally; or by leaving a copy thereof at [his] the dwelling house or usual place of abode with a competent member of [his] the household of the age of 14 years or over then residing therein; or by delivering a copy thereof to a person authorized by appointment or by law to receive service of process on [his] the individual's behalf; or as provided by R. 4:4-3(b).

describes how personal service is accomplished [no need to mention who does serving]

(2) ...no change

(b) [Infants] Minors Under 14 and Incompetents.

(1) [Infants.] Minors. Upon [an infant] a minor under 14 years of age, by delivering a copy of the summons and complaint personally to [his] the minor's father, mother or guardian of [his] the person or a competent adult member of [his] the household with whom [he] the minor resides[,]; or as provided by R. 4:4-3(b); or if service cannot be made upon any of them, then as provided by court order. The requirement of service of process or notice upon a father, mother, guardian or adult, common to more than one [infant] minor defendant in any action, shall be deemed complied with by service upon such

have + acquire juris. over minors + incomps: by pers. serv. on guardian or if no effective sheriff's services, can get pers. juris. by service by mail or other non-party cadet

person of one copy of the summons and complaint or other notice served.

(2) Incompetents. Upon an incompetent person, by delivering a copy of the summons and complaint personally to the guardian of [his] the person or a competent adult member of [his] the household with whom [he] the incompetent resides; or, if [he] the incompetent is living in an institution, then to the director or chief executive officer of the institution; or as provided by R. 4:4-3(b);[,] or if service cannot be made upon any of them, then as provided by court order; and, unless the court otherwise orders, also to the incompetent.

(c) ...no change

(d) ...no change

(e) ...no change

(f) ...no change

(g) ...no change

(h) ...no change

(i) ...no change

Note: Source--R.R. 4:4-4. Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (f) amended July 15, 1982 to be effective September 13, 1982; paragraph (e) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a), (f) and (g) amended November 5, 1986 to be effective January 1, 1987; paragraph (i) amended November 2, 1987 to be effective January 1, 1988; paragraph (e) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended to be effective .

4:4-7. Return

The person serving the process shall make proof of service thereof on the original process, and in Superior Court actions also on the copy, and shall promptly file such process with the court within the time during which the person served must respond thereto. The proof of service shall state the name of the person served and the place, mode and date of service, and a copy thereof shall be forthwith furnished plaintiff's attorney by the person serving process. If service is made upon a member of the household pursuant to R. 4:4-4 that person's name shall be stated in the proof or, if his or her name cannot be ascertained, the proof shall contain a description of the person upon whom service was made. If service is made by a person other than a sheriff, under-sheriff or deputy sheriff of a county of this State, proof of service shall be by affidavit. Failure to make proof of service does not affect the validity of the service. If service is made pursuant to R. 4:4-3(b), the party making service shall make proof thereof by affidavit which shall also include the facts of the sheriff's failure to effect service and the facts of the affiant's personal knowledge of defendant's place of abode, business or employment. With the proof shall be filed the affidavit or affidavits of inquiry, if any, required by R. 4:4-4 and R. 4:4-5. Where service is made by registered or certified mail and simultaneously by regular

mail, the return receipt card or the unclaimed registered or certified mail shall be filed as part of the proof.

Note: Source - R.R. 4:4-7. Amended July 14, 1972 to be effective September 5, 1972; amended June 29, 1990 to be effective September 4, 1990; amended to be effective .

N. Proposed Amendments to R. 4:6-1 -- When Presented

The Committee proposes two changes to R. 4:6-1(a). The first amendment is in response to an attorney's suggestion that the exceptions to the 20-day answer period set forth at the beginning of the rule be enlarged to include R. 4:8-1(b) (third-party joinder) and R. 4:9-1 (answer to amended complaint), both of which provide for time schedules that are quite different from that set out in R. 4:6-1. The Committee concurred with this suggestion and proposes amending R. 4:6-1 accordingly.

In addition, the Committee agreed with the suggestion of the Director of the Division of Law that the State of New Jersey be given 60 days (instead of the usual 20) to respond to a foreclosure complaint. Pursuant to federal statute, 28 U.S.C. § 2410, the United States of America receives 60 days to answer in foreclosure actions. The Committee determined that that extended period would be appropriate as well for the State of New Jersey, which is experiencing increasing difficulty in responding in timely fashion to the explosion of foreclosure complaints (some 200 monthly) in which the State is a named defendant. The attached proposed amendment reflects this suggestion. See section I.CC., below, for the proposed companion amendment to R. 4:64-1(g).

The proposed amendments to R. 4:6-1(a) read as follows:

4:6-1. When Presented

(a) Time; Presentation. Except as otherwise provided by R. 4:7-5(c) (crossclaims), 4:8-1(b) (third-party joinder), 4:9-1 (answer to amended complaint), and 4:64-1(g) (governmental answer in foreclosure actions), the defendant shall serve an answer, including therein any counterclaim, within 20 days after service of the summons and complaint on that defendant but that time shall be enlarged to 35 days (1) if service is made by mail, publication, or posting, or (2) if the defendant is served outside this State by any mode, or (3) if service is made on defendant by service on a registered, statutory or court appointed agent. If service is made as provided by court order, pursuant to R. 4:4-4(i), the time for service of the answer may be specified therein. Service by mail shall be complete upon mailing of the ordinary mail. If no ordinary mailing is made, service shall be deemed complete upon the date of the acceptance of the registered or certified mail. A party served with a pleading stating a counterclaim or crossclaim against that party shall serve an answer thereto within 20 days after the service upon that party. A reply to an answer, where permitted, shall be served with 20 days after service of the answer.

(b) ...no change

(c) ...no change

(d) ...no change

Note: Source -- R.R. 4:12-1(a)(b)(c)(e), 4:96-2(c); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended to be effective .

O. Proposed Amendments to Rules 4:7-1, 4:30A and 4:64-5 -- re Application of Entire Controversy Doctrine in Foreclosure Actions

In its 1990 Report to the Supreme Court, the Committee recommended amending Rules 4:7-1, 4:27-1, 4:28-1, 4:29-1 and 4:30, and adopting new R. 4:30A, to clarify for practitioners the effect of Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989). In that case, the Supreme Court concluded that "the entire controversy doctrine appropriately encompasses the mandatory joinder of parties", and called for the rule on party joinder (R. 4:28) to be amended consistent with the application of the entire controversy doctrine as set forth in the opinion. The centerpiece of the group of proposed amendments -- all of which were adopted effective September 4, 1990 -- was R. 4:30A, which was intended to alert attorneys to the consequences of failure to join claims or persons required to be joined by the entire controversy doctrine.

The new amendments and rule had an unexpected effect on foreclosure practice, apparently resulting in the joinder of multiple non-germane claims to the underlying foreclosure action. As a consequence, the processing and disposition of foreclosure cases, which have seen a dramatic increase in the current economic climate, have slowed significantly.

In response to numerous inquiries from the banking community and its counsel, and to an urgent request for relief from the Chief of the Office of Foreclosure, the Committee

proposes amendments to Rules 4:7-1 and 4:30A, and adoption of new R. 4:64-5, to make it clear that the entire controversy doctrine does not require the joinder of non-germane claims in a foreclosure complaint. The proposal was developed with the assistance of the Chief of the Office of Foreclosure and with consideration of the views of the banking community.

Because of the urgency of the problem, the Committee has asked that the Supreme Court issue an order relaxing R. 4:30A to exempt non-germane claims from inclusion in foreclosure actions, pending consideration of appropriate rule amendments in the normal cycle.

The proposed amendments to Rules 4:7-1, 4:30A and 4:64-5 read as follows:

4:7-1. Mandatory or Permissive Counterclaims

Except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4 (summary actions) [and except in foreclosure actions (in which only germane counterclaims may be pleaded)], a pleading may state as a counterclaim any claim against the opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. A defendant, however, either failing to comply with R. 4:30A (entire controversy doctrine) or failing to set off a liquidated debt or demand or a debt or demand capable of being ascertained by calculation, shall thereafter be precluded from bringing any action for such claim or for such debt or demand which might have been so set off.

Note: Source -- R.R. 4:13-1. Amended July 16, 1979 to be effective September 10, 1979; amended June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

RULE 4:30A. ENTIRE CONTROVERSY DOCTRINE

Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

Note: Adopted June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:64-5. [Order of Proceedings] Joinder of Claims in Foreclosure.

Unless the court otherwise orders on notice and for good cause shown, claims for foreclosure of mortgages shall not be joined with non-germane claims against the mortgagor or other persons liable on the debt. Only germane counterclaims and cross-claims may be pleaded in foreclosure actions without leave of court. Non-germane claims shall include, but not be limited to, claims on the instrument of obligation evidencing the mortgage debt, assumption agreements and guarantees. A defendant who chooses to contest the validity, priority or amount of any alleged prior encumbrance shall do so by filing a cross-claim against that encumbrancer, if a co-defendant, and the issues raised by the cross-claim shall be determined upon application for surplus money pursuant to R. 4:64-3, unless the court otherwise directs.

Note: Adopted _____ to be effective _____.

P. **Proposed Amendments to R. 4:7-5 -- Cross-Claim Against Co-Party; Claim for Contribution or Claim for Indemnity**

In Young v. Latta, 123 N.J. 584 (1991), the Court held that credit is available in every case in which there are multiple defendants, whether or not a cross-claim for contribution has been filed, and asked the Civil Practice Committee to draft the rule amendments necessary to accommodate the decision. Accordingly, the Committee proposes amending R. 4:7-5(c) to reflect the holding in Young v. Latta.

The proposed amendments to R. 4:7-5(c) read as follows:

4:7-5. Cross-Claim Against Co-party; Claim for Contribution or Claim for Indemnity

(a) ...no change

(b) ...no change

(c) Time for Assertion. Cross-claims may be asserted by any defendant as of right within 90 days after service upon [him] the defendant of the original complaint or after service of the complaint upon the party against whom the cross-claim is asserted, whichever is later. A cross-claim may be thereafter asserted only by leave of court, which shall be freely given. A copy of the proposed cross-claim shall be annexed to the notice of motion seeking such leave. A non-settling defendant's failure, however, to have asserted a cross-claim for contribution against a settling defendant shall not preclude either an allocation of a percentage of negligence by the finder of fact against the settling defendant or a credit in favor of the non-settling defendant consistent with that allocation, provided plaintiff was fairly apprised prior to trial that the liability of the settling defendant remained an issue and was accorded a fair opportunity to meet that issue at trial.

Note: Source -- R.R. 4:13-6(a)(b); paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (a) and (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 18, 1990 to be effective September 4, 1990; paragraph (c) amended _____ to be effective _____.

Q. Proposed Amendments to R. 4:10-2 -- Scope of Discovery

The Committee recommends amending R. 4:10-2(e), as proposed by the Subcommittee on the Discovery of Experts, which was chaired by the Hon. Leonard Arnold, to clarify who pays the costs associated with the preparation of an expert witness for deposition.

The proposed amendments to R. 4:10-2(d) read as follows:

4:10-2. Scope of Discovery

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) ...no change

(b) ...no change

(c) ...no change

(d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of R. 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) ...no change

(2) Unless the court otherwise orders, an expert whose report is required to be furnished pursuant to subparagraph (1) may be deposed as to [his] the opinion[s] stated therein at a time and place [convenient for him] as provided by R. 4:14-7(b)(2). The party taking the deposition shall pay the expert or treating physician a reasonable fee for [his] the appearance, to be determined by the court if the parties and the expert or treating physician cannot agree on the amount therefor. The fee for the witness's preparation for the deposition shall, however, be paid by the proponent of the witness.

(3) ...no change

Note: Source -- R.R. 4:16-2, 4:23-1, 4:23-9, 5:5-1(f). Amended July 14, 1972 to be effective September 5, 1972

(paragraphs (d)(1) and (2) formerly in R. 4:17-1); paragraph (d)(2) amended to be effective _____.

R. Proposed Amendments to Rules 4:11-1 and 4:18-1 -- re Pre-Litigation Discovery

A Committee member suggested a rule authorizing pre-litigation inspection of premises on which an accident has occurred. The need arises not only for people who may want to sue but also for those who anticipate being sued.

The Committee agreed that a right to any kind of pre-litigation discovery should be explicit in the rules, and recommends amending R. 4:11-1, which perpetuates the common law action for discovery, and R. 4:18-1.

The proposed amendments to Rules 4:11-1(a) and (c) and 4:18-1(c) read as follows:

4:11-1. Before Action

(a) Petition. A person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents pursuant to R. 4:18-1 may file a verified petition, seeking an appropriate order, entitled in the petitioner's name, showing: (1) that [he] the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought; (2) the subject matter of such action and [his] the petitioner's interest therein; (3) the facts which [he] the petitioner desires to establish by the proposed testimony or evidence and [his] the reasons for desiring to perpetuate or inspect it; (4) the names or a description of the persons [he] the petitioner expects will be opposing parties and their addresses so far as known; [and] (5) the names and addresses of the persons to be examined and the substance of the testimony which [he] the petitioner expects to elicit from each; and (6) the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof. [The petition shall ask for an order preserving the evidence or authorizing the petitioner to take the depositions of the persons to be examined named therein, for the purpose of perpetuating their testimony.]

(b) ...no change

(c) Order and Examination. If the court finds that the perpetuation of the testimony or evidence or the inspection may prevent a failure or delay of justice, it shall make an order designating or describing the evidence to be preserved, or the documents or property to be inspected or the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions or inspection may then be taken in accordance with these rules; and the court may make such orders as are provided for by R. 4:18 and R. 4:19.

(d) ...no change

Note: Source -- R.R. 4:17-1. Paragraphs (c) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (c) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (c) amended to be effective .

4:18-1. Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes; Pre-Litigation Discovery

(a) ...no change

(b) ...no change

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. Pre-litigation discovery within the scope of this rule may also be sought by petition pursuant to R. 4:11-1.

Note: Source -- R.R. 4:24-1. Former rule deleted and new R. 4:18-1 adopted July 14, 1972 to be effective September 5, 1972; rule caption and paragraph (c) amended to be effective .

S. Proposed Amendments to R. 4:14-7 -- Subpoena for Taking Depositions

In accordance with the recommendations of the Subcommittee on the Discovery of Experts, the Committee proposes two major amendments to this rule. The first would add a new subsection to R. 4:14-7(b) specifically to govern the deposition of expert witnesses and treating physicians, as opposed to fact witnesses. The second proposed amendment deals with the problem of an expert producing privileged information -- e.g., by mailing it to the attorney seeking the deposition -- on the basis of a subpoena that may subsequently be quashed. Under the proposed amendment, the subpoena would state that the evidence shall not be produced or released until the deposition date.

The proposed amendments to R. 4:14-7(b) and (c) read as follows:

4:14-7. Subpoena for Taking Depositions

(a) ...no change

(b) Time and Place of Examination by Subpoena; Witness' Expenses.

(1) Fact Witnesses. A resident of this State subpoenaed for the taking of a deposition may be required to attend an examination only at a reasonably convenient time and only in the county of this State in which he or she resides, is employed or transacts [his] business in person, or at such other convenient place fixed by court order. A nonresident of this State subpoenaed within this State may be required to attend only at a reasonably convenient time and only in the county in which he or she is served, at a place within this State not more than 40 miles from the place of service, or at such other convenient place fixed by court order. The party subpoenaing a witness, other than one subject to deposition on notice, shall reimburse [him] the witness for the out-of-pocket expenses and loss of pay, if any, incurred [by him] in attending at the taking of depositions.

(2) Expert Witnesses and Treating Physicians. If the expert or treating physician resides or works in New Jersey, but the deposition is taken at a place other than the witness's residence or place of business, the party taking the deposition shall pay for the witness' travel time and expenses. If the expert or treating physician does not reside or work in New Jersey, the proponent of the witness shall either (A)

produce the witness, at the proponent's expense, in the county in which the action is pending or at such other place in New Jersey upon which all parties shall agree, or (B) pay all reasonable travel and lodging expenses incurred by all parties in attending the witness' out-of-state deposition.

(c) Notice; Limitations. A subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of [his] a deposition is simultaneously compelled. The subpoena shall state that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action. [The party issuing the subpoena shall serve a copy thereof on all other parties no less than 10 days prior to the date therein scheduled and all parties] The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties, who shall have the right at the taking of the deposition to inspect and copy the subpoenaed evidence produced. If evidence is produced by a subpoenaed witness who does not attend the taking of the deposition, the parties to whom the evidence is so furnished shall forthwith provide notice to all other parties of the receipt thereof and

of its specific nature and contents, and shall make it available to all other parties for inspection and copying.

Note: Source -- R.R. 4:20-1 (last sentence), 4:46-4(a)(b). Paragraphs (a) and (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) adopted November 5, 1986 to be effective January 1, 1987; paragraph (b) recaptioned paragraph (b)(1) and amended, paragraph (b)(2) adopted and paragraph (c) amended to be effective .

T. Proposed Amendments to R. 4:21A-1 -- Actions Subject to Arbitration; Notice and Scheduling of Arbitration

Both the Arbitration Advisory Committee and the Conference of Civil Presiding Judges recommended amending R. 4:21A-1, to raise to $4,500 (from $2,500) the medical specials threshold for removal of auto negligence and personal injury cases from the statutory arbitration programs. The reason for this recommendation is that the lower threshold permits cases to be removed from the programs that may in fact be arbitrable under the legislative mandate. The Committee endorsed this proposal.

The proposed amendments to R. 4:21A-1 read as follows:

4:21A-1. Actions Subject to Arbitration; Notice and Scheduling of Arbitration

(a) Mandatory Arbitration.

(1) Automobile Negligence Actions. All tort actions arising out of the operation, ownership, maintenance or use of an automobile in which the amount in controversy, as hereafter defined, does not exceed $15,000 shall be submitted to arbitration in accordance with these rules. For purposes of these rules, the amount in controversy includes non-economic loss and uncompensated economic loss, except uncompensated property damage claims. The amount in controversy shall be presumed to be less than $15,000 if plaintiff's total medical expenses, as reported by his or her attorney in accordance with case management or screening procedures in the vicinage of venue, do not exceed [$2,500] $4,500.

(2) Other Personal Injury Actions. All actions for personal injury not arising out of the operation, ownership, maintenance or use of an automobile in which the amount in controversy, as hereafter defined, does not exceed $20,000 shall be submitted to arbitration in accordance with these rules. For purposes of these rules, the amount in controversy includes non-economic loss and uncompensated economic loss, except uncompensated property damage claims. The amount in controversy shall be presumed to exceed $20,000 if the cause of action involves medical malpractice, products liability, a toxic tort or intentional tort or if the plaintiff's total

medical expenses, as reported by his or her attorney in accordance with case management or screening procedures in the vicinage of venue, exceed [$2,500] $4,500.

(b) ...no change

(c) Removal From Arbitration. An action assigned to arbitration may be removed therefrom as follows:

(1) Prior to the case being scheduled for, and the attorneys noticed of an arbitration hearing, the case may be removed from arbitration upon submission of a certification stating that the medicals exceed [$2500] $4,500 or providing other reasons why the value of the case is greater than the applicable monetary limitations set forth in subsections (1) or (2) of paragraph (a) of this rule or why the controversy involves novel legal or unduly complex factual issues or is otherwise ineligible for arbitration pursuant to subsection (2) of paragraph (a). A copy of this certification must be provided to all other parties. If any party objects to removal, he or she should so notify the arbitration administrator within ten (10) days after the receipt of the certification and the matter will be referred to a judge for determination. If no objection is made and the reasons for removal certified to are sufficient, the case will be removed. If the certification for removal contains a representation that all parties consent, and the matter otherwise qualifies for removal, it will be removed.

(2) Once a case has been scheduled and noticed for a hearing, it may be removed within 15 days of the notice on the certification of either party stating that the medicals exceed [$2500] $4,500 or providing other reasons why the value of the case is greater than the applicable monetary limitations set forth in subsections (1) or (2) of paragraph (a) of this rule or setting forth specific reasons why the controversy involves novel legal or unduly complex factual issues or is otherwise ineligible for arbitration pursuant to subsection (2) of paragraph (a). The same provisions as noted in subparagraph (1) will apply.

(3) ...no change

(d) ...no change

(e) ...no change

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; caption amended and former paragraph (a) redesignated paragraph (a)(1) and new paragraph (a)(2) adopted, paragraphs (b) and (c)(1) and (2) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a)(1)and (2) and (c)(1) and (2) amended to be effective .

U. Proposed Amendments to R. 4:21A-6 -- Entry of Judgment; Trial De Novo

To deal with the problem of trial de novo requests being submitted without the required $150 fee, the Arbitration Advisory Committee sought an amendment to R. 4:21A-6 to make it clear that a check for $150, made payable to the "Treasurer, State of New Jersey" must be submitted simultaneously with the trial de novo request. The Committee voted in favor of the recommended amendment.

The proposed amendments to R. 4:21A-6(b) and (c) read as follows:

4:21A-6. Entry of Judgment; Trial De Novo

(a) ...no change

(b) Dismissal. An order shall be entered dismissing the action following the filing of the arbitrator's award unless:

(1) within 30 days after filing of the arbitration award, a party thereto files with the civil case manager and serves on all other parties a notice of rejection of the award and demand for a trial de novo and pays a trial de novo fee as set forth in paragraph (c) of this rule; or

(2) ...no change

(3) ...no change

(c) Trial De Novo. An action in which a trial de novo has been demanded by any party shall be returned, as to all parties, to the trial calendar for disposition. A party demanding a trial de novo [shall be required to pay] must tender with the trial de novo request a check payable to the "Treasurer, State of New Jersey" in the amount of $150 towards the arbitrator's fee and may be liable to pay the reasonable costs, including attorney's fees, incurred after rejection of the award by those parties not demanding a trial de novo. Reasonable costs shall be awarded on motion supported by detailed certification subject to the following limitations:

(1) ...no change

(2) ...no change

(3) ...no change

(4) ...no change

(5) ...no change

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraphs (b)(1) and (c) amended November 2, 1987 to be effective January 1, 1988; paragraph (c)(5) amended November 7, 1988 to be effective January 2, 1989; paragraphs (b)(1) and (c) amended to be effective .

V. Proposed Amendments to R. 4:26-2 -- Infant or Incompetent Person

The Committee approved the suggestions of an attorney and Committee member to change "infant" to "minor" throughout the rule, and to eliminate altogether the requirement that a minor of 17 years of age or older must consent to the appointment of a guardian ad litem in a negligence action. With respect to the latter change, it makes little sense to keep special rules that apply only during the one-year period until majority is attained.

In addition, the Committee recommends eliminating, in R. 4:26-2(b)(3), reference to a probate action "brought on notice", as such is anachronistic since the 1990 revision of the probate rules. Finally, a corrected rule reference in subsection (c) is proposed.

The proposed amendments to R. 4:26-2 read as follows:

4:26-2. [Infant] Minor or Incompetent Person

(a) Representation by Guardian. Except as otherwise provided by law or R. 4:26-3 (virtual representation), [an infant] a minor or incompetent person shall be represented in an action by the guardian of either [his] the person or [his] the property, appointed in this State, or if no such guardian has been appointed or a conflict of interest exists between guardian and ward or for other good cause, by a guardian ad litem appointed by the court in accordance with paragraph (b) of this rule.

(b) Appointment of Guardian ad Litem

(1) Appointment of Parent in Negligence Actions. In negligence actions, unless the court otherwise directs, a parent of [an infant] a minor or incompetent person shall be deemed to be appointed guardian ad litem of [his] the child without court order upon the filing of a pleading or certificate signed by an attorney stating the parental relationship, the child's status and, if [an infant] a minor, [his] the age, the parent's consent to act as guardian ad litem and the absence of a conflict of interest between parent and child. [If the infant is 17 years of age or older, his consent shall be endorsed on such pleading and certificate.]

(2) Appointment on Petition. The court may appoint a guardian ad litem for [an infant 17 years of age or older upon his verified petition or for an infant under that age] a minor or an alleged incompetent person, upon the verified petition

of a friend on his or her behalf. In an action in which the fiduciary seeks to have [his] the account settled or has a personal interest in the matter, the petition shall state whether or not the guardian ad litem therein nominated was proposed by the fiduciary or [his] the fiduciary's attorney. Each petition shall be accompanied by the sworn consent of the proposed guardian ad litem, stating his or her relationship to the [infant] minor or alleged incompetent person and certifying that he or she has no interest in the litigation, or if [he has] such interest exists, setting forth the nature thereof, and that he or she will [and] with undivided fidelity perform the duties of guardian ad litem, if appointed. The court shall appoint the guardian ad litem so proposed unless it finds good cause for not doing so, in which case it shall afford the petitioner opportunity to file a new petition seeking the appointment of another person within 10 days of the rejection. If such new petition is not filed within such time, or if filed, is not granted, the court, when designating some other person as guardian ad litem, shall state for the record its reasons for rejecting petitioner's nominee. A conflict of interest between the petitioner and the [infant] minor or alleged incompetent person shall be good cause for rejection of the petitioner's nominee. Only one guardian ad litem shall be appointed for all [infants] minors or alleged incompetent persons unless a conflict of interest exists.

(3) Appointment on Party's Motion. On motion by a party to the action, the court may appoint a guardian ad litem for [an infant] a minor or alleged incompetent person if no petition has been filed [by him or on his behalf] and either [his] default has been entered by the clerk or, in a summary action brought pursuant to R. 4:67 or in a probate action [brought on notice], 10 days have elapsed after service of the order [or the mailing of the notice]. Notice of the motion shall be served at least 10 days before the return date fixed therein upon the appropriate persons designated in R. 4:4-4(a) or (b) either personally, at the time of service of process or thereafter, or by registered or certified mail, return receipt requested. The court on ex parte motion may, in lieu thereof, fix such notice of the motion, given to such persons in such manner as it deems appropriate.

(4) Appointment on Court's Motion. The court may appoint a guardian ad litem for [an infant] a minor or alleged incompetent person on its own motion.

(c) Allowance of Fees. A guardian ad litem appointed pursuant to this rule or R. 4:26-3(c) (failure of virtual representation) who intends to apply for an allowance of a fee shall serve upon all parties and file with the court at least 7 days before the hearing a written notice of the amount applied for stating that [his] the report and affidavit of services (unless no such affidavit is required under

[R. 4:87-6] R. 4:87-7) have been filed and that copies thereof will be furnished on request.

Note: Source - R.R. 4:30-2(a)(b)(c), 7:12-6; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b) and (c) amended to be effective .

W. Proposed Amendments to R. 4:26-3 -- Virtual Representation of Future Interest

The Committee proposes revising R. 4:26-3 to make it clear that takers in default need not be joined when a party to an action is the donee of a power of appointment.

The proposed amendments to R. 4:26-3(b) read as follows:

4:26-3. Virtual Representation of Future Interest

(a) ...no change

(b) Representation by Donee of Power of Appointment. Where a party to an action is the donee of a power of appointment of any type, it shall not be necessary to join the potential or permissible appointees of the power or takers in default, and the judgment entered therein shall be binding upon the appointees, unless it shall affirmatively appear in the action that there exists a conflict of interest between the donee of the power and the appointees.

(c) ...no change

(d) ...no change

Note: Source - R.R. 4:30-3. Paragraph (b) amended to be effective .

X. Proposed Amendments to R. 4:42-9 -- Counsel Fees

In the previous term, the Tax Court Committee had recommended that R. 4:42-9(a)(5) be amended to provide that the maximum counsel fee for each tax sale certificate be in the same amount whether it be an in rem (presently $150) or in personam (presently $350) tax foreclosure proceeding. The Court referred this issue to the Civil Practice Committee for review. The Committee recommends a $350 maximum fee for both types of proceedings.

The proposed amendments to R. 4:42-9(a)(5) read as follows:

4:42-9. Counsel Fees

(a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except

(1) ...no change

(2) ...no change

(3) ...no change

(4) ...no change

(5) In an action to foreclose a tax certificate or certificates, the court may award a counsel fee not exceeding [$150] $350 per tax sale certificate in any in rem or in personam proceeding [or $350 per tax sale certificate in any in personam proceeding] except for special cause shown by affidavit. If the plaintiff is other than a municipality no counsel fee shall be allowed unless prior to the filing of the complaint the plaintiff shall have given not more than 120 nor less than 30 days' written notice to the interested owners and mortgagees whose interests appear of record, by registered or certified mail with postage prepaid thereon addressed to their last known addresses, of intention to file such complaint. The notice shall also contain the amount due on the tax lien as of the day of the notice.

(6) ...no change

(7) ...no change

(8) ...no change

(b) ...no change

(c) ...no change

(d) ...no change

Note: Source - R.R. 4:55-7(a)(b)(c)(d)(e)(f), 4:55-8, 4:98-4(c). Paragraphs (a) and (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)(1) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a)(1) and (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended January 19, 1989 to be effective February 1, 1989; paragraph (a)(4) amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(5) amended _____ to be effective _____.

Y. Proposed Amendments to R. 4:43-2 -- Final Judgment by Default

The Special Civil Part Practice Committee has proposed an amendment to R. 6:6-3, Judgment by Default, to require that, in the Special Civil Part, proofs in deficiency cases and proof of negligence in all actions involving property damage must be by affidavit unless the plaintiff requests or the court orders oral testimony. The Civil Practice Committee considered whether a corresponding requirement should be imposed for default judgment proceedings in the Law Division.

A majority of the Committee voted to require proofs by affidavit in negligence actions involving damage to property only. However, the Committee voted against amending R. 4:43-2 to alter the current practice of permitting proofs by either affidavit or testimony, as the discretion of the trial judge dictates, in deficiency suits or chattel repossession claims.

The proposed amendments to R. 4:43-2 read as follows:

4:43-2. Final Judgment by Default

When a default has been entered in accordance with R. 4:43-1, except as otherwise provided by R. 4:64 (foreclosures), a final judgment may be entered in the action as follows:

(a) ...no change

(b) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against [an infant] a minor or incompetent person unless [he is] represented in the action by a guardian or guardian ad litem who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, [he] that party (or, if appearing by representative, [his] the representative) shall be served with written notice of the application for judgment at least 5 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any allegation by evidence or to make an investigation of any other matter, the court may conduct such hearings with or without a jury or to take such proceedings as it deems appropriate. In comparative negligence actions in which less than all defendants have defaulted, default judgment of liability may be entered against the defaulting defendants but such questions as defendants' respective percentages of liability

and total damages due plaintiff shall be reserved for trial or other final disposition of the action. If application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel which has been repossessed, the plaintiff shall prove before the court the description of the property, the amount realized at the sale or credited to the defendant and the costs of the sale. In actions for possession of land, however, the court need not require proof of title by the plaintiff. If application is made for the entry of judgment by default in negligence actions involving property damage only, proof may be made as provided by R. 6:6-3(c).

(c) ...no change

(d) ...no change

Note: Source - R.R. 4:55-4 (first sentence), 4:56-2(a)(b) (first three sentences) (c), 4:79-4. Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; text and paragraph (a) amended January 19, 1989 to be effective February 1, 1989; paragraph (b) amended _____ to be effective _____.

Z. Proposed Amendments to R. 4:49-2 -- Motion to Alter or Amend a Judgment or Order

The Committee proposes amending this rule to provide that the 10-day period, within which a motion to alter or amend an order or judgment must be served, will begin at the date of receipt of the order by the party seeking relief. This date can be proved by affidavit.

See section I.D., above, for background on the proposed companion amendment to R. 1:7-4.

The proposed amendments to R. 4:49-2 read as follows:

4:49-2. Motion to Alter or Amend a Judgment or Order

Except as otherwise provided by R. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 10 days [after entry of the judgment or order] after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred.

Note: Source -- R.R. 4:61-6. Amended November 5, 1986 to be effective January 1, 1987; amended to be effective .

AA. Proposed Amendments to R. 4:53-1 -- Notice; Dismissal

Case law has established that an order appointing a statutory or liquidating receiver (unlike that appointing a custodial receiver or a fiscal agent) is appealable as of right. An Appellate Division judge and Committee member suggested that this be made explicit in the court rules. Accordingly, the Committee proposes amending R. 4:53-1 to provide that an order making such an appointment is to be deemed final, for purposes of appeal.

See also section I.K., above, for the proposed companion amendment to R. 2:2-3(a).

The proposed amendment to R. 4:53-1 reads as follows:

4:53-1. Notice; Dismissal; Appeal

No order appointing a custodial receiver under the general equity power of the court shall be granted without the consent of or notice to the adverse party [or his consent], unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable damage will result to the applicant before notice can be served and a hearing had thereon. Such an order granted without notice shall give the adverse party leave to move for the discharge of the receiver on not more than 2 days' notice; and shall direct a corporation or a partnership for whom a custodial receiver has been appointed to show cause why a receiver should not be appointed under the power conferred by statute. No statutory receiver shall be appointed for a corporation without giving it notice and an opportunity to be heard; and an order appointing a statutory receiver for a corporation shall give the stockholders and creditors of the corporation leave, at a specified time and place, to show cause why the receiver should not be continued. An action in which a receiver of a corporation has been appointed, or applied for shall not be dismissed except by order of the court. An order appointing a statutory or liquidating receiver shall be deemed final for the purposes of appeal.

Note: Source - R.R. 4:68-1; amended to be effective .

BB. Proposed Amendments to R. 4:59-1 -- Execution

A litigant suggested that R. 4:59-1 be amended to make it clear that an "information subpoena" may be used to obtain discovery with respect to a Special Civil Part judgment that has been docketed in the Superior Court. The Committee noted that the information subpoena process, now available in the Special Civil Part only pursuant to R. 6:7-2, is an effective and inexpensive mechanism to obtain post-judgment discovery and recommends that the procedure be made available in Law Division actions, through R. 4:59-1.

The proposed amendments to R. 4:59-1 read as follows:

4:59-1. Execution

(a) ...no change

(b) ...no change

(c) ...no change

(d) ...no change

(e) Supplementary Proceedings. In aid of the judgment or execution, the judgment creditor or [his] successor in interest appearing of record, may examine any person, including the judgment debtor, by proceeding as provided [by R. 6:7-2, or] by these rules for the taking of depositions or as provided by R. 6:7-2, except that service of an order for discovery or an information subpoena shall be made as prescribed by R. 1:5-2 for service on a party. If the deposition is taken on written questions, the notice of the taking thereof may contain a statement that the judgment debtor or deponent need not appear pursuant to the notice, provided before the time fixed therein, [he] the deponent serves upon the judgment creditor or [his] the judgment creditor's attorney answers under oath to the written questions served. The court may make any appropriate order in aid of execution.

(f) ...no change

(g) ...no change

Note: Source - R.R. 4:74-1, 4:74-2, 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21,

1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended to be effective .

CC. Proposed Amendments to R. 4:64-1 -- Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

In Berg v. United Jersey Bank, an unpublished Appellate Division opinion decided in March 1990, the court suggested that R. 4:64-1 be amended to provide that 1) a defendant in a foreclosure action who contests the validity or priority of an allegedly prior lien may file an answer contesting only the challenged encumbrance; 2) if there is a priority issue, the contested encumbrance is ineligible for inclusion in the judgment, with the validity or priority of the mortgage to be determined either in a surplus money proceeding or as the court might otherwise order; and 3) any subsequent encumbrancer who seeks to have its lien reported in the judgment should file an answer and cross-claim. A subcommittee consisting of two General Equity judges and the Chief of the Office of Foreclosure proposed, and the full Committee endorses, amendments to R. 4:64-1 to reflect the holding in Berg.

In considering the issues raised in Berg, however, the Committee declined to recommend an amendment to R. 4:5-1 that would require the plaintiff to set forth in the complaint the addresses and attorneys of all persons against whom relief is sought (see section II.L., below).

In addition, new paragraph (g) is proposed to provide that the State of New Jersey, as well as the United States of America, has 60 days from the date of service to file its

answer in foreclosure actions. See section I.N., above, for the proposed companion amendment to R. 4:6-1.

The proposed amendments to R. 4:64-1 read as follows:

Pre MW -- Beg is an aberration;
never reported.
Remedy being created for
aberration that will burden
practice

Now -- if subseq. enc. wants to be
included in judg of forecl.,
upon receiving notice of motion
will file proof of amt due [affidavit]
plus copy of mtg. Controversies betw Δs settled
in surplus $ proceeding.

Problem w/ current practice -- subseq.
encumbrancer or compet; look OK ~~[illegible]~~
no contesting answer
∴ no notice thereafter as to amts lienholders
ahead of him are claiming until 10 day
notice of motion for judg. received,
then it's too late to start
figuring amounts, researching
priorities

4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

(a) ...no change

(b) Procedure to Enter Judgment. If the action is uncontested as defined by paragraph (a) the court, on motion on 10 days notice if there are no other encumbrancers and on 30 days notice if there are other encumbrancers, and subject to paragraph (f) of this rule, may enter final judgment upon proof establishing the amount due. Notice shall be served on all parties who have appeared in the action including defendants whose answers have been stricken or rendered noncontesting. Defaulting parties shall be noticed only if required by R. 4:43-2(d). [Subsequent encumbrancers who have filed proofs pursuant to R. 4:64-2 need not be noticed.] The application for entry of judgment shall be accompanied by proofs as required by R. 4:64-2 and in lieu of the filing otherwise required by R. 1:6-4 shall be only filed with the Office of Foreclosure in the Administrative Office of the Courts. The Office of Foreclosure may recommend entry of final judgment pursuant to R. 1:34-6.

30 days needed if subseq. encumbrancer to carry procedure set out in (c)(2), i.e., get names + addresses of all Pls, send notices, await 10-day response received, file affidavit w/ court

(c) Priorities; Subsequent Encumbrances. A party holding a subsequent encumbrance for a sum certain and filing an uncontesting answer may have the encumbrance included for payment in the foreclosure judgment on the filing of proofs pursuant to R. 4:64-2. The judgment shall not order payment to a subsequent encumbrancer unless

(1) [his] the priority of the encumbrance has been determined; and

(2) the encumbrancer has filed an affidavit stating that notice of the amount claimed due on the encumbrance has been served on all defendants whose addresses are known or readily ascertainable and none of the defendants, whose names and addresses shall be listed in the affidavit, has, within 10 days after the date of service of the notice made written objection to the validity, priority or amount of the encumbrance; and

[2] (3) all prior encumbrances of parties to the action, including answering and defaulting parties, have been previously satisfied or ordered paid; and

[3] (4) the encumbrance extends to the entire interest being foreclosed[.]; and

(5) no cross-claim pursuant to R. 4:64-5 has been filed.

No judgment by default shall be entered against a defendant postponing [his] that defendant's rights or claims to those of any other defendant unless the priority of the right or claims of the latter and the facts upon which they depend are distinctly set forth in the pleadings. A controversy between such defendants may be settled upon application for surplus moneys pursuant to R. 4:64-3.

(d) ...no change

(e) ...no change

(f) ...no change

(g) Answer by United States and State of New Jersey. Rule 4:6-1(a) notwithstanding, the United States of America and the State of New Jersey, if a party defendant to a mortgage foreclosure action, shall have 60 days from the date of service of the complaint upon it to file and serve its answer.

Note: Source - R.R. 4:82-1, 4:82-2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted to be effective .

DD. Proposed Amendments to R. 4:72-4 -- Hearing; Judgment; Publication; Filing

An attorney pointed out an apparent discrepancy between the court rule and the statute governing name changes. The statute, N.J.S.A. 2A:52-2, requires the Superior Court Clerk to forward a copy of the judgment for name change to the State Bureau of Identification, whereas the rule requires this only if the plaintiff has been convicted of a crime. The Committee agreed that R. 4:72-4 should be amended to conform to the statute.

The proposed amendments to R. 4:72-4 read as follows:

4:72-4. Hearing; Judgment; Publication; Filing

On the date fixed for hearing the court, if satisfied from the filed papers, with or without oral testimony, that there is no reasonable objection to the assumption of another name by plaintiff, [it] shall by its judgment authorize [him] plaintiff to assume such other name from and after the time fixed therein which shall be not less than 30 days from the entry thereof. Within 20 days after entry of judgment a copy thereof shall be published in a newspaper of general circulation in the county of plaintiff's residence, and within 45 days after entry of judgment, the judgment and affidavit of publication of the judgment shall be filed with the Clerk of the Superior Court and a certified copy of the judgment shall be filed with the Secretary of State. [If plaintiff has been convicted of a crime, t]The clerk shall mail a copy of the judgment to the State Bureau of Identification.

Note: Source--R.R. 4:91-4; amended July 24, 1978 to be effective September 11, 1978; amended July 11, 1979 to be effective September 10, 1979; amended July 22, 1983 to be effective September 12, 1983; amended to be effective .

EE. Proposed Amendments to R. 4:74-7 -- Civil Commitment

The Mental Commitments Subcommittee, chaired by Deborah Poritz, Esq., has drafted, and the full Committee recommends, several amendments to the rule governing involuntary civil commitments:

- A revision to R. 4:74-7(c) is proposed, to enlarge the permitted adjournment period for commitment hearings from 10 to 14 days. This change is based on practical considerations, as the county adjuster must serve all persons required under the rule with 10 days notice of the adjourned date.

- A revision to paragraph (e) of the rule is proposed, to reference the proposed amendment to R. 3:19-2, which would require hearings in cases where the defendant was acquitted by reason of insanity to be held in open court (see section I.L., above).

- Revisions to subparagraphs (g)(1) and (2) are proposed, to provide that patients converting from involuntary to voluntary status must attend the review hearing unless the court is satisfied that the patient does not wish to attend.

- A further revision to subparagraph (g)(2) is proposed, to provide that when a patient is admitted

voluntarily through a screening service, notice of the commitment hearing may be given to the patient's relatives only if the patient so requests in writing. This provision is intended to safeguard the privacy rights of a voluntary patient who may well not want relatives to be made aware of the commitment.

The report of the Mental Commitments Subcommittee is attached as Appendix B.

The proposed amendments to R. 4:74-7(c), (e), and (g) read as follows:

4:74-7. Civil Commitment

(a) ...no change

(b) ...no change

(c) Temporary Commitment. The court may enter an order of temporary commitment authorizing the admission to or retention of custody by a facility pending final hearing if it finds probable cause, based on the certificates filed in accordance with paragraph (b) of this rule, to believe that the person is in need of involuntary commitment. The order of temporary commitment shall include the following terms:

1. A place and day certain for the commitment hearing, which shall be within 20 days after the initial inpatient admission to the facility. The date shall not be subject to adjournment except that in exceptional circumstances and for good cause shown in open court and on the record the hearing may be adjourned for a period of not more than [10] 14 days.

2. ...no change

3. Assignment of counsel to represent an unrepresented patient. If the patient is a minor, a guardian ad litem shall be appointed to represent [him] the patient, who shall not be the applicant for the commitment. If the court, for good cause shown, appoints a guardian ad litem who is not an attorney, counsel for the guardian ad litem shall also be appointed. The guardian ad litem shall continue to represent the minor in respect of all matters arising under this rule until the minor is either released or reaches [his] majority,

and no guardian ad litem appointed pursuant to this rule shall be relieved without court order. Assigned counsel and guardian ad litem fees shall be fixed by the court after hearing and paid pursuant to paragraph [(h)] (i) of this rule.

4. ...no change

(d) ...no change

(e) Hearing. No final order of commitment shall be entered except upon hearing conducted in accordance with the provisions of these rules. The application for commitment shall be supported by the oral testimony of a psychiatrist on the patient's treatment team who has conducted a personal examination of the patient as close to the court hearing date as possible, but in no event more than five calendar days prior to the court hearing. If a licensed psychologist has examined the patient, the court may also require the psychologist to appear and testify in the matter. Other members of the patient's treatment team may also testify at the hearing, as may the patient's next-of-kin if the court so determines. The patient shall have the right to appear at the hearing, but may be excused from the courtroom during all or any portion thereof if the court determines that because of the patient's conduct at the hearing it cannot reasonably continue while the patient is present. In no case shall the patient appear pro se. The patient, through counsel, shall have the right to present evidence and to cross-examine witnesses. The hearing

shall be held in camera, except as otherwise provided by R. 3:19-2 (acquittal by reason of insanity).

(f) ...no change

(g) Conversion to Voluntary Status; Voluntary Admission Through a Screening Service.

(1) When a patient has been involuntarily committed to a short-term care facility, a psychiatric facility or a special psychiatric hospital, as defined in N.J.S.A. 30:4-27.2, and thereafter seeks to convert to voluntary status, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to convert to voluntary status and whether the decision was made knowingly and voluntarily. Counsel previously appointed shall represent the patient at that hearing and notice shall be given in accordance with paragraph (c)(4) of these rules. The patient shall attend the hearing unless the court is satisfied that the patient does not wish to attend.

(2) When a patient has been evaluated by a screening service and thereafter admitted to a short-term care facility or a psychiatric facility as a voluntary patient and when no court order of temporary commitment has been entered, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to be admitted voluntarily and whether the decision was made knowingly and voluntarily. Counsel shall be appointed to represent the patient at this hearing and notice shall be

given in accordance with paragraph (c)(4) of these rules, except that notice to the nearest relatives of the patient shall be given only as requested in writing by the patient. The form of notice served upon the patients and their counsel or guardians ad litem shall include a statement of the patient's rights at the hearing and a copy of the screening documents. The patient shall attend the hearing unless the court is satisfied that the patient does not wish to attend.

(h) ...no change

(i) ...no change

(j) ...no change

(k) ...no change

Note: Source - paragraphs (a)(b)(c)(d)(e)(f) and (g), captions and text deleted and new text adopted July 17, 1975 to be effective September 8, 1975; paragraphs (a)(b)(c)(e)(f) amended and (j) caption and text deleted and new caption and text adopted September 13, 1976, to be effective September 13, 1976; paragraphs (b)(d) and (f) amended July 24, 1978, to be effective September 11, 1978; paragraph (f) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; paragraphs (e) and (f) amended and paragraphs (g) and (h) caption and text amended November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended, subparagraphs (b)(1) and (2) adopted, paragraphs (c)(d) and (e) amended, caption and text of paragraph (f) amended, and caption and text of subparagraphs (g)(1) and (2) amended November 7, 1988 to be effective immediately; November 7, 1988 amendments rescinded February 21, 1989 retroactive to November 7, 1988; November 7, 1988 amendments reinstated June 6, 1989 to be effective June 7, 1989; subparagraph (c)(2) amended June 6, 1989 to be effective June 7, 1989; paragraph (g) recaptioned and text adopted and paragraphs (g)(h)(i) and (j) redesignated (h)(i)(j) and (k) June 29, 1990 to be effective September 4, 1990; paragraphs (c)(e) and (g) amended to be effective .

FF. Proposed Amendments to R. 4:86-2 -- Accompanying Affidavits

A State senator suggested the need to amend R. 4:86-2(b), concerning the affidavits required from two physicians in an application for a declaration of incompetency. In his view, it is often impossible to satisfy the requirement that the physicians who certify that the alleged incompetent is unfit must have made a personal examination within twenty days of the filing of the complaint.

The Committee agreed that the twenty-day period should be expanded and so proposes a thirty-day period with an express right to seek the court's relaxation of this requirement.

The proposed amendments to R. 4:86-2(b) and (c) read as follows:

4:86-2. Accompanying Affidavits

The allegations of the complaint shall be verified as prescribed by R. 1:4-7 and shall have annexed thereto:

(a) ...no change

(b) Affidavits of two reputable physicians, having qualifications set forth in N.J.S.A. 30:4-27.2t. If an alleged incompetent has been committed to a public institution and is confined therein, one of the affidavits shall be that of the chief executive officer, the medical director, or the chief of service providing that person is also the physician with overall responsibility for the professional program of care and treatment in the administrative unit of the institution. However, where an alleged incompetent is domiciled within this State but resident elsewhere, the affidavits may be those of physicians who are residents of the state or jurisdiction of the alleged incompetent's residence. To support the complaint, each affiant shall state that in his or her opinion the alleged incompetent is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the circumstances and conduct of the alleged incompetent upon which this opinion is based, including a history of the alleged incompetent's condition. Each affiant shall have made a personal examination of the alleged incompetent not more than [20] 30 days prior to the filing of the complaint, and the affidavit shall set forth the date of the examination, include a physical description

sufficient to identify the alleged incompetent, and state that the physician is not disqualified pursuant to R. 4:86-3. The time period herein prescribed may be relaxed by the court on an ex parte showing of good cause.

(c) In lieu of the affidavits provided for in paragraph (b), an affidavit of one reputable physician having the qualifications as required by paragraph (b), stating that he or she has endeavored to make a personal examination of the alleged incompetent not more than [20] 30 days prior to the filing of the complaint but that the alleged incompetent or those in charge of him or her have refused or are unwilling to have the affiant make such an examination. The time period herein prescribed may be relaxed by the court on an ex parte showing of good cause.

Note: Source -- R.R. 4:102-2; former R. 4:83-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended to be effective .

GG. Proposed Amendments to R. 4:86-10 -- Appointment of Guardian for Persons Receiving Services from the Division of Developmental Disabilities

The Public Advocate has requested that R. 4:86-10 be revised to conform to recent amendments to the statute governing Title 30 guardianships.

The 1990 statutory amendments effected three changes which the Committee agrees should be reflected in the court rule that relates to such guardianships. Specifically:

- N.J.S.A. 30:4-165.8, as amended, changes the requirements for affidavits supporting the complaint.

- N.J.S.A. 30:4-165.13, as amended, no longer provides for private practitioners who are appointed counsel for indigent alleged incompetents receiving services from the Division of Developmental Disabilities (DDD) to have their fees paid "by the State."

- N.J.S.A. 30:165.14, as amended, states that the Public Advocate will not be appointed counsel for the alleged incompetent if the petition seeks guardianship of the estate. The Public Advocate's appointment in guardianship of the person cases remains subject to the availability of funds to the

Public Advocate for the purpose of representing alleged incompetents in Title 30 proceedings.

The Committee is aware that joint efforts are underway involving the Judiciary, the Public Advocate, the Attorney General, and the Department of Human Services to develop solutions to the questions the statutory amendments have raised -- e.g., how will compensation and training be provided to the private attorneys who will of necessity be appointed to represent alleged incompetents in Title 30 guardianship proceedings. Nonetheless, the fact remains that the current rule is seriously at odds with the statute, especially insofar as it leads judges and attorneys to believe that "the State" will pay for the services of private attorneys appointed to represent alleged incompetents in Title 30 guardianship actions. Accordingly, the Committee recommends amending R. 4:86-10 as proposed by the Public Advocate, as an interim measure until a satisfactory solution to the difficulties engendered by the recent legislation is reached.

The proposed amendments to R. 4:86-10 read as follows:

4:86-10. Appointment of Guardian for Persons Receiving Services from the Division of Developmental Disabilities

An action pursuant to N.J.S.A. 30:4-165.7 et seq. for the appointment of a guardian for a person over the age of 18 who is receiving services from the Division of Developmental Disabilities shall be brought pursuant to these rules insofar as applicable, expect that:

(a) ...no change

(b) In lieu of the affidavits prescribed by R. 4:86-2 the verified complaint shall have annexed thereto two affidavits [setting forth with particularity why the person is in need of a guardian]. One affidavit shall be submitted by the chief executive officer, medical director or other officer having administrative control over a Division of Developmental Disabilities program servicing the alleged incompetent and the other shall be submitted by a physician licensed to practice in New Jersey or a psychologist licensed pursuant to N.J.S.A. 45:14B-1, et seq. The affidavit shall set forth with particularity the alleged incompetent person's significant chronic functional impairment, as that item is defined in N.J.S.A. 30:4-165.8, and the facts supporting the affiant's belief that as a result thereof, the person lacks the cognitive capacity either to make decisions or to communicate decisions to others.

(c) If the petition seeks guardianship of the person only, the Public Advocate, if available, shall be appointed as attorney for the alleged incompetent person, as required by R. 4:86-4. If the Public Advocate is unavailable or if the petition seeks guardianship of the person and the estate, the court shall appoint an attorney other than the Public Advocate to represent the alleged incompetent person. [The attorney for the alleged incompetent, as required by R. 4:86-4(a) shall be the Public Advocate, or, if unavailable, the court shall appoint an attorney, to be paid by the State, to represent the alleged incompetent.] The attorney for the alleged incompetent person [at the expense of the State] may where appropriate retain an independent expert to render an opinion respecting the incompetency of the alleged incompetent person.

(d) ...no change

Note: Adopted July 7, 1971 to be effective September 13, 1971; amended July 24, 1978 to be effective September 11, 1978. Former rule deleted and new rule adopted November 5, 1986 to be effective January 1, 1987; caption amended and paragraphs (b), (c) and (d) of former R. 4:83-10 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended to be effective .

HH. Proposed Amendments to R. 4:86-12 -- Special Medical Guardian

At the May 22, 1991 meeting of the Conference of General Equity Presiding Judges, the group agreed that the introductory sentence of R. 4:86-12 should be amended to make it clear that the special medical guardian is appointed to consent to the medical treatment that has been ordered by the court, in conformance with the language of subsections (1) and (2) of paragraph (a). Such an amendment is necessary because some attorneys and public agencies have taken the position that the special medical guardian has the authority to refuse to consent to the medical procedure at issue.

Although the special medical guardian is a legal fiction, the position is necessary to sign the form required by the hospital consenting to the procedure ordered by the court. Further some General Equity judges specify that the special medical guardian has the authority to consent to any ancillary procedures made necessary by the original treatment. Thus, if an operation is ordered and as a result a blood transfusion is required, the special medical guardian may consent to the latter under the terms of his or her appointment. The primary function of the special medical guardian is to consent to the treatment that the court has determined is necessary. The Committee recommends that this function be expressly stated in the rule.

In addition, a revision is recommended to make reference to appropriate provisions of the Advance Directives for Health Care Act, signed into law in July 1991.

The proposed amendments to R. 4:86-12 read as follows:

4:86-12. Special Medical Guardian

(a) Standards. On the application of a hospital, nursing home, treating physician, relative or other appropriate person under the circumstances, the court may appoint a special guardian of the person of a patient to [make decisions respecting] consent to medical treatment consistent with the court's order, if it finds that:

(1) the patient is incompetent, unconscious, underage or otherwise unable to consent to medical treatment;

(2) no general or natural guardian is immediately available who will consent to the rendering of medical treatment; [and]

(3) the prompt rendering of medical treatment is necessary in order to deal with a substantial threat to the patient's life or health[.]; and

(4) the patient has not designated a health care representative or executed a health care instruction pursuant to the New Jersey Advance Directives for Health Care Act, N.J.S.A. 26:2H-53 to -78, determining the treatment question in issue.

(b) ...no change

(c) ...no change

(d) ...no change

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraphs (a), (b) and (c) of former R. 4:83-12 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (a) amended to be effective _____.

II. PROPOSED RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendment to R. 1:5-6 -- Filing

An attorney objected to the Superior Court Clerk's Office practice of accepting even non-conforming papers for filing, without notifying the filing attorney that a problem exists. (In the specific situation that prompted the complaint, the Clerk accepted an answer for filing when default had already been entered.)

Rule 1:5-6(c) was amended in 1969 specifically to remove from the Clerk any discretion to determine what papers are appropriate for filing, except for those submitted without the required fee. In the Committee's view, the rule should not be changed. It is the responsibility of the filing attorney to know the status of the case. The provision in the rule that the Clerk "may notify the person filing if such papers do not conform to these rules" refers to facial non-conformity and does not require the Clerk to ascertain the status of the case, determine whether a particular filing is timely, and so advise the attorney.

B. Proposed Amendments to R. 1:6-2 -- Form of Motion; Hearing

An attorney had proposed a late filing fee of $100 as a solution to the problem of motion papers filed out-of-time. The Committee determined that no rule amendment is necessary; late-filing sanctions are already permitted and there is no need to spell this out in the rule.

C. Proposed Amendments to R. 1:6-3 -- Time for Serving and Filing

In the previous term, the Family Practice Committee had recommended that the time for service and filing of motions be enlarged from 14 to 15 days prior to the return date. The Supreme Court referred this issue to the Civil Practice Committee for review. The Committee was of the view that the time period should not be enlarged, either for civil or family motions. This view was also shared by the Committee on Civil and Family Motion Practice, which considered the proposal independently.

D. Proposed Amendments to R. 1:6-5 -- Briefs

The Committee was asked to consider the possible need for a rule placing limits on the number of pages in trial briefs, as some trial judges are of the view that unnecessarily lengthy briefs can be a problem. The Committee took the position that no rule change is needed, since it is within the trial judge's discretion to limit the size of trial briefs.

E. Proposed Amendments to Rules 1:7-4 and 4:46-2 -- re Decisions on Motions

An attorney suggested a rule change to require that a judge deciding a motion maintain and make available to attorneys some brief documentation of the court's reasons for granting or denying the motion. The Committee did not support such a rule change, but recognized that, for purposes of appeal, it is necessary that transcripts of decisions on motions be available promptly. Further, if the judge's decision is sound recorded, it may be possible to have copies of the tape made quickly and inexpensively, thereby providing attorneys with access to the motion decision.

F. Proposed Amendments to R. 1:9-1 -- For Attendance of Witnesses; Forms; Issuance; Notice in Lieu of Subpoena

The Committee considered a trial judge's suggestion that a procedure be developed whereby a judge listed as a witness in a case would be given written notice of the fact, along with the area of testimony sought. The Committee determined that the court rules were not an appropriate mechanism to address the issue.

G. Proposed Amendments to Rules 2:4-3, 2:12-7 and 2:12-8 -- re Appellate Practice

The following proposed amendments to appellate rules were not recommended by the Committee:

- R. 2:4-3: an attorney and Committee member suggested revising this rule to make it clear that the time for filing the petition for certification itself is also covered by the rule. The Clerk of the Supreme Court expressed the view that the rules as written are clear on the subject, but if the Committee was of the view that a change is needed, an amendment to R. 2:12-7(b) might achieve the same goal. The Committee referred the proposal to the Appellate Division Rules Committee, which did not favor the amendment. Accordingly, the Committee does not recommend the change.

- R. 2:12-7(a): the Committee rejected as unnecessary a proposal to change the wording of this rule from "exclusive of tables of contents, citations and appendix" to "exclusive of the table of contents, table of citations and appendix".

- R. 2:12-7(b): the Committee declined to recommend a suggestion that the rule be amended to require that "an original and 8 copies" of the petition for

certification be filed rather than "9 copies" now called for.

- R. 2:12-8: here, too, the Committee did not support the language changes previously suggested and rejected for R. 2:12-7(a) and (b) (see above).

H. Proposed Amendments to R. 3:23-8 -- Hearing on Appeal

The Committee rejected an attorney's proposal that R. 3:23-8(a) be amended to require that one copy of the transcript be served upon the attorney for the appellant. This issue had been raised in the past, and the Committee declined to recommend an amendment that would require the appellant to order an additional copy of the transcript. The Committee's position is that the appellant should have the less expensive option of making a xerox copy of the transcript.

I. Proposed Amendments to Rules 4:3-1 and 4:3-3 -- re Civil Case Information Statement

The Committee considered an Assignment Judge's suggestion that the rules specifically require a Case Information Statement from all parties whenever a case is transferred to the Law Division, Civil from another court or when a case filed in the Law Division, Civil prior to April 1, 1991 (the effective date of the CIS requirement) is transferred to another county.

The Committee voted unanimously that no change to Rules 4:3-1 and 4:3-3 is needed. Any problem can be cured by including in the order permitting the transfer or change of venue a requirement that a CIS must be filed.

J. Proposed Amendments to Rules 4:4-2 and 4:4-4 -- re Summons

An attorney pointed out an apparent anomaly between R. 4:4-4(a)(2), which in his view permits optional mailed service and a 60-day answer period, and R. 4:4-2, which requires the summons form to advise defendants of 20- and 35-day answer periods only.

The Committee declined to recommend any rule change. The 60-day period mentioned in R. 4:4-4(a)(2) is not an answer period; rather, that rule provides that if a defendant does not appear within 60 days following mailed service, the plaintiff's attorney must re-serve the complaint.

K. Proposed Amendments to Rules 4:4-6 and 4:6-1 -- re Acknowledgement of Service

A litigant suggested that acceptance of service by execution of an Acknowledgement of Service pursuant to R. 4:4-6 should trigger the 20-day response time of R. 4:6-1(a). The Committee declined to accept this proposal, seeing no need to amend the current service rules.

L. Proposed Amendments to R. 4:5-1 -- General Requirements for Pleadings

In endeavoring to address the several issues concerning foreclosure practice raised in Berg v. United Jersey Bank, an unpublished Appellate Division opinion decided in March 1990, the Committee rejected a proposal to amend R. 4:5-1 that would have required the plaintiff to set forth in the complaint the addresses and attorneys of all persons against whom relief is sought. The Committee was concerned that such a requirement would unnecessarily burden the plaintiff. (See section I.CC., above, for the Committee's proposed amendments to R. 4:64-1, drafted in response to Berg.)

M. Proposed Amendments to Rules 4:6-2, 4:6-3, 4:6-6 and 4:6-7 -- re Defenses and Objections

A Committee member had proposed amendments to eliminate perceived inconsistencies or ambiguities in the requirements of the above-noted rules as to the timing of presenting defenses and objections.

The Committee voted overwhelmingly against the suggested amendments. The language of the rules in question is taken from the Federal Rules, and no practical problems have arisen because of the present wording of the rules.

N. Proposed Amendments to Rules 4:9-1 and 4:9-4 -- re Amended and Supplemental Pleadings

An attorney and Committee member questioned the apparent discrepancy between the procedure for filing an amended pleading, as detailed in R. 4:9-1, which may be done without leave of court anytime before a responsive pleading is served, and for filing a supplemental pleading, as detailed in R. 4:9-4, which can only be done upon motion. She suggested that R. 4:9-4 be amended to allow the filing of a supplemental pleading as a matter of course prior to the service of a responsive pleading.

One member observed that an "amended" pleading stays within the established circle of controversy, but a "supplemental" pleading enlarges that circle; thus, a court order is necessary for a supplemental pleading so that the court can maintain control over the scope of the litigation. This distinction is meaningless, however, if the pleading is filed before any response is served. As a matter of definition and practical fact, no pleading is "supplemental" unless it is filed after service of a responsive pleading.

No rule change is necessary. The pleading should simply be designated "amended" if it is filed before the responsive pleading, and "supplemental" if it is filed after it.

O. Proposed Amendments to R. 4:10-3 -- re Protective Orders and Secret Settlements

A subcommittee, chaired by the Hon. Andrew Napolitano, was established to examine the need to amend R. 4:10-3 to guard against the abuse of protective orders that limit the use of discovered information to the party obtaining the discovery. The subcommittee determined, and the full Committee agreed, that R. 4:10-3 as it now reads is adequate, in that it provides for open discovery while also accommodating the need for protective orders upon a showing of good cause.

The subcommittee also discussed the issue of secret settlements, i.e., settlements conditioned on non-disclosure of terms. The subcommittee here determined, and again the full Committee agreed, that this issue, insofar as it involves the payment of "hush money" to ensure secrecy, is essentially a matter of attorney ethics, and that there is no present need to amend the Rules of Professional Conduct to address it.

Finally, the subcommittee considered a proposal that would require notice to the media whenever any application is made to seal a document or to close a proceeding. Both the subcommittee and the full Committee overwhelmingly rejected the proposal. (See section I.A., above, for the Committee's proposed amendment to R. 1:2-1, dealing with closed hearings and sealed records.)

P. Proposed Amendments to R. 4:14-6 -- Certification and Filing by Officer; Exhibits; Copies

A trial judge proposed that a defendant, against whom all claims have been resolved prior to trial, be required by rule to provide the plaintiff with the original transcript and copies of depositions noticed by that defendant, so that they can be furnished to the court for use at trial.

The Committee took the position that no rule amendment is necessary. Rather, this problem can most appropriately be worked out among the judge and the remaining attorneys before trial starts.

Q. Proposed Amendments to R. 4:17-4 -- Form, Service and Time of Answers

An attorney noted that, although R. 4:17-4(a) was recently amended to allow insurance agents or authorized representatives to answer interrogatories when a party is unavailable, the amended rule is silent as to any requirement by the carrier or agent to set forth what efforts were made to locate the unavailable party.

Two Committee members suggested a requirement of a certification, attached to the interrogatory answers, stating what efforts were made to find the absent defendant. However, others pointed out that no such certification should be necessary, as the amended rule specifically states that the carrier's answers bind the absent defendant.

The question was then raised as to what should be done if the defendant appears to testify at trial, and the testimony contradicts the interrogatory answers provided by the carrier. The Committee determined that the admissibility of defendant's conflicting testimony would be a matter for the trial judge to decide and voted against making any rule change at this time. The question raised was purely theoretical, with no evidence presented to the Committee that the problem had ever occurred.

Also with respect to R. 4:17-4, it was suggested that the rule be revised to require that answers to interrogatories be provided in the spaces following each question. The Committee noted that the rule was amended in 1984 and again in 1988

specifically to permit answers to be provided on sheets separate from the questions. As noted in the comment following the rule, this change was intended to accommodate the use of word processors and is "more practical than requiring the answering party to annex addenda sheets where the space provided for the answer was inadequate."

R. Proposed Amendments to Rules 4:17-5, 4:17-6 and 4:18-1 -- re Interrogatories and Production of Documents

An attorney and Committee member recommended several amendments to Rules 4:17 and 4:18 to reduce the potential for manipulation by litigants seeking to avoid complying with legitimate requests for discovery. The proposal would have amended: 1) R. 4:17-5(a), to place greater responsibility for establishing the objectionable nature of a question on the objecting party, and to require that the remainder of a question objected to in part be answered; 2) R. 4:17-5(c), to require a party objecting to an interrogatory request for documents to file a motion for a protective order and to specify the type, nature and number of documents being withheld because of any objections; 3) R. 4:17-6, to limit the number of interrogatories that may be propounded to 40; and 4) R. 4:18-1(b), to place greater responsibility on the party objecting to a request for documents by requiring that party to file a motion to strike the request, setting forth the ground of the objection, and to produce documents in response to those parts of a request to which no objection is made.

The Committee took the position that the rules should not be amended as proposed; the current procedure is fair and efficient.

Another attorney recommended that R. 4:18-1 be amended to require a party producing documents to identify the particular category of the request to which they respond.

The Committee declined to support such an amendment. Any problems in this area can readily be handled by the attorneys and the trial court. A rule amendment is not necessary.

S. Proposed Amendments to R. 4:17-7 -- Amendment of Answers

The Subcommittee on Discovery of Experts, chaired by the Hon. Leonard Arnold, drafted revisions to R. 4:17-7 designed to prevent discovery problems from arising during the course of trial, i.e., the Ratner problem. (In Ratner v. General Motors Corp., 241 N.J. Super. 197 (App. Div. 1990), a trial judge excluded pivotal prejudicial testimony by an expert, which testimony was not within the scope of the expert's report, although not offered with a design to mislead.) Under the first proposed revision, no amendment of interrogatory answers would be permitted if it is prejudicial and the result of a design to mislead and introduction would constitute a surprise to the prejudiced party.

The full Committee does not recommend such an amendment, for several reasons. First, it was felt that Ratner dealt with an aberrational situation, and the court rules should not be amended (or expected) to address every anomaly that occurs in civil practice. Also, the solutions of adjournment or mistrial, proposed in Ratner and the draft amendment, may themselves be highly prejudicial. Finally, the rule as it now reads is adequate to cover the problem as it allows the court discretion to admit or exclude the amended answers, as justice demands.

The subcommittee subsequently proposed another amendment to R. 4:17-7, setting out a schedule for the disclosure of

information about the identity of experts and the substance of their anticipated testimony at trial. In addition to requiring what amounts to "automatic discovery" in civil matters, the proposed revision would also address the Ratner situation by explicitly providing for preclusion at trial of any information not previously provided. Again, the full Committee declined to endorse the proposal in the belief that its adoption would dramatically increase the pretrial preparation for all cases to solve a problem that may arise in only a handful of those cases that actually do go to trial.

Accordingly, the Committee recommends no amendments to current R. 4:17-7.

T. Proposed Amendments to R. 4:21A-6 -- Entry of Judgment; Trial de Novo

The Committee referred to the Arbitration Advisory Committee an attorney's suggestion that R. 4:21A-6 be amended to allow plaintiffs to accept or reject an arbitration award independently of any co-party. (At present, when one party requests a trial de novo, the entire case as to all parties goes back on the trial list.) The latter committee reviewed the proposal and recommended no change to the present rule.

The Civil Practice Committee agreed with the present rule insofar as it applies to multiple defendants. However, if there are two plaintiffs and only one is dissatisfied with the arbitration award, the Committee questioned why the satisfied plaintiff must go to trial. According to the Arbitration Advisory Committee, which subsequently reconsidered the question at the Civil Practice Committee's request, and all the plaintiffs' attorneys on the latter committee, this is simply not a problem. Although a trial de novo request from a dissatisfied party brings the entire matter back onto the trial list, each party is still free to work out its own settlement based on the arbitrator's award. Thus, the Civil Practice Committee does not recommend the proposed change to R. 4:21A-6.

U. Proposed Amendments to R. 4:30A -- Entire Controversy Doctrine

The Division of Law and Public Safety proposed an amendment to R. 4:30A to except condemnation actions from the application of the entire controversy doctrine, because of the increasing prevalence of environmentally contaminated properties that are the subject of such actions.

The Committee agreed that no exception to the entire controversy doctrine need be carved out for condemnations. It is always possible to avoid the consequences of the doctrine by moving to sever and reserve a particular claim, and this would be an appropriate way to handle contamination issues.

V. Proposed Amendments to R. 4:38-2 -- Separate Trials

The Medical Inter-Insurance Exchange of New Jersey proposed amending R. 4:38-2(b) to mandate bifurcation of all medical malpractice trials into separate liability and damages proceedings. The Committee does not support such an amendment, preferring the current rule which leaves the issue of bifurcation to the sound discretion of the trial judge.

W. Proposed Amendments to R. 4:42-9(a) -- Counsel Fees

In light of a Chancery Division decision holding that R. 4:42-9(a)(4) does not apply to the recovery of counsel fees by a condominium association as part of its action against a delinquent unit owner, the Chief of the Office of Foreclosure proposed amending R. 4:42-9(a)(4) to include a specific reference to condo association lien foreclosures. The Committee does not support such an amendment, noting that N.J.S.A. 46:8B-21 permits reasonable counsel fees to be assessed against a delinquent owner if authorized by the master deed.

In addition, an attorney had proposed that R. 4:42-9(a)(5) be amended to permit full recovery of attorney's fees in actions to foreclose a tax sale certificate. The Committee declined to recommend such an amendment, since the rule now provides for increased fees to be awarded in the court's discretion, "for special cause shown". Note, however, that the Committee does recommend amending R. 4:42-9(a)(5) to provide a maximum fee of $350 for both in rem and in personam tax foreclosure proceedings (see section I.X., above).

X. Proposed Amendment to R. 4:42-11 -- Interest; Rate on Judgments; in Tort Actions

The Medical Inter-Insurance Exchange of New Jersey proposed extensive amendments to R. 4:42-11(b) to eliminate the application of the rule to future losses, non-economic damages, cases in which the plaintiff has caused unreasonable delays in pretrial proceedings and cases in which the plaintiff has failed to recover at trial an amount equal to or in excess of a previously rejected written settlement offer. The Committee does not recommend revising the rule as proposed.

Y. Proposed Amendments to R. 4:43-2 -- Final Judgment by Default

An attorney advise that the Superior Court Clerk's Office refused to enter default judgment against a defendant who had appeared in the action only to file a motion to set aside a previously entered default judgment because of defective service. The attorney's position was that the filing of the motion did not constitute an appearance and thus the Clerk could properly enter default judgment.

The Committee noted that the rules of court no longer make a distinction between "special" and "general" appearances. A motion to set aside a default judgment for defective service brings the movant under the jurisdiction of the court and this constitutes an appearance. The Committee determined that no rule change is necessary.

Z. Proposed Amendments to R. 4:51 -- Ne Exeat; Capias

An article in the New Jersey Lawyer stated that the detailed provisions in R. 4:51 relating to ne exeat surety bonds are meaningless as surety bond companies have made a business decision not to write such bonds.

Committee members expressed the view that there is no real problem in obtaining ne exeat and capias bonds. Accordingly, it was agreed that the rule should not be changed unless and until it is demonstrated that no such bonds are available.

AA. Proposed Amendments to R. 4:74-7 -- Civil Commitment

Rule 4:74-7 was amended as of September 1, 1990 to provide for judicial review of all patients converting from an involuntary to a voluntary commitment status as well as of all patients choosing voluntary commitment following screening. The Mental Commitments Subcommittee, chaired by Deborah Poritz, Esq., was subsequently asked to consider a rule that would provide for review of all patients who had converted from involuntary to voluntary status prior to September 1, 1990. As it was reported that the Public Advocate is bringing these patients before the court on a gradual basis, however, the subcommittee and full Committee determined that no rule change is needed.

BB. Proposed Amendments to R. 4:80-6 -- Notice of Probate of Will

An attorney wrote to the Committee advising that the notice requirements of R. 4:80-6 are virtually impossible to satisfy, as the rule calls for notice to be sent not only to all beneficiaries under the will but also, since the 1990 amendments, to all persons designated by R. 4:80-1(a)(3), i.e., spouse, heirs, next of kin, and others entitled to letters testamentary or letters of administration.

The Committee determined that no rule change is necessary, as R. 4:80-6 as amended in 1990 requires no new search. Once a will is admitted to probate, notice must be given to all persons in interest previously required to be identified in the complaint. This notice requirement was added in 1990 to ensure that New Jersey probate practice complies with the due process mandates of Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) and Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983).

CC. Breach of Settlement Agreement

The Committee declined to recommend an attorney's suggestion that rules be drafted to deal with the problem of breached settlement agreements.

DD. In Limine Applications

an attorney proposed adoption of a rule that would permit, if not encourage, in limine applications during the course of litigation. The Committee voted that no such rule is desirable or necessary.

EE. Periodic, Temporary Substitution of Attorney

An attorney had suggested that a rule be drafted to allow the attorney of record to hire a temporary substitute to appear for him or her at any time during the proceedings, e.g., to respond to a calendar call. This practice is permitted in New York. The Committee took a strong position against such an amendment.

FF. Federal Rules of Civil Procedure

The Committee considered whether amendments to the New Jersey rules are necessary or desirable, in light of the recently adopted amendments to the Federal Rules of Civil Procedure. The Committee concluded that no amendments are needed.

GG. Renotice Requirements of Adjourned Sheriff's Sale

In a previous term, the Committee established a subcommittee to consider what rule or legislative amendments, if any, are necessitated by the decision in First Mutual Corporation v. Samojeden, 214 N.J. Super. 122 (App. Div. 1986). That opinion holds that Rules 4:65-2 and 4:65-4 implicitly entitle interested parties to actual knowledge of the adjourned date upon which a Sheriff's sale occurs. It was concluded that no rule change is needed.

II. Fax Filing and Service

The Subcommittee on Fax Filing and Service, chaired by the Hon. Howard Kestin, was established to consider the desirability and feasibility of filing and/or service by fax. The subcommittee recommended a rule change that would permit interlocutory service by fax among attorneys only, of up to 50 pages, to be followed by hard copy. It recommended against permitting original service by fax at this time.

After discussing the subcommittee's recommendations, the full Committee declined to support any rule amendment permitting fax service. The majority of the Committee felt strongly that a fax sender is using the recipients's machine to accommodate himself or herself. Also, potential for abuse exists, despite any safeguards that may be built into a rule. Accordingly, the Committee recommends that fax service be permitted by specific consent of the adversary and that fax filing directly with a judge, as in a TRO situation, be permitted with the express consent of the judge. No rule is needed for such a consensual procedure.

See the report of the Subcommittee on Fax Filing and Service, included as Appendix C to this report.

See also Section III.E., below, for further discussion of the Committee's recommendations on this issue.

JJ. Miscellaneous Proposals

A listener of a local radio show dealing with legal issues wrote to suggest procedural changes that would require arbitration of civil cases and facilitate enforcement of judgments or settlements. The Committee agreed that no rule changes are necessary. Statewide statutory arbitration programs, as well as local rule-based programs, provide for arbitration of much of the civil caseload. The issue of the enforcement of judgments or settlements is already adequately addressed in the current rules.

III. OTHER RECOMMENDATIONS

A. Proposed Amendments to Appendix I -- Life Expectancy Tables

In light of the decision in IMO the November 14, 1989 Non-Group Rate Filing by Blue Cross and Blue Shield of New Jersey, 239 N.J. Super. 434 (App. Div. 1990), the Committee agreed that the Life Expectancy Tables contained in Appendix I of the Rules should be revised to eliminate gender-based differentiation.

The proposed new table follows:

Life Expectancies for All Races and Both Sexes

Age	Expectancy	Age	Expectancy	Age	Expectancy
0-1	73.88	37-38	39.56	74-75	11.02
1-2	73.82	38-39	38.63	75-76	10.48
2-3	72.89	39-40	37.71	76-77	9.95
3-4	71.93	40-41	36.79	77-78	9.44
4-5	70.97	41-42	35.87	78-79	8.93
5-6	70.00	42-43	34.96	79-80	8.45
6-7	69.02	43-44	34.06	80-81	7.98
7-8	68.05	44-45	33.16	81-82	7.53
8-9	67.07	45-46	32.27	82-83	7.11
9-10	66.08	46-47	31.39	83-84	6.70
10-11	65.10	47-48	30.51	84-85	6.32
11-12	64.11	48-49	29.65	85-86	5.96
12-13	63.12	49-50	28.79	86-87	5.61
13-14	62.14	50-51	27.94	87-88	5.29
14-15	61.16	51-52	27.10	88-89	4.99
15-16	60.19	52-53	26.28	89-90	4.70
16-17	59.24	53-54	25.46	90-91	4.43
17-18	58.28	54-55	24.65	91-92	4.17
18-19	57.34	55-56	23.85	92-93	3.93
19-20	56.40	56-57	23.06	93-94	3.71
20-21	55.46	57-58	22.29	94-95	3.51
21-22	54.53	58-59	21.52	95-96	3.34
22-23	53.60	59-60	20.76	96-97	3.19
23-24	52.67	60-61	20.02	97-98	3.05
24-25	51.74	61-62	19.29	98-99	2.93
25-26	50.81	62-63	18.58	99-100	2.82
26-27	49.87	63-64	17.88	100-101	2.73
27-28	48.94	64-65	17.19	101-102	2.64
28-29	48.00	65-66	16.51	102-103	2.57
29-30	47.06	66-67	15.85	103-104	2.50
30-31	46.12	67-68	15.20	104-105	2.44
31-32	45.18	68-69	14.56	105-106	2.38
32-33	44.24	69-70	13.93	106-107	2.33
33-34	43.30	70-71	13.32	107-108	2.29
34-35	42.36	71-72	12.72	108-109	2.24
35-36	41.43	72-73	12.14	109-110	2.20
36-37	40.49	73-74	11.58		

National Center for Health Statistics: United States Life Table. United States Decennial Life Table for 1979-81. Vol. I, no. 1. United States Printing Office, 1985.

B. Proposed Amendments to Law Division-Civil Summons

In an article in the Star-Ledger, Herb Jaffe criticized the civil summons forms currently in use, as confusing and cluttered. Upon examination of the form, the Committee agreed it should be redrafted in plain language, omitting gender-based references. Another change in the form omits the signature line for the Clerk of the Superior Court. The Committee is of the view that the Clerk's printed name is sufficient.

The proposed revised civil summons form is attached.

Attorney(s):
Office Address & Tel. No.:
Attorney(s) for Plaintiff(s)

	:	SUPERIOR COURT OF NEW JERSEY
	:	COUNTY
	:	DIVISION
Plaintiff(s)	:	
vs.	:	Docket No.
	:	
	:	CIVIL ACTION
	:	
	:	
Defendant(s)	:	SUMMONS

From The State of New Jersey
To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the county clerk of the county listed above within _____ 20 days from the date you received this summons, excluding the date you received it. (The address of each county clerk is listed on the back of this summons.) You must also send a copy of your answer or motion to plaintiff or the attorney whose name and address appear above. A telephone call will not protect your rights; you must file and serve a written answer or motion if you want the court to hear your case.

If you do not file and serve a written answer or motion within _____ 20 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live. A list of these offices is on the back of this summons. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services listed on the back.

DONALD F. PHELAN
Clerk of the Superior Court

DATED:

Name Of Defendant To Be Served:
Address of Defendant To Be Served:

ATLANTIC COUNTY:
Lori Mooney, Clerk
Civil Division, Direct Filing
1201 Bacharach Blvd., First Fl.
Atlantic City, NJ 08401
LAWYER REFERRAL
(609) 345-3444
LEGAL SERVICES
(609) 348-4200

BERGEN COUNTY:
Kathleen A. Donovan, Clerk
119 Justice Center
10 Main St.
Hackensack, NJ 07601-7698
LAWYER REFERRAL
(201) 488-0044
LEGAL SERVICES
(201) 487-2166

BURLINGTON COUNTY:
Edward A. Kelly, Jr., Clerk
First Fl., Courts Facility
49 Rancocas Rd.
Mt. Holly, NJ 08060
LAWYER REFERRAL
(609) 261-4862
LEGAL SERVICES
(609) 261-1088

CAMDEN COUNTY:
Michael S. Keating, Clerk
1st Fl., Hall of Records
5th St. & Mickle Blvd.
Camden, NJ 08103
LAWYER REFERRAL
(609) 964-4520
LEGAL SERVICES
(609) 964-8251

CAPE MAY COUNTY:
Angela F. Pulvino, Clerk
(Law Division Filings)
Box DN-209
Cape May Court House, NJ 08210
or
(General Equity Filings)
Box DN-209A
Cape May Court House, NJ 08210
LAWYER REFERRAL
(609) 463-0313
LEGAL SERVICES
(609) 465-3001

CUMBERLAND COUNTY:
John G. Nardelli, Clerk
Court House, Direct Filing
Broad & Fayette Sts.
Bridgeton, NJ 08302
LAWYER REFERRAL
(609) 451-5291
LEGAL SERVICES
(609) 451-0003

ESSEX COUNTY:
Patricia McGarry Drake, Clerk
237 Hall of Records
465 Dr. Martin Luther King, Jr. Blvd.
Newark, NJ 07102
LAWYER REFERRAL
(201) 533-1779
LEGAL SERVICES
(201) 624-4500

GLOUCESTER COUNTY:
Joseph J. Hoffman, Clerk
First Fl., Court House
1 North Broad St., P.O. Box 129
Woodbury, NJ 08096
LAWYER REFERRAL
(609) 848-4589
LEGAL SERVICES
(609) 848-5360

HUDSON COUNTY:
Frank E. Rodgers, Clerk
Superior Court, Civil Records Dept.
Brennan Court House, 583 Newark Ave.
Jersey City, NJ 07306
LAWYER REFERRAL
(201) 798-2727
LEGAL SERVICES
(201) 792-6363

HUNTERDON COUNTY:
Dorothy K. Tirpok, Clerk
Hall of Records
71 Main St.
Flemington, NJ 08822
LAWYER REFERRAL
(908) 788-5112
LEGAL SERVICES
(908) 782-7979

MERCER COUNTY:
Albert E. Driver, Jr., Clerk
P.O. Box 8068
209 South Broad St.
Trenton, NJ 08650
LAWYER REFERRAL
(609) 989-8880
LEGAL SERVICES
(609) 695-6249

MIDDLESEX COUNTY:
Herbert P. Lashomb, Clerk
Court House, East Wing, Lobby Fl.
1 Kennedy Sq., P.O. Box 2633
New Brunswick, NJ 08903-2633
LAWYER REFERRAL
(908) 828-0053
LEGAL SERVICES
(908) 249-7600

MONMOUTH COUNTY:
Jane Clayton, Clerk
P.O. Box 1252
Court House, East Wing
Freehold, NJ 07728-1252
LAWYER REFERRAL
(908) 431-5544
LEGAL SERVICES
(908) 747-7400

MORRIS COUNTY:
Alfonse W. Scerbo, Clerk
CN-900
30 Schuyler Pl.
Morristown, NJ 07960
LAWYER REFERRAL
(201) 267-5882
LEGAL SERVICES
(201) 285-6911

OCEAN COUNTY:
M. Dean Haines, Clerk
119 Court House
CN-2191
Toms River, NJ 08754
LAWYER REFERRAL
(908) 240-3666
LEGAL SERVICES
(908) 341-2727

PASSAIC COUNTY:
William L. Kattak, Clerk
Court House
77 Hamilton St.
Paterson, NJ 07505
LAWYER REFERRAL
(201) 278-9223
LEGAL SERVICES
(201) 345-7171

SALEM COUNTY:
John W. Cawman, Clerk
92 Market St., P.O. Box 18
Salem, NJ 08079
LAWYER REFERRAL
(609) 678-8363
LEGAL SERVICES
(609) 451-0003

SOMERSET COUNTY:
R. Peter Widin, Clerk
Civil/General Equity
New Court House, 3rd Fl.
P.O. Box 3000
Somerville, NJ 08876
LAWYER REFERRAL
(908) 685-2323
LEGAL SERVICES
(908) 231-0840

SUSSEX COUNTY:
Helen C. Ackerman, Clerk
Superior Court, Law Division
49 High Street
Newton, NJ 07860
LAWYER REFERRAL
(201) 267-5882
LEGAL SERVICES
(201) 383-7400

UNION COUNTY:
Walter G. Halpin, Clerk
1st Fl., Court House
Elizabeth, NJ 07207
LAWYER REFERRAL
(908) 353-4715
LEGAL SERVICES
(908) 354-4340

WARREN COUNTY:
Terrance D. Lee, Clerk
Court House
Belvidere, NJ 07823
LAWYER REFERRAL
(201) 267-5882
LEGAL SERVICES
(908) 475-2010

C. Attorney on Remand

A judge and Committee member pointed out an increasingly common problem, that of an attorney continuing to mishandle on remand a case that had been remanded primarily to salvage an apparently just cause from previous mishandling. One solution would be for the trial or appellate judge to refer the attorney to the District Ethics Committee. However, the function of such a committee is punitive, rather than remedial.

The Committee agreed that there is a need for peer review and remediation to deal with a problem that goes beyond the civil area and beyond the scope of a rules committee. The Committee recommends the appointment of a blue-ribbon committee or task force to study the problem and make recommendations to address it.

D. Operational Guidelines for Supreme Court Committees

The Chief Justice has asked the chairs of the standing committees for their views on the efficacy of the two-year cycle. The general consensus of the Civil Practice Committee is that a one-year rules cycle is preferable, for various reasons: under a two-year cycle, projects become too protracted; most issues can be adequately handled in a single year; important items tend to get lost or delayed, as it has proved difficult to pass rule amendments on an emergent basis; and, most importantly, the two-year cycle may ultimately result in the rules losing their importance as a current source of law and procedure.

E. Fax Filing and Service

Although the Committee rejected rule amendments, proposed by the Subcommittee on Fax Filing and Service, that would permit filing and/or service by fax (see section II.II., above), it does recommend that fax service be permitted by specific consent of the adversary and that fax filing directly with a judge -- i.e., when a TRO is sought -- be permitted with the express consent of the judge. Consent is not to be implied by the printing of a fax number on letterhead. No rule or rule amendment is needed for such a consensual procedure.

In order to obtain some practical information on the cost, benefits and problems relating to fax filing, the subcommittee proposed that a limited pilot program be developed and implemented. The Committee concurs, and recommends that the Superior Court Clerk's Office design a pilot for the fax filing of certain specified documents only.

See the report of the Subcommittee on Fax Filing and Service, included as Appendix C.

IV. LEGISLATION

A. Proposed Amendments to N.J.S.A. 2A:17-1 Considered and Rejected

A litigant had urged the amendment of N.J.S.A. 2A:17-1 to eliminate the requirement that a judgment creditor execute on personalty before being permitted to levy against the debtor's realty. The Committee determined not to recommend such a statutory amendment. However, legislation along the lines proposed was introduced by Senator McManimon in June 1991.

B. Proposed Amendments to Foreclosure Legislation -- S. 3765

The Committee was asked for its position on S. 3765, which would establish an alternative procedure for mortgage foreclosure without public sale. The Committee declined to comment on the legislation, which in its view implicates a matter of substantive law.

V. MATTERS HELD FOR CONSIDERATION

A. Subcommittee on Direct Filing

The current court rules do not now reflect procedures for direct filing -- that is, local filing with the County Clerk as Deputy Clerk of the Superior Court -- in civil and family matters. Instead, direct filing has been implemented by means of Supreme Court orders relaxing the appropriate rules. Although direct filing in Law Division - Civil has been in place statewide for some time, it will not be implemented in the Family Part in all counties until the end of 1992. Accordingly, the Committee will await completion of the direct filing implementation in Family to amend the rules to reflect these procedures. At the appropriate time, the amendments will be drafted by the Subcommittee on Direct Filing, chaired by the Hon. Sylvia Pressler.

B. Subcommittee on Appointment of Attorney Trustees

In the previous term a subcommittee, chaired by Edwin McCreedy, Esq., was established to consider the effectiveness of R. 1:20-12 in a "catastrophic" situation, i.e., when an attorney-trustee appointed under the rule is faced with managing a large number of very complex and/or disorganized files of a suspended, disbarred or deceased attorney. The subcommittee, which included three Sate Bar representatives, studied the problem and sought the views of the New Jersey Lawyers' Fund for Client Protection, the Office of Attorney Ethics, and the Administrative Office of the Courts.

The work of the subcommittee can go no further until a source of funds is identified, to pay out-of-pocket expenses of attorney-trustees, to compensate them for their time and effort, and in a situation where an attorney with a substantial practice leaves it in disarray, to underwrite the cost of the team of persons -- clerical staff and paralegals as well as the appointed attorney-trustee -- needed to unravel the files and deal with clients.

The subcommittee will continue to work to resolve the funding issue, possibly by seeking an IOLTA grant.

C. Subcommittee on Publication of Opinions

The bulk of the subcommittee's work in the 1990-92 term involved review of a proposal to make all trial and Appellate Division opinions, including those not approved for publication, available on LEXIS. See section VI.B., below, for a discussion of this issue. In the coming term, the subcommittee will undertake an examination of the process by which opinions are reviewed and chosen for publication.

D. Subcommittee on Service of Process

As stated in the narrative commenting on proposed changes to R. 4:4-4 (see section I.M., above), the subcommittee will undertake a comprehensive review of the timeliness and effectiveness of current service procedures, to identify problems and develop solutions. The study will include a survey of Sheriffs and the bar.

See Appendix A for the report of the Subcommittee on Service of Process.

E. Subcommittee on Contingent Fees

In response to repeated requests to consider amendments to various aspects of the contingent fee rule, R. 1:21-7, the Committee established a Subcommittee on Contingent Fees, chaired by Harold Sherman, Esq. The work of the subcommittee has included preparation, receipt and analysis of questionnaires sent to all other states concerning restrictions on contingent fees generally, and in particular types of cases. The subcommittee anticipates submitting its report to the full Committee in Spring 1992.

F. Pro Hac Vice Study

The Committee was asked to study the operation of R. 1:21-2, which governs appearances pro hac vice. It was noted that when the rule was originally drafted, the intent was to make it as liberal as possible. Now, pro hac vice admissions are so numerous (over 600 in 1990) that trials must frequently be adjourned because of attorneys' obligations in their home states.

Before coming to any conclusions about the rule's operation, the Committee reviewed data compiled from the files of the New Jersey Lawyers' Fund for Client Protection, to which all attorneys admitted pro hac vice must pay a fee. The Fund's files, however, were never intended to provide the kind of information the Committee needs to make its determination. Accordingly, the Committee recommended, and the Court approved, requiring that a copy of every order granting or denying a pro hac vice application, along with the affidavit submitted in support of the application, be sent to the AOC at the time the order is entered.

This requirement went into effect on July 1, 1991. After a full year's worth of data is compiled, the Committee should have sufficient information to undertake the requested study.

G. Rule 1:6-2 -- Form of Motion; Hearing

An attorney and Committee member recommended eliminating from R. 1:6-2(c) the requirement that an attorney making a discovery motion must certify that he or she has conferred orally (or made a good faith effort to confer) with the adversary in order to resolve the discovery dispute. The proponent of this proposal is of the view that the requirement is meaningless in the context of most cases.

The Committee voted to table the issue until the next term, to allow recent amendments designed to tighten up this requirement an opportunity to take effect.

H. Proposed Amendments to Rules 1:6-2(c) and 4:23-5(a) -- re Certifications

An attorney advised the Committee that some judges in some counties use the movant's inadvertent failure to provide the certifications required by R. 1:6-2(c) (that the attorney for the moving party has conferred with the adversary in an effort to resolve the issues raised by the motion) and R. 4:23-5(a)(1) as recently amended (that the party moving to dismiss or suppress an adversary's pleading for failure to provide timely answers to interrogatories is not itself in default in answering the interrogatories of the delinquent party) as a reason to deny unopposed discovery motions. He suggested that these rules be revised to prevent the denial of motions in these circumstances.

The Committee determined not to act on the proposal at this time, but to reconsider it in the next term, to allow the relatively new certification requirement of R. 4:23-5(a)(1) a chance to operate.

I. Rule 4:42-11 -- Interest; Rate on Judgments; in Tort Actions

An attorney recommended increasing the prejudgment interest rate as an incentive to encourage settlements. This issue comes before the Committee periodically and was studied extensively in the 1987 term. The Committee agreed that no change to the rule should be recommended at this time, but the issue should be reconsidered in the coming term.

J. Post-Trial Interviews with Jurors

A subcommittee, chaired by Kevin Marino, Esq., was formed to consider an attorney's suggestion that lawyers should be able to conduct post-trial interviews with jurors for educational purposes. Currently, the rules prohibit post-verdict interviews of jurors by attorneys, in an effort to prevent communication of information that might result in an attempt to impeach the verdict collaterally.

It was suggested that attorneys might be permitted to interview jurors in cases that terminated before any verdict was reached or before deliberations began. This would eliminate any concerns as to a mistrial and remove the chilling effect on deliberations that might occur if jurors knew that their actions and conversations in the jury room may be held up to later scrutiny. Interviews with jurors even in cases that did not reach verdict or deliberation would still be helpful, in that attorneys could learn jurors' views on particular experts, and on the effect of the attorneys' opening statements and trial techniques. Further, the summary jury trial procedure used in at least one county permits attorneys to interview jurors, and this has proved to be very informative not only to the attorneys but to the judge as well. A further benefit is that the interviews strengthen the jurors' sense of being part of the system, of having input.

In considering this issue, the subcommittee is reviewing the practice in other jurisdictions. The subcommittee expects to submit its report to the full Committee in the coming term.

VI. MISCELLANEOUS MATTERS

A. Judiciary Style Manual

A subcommittee, under the chairmanship of the Hon. Stephen Skillman, completed a comprehensive revision of the Judiciary Style Manual. The proposed revised manual has been submitted to the Supreme Court for its consideration.

B. Publication of Opinions

The Supreme Court requested that the Committee review and make recommendations regarding a proposal from Mead Data Central to place unpublished Opinions of the Appellate, Chancery and Law Divisions of the Superior Court on LEXIS. The Subcommittee on Publication of Opinions, chaired by the Hon. Richard Cohen, met with representatives of Mead Data Central and discussed the proposal at length. The subcommittee was deadlocked. A majority of the full Committee, however, concluded after lengthy discusssion that the problems inherent in the proposal far outweighed any potential benefits. The Committee transmitted this view to the Supreme Court, along with its recommendation that the proposal be rejected. Based on this recommendation, the Court determined that the proposal should not be adopted, and Mead Data Central has been so advised.

The Subcommittee on Publication of Opinions continues to work on its study of the publication process (see section V.C., above).

C. Juror Interview Cards/Voir Dire

A joint subcommittee of the Criminal Practice and Civil Practice Committees, chaired by the Hon. Lawrence Weiss, was established to review a procedure, in use in at least one county, whereby jurors are asked to complete a nine-question pretrial questionnaire or "interview card" while in the juror assembly room. The cards ask for basic information, including anything that might prevent service as a juror, and are intended to facilitate the voir dire process.

Although the subcommittee found the concept of juror interviews cards to be well-intended, in actual practice some difficulties arise. For example, few attorneys avail themselves of the opportunity to review the cards prior to trial, and even those who do still want to observe jurors as they respond to the questions. Accordingly, the subcommittee did not recommend the use of juror interview cards as a routine matter. The Civil Practice Committee endorses this position.

The discussion on the juror interview cards led to a consideration of the voir dire process in general. In some counties, the judge conducts the entire voir dire, whereas in others the attorneys are permitted to ask supplemental questions. A Civil Practice subcommittee was established to develop a videotape on effective voir dire procedures. It is anticipated that the videotape will be available for use at the 1992 Judicial College.

D. In Re Blackman

In In re Blackman, 124 N.J. 547 (1991), the Supreme Court directed the Civil Practice Committee to consider and clarify the scope and meaning of R. 1:15, Limitation on Practice of Attorneys, insofar as it precludes a municipal court judge as well as his or her partners and associates from representing an official of the municipality in which the judge is serving. Before undertaking this task, the Committee has requested clarification from the Court as to whether it -- the Committee -- is to determine which municipal employees would constitute "municipal officials" within the meaning and intent of the rule.

E. Rule 1:21-3(c) -- Appearance by Law Graduates and Students; Special Permission for Out-of-State Attorneys

The Trustees of the New Jersey Lawyers' Fund for Client Protection inquired whether out-of-state attorneys permitted to appear in New Jersey on behalf of a legal services organization, pursuant to R. 1:21-3(c), should be required to make payment to the Fund. In the view of the Committee, no such payment is required. Rule 1:21-3(c) merely authorizes an attorney to practice for a limited purpose, i.e., on behalf of a legal services organization which is responsible for the actions of the out-of-state attorney. This is not tantamount to admission pro hac vice and so no fee is necessary.

F. Proposed Amendment to R. 4:43-2(a) -- Final Judgment by Default

An attorney brought to the Committee's attention the fact that some counties are requiring proof hearings before entering default judgment in cases where an answer had been filed but was subsequently stricken. These counties point to a 1966 administrative directive mandating this procedure. The Committee determined that Judge Pressler should write to the Chief Justice, expressing the Committee's concern that rule-making by administrative directive is resulting in disparate procedures.

G. Proposed Amendment to R. 1:21-7A and RPC 1.5(b) -- re Retainer Agreements in Family Actions/Fees

An attorney suggested that R. 1:21-7A be amended to provide that in the event a representation is discontinued (e.g., the husband and wife reconcile), any new representation requires an additional retainer agreement. He suggested also that there should be separate fee agreements for domestic violence representation, matrimonial representation, or other representation, each of which should be specific and in writing. The Committee agreed to refer the issue to the Family Practice Committee.

H. Proposed Increase of Special Civil Part Monetary Jurisdiction

A listener of a local radio show on legal matters suggested raising the monetary jurisdiction of Small Claims to $10,000. This suggestion was referred to the Special Civil Part Practice Committee.

I. Proposed Amendments to Rules 1:34-2, 4:101-1 and 4:101-5 -- re Child Support Judgments

In response to Federal (Section 9103 of the Federal Omnibus Budget Reconciliation Act of 1986) and State (N.J.S.A. 2A:17-56.23a) legislation requiring that orders for child support payments become judgments by operation of law as they become due, a joint subcommittee, chaired by the Hon. Stephen Schaeffer and consisting of Family Practice and Civil Practice Committee members, the Superior Court Clerk, and Probation staff prepared amendments to Rules 1:34-2, 4:101-1 and 4:101-5, along with a certification form. The entire proposal was published for comment in the August 22, 1991 issue of the Law Journal. Two comments were received, both from county welfare boards. The amendments and form were revised to accommodate the comments and will be sent to the Supreme Court for immediate review.

The revised proposed amendments and certification form read as follows:

1:34-2. Clerks of Court

The clerk of every court, except the Supreme Court, the Superior Court and the Tax Court, shall be responsible to and under the supervision of the judge or presiding judge of the court of which the clerk serves, the Assignment Judge of the county, and the Administrative Director of the Courts. The clerks of the Supreme and Superior Courts shall be responsible to and under the supervision of the presiding judge of the court and the Administrative Director of the Courts. The clerk of the county shall be the deputy clerk of the Superior Court with respect to Superior Court matters pending in that county and may issue writs out of the Superior Court. The Surrogate of the county shall be the deputy clerk of the Superior Court, Chancery Division, Probate Part, with respect to probate matters pending in that county. Deputy clerks in the Superior Court, Chancery Division, Family Part and the Superior Court, Law Division, Special Civil Part and all other employees of such courts shall be responsible to and under the supervision of the clerk of the court. The Vicinage Chief Probation Officer shall be the deputy clerk of the Superior Court for the purpose of entering and certifying child support judgments and orders as required by R. 4:101.

Note: Source - R.R. 6:2-7, 7:21-1, 7:21-2, 8:13-4. Amended July 14, 1972 to be effective September 5, 1972; amended June 20, 1979 to be effective July 1, 1979; amended June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:101-1. Abstracts to Be Entered

(a) Entry on Civil Judgment and Order Docket. The Clerk of the Superior Court or, where provided by law or these rules, the county clerk as [his] deputy clerk of the Superior Court shall enter without request in the Civil Judgment and Order Docket an abstract of each judgment or order for the payment of money entered in [their respective courts] the Superior Court; and upon written notice by any party thereto pursuant to law, an abstract prepared by such party of any judgment or order affecting title to or a lien upon real or personal property, and an abstract of any judgment or order for costs and counsel fees entered by the Appellate Division of the Superior Court. The abstract shall contain the following information:

[(a)] (1) The title of the court and the names of all the parties to the judgment or order, designating particularly against whom it is rendered, and the firm name of all partnerships, if such appears in the pleadings;

[(b)] (2) The style of the action and the amount of the debt, damages and costs recovered; or, in the case of a judgment or order affecting title to or a lien upon real or personal property, a designation of the property so affected; and

[(c)] (3) The date of the actual entry of such judgment or order by notation thereof upon the Civil Docket.

(b) Child Support Judgments and Orders. When a child support judgment or order issued pursuant to N.J.S.A. 2A:17-56.23a is entered in the Superior Court Child Support Judgment Index of the Automated Child Support Enforcement System, it shall have the same force and effect as entry of an abstract in the Civil Judgment and Order Docket pursuant to paragraph (a) of this rule.

Note: Source - R.R. 4:120-2 (first unnumbered paragraph). Paragraph (a) amended September 5, 1969 to be effective September 8, 1969; amended July 7, 1971 to be effective September 13, 1971; amended July 24, 1978 to be effective September 11, 1978; amended July 22, 1983 to be effective September 12, 1983; existing rule redesignated as paragraph (a) with new caption added and new paragraph (b) added to be effective .

4:101-5. Assignments of, Postponement of Lien of, or Warrant to Satisfy Judgments; Entry of Satisfaction

(a) Assignments; Postponements; Warrants. The clerk shall enter upon the [c]Civil [j]Judgment and [o]Order [d]Docket, if the judgment is entered therein, and otherwise in the [c]Civil [d]Docket or other book in which the judgment or lien has been entered, a notation of the filing or lodging with [him] the clerk for record of any assignment of, postponement of the lien of, or warrant to satisfy, any judgment. Such notation shall appear at a discernible place on or at the entry of such judgment in said docket or book.

(b) Entry of Satisfaction -- Generally. Where a judgment is satisfied, the entry of satisfaction may be made at any discernible place on or at the entry of such judgment on the [c]Civil [j]Judgment and [o]Order [d]Docket or other book in which it may be entered.

(c) Entry of Satisfaction -- Child Support Judgments and Orders. If a child support judgment or order entered in the Child Support Judgment Index requires payment to an individual obligee, the obligee shall execute a warrant of satisfaction as of the date requested by or on behalf of the obligor. If the order or judgment requires payment through a probation department, the Chief Probation Officer shall issue, upon request, a certification as to the amount due in the form prescribed by Appendix XII to these rules, and the warrant of

satisfaction shall be signed by both the creditor and the Chief Probation Officer.

Note: Source - R.R. 4:120-6; paragraphs (a) and (b) amended and new paragraph (c) added to be effective .

Superior Court of New Jersey
Chancery Division - Family Part
County of _____

Docket No. _____

Judgment No. JCS _____

_____
Plaintiff/Oblig___

vs.

_____
Defendant/Oblig___

CERTIFICATION OF CHILD SUPPORT ARREARS

As of _____, 19 ___, the obligor in the above captioned matter owes $ _____ in past-due child support payments and $ _____ in post-judgment interest.

The undersigned certifies that the foregoing is a true and accurate record of outstanding judgment for child support entered in accordance with N.J.S.A. 2A:17-56.23a.

_____

Title: _____

_____ County Probation Department

J. Recovery of Paraprofessional Fees

Effective February 1, 1990, R. 4:42-9(b) was amended to clarify the criteria for recovery of paraprofessional fees. Subsequently, the South Jersey Paralegal Association forwarded its report on the issue to the Committee, for its information; the report referenced Missouri v. Jenkins, 109 S.Ct. 2463; 105 L.Ed. 2d 229 (1989). The Committee determined that neither the Paralegal Association report nor Missouri necessitated any further changes in the rule. The former does not contradict the amended rule. The latter merely represents caselaw development of the fee calculation issue.

K. Proposed Amendments to R. 4:59-1 -- Execution

An attorney had written to obtain the Committee's advice on where post-judgment discovery must be taken, as his interpretation of the requirements of the rule differ from that of a trial judge. Although the Committee agreed with the attorney's interpretation, it may not give advisory opinions in such matters. The attorney was advised that the problem he raised is not correctable by rule amendment. In any event, this question will be mooted by adoption of the proposed amendment to R. 4:59-1 (see section I.DD., above), which would permit an "information subpoena" to be used in place of post-judgment depositions.

Respectfully submitted,

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Hon. Leonard N. Arnold
Robert A. Baxter, Esq.
David H. Ben-Asher, Esq.
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Hon. Maurice J. Gallipoli
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Linda Lashbrook, Esq.
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Deanne Wilson, Esq.

Jane F. Castner, Esq., AOC staff

Dated: January 31, 1992

CIVIL PRACTICE COMMITTEE

SUBCOMMITTEE ON FAX

REPORT AND RECOMMENDATIONS II

November, 1991

CIVIL PRACTICE COMMITTEE
SUBCOMMITTEE ON FAX

REPORT AND RECOMMENDATIONS II

The Subcommittee on FAX has been instructed to update its 1989 report and recommendations, particularly in the light of a recently adopted amendment to Rule 5 of the Federal Rules of Civil Procedure (See Appendix A) and the proposed model rules for facsimile utilization recently promulgated by the National Center for State Courts (See Appendix B). Aside from commenting more extensively on the issue of filing by FAX in the light of these recent developments, the Subcommittee unanimously resubscribes to its 1989 report and recommendations (See Appendix C) which dealt primarily with the issue of service by FAX.

SERVICE BY FAX

In summary in this latter regard, we opined in our 1989 report that it was not appropriate to permit original service by FAX. For many of the same reasons that led us to that conclusion, it was also the Subcommittee's view that service by FAX between persons other than attorneys should also not be permitted. It was our view, however, that interlocutory service by FAX, between attorneys only, should be permitted, at least as an experiment. A rule amendment was proposed toward this end, embodying several conditions, limitations, and safeguards designed to prevent abuse or failure of this mechanism for serving papers. A full analysis of the issues and the reasons for the action which the Subcommittee recommended is contained in the 1989 report. It is the

Subcommittee's view that its 1989 draft rule is far better than the provisions of the National Center for State Courts' draft concerning service of process (Part III). This Subcommittee's proposed draft deals with all of the issues addressed by the National Center's draft and also covers some issues which apparently were not considered by those who prepared the National Center's draft.

FILING BY FAX

As concerns the issue of filing by FAX, the Subcommittee notes that the amendment to Rule 5 of the Federal Rules of Civil Procedure merely authorizes federal district courts to permit filing by FAX. Because of the amendment's recency, it is unlikely that any track record of experience under such a rule has yet developed.

While the National Center's draft concerning filing by FAX addresses many issues which ought to be considered, it should not be adopted in New Jersey at this time until further study is undertaken. Too many unanswered questions presently exist concerning the impact of FAX service as well as its manageability. Therefore, limited experiments should be undertaken before full-scope implementation is authorized.

The Subcommittee has arrived at these conclusions after seeking the views of Donald F. Phelan, Clerk of the Superior Court, and discussing issues he raised in the light of the Subcommittee's collective experience.

Mr. Phelan does not oppose the concept of service by FAX. He has advised the Subcommittee that he would support a limited

experiment for the purpose of evaluating its feasibility. Some of the problems he presently sees are related to his staff resources, the cost of gearing up for any such system, its impact upon important functions of the Clerk's office, and the like.

If a rule permitting filing by FAX is to include a provision for follow-up filing of hard copy (as provided in the National Center's proposal), an impossible burden would be created. Such a rule would require staff to handle papers twice. Existing shortages of staff and the current difficulty of handling the existing volume of filed papers suggest that such a mechanism could not be managed. The need to follow up FAX filing with a transmittal of hard copy exists, among other reasons, because the FAX machines presently in use in the Clerk's office (and most machines elsewhere) use the type of paper which deteriorates in relatively short time.

Double handling of papers could be avoided by having FAX equipment which produces its product on plain paper. Such equipment exists at a somewhat higher cost than standard models. Existing equipment would need to be replaced and more machines purchased, at least over the long run, to handle the anticipated volume. In a time of fiscal shortfall in all branches of government, it simply may not be feasible to make full use of this technological development.

Another problem which bears upon staff resources relates to filing fees. Presently in most situations, a check covering filing fees accompanies the papers to be filed. If papers are to be

transmitted by FAX with a filing fee to follow, once again clerical personnel will be involved in some double handling with its resulting impact upon personnel resources. This problem could be addressed by requiring any attorney who files by FAX to have an account with the Clerk's office. Such a requirement may engender other problems bearing upon staff resources if it means that more accounts will be maintained than presently is the case. Also in this regard, the members of the Subcommittee are under the impression that the number of accounts in the Clerk's office is decreasing perhaps because of factors relating to the economy.

Mr. Phelan highlighted another problem which will exist with any FAX filing system in which originals are not eventually filed. This related to the Clerk's function of certifying the authenticity of signatures in such instances as where a proceeding in another jurisdiction relates to one pending or previously held here.

With all of the actual and potential problems which FAX filing might engender, it would be best to undertake a fuller study before any rule amendments are considered. Even if it is eventually determined that filing by FAX is a system which should be implemented, it might be advisable to begin experimentally in limited ways and for limited time periods such as by permitting such filing for well-defined miscellaneous documents only, requests for emergent relief, or where permitted by a judge for special reasons. An experiment of this nature is being contemplated by the Office of Administrative Law, restricting filing by FAX to these limited areas. Once this experiment is established by rule and its

experience obtained, useful information may be available to the Superior Court in its consideration of a limited use of FAX filing.

Also, this Subcommittee in its 1989 report mentioned a then ongoing one-year experiment in Minnesota wherein FAX filing was authorized in order to address the problems of attorneys who practice at some distance from the filing location. It would be helpful to learn more about the Minnesota experiment before "re-inventing the wheel" in New Jersey. Furthermore along these lines, our recently implemented system of local filing may lessen the need for a FAX alternative. On the other hand, the Subcommittee recently learned of a project under way in Cape May County in which the county bar association is adverting a service for local filing which involves the use of FAX (See Appendix D). Such innovative efforts may also have some practical impact on the need for and advisability of direct FAX filing, although any system of local filings using FAX raises additional questions concerning equipment and staff cost factors which must be taken into consideration.

Accordingly, the Subcommittee recommends that no action be taken at this time to authorize filing by FAX. The Subcommittee further recommends that a feasibility study be instituted before any such action is considered.

Respectfully submitted,

Hon. Howard H. Kestin, Chair
Dennis M. Cavanaugh, Esq.
Hon. Jaynee LaVecchia
Deanne Wilson, Esq.

November, 1991

cir. 1966). The [illegible] show cause order to Waffenschneider v. Mackay, 763 F. 2d 711 (5th cir. 1985).

The new rule does not affect the reach of the court to impose criminal contempt sanctions. Nationwide enforcement of federal decrees and injunctions is already available with respect to criminal contempt: a federal court may effect the arrest of a criminal contemnor anywhere in the United States, 28 U.S.C. § 3041, and a contemnor when arrested may be subject to removal to the district in which punishment may be imposed. F. R. Crim. Pro. 40. Thus, the present law permits criminal contempt enforcement against a contemnor wherever that person may be found.

The effect of the revision is to provide a choice of civil or criminal contempt sanctions in those situations to which it applies. Contempt proceedings, whether civil or criminal, must be brought in the court that was allegedly defied by a contumacious act. Ex parte Bradley, 74 U.S. 366 (1869). This is so even if the offensive conduct or inaction occurred outside the district of the court in which the enforcement proceeding must be conducted. E.g., McCartney v. United States, 291 Fed. 497 (8th cir.), cert. denied 263 U.S. 714 (1923). For this purpose, the rule as before does not distinguish between parties and other persons subject to contempt sanctions by reason of their relation or connection to parties.

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

(d) FILING; CERTIFICATE OF SERVICE. All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court ~~either before service~~

~~or~~ within a reasonable time ~~there~~after service, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

(e) FILING WITH THE COURT DEFINED. The filing of ~~pleadings and other~~ papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Papers may be filed by facsimile transmission if permitted by rules of the district court, provided that the rules are authorized by and consistent with standards established by the Judicial Conference of the United States. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in

proper form as required by these rules or any local rules or practices.

COMMITTEE NOTES

Subdivision (d). This subdivision is amended to require that the person making service under the rule certify that service has been effected. Such a requirement has generally been imposed by local rule.

Having such information on file may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service. The certificate will generally specify the date as well as the manner of service, but parties employing private delivery services may sometimes be unable to specify the date of delivery. In the latter circumstance, a specification of the date of transmission of the paper to the delivery service may be sufficient for the purposes of this rule.

Subdivision (e). The words "pleading and other" are stricken as unnecessary. Pleadings are papers within the meaning of the rule. The revision also accommodates the development of the use of facsimile transmission for filing.

Several local district rules have directed the office of the clerk to refuse to accept for filing papers not conforming to certain requirements of form imposed by local rules or practice. This is not a suitable role for the office of the clerk, and the practice exposes litigants to the hazards of time bars; for these reasons, such rules are proscribed by this revision. The enforcement of these rules and of the local rules is a role for a judicial officer. A clerk may of course advise a party or counsel that a particular instrument is not in proper form, and may be directed to so inform the court.

Appendix B

PROPOSED MODEL FACSIMILE UTILIZATION RULES

With Commentary and Alternatives

(JUNE, 1991 DRAFT)

PROPOSED MODEL FACSIMILE UTILIZATION RULES

I. GENERAL PROVISIONS

1-101 [SHORT TITLE]

These rules may be cited as "fax filing rules."

* * *

COMMENTARY:

Adopting jurisdictions may wish to specify "filing" rules if facsimile use is limited to filings.

1-102 DEFINITIONS

As used in this division, unless the context requires otherwise:

(1) "These rules" means the rules in this chapter.

(2) "Facsimile transmission" means the transmission of a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals over a telephone line, and reconstructs the signals to print a duplicate of

the original document at the receiving end.

(3) "Facsimile filing" or "filing by fax" means the facsimile transmission of a document to a court or fax filing agency for filing with the court.

(4) "Service by fax" or "Service via Facsimile Transmission" means the transmission of a document to an attorney or a party under these rules.

(5) "Fax" is an abbreviation for "facsimile" and refers, as indicated by the context, to a facsimile transmission or to a document so transmitted.

* * *

ALTERNATIVES/ADDITIONS:

ALT. (6-a) "Facsimile machine" means a machine that can send a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the

International Telecommunications Union (CCITT),[1] in regular resolution. A facsimile machine used to send documents to a court shall send at an initial transmission speed of no less than 4800 baud and be able to produce a transmission record. As applied to a court, facsimile machine also means a receiving unit meeting the standards specified in this subdivision that is connected to and prints through a printer using xerographic technology, and a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. (Cal.)

ALT. (6-b) "Facsimile machine," a device capable of facsimile transmissions will be attached to a dedicated phone line and a dedicated electronic circuit protected by a surge protector.

The device will use 20 lb. alcoline base bond paper and will meet CCITT GROUP ____ specifications. It will automatically place the date and time of receipt on the printed transmission.

ADD. (7) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the

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1 Recommendations T.4 and T.30, Volume VII - Facsimile VII.3, CCITT Red Book, malaga-Torremolinos, 1984, U.N. Bookstore Code ITU 6731.

transmission time, and an indication of errors in transmission. (Cal.)

1-103 [AUTHORITY]

The rules in this division are adopted under [_____] and the authority granted under statute [_____] and by the [_____] Constitution, article __, section __.

1-104 [FACSIMILE TRANSMISSION]

All courts within the state may accept the filing of pleadings designated in this rule by facsimile transmission. Designated pleadings include all initial and supplemental pleadings to be filed in any action.

* * *

ALTERNATIVES/ADDITIONS:

ALT. 1-104 (1) [. . . within the case categories of civil, criminal, domestic relations, juvenile, traffic, small claims, and _____cases, . . .]

(2) [. . . including warrants and associated affidavits, . . .]

(3) [. . . that do not require the payment of a filing fee].

(4) [The following pleadings and matters are not acceptable for facsimile transmission to the court:

- Wills, codicils, bonds and similar undertakings (Cal. amend);
- Any pleading or submission requiring the inclusion of a verified document or signature by rule or statute (Missouri); and [or]
- Any citation or writ bearing the official seal of any court. (Texas)]

* * *

COMMENTARY:

Adopting jurisdictions may wish to limit casetypes and/or pleadings and papers for which facsimile filing is deemed appropriate. Delayed or subsequent payment of court fees or facsimile use service fees obviously entail a credit, billing or accounting system. These corollary duties and services may be minimized by limiting facsimile use to those filings not entailing a fee (Alt 3).

1-105 [TRANSMISSION DOES NOT CONSTITUTE FILING]

Electronic transmission of a document via facsimile machine does not constitute filing; filing is complete only after verification by the clerk for compliance with applicable rules of court, including rules [_____] regarding the form or format of papers; and with rules [_____] regarding filing procedures.

* * *

ALTERNATIVES/ADDITIONS:

ADD. 1-105 [. . . and the affixing of the official date and time stamp on each page received. (Texas)]

* * *

COMMENTARY:

It is not advocated that clerks be responsible for rules compliance other than the facial acceptability of incoming pleadings.

II. FILING PROCEDURES

2-101 [METHODS OF FILING]

(a) [Direct filing] A party may file by fax directly to any court locations offering this service. The court shall file the document if it complies with these rules.

(b) [Availability of court facsimile machine] Each court offering facsimile services shall have its facsimile machine available during normal business hours.

* * *

ALTERNATIVES/ADDITIONS:

ADD. (c) [A document received in whole or in part after normal business hours, as indicated by the receiving facsimile machine in the court, shall be deemed received and will be processed on the next court day.]

ADD. (d) [No facsimile transmissions of over [_____] pages (including cover sheet) in length will be accepted during normal court hours. Transmissions of more than [_____] pages must be made after the close of the court business day. (Idaho, Colorado, Minnesota)]

ADD. (e) [Required copies. Required copies of motions or briefs under rule [_____] must be transmitted with the original. Copies will be included in page counts. (Colorado)]

* * *

COMMENTARY:

The committee recommends consideration of after hours or unattended facsimile service. This decision should be made in consideration of facsimile machine capabilities, such as memory capacity, "stacking" ability for separating individual filings and standard paper (versus thermal paper) printing capacities. The extension of such service should not unduly burden court staff. In the same vein, adopting jurisdictions may wish to place page limits on transmissions during normal business hours. Alterations to times and limits may be made by prior approval.

(c) [Mandatory cover sheet] The sender must provide all required instructions and identifying information on the first page of the transmission (cover sheet) in a format prescribed by the court. (See Appendix ___ for sample forms.)

* * *

ALTERNATIVES/ADDITIONS:

ALT. (c-1) [Mandatory cover sheet] A facsimile filing shall be accompanied by the facsimile transmission cover sheet adopted by rule [_____] The cover sheet shall be the first page transmitted, followed by any special handling instructions needed to assure the document complies with local rules. This cover sheet shall:

1) clearly identify the sender by name, fax number and state bar number; the documents being transmitted by caption and matter; and the number of pages;

2) have clear and concise instructions concerning issuance or other request; and

3) have complete information on the charge card authorization or escrow account debit for court costs and fees.

Neither the cover sheet nor the special handling instructions shall be filed in the case. The court shall ensure that any billing or credit card information on the cover sheet shall not be publicly disclosed. The court shall not be required to keep a copy of the cover sheet.

* * *

COMMENTARY:

All information relating to sender identification, pleading identification, and any special instructions must

be placed in a standardized format on a form approved by the court or appropriate authority. The committee does not recommend the open transmittal of any information pertaining to credit cards or accounts if a billing system is maintained. Only account identifier codes should be referenced by the sender.

* * *

(d) [Return of copy of cover sheet by facsimile transmission] Upon receipt and processing of a filing by fax, a court may wish to transmit to the sending party, by facsimile transmission, a copy of the cover sheet showing filing [and any fee] information.

* * *

ALTERNATIVES/ADDITIONS:

ALT. (d-1) [Court personnel will not verify receipt of a facsimile transmission by telephone or return transmission. (Colorado)]

ALT. (d-2) [Return of copy of cover sheet by mail] Upon receipt and processing of a filing by fax, a court may mail to the sending party a copy of the cover sheet showing filing fee and information as required. (Texas)

ALT. (d-3) [Failure to return endorsed filed cover sheet] The failure of a court to transmit or mail verification or acknowledgement of receipt of a facsimile filing shall not affect the validity of the filing. (Cal.)

* * *

COMMENTARY:

The risk of the use of facsimile transmissions must lie with the sender. The provision of a courtesy confirmation of receipt or a verification of transmission lies within the discretion of the court or other appropriate authority. If provision is made for such verification or confirmation and it is not received, the sender would be on notice of a potential problem.

* * *

(e) [Presumption of filing] If the attempted facsimile filing is not filed with the court because of (1) an error of transmission unknown to the sending party or (2) a failure to receive or process by the court, the sending party may move acceptance nunc pro tunc. The court, in the interest of justice, and upon the submission of appropriate documentation, may entertain a written motion and hearing in its discretion.

* * *

ALTERNATIVES/ADDITIONS:

ALT. (e-1) [Presumption of filing] A party filing by fax shall cause the transmitting facsimile machine to print a transmission record of each filing by fax. If the facsimile filing is not filed with the court because of (1) an error in the transmission of the document to the court which was unknown to the sending party or (2) a failure to process the facsimile filing when received by the court, the sending party may move the court for an order filing the document nunc pro tunc. The motion shall be accompanied by the transmission record and a proof of transmission in the form set forth in rule [_____].

2-102 [FACSIMILE SIGNATURE CONSTITUTES ORIGINAL SIGNATURE] Notwithstanding any provision of law to the contrary, a signature produced by facsimile transmission is an original. A party who files a signed document by fax represents that the original physically signed document is in his or her possession or control.

* * *

ALTERNATIVES/ADDITIONS:

ALT. 2-102 [Facsimile Signature Constitutes Original Signature]

[For all designated filings conforming to these rules, a signature produced by a facsimile machine will be treated as an original signature for all purposes, except where rule or statutory requirements specifically demand a verified document or signature. (Missouri)]

* * *

COMMENTARY:

Electronic filings, whether by facsimile or other means, present new challenges to the reliance on documents bearing an "original" signature. In all cases where a document other than a "hard copy" document is accepted for filing, the first generation hard copy document with actual signature should remain in the hands of the sender, and be available for review as necessary for any subsequent challenges to authenticity within the scope of applicable discovery rules.

2-103 [PAPER SIZE AND DOCUMENT QUALITY]

All documents filed via facsimile transmission must conform in form and format to existing court document quality standards of rules [_____]. They should be received on 8-1/2" x 11" 20 lb. alkaline plain paper of archival quality, and satisfy all other requirements of these rules.

* * *

ALTERNATIVES/ADDITIONS:

ADD. 2-103 [Facsimile filing must have a left and bottom margin of 1 inch, a top margin of 1.5 inches and a right margin of 1.25 inches, (Washington)]

* * *

COMMENTARY:

The utility and convenience of facsimile filing should not occasion greater burdens on court staff in copying or cutting non-standard or non-conforming paper stocks. This problem can be minimized through the use of court facsimile machines capable of producing facsimile filings on paper stocks which meet court-set paper size and quality standards. Thermal paper fax machines may

create undue burdens on staff to copy and cut transmissions. If such machines are in service and cannot be readily replaced for budgetary reasons, the court may wish to require that conforming originals follow the acceptance of the facsimile filing by mail, within a set period of time. The filing of these conforming originals would then be effective upon the date of the receipt of the original facsimile transmission.

(a) [Oversize exhibits] No facsimile filings will be accepted where any part of that filing cannot be legibly reduced to 8-1/2 by 11 inches.

* * *

ALTERNATIVES/ADDITIONS:

ALT. (a-1) [Oversize exhibits] If a filing transmitted via fax is to contain exhibits of a size or nature not amenable to downsizing for facsimile transmission, the filing must contain titled insert pages representing those exhibits, with explanation. The missing exhibits must then be received by the court within five (5) court days following receipt of the filing. The date of filing will be the date of the original conforming transmission. (Cal.)

* * *

ADD. (b) [Demand for original; waiver] Within fifteen (15) days after service of a signed facsimile filing, any other party may serve a demand for production of the original physically signed document. The demand shall be served on all other parties but shall not be filed with the court. Failure to serve a demand is a waiver of the right to demand production of the physically signed original.

ADD. (c) [Examination of original] If a demand for production of the original physically signed document is made, the parties shall arrange a meeting at which the original physically signed document can be examined.

* * *

COMMENTARY:

Production of original documents should not pose any special problems within the framework of existing discovery rules. It is anticipated that parties will cooperate; court sanction power is sufficient to compel cooperation where it is not forthcoming.

2-104 [PAYMENT OF FEES]

Payment of filing fees and any additional charges levied by the court for the use of the facsimile filing option (user service charges) shall be paid in the manner prescibed by the appropriate authority.

* * *

ALTERNATIVES/ADDITIONS:

ADD. (a) [Payment of fee by charge card] Visa or Mastercard accounts may be used to charge filing fees and service charges on facsimile filings as follows:

1) A filing requiring the payment of a filing fee shall include on the cover sheet (1) the Visa or Mastercard account number to which the fees shall be charged, (2) the signature of the cardholder authorizing the charging of the fees, and (3) the expiration date of the credit card.

2) If the charge is rejected by the issuing company, the court shall proceed in the same manner as required for returned checks. This provision shall not prevent a court from seeking authorization for the charge before the filing and rejecting the filing if the charge is not approved by the issuing company.

3) Notwithstanding any provision of law to the contrary, the amount authorized to be charged shall be the total of the applicable filing fee plus any fee or discount imposed by the card issuer or draft purchaser, and the total court imposed fee for the use of this service. (Cal.)

ADD. (b) [Filing fee accounts] An account may be used to pay all fees for documents filed by fax in the courts as follows:

1) This method may be used only if an attorney has established an account with the court before filing by fax a paper requiring the payment of a fee.

2) The court may require the deposit in advance of an amount not to exceed $1000.00 or the court may agree to bill the attorney not more often than monthly. A court subject to this subdivision shall select either the advance deposit method or the billing method. (Cal.)

ADD. (c) [Subsequent payment of filing fee] A filing fee may be paid by mail or in person following a facsimile filing as follows:

1) The filing fee, accompanied by a copy of the facsimile filing cover sheet, shall be deposited with the court not later than seven calendar days after the filing by fax. The court may withhold entry of judgment pending receipt of the fees.

2) If the filing fee is not received by the court within seven calendar days after the filing by fax, the court shall proceed in the same manner as required for returned checks, except that no further notice need be given any party.

3) A three day grace period will be allowed for receipt of direct (non-credit card or escrow account) payments. Non-receipt of payments will result in suspension of facsimile privileges, the striking of pleadings for which fees were not tendered, and any other penalties deemed appropriate within the discretion of the court. (Colorado)

ADD. (d) [Fees for filing by fax] The following fees will be assessed by a receiving court for all filings submitted by fax as a service charge to cover maintenance and operating costs:

1) [Each document filed by fax shall be assessed a fax filing fee of $1 for each page that is received.]

2) [The first paper filed by fax by each party in an action shall be assessed a fee of $15. No fee for filing by fax shall be charged for subsequent papers filed by fax in the action.]

3) [The fee for filing shall be $10.00 for from 1 to 10 pages; additional pages will be $1.00 each. (Colorado)]

ADD. (e) The fees or user service charges assessed by this subdivision shall be paid as provided by this rule.

ADD. (f) [State agencies exempted from filing fees under [_____] are not exempt from the user service charges enumerated within this subsection (d). (Colorado)]

* * *

COMMENTARY:

The assessment of fees or user service charges for filing by fax (a charge separate and distinct from the normal filing fee itself) should be reflected in existing statutory fee schedules. Whether a fee should be imposed for the provision and maintenance of this service is an open question. Jurisdictions considering imposition of a service charge for facsimile filing should weigh the purpose of such fees: are they a cost-recovery device for machine purchase, maintenance and operating costs, or a revenue generator? Does facsimile filing serve court or litigant convenience? Will fees serve to ration or

discourage use? Facsimile filing will certainly entail some form of delayed payment system, for filing fees or charges, with attendant accounting, billing, audit, and collection burdens. These corollary duties should be carefully considered and carefully planned for prior to implementation.

III. SERVICE OF PROCESS

3-101 [SERVICE OF PROCESS BY FACSIMILE TRANSMISSION]

(a) [Transmission of papers by court] A court subject to these rules may serve a notice by fax if that notice may be served by mail.

(b) [Method of service] Service by fax to an attorney or person to be served shall be made by transmitting the document to the facsimile machine telephone number of the office of the attorney or the person to be served.

(c) [When service complete] Service by fax is complete upon receipt of the entire document by the receiving party's facsimile machine.

* * *

ALTERNATIVES/ADDITIONS:

ALT. (c-1) [Service that occurs in whole or part after 5:00 p.m. shall be deemed to have occurred on the next court day.] (Cal.)

ADD. (d) [Proof of service by fax] Proof of service by fax may be made by a statement to the court that includes:

1) the time, date, and sending facsimile machine telephone number shall be used (instead of the date and place of deposit in the mail);

2) the name and facsimile machine telephone number of the person to whom sent (instead of the name and address of the person served as shown on the envelope);

3) a statement that the document was transmitted by facsimile transmission and that the transmission was reported as complete and without error.

ADD. (d-1) 4) [a copy of the transmission report shall be attached to the proof of service and the proof of service shall declare that the transmission report was properly issued by the transmitting facsimile machine.]

ADD. (e-1) [Form of proof of service by facsimile transmission]

The proof of transmission required by these rules shall be in the following form:

"At the time of transmission I was at least 18 years of age and not a party to this legal proceeding. I transmitted to the (court name) _____ the following documents (name) _____ by facsimile machine, pursuant to rule [ ]. The court's fax number that I used was (fax number) _____. The facsimile machine I used complied with rule [ ] and no error was reported by the machine. "I declare under penalty of perjury under the laws of the State of [_____] that the foregoing is true and correct."]

ALT. (e-2) [Where service is made by facsimile machine, proof of service shall be made by affidavit of the person making service, or by certificate of an attorney. Attached to such affidavit or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine. (Oregon)]

ADD. (f) [Consent to service by use of fax filing] An attorney who files a paper by fax consents to service of papers on him or her by fax in that proceeding. (Cal.)

ADD. (g) [Other consent to service] An attorney who is willing to accept sevice of papers by fax shall so indicate by including his or her facsimile machine telephone number, designated as a "fax" number, as part of the attorney's name, address, and telephone number on a document filed in this action. (Cal.)

* * *

COMMENTARY:

Service by facsimile transmission should be the equivalent of service by first class mail. Receiving machines should have the capability of providing a date and time stamp on all incoming transmissions to corroborate receipt.

IV. SEARCH WARRANTS

4-101 [SEARCH WARRANTS, AFFIDAVITS AND ORDERS]

Orders, affidavits for search warrants and search warrants may be submitted and issued via facsimile transmission.

(a) An affidavit for a search warrant may be submitted by facsimile transmission if all of the following occur:

1) the judge or magistrate orally administers the oath or affirmation to an applicant for a search warrant who submits an affidavit under this subsection;

2) The affiant signs the affidavit. Proof that the affiant has signed the affidavit may consist of a facsimile transmission of the signed affidavit; and

3) the judge or magistrate is satisfied of the authenticity of the request and the identity(ies) of the requestor(s).

(b) A judge may issue a written search warrant in person or by facsimile transmission. If a court order is issued as a search warrant, the written search warrant may be issued in person or by facsimile transmission by a judge or magistrate.

(c) The peace officer or department receiving a faxed search warrant shall receive proof that the issuing judge or magistrate has signed the warrant before the warrant is executed. Proof that the issuing judge or magistrate has signed the warrant may consist of a transmitted facsimile of the signed warrant.

(d) A search warrant issued by facsimile shall be constructed of materials that do not deteriorate more rapidly than ordinary typewritten material on ordinary paper.

(e) If an oath or affirmation is orally administered by telephone under this section, the oath or affirmation is considered to be administered before the judge or magistrate.

(f) If an affidavit for a search warrant or a search warrant is issued by facsimile, the transmitted copies of the affidavit or search warrant are duplicate originals of the affidavit or search warrant and are not required to contain an impression made by an impression seal. (Michigan)

* * *

ALTERNATIVES/ADDITIONS:

ALT. 4-101 [Issuance of Orders or Warrants]

(a) Facsimile transmission may be used for the issuance of all orders and warrants including, but not limited to, the following circumstances:

1) criminal matters for the issuance of arrest and search warrants;

2) juvenile matters for the issuance of orders or warrants for taking a juvenile into custody and for the release or detention of the juvenile;

3) family matters for the issuance of ex parte temporary orders for protection; and

4) civil cases for the issuance of temporary restraining orders.

(b) All procedural and statutory requirements for the issuance of a warrant or order, including the making of a record of the proceedings, shall be met.

(c) For all procedural and statutory purposes, the facsimile shall have the same force and effect as the original.

(d) The original order or warrant, along with any other documents, including affidavits, shall be delivered to the court administrator of the county where the request or application for the order or warrant was made. (Minnesota)]

* * *

COMMENTARY:

Due to their sensitive nature and the power the warrant will confer on the requesting official, the traditionally strict requirements for verification and authenticity of

warrant requests and supporting process should be maintained in the context of facsimile transmission. Judges or magistrates may wish to consider the transmission of further proofs or identifications from requestors via facsimile in the course of the warrant issuance process. The use of facsimile transmissions for this purpose should always be permissive for the judicial officer involved.

STATE OF MINNESOTA

IN SUPREME COURT

C2-87-1853

ORDER CONTINUING USE OF
FACSIMILE TRANSMISSION

WHEREAS, by Order #C4-87-1853 dated September 21, 1987, this Court authorized the filing of papers and issuance of warrants and orders by use of facsimile transmission on an experimental basis from October 1, 1987 to September 30, 1988; and

WHEREAS, on June 22, 1988, this Court held a hearing to consider proposed amendments to the Rules of Civil Procedure that would, among other things, authorize the filing of papers by facsimile transmission; and

WHEREAS, this Court is in the process of promulgating an amendment to the Rules of Civil Procedure that will permit the filing of papers by facsimile transmission effective January 1, 1989;

NOW, THEREFORE, IT IS ORDERED that until January 1, 1989, the filing of papers and issuance of orders and warrants by the use of facsimile transmission shall be permitted according to the terms and conditions set forth in Supreme Court Order #C4-87-1853 dated September 21, 1987

Dated October 3, 1988

BY THE COURT

Douglas K. Amdahl
Chief Justice

STATE OF MINNESOTA

IN SUPREME COURT

C2-87-1853

Order Regarding the
Experimental Use of
Facsimile Transmission

WHEREAS, the Supreme Court has the inherent and statutory authority pursuant to Minn.Stat. §2.724, subdivision 4; Minn. Stat. §§480.05; .051; .059; .0591; and .0595 to regulate pleadings, practice, and procedure in the trial courts of this state; and,

WHEREAS, the Supreme Court shares the concerns expressed in the legislature and in various public hearings for the need for access to judges, particularly in emergency situations; and,

WHEREAS, all appropriate means must be used to enhance accessibility to limited judicial resources; and,

WHEREAS, the non-emergency use of facsimile transmission may also benefit practitioners and litigants;

NOW, THEREFORE, IT IS HEREBY ORDERED that the use of facsimile transmissions is allowed on an experimental basis subject to the following conditions:

(1) Equipment. Facsimile transmission equipment owned or operated by any official of the courts of the State of Minnesota shall conform to standards prepared by the State Court Administrator's Office. This rule is not intended to preclude facsimile tranmission by equipment owned or operated by persons other than officials of the courts of this state.

(2) Issuance of Orders or Warrants.

(a) Facsimile transmissions may be used in the following circumstances only where time is of the essence and no local judge is available:

(i) Criminal matters for the issuance of arrest or search warrants;

(ii) Juvenile matters for the issuance of orders or warrants for taking a juvenile into custody and for the release or detention of the juvenile;

(iii) Family matters for the issuance of ex-parte temporary orders for protection; and,

(iv) Civil cases for the issuance of temporary restraining orders.

(b) All procedural and statutory requirements for the issuance of a warrant or order, including the making of

a record of the proceedings, shall be met. Written affidavits may be transmitted by facsimile or the court may accept a sworn reading of the affidavit in lieu thereof.

(c) For all procedural and statutory purposes, the facsimile shall have the same force and effect as the original.

(d) The issuing court shall mail the original, along with any other documents, including affidavits, to the court administrator of the county where the request originated.

(e) The issuing court shall notify the district administrator of the transmission of any facsimile, including the name of the requesting county, the name of the issuing county, and the nature of the warrant or order.

(3) Electronic Filing. Any document may be filed with any court by facsimile transmission. The place of filing shall be deemed to be the place where the transmission is received. The document made at the receiving station shall be deemed the original filing and shall be so marked. The receiving official shall sign the document as having been received and filed. The original document shall thereafter be transmitted to the appropriate court with a notation that a facsimile was filed and the date of filing.

(a) The sending party, if an official of the courts of the State of Minnesota, shall:

(i) Collect from the party wishing to file a document by facsimile transmission the applicable filing fee of the receiving court;

(ii) Notify the receiving court at the time of transmission that all applicable filing fees have been paid and transmit those fees to the court administrator of the receiving court; and,

(iii) Collect from the party wishing to file a document by facsimile transmission a transmission fee established by local court rule or order, which fee shall take into consideration the costs associated with facsimile transmission including, but not limited to, long distance telephone charges.

(b) If an official of the courts of the State of Minnesota is not the sending party, arrangements for payment of applicable filing fees shall be the responsibility of the party wishing to file by facsimile transmission.

(4) Reporting. The district administrator shall monitor and report the use of facsimile transmissions to the chief judge of the district and to the state court administrator.

(5) Duration. The experimental period as provided in this order shall run from October 1, 1987 to September 30, 1988. At the end of this period, the Supreme Court shall conduct a public hearing to consider issues raised by the use of facsimile transmissions and to make such further orders as it deems appropriate.

Dated September 21, 1987.

BY THE COURT

Douglas K. Amdahl
Chief Justice

NEW YORK LAW JOURNAL
Feb. 23, 1989
Page 1, col. 3

Faxed' Court Papers Get Bar Unit's Support

Study Report Issued by New York State Bar Section on Commercial and Federal Litigation

BY GARY SPENCER

ALBANY — Concerned about possible abuse of facsimile machines in serving papers in state court proceedings, the New York State Bar Association's Section on Commercial and Federal Litigation yesterday recommended adoption of a uniform rule to regulate service of interlocutory papers by fax.

The section generally endorsed the use of fax machines by attorneys to serve papers on one another.

"Service by fax is not only quick and easy but, in view of the present state of technology, reasonably certain to give actual notice," the State Bar group said in a study report. "The likelihood of receiving a fax transmission is at least as great as the likelihood of receiving mailed papers."

TEXT OF REPORT — PAGE 31

The report stated CPLR 2103(b), which governs service of interlocutory papers, appears to already permit service by fax, citing 1988 decisions of the New York City Civil Court in *Calabrese v. Springer Personnel* (534 NYS2d 83) and state Supreme Court in *Degre-*

Continued on page 32, column 2

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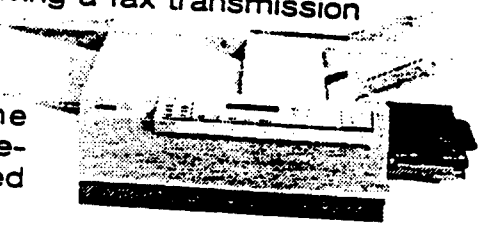

Bar Report on Service by 'Fax'

Continued from page 1, column 4

mont Inc. v. Carland Construction Co. (NYLJ Dec. 27, 1988 p. 25).

However, the report called for adoption of a uniform rule that would go beyond granting express approval to fax service. Fordham Law Professor Mark Davies, who wrote the report, said the section's major concerns are "tactical abuse" by attorneys using fax machines to serve papers after hours and problems caused by missing or illegible pages.

"A clear and comprehensive uniform rule could head off a lot of motion practice," he said. He said the rule should, "for example, mandate the use of cover sheets, clarify which party bears the risk of incomplete or illegible transmissions and discourage abuse by providing for appropriate sanctions."

Chief Judge Sol Wachtler and Chief Administrative Judge Albert M. Rosenblatt have begun considering the need for such a rule. Judge Rosenblatt, who called himself "a strong advocate" of service by fax, said "It's almost like the advent of the telephone .... I think the fax is almost as revolutionary and has enormous potential for saving time and extending convenience."

But he said, "There are a lot of possible pitfalls," including uncertainty about the machines' "legibility and reliability." Judge Rosenblatt has asked his advisory committees on criminal, civil and family law to study the issue and report.

Mr. Davies said tactical abuse of fax service was primarily a concern of section members from small law firms, who feared it could exacerbate a problem that already occurs when an opposing attorney delivers documents after business hours. In the report, he called it "the minute-to-midnight 50-page reply brief for a 9 A.M. oral argument."

Mr. Davies said, "Those in smaller offices don't have the backup" that large firms provide, so papers delivered "even at 8 P.M." can cause problems the next morning. "They don't have an associate who calls them up or trots into court with papers," he said. "They go right to court for an oral argument or a pretrial conference or whatever, and all of a sudden the other side is talking about papers they haven't seen because they were delivered the night before after the office was closed."

"Their concern is there would be open season on this kind of practice unless it's regulated somehow," he said. Pre-fax attorneys "at least had to walk over and stick the papers under the door or in the mail slot. Now they can just fax them."

The report said court officials should also consider "whether service of *process* by fax is — or should be — permitted; and whether the filing of papers by fax should be allowed, at least on an experimental basis. Since service of process is a prerequisite to obtaining jurisdiction over the defendant, it has traditionally been strictly construed."

The report essentially adopted the analysis and recommendations of the section's prior report on service of papers by fax in federal court proceedings (NYLJ Dec. 16, 1988 p. 1). Both reports were initiated by the Committee on Service of Process and Papers, which is headed by Mr. Davies. The other members are Joseph A. DiBenedetto of New York City and David S. Weinstock of Port Washington, L.I.

Text of Report

With the widespread acceptance of facsimile machines as a means of transmitting documents among law firms, both large and small, the question has finally arisen whether service of papers "by fax" complies with Rule 2103 of the New York CPLR. Apparently only two reported decisions have addressed this issue, both of which have upheld such service.[1] The section agrees with the rationale and conclusion of those decisions but recommends that, in order to prevent abuse of fax service, a uniform rule be adopted regulating service of papers by fax.

For the uninitiated, one might note that a facsimile machine, which may now be purchased for under $1,000, permits the user to transmit a document by telephone to another facsimile machine. One need only dial the other machine and place the document in the transmitting tray. Unless it receives a busy signal, the machine then "reads" each page, line by line, transmitting it to the machine at the other end at the highest speed permitted by the slower of the two devices. The document is then reproduced, page by page, at the receiving end, where it falls into a receiving tray. At the conclusion of the transmission, the transmitting machine spits out a written message informing the sender of the date, time, and length of transmission, the telephone number of the receiving machine, and whether the transmission was received. If at any time during the course of a transmission a problem occurs, the transmitting machine will set off an alarm, halt the transmission, and print out a message informing the sender that the trnasmission has been stopped. Although fax machines vary considerably in sophistication, they are all compatible with one another, at least at a slow speed, and most of them can perform all of the above functions.

Service of interlocutory papers upon attorneys in New York State court proceedings is governed by CPLR 2103(b). (Interlocutory papers, unlike a summons or subpoena, do not seek to obtain jurisdiction over the person served.[2]) Included among the service options currently listed in that subdivision are personal delivery of the papers to the attorney, service of the papers by mail, and

(3) if [the attorney's] office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if his office is not open, by depositing the paper, enclosed in a sealed wrapper directed to him, in his office letter drop or box; or

(4) [if service at the attorney's office cannot be made,] by leaving [the paper] at his residence within the state with a person of suitable age and discretion.

As the New York City Civil Court recognized in upholding fax service in *Calabrese*, "[p]erhaps, literally reading Rule §2103(b)(3) CPLR, there whether anyone is in charge, and whether the fax machine is a conspicuous place." However, the court "refuse[d] . . . to engage in 'such Augustinian folly. Of course the office is open when the fax machine is receiving. If an operator is present, of course there is delivery. If no operator is present, of course the fax machine, which is visited regularly, is in a conspicuous place. Faxing patently satisfied the plain intent of the subsection. Any other interpretation would war with the canon of construction contained in §104 CPLR, and would justify the blunt observation about the Law which Charles Dickens put in the mouth of Mr. Bumble in *Oliver Twist*." CPLR 104, which is modelled on Rule 1 of the Federal Rules of Civil Procedure, states that the CPLR "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding."[3]

Ruling Supports CPLR

The *Calabrese* decision — with the rationale of which the Supreme Court, New York County, pronounced itself "in accord" — is consistent with both the language and the purpose of CPLR 2103(b). Not surprisingly, there is a dearth of case law on service of papers upon attorneys in their office under Rule 2103,[4] perhaps reflecting the rarity of problems with such service. According to the Advisory Committee Notes to Rule 2103(b)(3), that provision was based on Rule 20 of the Rules of Civil Practice. However, "[t]he limitation on the time of the day during which service can be made by leaving in a conspicuous place is eliminated in favor of the general requirement, existing under present law, that the office be open. If the office is open, no hardship will result from service at another time of the day."[5] Thus, service upon an attorney in his or her office (if open) may be accomplished at any time of the day or night; that fact provides an additional argument for upholding fax service. Moreover, "not open" for purposes of Rule 2103(b) must mean not merely that the office is not open for business but also that access to the office is barred, for if the door is open but no one is present (and thus no one is in charge), one may simply leave the papers in a conspicuous place in the office.

Thus, if a law firm's fax machine is operating, the office should not be deemed "closed" for these limited purposes since access to the office, at least by fax, is not barred; if one wishes to close the office to fax transmissions, one need only turn off the machine. Likewise, 2103(b)(3) should not be read as requiring that a paper be faxed directly to a person in charge of the receiving office since presumably a person "in charge" of the office is also "in charge" of the fax machine. When no person is in charge of the most conspicuous places to leave the document.

Unreasonable Practice

Compelling the serving attorney to traipse over to the receiving attorney's office and push the papers through the "office letter box or drop," as permitted by 2103(b)(3) when the office is closed, hardly seems reasonable when the papers may be faxed. Indeed, such a requirement makes even less sense when the serving attorney discovers that the receiving attorney has no "office letter box or drop" or that access to such a place is barred by a security guard posted at the door of the building. In that event, the serving attorney is all too likely to opt for leaving the papers with the guard.[6] The probability that papers delivered to a guard downstairs will reach the intended recipient is almost certainly less than the probability that faxed papers will reach the proper person. Certainly faxing a document to an attorney's office would seem preferable to leaving it at the attorney's home "within the state with a person of suitable age or discretion" as the Rule permits when the attorney's office is closed and access to an office letter box or drop is unavailable.

Upholding fax service under Rule 2103(b) also accords with the purpose of the Rule. The very fact that express provisions for service of interlocutory papers were included in the CPLR, and the fact that courts have occasionally struck down attempts at service for failure to comply with that Rule,[7] indicate that one of the primary purposes of Rule 3103(b), like that of the service of process provisions in article 3 of the CPLR, is to insure that service is made in a manner likely to afford actual notice. Concomitantly, the range of service options provided by Rule 2103(b) indicates that the Rule also intends that service be easy and quick.

Interpreting Rule 2103(b) in light of those dual purposes, and in light of the admonition of §104 that the CPLR "be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding," one must conclude that service of interlocutory papers by fax in New York State court is permitted by Rule 2103(b). Service by fax is not only quick and easy but, in view of the present state of technology, reasonably certain to give actual notice. The likelihood of receiving a fax transmission is at least as great as the likelihood of receiving mailed papers. The risk that a fax will not reach its intended destination is probably no greater than the risk that papers left with a receptionist or left on a reception desk, methods of service countenanced by Rule 2103(b), will not reach theirs. Moreover, to hand deliver litigation papers over long distances, at considerable expense to clients, often makes little sense when

Rare Occurrence

Although the possibility undoubtedly exists that a fax machine may confirm that a transmission was received when in fact it was not, such occurrences appear rare. The problem with transmissions by fax is not total nonreceipt but occasional nonreceipt of individual pages or illegibility. However, if the sender includes a cover sheet, as is the custom, identifying the sender, supplying a telephone number, and stating the number of pages transmitted, such problems are quickly and easily cured by a simple telephone call. Common courtesy, and the availability of a continuance when courtesy fails, should remedy any problems not thus cured. Attorneys abusing fax service should be sternly admonished by the court. In short, the advantages of service by fax — speed, ease, and convenience, including the ability to serve at any time of the day or night — would seem to outweigh the disadvantages.

Although Rule 2103(b) thus permits service of interlocutory papers by fax, a uniform rule should nonetheless be adopted to regulate fax service. Such a rule, which might also address overnight courier service and clarify when courier service is complete, would obviate the need for courts around the state to decide these questions.[8] (The Advisory Committee on Civil Practice has proposed an amendment to CPLR 2103(b) to provide expressly for service of interlocutory papers by overnight courier service.[9] However, one must question whether such a clarification could not be provided by court rule.)

In addition, some concern has been expressed that service by fax will exacerbate the problem that currently arises when an attorney delivers documents to the opposing counsel's offices after business hours in order to maximize tactical advantage in a litigation and, in the process, minimize the number of "waking hours" during which opposing counsel would have an opportunity to have actual notice of the document or respond to it — the minute-to-midnight 50-page reply brief for a 9 A.M. oral argument. A uniform rule could help curb such abuses, and provide for the sanctioning of those abuses that do occur. In addition, such a rule should regulate such matters as cover sheets and should address which party bears the risk of illegible or incomplete fax transmissions.

By way of conclusion, one might note that New York State courts will also need to grapple with two additional questions: whether service of process by fax should be permitted; and whether the filing of papers by fax should be allowed, at least on an experimental basis. Since service of process is a prerequisite to obtaining jurisdiction over the defendant, it has traditionally been strictly construed. Unlike Federal Rule of Civil Procedure 4(c)(2)(C)(ii), the CPLR does not even allow service of process by mail alone. It thus appears highly questionable that New York law could ever be construed to permit service of process by fax, unless such service is ordered by the court pursuant to CPLR 308(5).

Filing of papers by fax, and service by the court of orders by fax, raise additional questions, the consideration of which is beyond the scope of this report. At least in rural counties, where such procedures could save substantial time and money with little additional burden on the court system, they could prove invaluable. Other states have begun to address these questions, and so, too, should New York.[10]

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This report was written by Professor Mark Davies of Fordham University's School of Law on behalf of the Section's Committee on Service of Process and Papers and is based on an earlier report by the Committee, entitled "Service of Papers by Fax in Federal Court Proceedings" and published in the *New York Law Journal*, Dec. 16, 1988, at p. 1, col. 3.

The members of the Committee are Professor Davies (chairman), Joseph A. DiBenedetto and David S. Weinstock.

(1) *Calabrese v. Springer Personnel of New York, Inc.*, 534 NYS2d 83 (NYC Civil Ct., N.Y. County, 1988); *Infilco Degremont Inc. v. Cariand Construction Co.*, NYLJ, Dec. 27, 1988, at p. 25, col. 2 (Sup. Ct., N.Y. County).

(2) See D. Siegel, *Handbook on New York Practice* §202, at 238 (1978) (Siegel).

(3) See *Fourth Preliminary Report of the Advisory Committee on Practice and Procedure* A-220 (McKinney 1960).

(4) See generally 2A J. Weinstein, H. Korn, & A. Miller, *New York Civil Practice* ¶¶2103.04, 2103.07 (1988).

(5) *Second Preliminary Report of the Advisory Committee on Practice and Procedure*, in 1958 Report of the Temporary Commission on the Courts, at 178 (Leg. Doc. No. 13, Feb. 15, 1958).

(6) Since leaving *process* with a building security guard may in some instances be deemed valid service upon a building tenant, one might argue that, *a fortiori*, leaving interlocutory papers with the guard may be deemed valid service upon the attorney. See *F.I. DuPont Glore Forgan & Co. v. Chen*, 41 NY2d 794, 396 NYS2d 343 (1977); *Reliance Audio Visual Corp. v. Bronson*, NYLJ, Nov. 9, 1988, at p. 23, col. 3 (NYC Civil Ct., N.Y. County) (dictum).

(7) See generally 2A Weinstein, Korn, & Miller, ¶¶2103.02-2103.08; Siegel, §202.

(8) *Infilco Degremont Inc.* also involved service of interlocutory papers by Federal Express but did not rule on the validity of such service.

(9) See, *1989 Report of the Advisory Committee on Civil Practice* 41-44 (Dec. 1988).

(10) See, *e.g.*, "Debate Grows over Legal Papers Sent by FAX," St. Louis Daily Record, Jan. 20, 1989, at p. 5, col. 1; "Fax of (Court) Life," A.B.A.J., Feb. 1989, at p. 29.

Citation
534 N.Y.S.2d 83
(Cite as: 534 N.Y.S.2d 83)

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Ben CALABRESE, Plaintiff,
v.
SPRINGER PERSONNEL OF NEW YORK, INC. and Larry Ceccarelli, Harvey Cohen and George Sieber, Defendants.

Civil Court of the City of New York, New York County, Special Term, Part 1.
Oct. 24, 1988.

Plaintiff's counsel rejected defendant's answer to interrogatories as late and noticed case for inquest. On defense motion to vacate notice of inquest, the Civil Court, City and County of New York, Special Term, Part 1, Lane, J., held that: (1) service of papers upon attorney through facsimile machine complies with requirements of rule, and (2) defendant's delay of eight days beyond court-ordered time limit in responding to interrogatories did not warrant striking of answer, but, rather, Special Term exercised its discretion to extend time allowed.

Motion granted.

[1]
313K80
PROCESS
K. Service on attorney or agent.
N.Y.City Civ.Ct. 1988.
Service of papers upon attorney through facsimile machine complies with requirements of rule permitting service of papers upon attorney by leaving paper with person in charge if office is open or leaving it in conspicuous place if no person is in charge. McKinney's CPLR 2103(b), par. 3.
Calabrese v. Springer Personnel of New York, Inc.
534 N.Y.S.2d 83

[2]
307AK302
PRETRIAL PROCEDURE
K. Time for answer.
N.Y.City Civ.Ct. 1988.
Defendant's delay of eight days beyond court-ordered time limit in responding to interrogatories did not warrant striking of answer, but, rather, special term exercised its discretion to extend time allowed; defendant had claimed that service of papers through facsimile machine was invalid and did not start running of 20-day period set by court to respond to interrogatories. McKinney's CPLR 104, 2004, 2103(b), par. 3.
Calabrese v. Springer Personnel of New York, Inc.
534 N.Y.S.2d 83

[2]
307AK314
PRETRIAL PROCEDURE
K. Striking pleadings.
N.Y.City Civ.Ct. 1988.
Defendant's delay of eight days beyond court-ordered time limit in responding to interrogatories did not warrant striking of answer, but, rather, special term exercised its discretion to extend time allowed; defendant had claimed that service of papers through facsimile machine was invalid and did not start

running of 20-day period set by court to respond to interrogatories. McKinney's CPLR 104, 2004, 2103(b), par. 3.

Calabrese v. Springer Personnel of New York, Inc.

534 N.Y.S.2d 83

*84 Flashner & Eisenstat, New York City, for plaintiff.

Taylor Newmark & Rosenberg, New York City, for defendants.

RICHARD S. LANE, Judge.

[1] This motion raises the issue of validity of service of papers upon an attorney through a facsimile ("fax") machine.

These machines have been around for many years, but recently they have become so sophisticated and user-friendly that they have become overwhelmingly the method of choice for the transmission of documents in today's world. Indeed their use has become so widespread that business stationery now commonly carries a "fax" telephone number in addition to an ordinary one, and, in common usage, "fax" has been converted into a verb as well as an adjective and noun.

Startling as it may seem, however, no published opinion has been found considering the applicability of fax machines to the conduct of litigation. This motion compels me to do so.

In June of this year I issued a common garden variety of conditional order in this case striking Defendant's answer unless it responded to interrogatories within twenty days of service of a copy of my order. In July Plaintiff's counsel faxed a copy of my order to Defendant's counsel. Defendant's counsel promptly rejected the faxed copy as incompatible with the CPLR, but promised anyhow that interrogatory responses would be forthcoming shortly. And they were indeed mailed in August--eight days late if faxing was valid service of my order. Now it was Plaintiff's counsel's turn--they rejected the interrogatories and noticed the case for inquest. This motion followed seeking to vacate the notice of inquest.

The governing provision of the CPLR providing for service of papers upon an attorney is Rule § 2103(b)(3).

The language of Rule § 2103(b)(3) renders useful a simplified explanation of how faxing functions. At the sending end an operator phones the intended recipient's machine. If the recipient's machine does not give a busy signal, the document is then transmitted and comes out of the recipient's machine in much the same manner as with a copy machine. It then remains in a tray or other container along with prior and subsequent transmissions until picked up by the recipient.

Perhaps, literally reading Rule § 2103(b)(3) CPLR, there could now ensue controversy as to whether the recipient's office is open, whether anyone is in charge, and whether the fax machine is a conspicuous place. I refuse, however, to engage in such Augustinian folly. Of course the office is open when the fax machine is receiving. If an operator is present, of course there is delivery. If no operator is present, of course the fax machine, which is visited regularly, is in a conspicuous place. Faxing patently satisfied the plain intent of the subsection. Any other interpretation would war with the canon of construction contained in Section § 104 CPLR, and would justify the blunt observation about the Law which Charles Dickens put in the mouth of Mr. Bumble in Oliver Twist.

[2] To the extent that, accordingly, there was tardy compliance with the terms

of my order, it was tardy by only a few days and I exercise my discretion under Section # 2004 CPLR to extend the time allowed.

Motion to vacate notice of inquest granted, and lets get on with the merits of this case.

END OF DOCUMENT

PERSONAL COMPUTERS

The Etiquette of Fax Transmission

By PETER H. LEWIS

LET us pause in the day's occupation to consider some of the social issues related to facsimile (fax) technology.

Learning to use a fax machine or a PC fax device is relatively easy, but learning to use it responsibly appears to be a little more difficult. There is an etiquette to faxing, just as there is to correspondence, telephone calls of personal meetings.

Imagine if a loud and abrasive stranger walked unannounced into your office, slapped you on the back, asked you to stop working while he made a sales pitch, reached into your desk drawer for a pen and piece of paper, then asked to borrow your phone for a few minutes. Worse, suppose he dashed from the room before you had the satisfaction of throwing a paperweight at him.

That is essentially the way a fax hacker attacks.

The key to a fax machine's power, and also its Achilles' heel, is that it works over regular telephone lines. Any boor with a fax machine and your phone number can deluge you with unwanted documents.

The assault can be more egregious than junk mail or telephone calls because the fax hacker uses your machine, your paper and your phone line. Also, many fax machines have "broadcast" capability, letting them send the same message to more than one fax machine while operating unattended, so one fax hacker can easily annoy dozens of people.

●

As more and more fax machines enter offices, hotels, restaurants, airline terminals and homes, senders need to be aware of how to avoid offending receivers.

The Golden Rule is simple: Fax unto others as you would have others fax unto you.

People need to keep their fax machines open to receive important documents, but that means the machine is open to unsolicited documents as well. When one document is coming in, all others are held up.

Fax unto others as you would have others fax unto you.

Companies that send frivolous letters by fax, perhaps in the belief that the technology itself lends an air of importance, are temporarily appropriating another company's resources.

●

The intrusion is even worse if the receiving fax is installed inside a personal computer. Unless the fax board is capable of operating in true background mode, meaning that it acts independently from the computer's main processor, an incoming fax can seize control of the computer, forcing the user to halt whatever work is in progress until the transmission ends.

If the intrusion comes at the moment a user is storing a file, there is also a risk of losing important data.

"Just last night I got 56 pages, all of them a repeat of the same sales promotion from a thermal paper company," said Bill McCue, marketing manager for Public Fax Inc. of Orange, Calif., which publishes a directory of public fax stations. Apparently the sender had meant to broadcast the message to different recipients but had misprogrammed the machine.

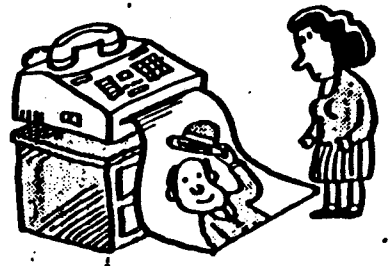
"He was very apologetic and said he was sending me a replacement roll of paper," Mr. McCue said. "The lesson is that when you're broadcasting, you should be careful whom you're sending it to and considerate of what the reaction is going to be."

The delayed transmission feature on many fax machines allows the sender to instruct the fax machine to wait until night, when phone rates are lower, before broadcasting its messages. Besides saving on phone bills, it does not tie up the recipient's fax machine during working hours.

Start every transmission with a cover letter stating the sender's name, the number of pages being sent, including the cover letter, the recipient's name and any other information that will help get the fax to the proper person. Include a telephone number to call in case there is a problem with the transmission, such as a lost page or dropped line.

Use as complete an address as possible. Imagine the fate of a letter addressed simply to "Daddy, Big Building in New York."

Remember that a telephone number can serve hundreds of people. It can be dangerous to assume that the recipient actually received the transmission, especially if the fax was unsolicited. A successful transmission simply means that the document made its way to the receiving paper tray.



Stuart Goldenberg

Above all, call ahead to get the rules of engagement, especially from people to whom you plan to send faxes regularly. After all, you are asking for permission to use their expensive equipment and their even more valuable time.

Calling ahead requires an investment of a few minutes of telephone time, but it pays off by conveying the impression that you take the process, and the information to be sent, seriously. Also ask if a follow-up call is necessary.

If receivers decline to give their fax numbers, respect their wishes. Some people buy fax machines in the spirit that it is better to transmit than to receive.

APPENDIX D

NEW JERSEY LAWYERS SERVICE

240 MULBERRY STREET
P.O. BOX 50
NEWARK, N.J. 07101
(201) 623-6190

October 4, 1989

Hon. Sylvia B. Pressler
60 Court Plaza
25 Main Street
Hackensack, NJ 07601-7015

RE: Rule 1:5-2

Dear Judge Pressler:

I write to you in your capacity as Chair of the Supreme Court Civil Practice Committee. Recently, I came across legislation in New York regarding the service papers upon an attorney by use of overnight delivery services.

Enclosed is a copy of the statute for your review. This statute was enacted as part of a larger issue dealing with delivery by "Fax" and, I assume, Federal Express type services.

I am curious if there is any pending revision to Rule 1:5-2 concerning the above presently before your committee. If so, is there the opportunity for comment by interested parties?

My father-in-law, Richard Skinder, suggested I write to you. If however, this request should be directed elsewhere kindly advise me at your earliest convenience. I look forward to hearing from you. Your attention to this matter is most appreciated.

Very truly yours,

NEW JERSEY LAWYERS SERVICE

Jerrold S. Krivitzky
President

JSK:sr

SERVICE OR PAPERS BY OVERNIGHT DELIVERY SERVICE

CHAPTER 478

S. 1406–A, A. 2114–A

Approved July 16, 1989, effective Jan. 1, 1990

Message of necessity, pursuant to Art. III, sec. 14, of Const.

AN ACT to amend the civil practice law and rules, in relation to service of interlocutory papers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Subdivision (b) of rule 2103 of the civil practice law and rules, paragraph 2 as amended by chapter 20 of the laws of 1982, is amended to read as follows:

(b) Upon an attorney. Except where otherwise prescribed by law or order of court, papers to be served upon a party in a pending action shall be served upon ~~his~~ the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon ~~him~~ the attorney. Such service upon an attorney shall be made

1. by delivering the paper to ~~him~~ the attorney personally; or

2. by mailing the paper to ~~him~~ the attorney at the address designated by ~~him~~ that attorney for that purpose or, if none is designated, at ~~his~~ the attorney's last known address; service by mail shall be complete upon deposit of the paper enclosed in a postpaid properly addressed wrapper, in a post office or official depository under the exclusive care and custody of the United States post office department within the state; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period; or

3. if ~~his~~ the attorney's office is open, by leaving the paper with a person in charge, or if no person is in charge, by leaving it in a conspicuous place; or if ~~his~~ the attorney's office is not open, by depositing the paper, enclosed in a sealed wrapper directed to ~~him~~ the attorney, in ~~his~~ the attorney's office letter drop or box; or

4. by leaving it at ~~his~~ the attorney's residence within the state with a person of suitable age and discretion. Service upon an attorney shall not be made at ~~his~~ the attorney's residence unless service at ~~his~~ the attorney's office cannot be made; or

5. by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney's last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. Where a period of time prescribed by law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period. "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state.

2. Subdivision (c) of rule 2103 of the civil practice law and rules is amended to read as follows:

(c) Upon a party. If a party has not appeared by an attorney or ~~his~~ the party's attorney cannot be served, service shall be upon the party ~~himself~~ by a method specified in paragraph one, two ~~or~~, four, or five of subdivision (b) of this rule.

§ 3. This act shall take effect on the first day of January next succeeding the date on which it shall have become a law.

Additions in text are indicated by underline; deletions by ~~strikeouts~~

and other papers except a judgment signed by the clerk shall be served upon all attorneys of record in the action and upon parties appearing pro se; but no service need be made on parties who have failed to appear except that pleadings asserting new or additional claims for relief against such parties in default shall be served upon them in the manner provided for service of original process. The party obtaining an order or judgment shall serve it as herein prescribed within 7 days after the date it was signed unless the court otherwise orders therein.

(b) Criminal Actions. In criminal actions, unless otherwise provided by rule or court order, written motions (not made ex parte), briefs, appendices, petitions, memoranda and other papers shall be served upon all attorneys of record in the action and upon parties appearing pro se.

Note: Source—R.R 3:11–4(a), 4:5–1. Paragraph (a) amended July 16, 1979 to be effective September 10, 1979.

COMMENT

The text of this rule as adopted as part of the 1969 revision made only minor language changes in the source rules. Paragraph (a) of the rule was amended effective September 1979 by the addition of the last sentence requiring the party obtaining an order or judgment to ensure its service on all other parties within seven days after its signing. This change was necessitated by the frequently occurring situation of failure of an opposing party to be timely noticed of entry of the order and his consequent prejudice in taking further steps in the litigation within a prescribed time period triggered by the entry date. The effect of the rule is not only to impose the requirement upon the proponent attorney to make service [illegible] to monitor, as it were, the progress of his form of order or judgment from submission to signature.

Note that while this rule continues to except from service requirements judgments signed by the clerk, both R.R. 3:11–4(c) and 4:118–8 were eliminated. Those rules, which required the clerk of the court to give notice by ordinary mail to the interested parties (in criminal and civil actions, respectively) of the entry of orders had been generally complied with only in the case of final judgments, and such notice is generally superfluous and duplicative.

Failure of a moving party to comply with the service requirements of the rule will result either in the dismissal or adjournment of the motion. See Zon. Bd. of Adj. v. Service Elec. Cable T.V., 198 N.J. Super. 370 (App. Div. 1985). See also R. 1:2-4 and Comment thereon.

1:5–2. Manner of Service

Service upon an attorney of papers referred to in R. 1:5–1 shall be made by mailing a copy to him at his office by ordinary mail, by handing it to him, or by leaving it at his office with a person in his employ, or, if his office is closed or he has no office, in the same manner as service is made upon a party. Service upon a party of such papers shall be made as provided in R. 4:4–4 or by registered or certified mail, return receipt requested, to his last known address; or if the party refuses to claim or to accept delivery, by ordinary mail to his last known address; or if no address is known, by ordinary mail to the clerk of the court. Where mailed

service is made upon a party, the modes of service may be made simultaneously.

Note: Source—R.R 1:7-12(d), 1:10-10(b), 1:11-2(c), 2:11-2(c), 3:11-1(b), 4:5-2(a) (first four sentences); amended July 16, 1981 to be effective September 14, 1981.

COMMENT

This rule, as adopted as part of the 1969 revision, followed the 1967 amendment of the source rules, which, in accordance with the then federal practice, permitted service of papers on attorneys to be made by ordinary mail. The 1969 version of the rule extended that practice to criminal actions as well as civil actions.

Also following the 1967 amendment of the source rule, this rule permits service by ordinary mail on parties who refuse or fail to accept certified or registered mail. Ordinary mail service, when certified or registered mail service fails, is also provided for under these circumstances by all of the rules permitting service of papers, including original process, by registered or certified mail. See, e.g. R. 4:4-4, 4:4-5. And see R. 1:5-4(a) and Comment thereon. This rule was amended, effective September, 1981, to permit ordinary mail service to be made simultaneously with registered or certified mail rather than after the failure of such mail service. The affidavit of service should, of course, recite the details pertaining to all mail modes employed. Cf. R. 6:2-3 and Comment thereon.

The final change in the practice made by the revised rule, is the provision that papers may be served on an attorney at his home only if he has no office or, at the time service is attempted, his office is closed. Cf. Mestice v. Bd. of Adjustment of Neptune City, 35 N.J. Super. 313, 317 (App. Div. 1955), disapproving service on an attorney by leaving papers in an unattended office after regular business hours.

Other related source rules were deleted for the following reasons:

R.R. 4:5-4 (service on corporation delinquent in taxes) was eliminated as obsolete, the applicable statute (N.J.S. 54:10A-20 and 54:10B-19) having been amended after the rule's adoption to require the Attorney General to proceed under the summary action rule.

R.R. 4:5-2(c) was eliminated for the reason that generally certification as true copies of papers to be served is unnecessary. The requirement of certification was however, retained by R. 4:67-3 (order to show cause), R. 4:60-7(h) (writ of attachment), and R. 6:7-2(b) (order for supplementary proceedings). Furthermore, if certification appears necessary under particular circumstances, the manner of making such certification may be provided for by court order without the need for a rule authorizing such an order.

1:5-3. Proof of Service

Proof of service of every paper referred to in R. 1:5-1 may be made (1) by an acknowledgment of service, signed by the attorney for a party or signed and acknowledged by the party, or (2) by an affidavit of the person making service, or (3) by a certificate of service appended to the paper to be filed and signed by the attorney for the party making service. The proof shall be filed with the court promptly and in any event before action is to be taken on the matter by the court. Where service has been made by registered or certified mail, the return receipt card shall be filed as part of the proof. Failure to make proof of service does not affect the

Appendix D

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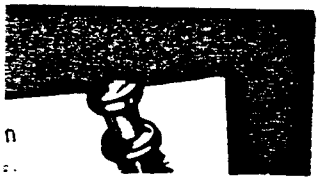

Cape May Co. Files by Fax

Last year, the Cape May County Bar Association instituted a service to aid in the efficiency of filing documents with the Cape May County Courts at substantial savings to practitioners. The system has been extremely successful primarily with respect to motion practice. It has been, with proper permission, available for other pleading filings.

1.) Fax your document to the Cape May Conty Bar Office before 2 p.m. The Bar Association fax number is (609) 463-1656, the Bar office telephone number (for confirmation and special instructions) is (609) 463-0313.

2.) Your fax transmittal will be copied onto regular paper.

3.) Your papers will be delivered to the designated law or motions clerk before 4:30 p.m. that day.

The charge for the service, which is payable the next business day is as follows: $30 for up to 15 pages, $35 for up to 25 pages.

This service, previously available only to members of the Cape May and Atlantic County Bar Associations, is now available to any attorney.

The filing in service of the Cape May County Bar Association allows all practitioners, especially small and remote offices, ready, economical access to the courts. It aids the courts in their administration by making it easier to stick with the rule time guidelines.

Filing your court documents by fax is quick, easy and inexpensive. Contact the Cape May County Bar Association's Executive Director, Debra Wetherby, for more information.

The Middlesex County Bar Association has made arrangements with the United States Supreme Court to move the admissions of Middlesex County attorneys on May 4, 1992. We are currently making lodging arrangements for the weekend of May 2-3, and planning a trip to Washington in conjunction with the admission ceremony. Attorneys who

V. FACSIMILE TRANSMISSION COVER SHEETS

5-101 [FACSIMILE TRANSMISSION COVER SHEET]

The Facsimile Transmission Cover Sheet shall be in the following form:

[See form on next page]

ALT. (a-1) (California)

ALT. (a-2) (Washington)

Appendix C

CIVIL PRACTICE COMMITTEE
SUBCOMMITTEE ON FAX
REPORT AND RECOMMENDATIONS

The subcommittee began its study by comparing the advantages and disadvantages of facsimile transmission (FAX) in the filing and service of legal papers. It was clear from the outset that while the technology has developed extensively in recent years and has come to be widely used, some inherent limitations preclude its present application to original service and to filing. It is appropriate in the subcommittee's opinion, however, to authorize the use of FAX for service of interlocutory papers between attorneys.

While it may be useful someday to permit original service by FAX, that day has not yet arrived. Although most business entities of any size probably possess FAX capability or access, smaller ones may not and most individuals do not. The relative certainty of personal service that is a necessary prerequisite to the assertion of in personam jurisdiction, see R. 4:4-4, cannot, therefore, presently be achieved through the use of FAX.

Future circumstances might also suggest the suitability of permitting papers to be filed by FAX in New Jersey, but the necessary conditions do not yet exist in this connection either. The subcommittee became aware of an on-going, one-year experiment in the

State of Minnesota permitting filing by FAX. See, attached as Appendix A, Minnesota Rules and Court Orders. However, the volume of litigation in New Jersey, the limited availability of FAX equipment in the Superior Court Clerk's office and in the county courthouses, and current limitations in FAX technology combine to preclude such an eventuality in New Jersey at this time. Furthermore, geographic and demographic considerations which render the use of FAX so attractive in Minnesota do not pertain in New Jersey. Our State is less than one-tenth the size of Minnesota. All New Jersey attorneys are much closer to courthouses and the State capital than are many Minnesota attorneys. Additionally, judges in New Jersey no longer ride circuit as continues to be in the case in Minnesota.

Notwithstanding the foregoing considerations and for special reasons, the Civil Practice Committee may wish to consider whether it is appropriate to permit emergent filings by FAX. This was a subject viewed by the subcommittee as being beyond its charge.

As a consequence of the aforementioned conclusions, the subcommittee was left with the subject of interlocutory service by FAX. The inquiry was further narrowed by the determination that some of the same reasons that militate against authorizing original service by FAX apply as well to interlocutory service

upon parties. Accordingly, the subcommittee limited its study to the advantages and shortcomings of FAX service between attorneys. It is worth noting in passing that while the Minnesota experiment authorizes filing by FAX, it does not permit service of any kind by FAX. It should also be noted that the use of FAX is presently being studied in many other jurisdictions. See, e.g., attached as Appendix B, a report of the Section on Commercial and Federal Litigation of the New York State Bar Association (December, 1988).

Given the emergence of FAX as a system for enhancing communication, there is no fundamental reason why it should not be used fully in the legal community. Cf., attached as Appendix C, opinion of Hon. Richard S. Lane in Calabrese v. Springer, 534 N.Y.S. 2d 83 (Civ. Ct., N.Y.C., 1988). With respect to matters in litigation, standards must be established to safeguard against inherent imperfections in the technology and its potential for abuse.

The primary advantages of communication by FAX are convenience and speed. The main disadvantages stem from some limitations of the technology and the fact that the burdens of service now properly upon the generating party come to be shared by the recipient when FAX is used. In the latter regard, the rule amendments proposed herein are not intended to establish that any

attorney who prefers not to become a FAX user should be required to do so. Rather these recommendations simply establish the mechanics of use between attorneys who have chosen the benefits of the device, presumably after having reflected on its drawbacks. The primary shortcomings of FAX usage are manifested when transmissions fail or are incomplete because of equipment malfunction or operator error in sending or receiving. Also, most FAX machines presently use thermal paper, which deteriorates after some time. In order to assure durability, the recipient of a FAX transmission may be required to photocopy the document on plain paper. Fax machines that use plain paper are presently on the market, but they are relatively new and somewhat more expensive than the thermal paper variety.

With these considerations in mind, the subcommittee has prepared rule amendments authorizing service of interlocutory papers by FAX. These provisions allocate as much of the burden of perfecting service as possible upon the proponent of papers; they safeguard appropriately against operator or machine failure; and they deal with the foreseeable potential for abuse.

The proposed amendment contained in R. 1:5-2(a), in addition to authorizing service of interlocutory papers by FAX, requires the completion of a transmission no later than 4 p.m. on the due date. This is designed to

prevent a potential abuse by assuring that even a lengthy FAX transmission will be fully in the hands of the receiving attorney by the close of business on a service deadline day.

A new provision, R. 1:5-2(b), establishes the necessary safeguards against equipment malfunction or human error. Cf., attached as Appendix D, Peter H. Lewis, "The Etiquette of Fax Transmission", The New York Times, March 21, 1989. It also places the responsibility for complete service upon the sender. The telephone verification requirement of subparagraph (4) was the subcommittee's preference over requiring a fax transmission to be followed by mail service of a complete copy of the papers transmitted. The latter alternative was viewed as unduly cumbersome, defeating the underlying intent of the rule.

The recommended amendments to R. 1:5-3 and R. 1:5-5 are self-explanatory. The latter provision also assures that the responsibility for completion of service by FAX will be the sender's.

Respectfully submitted by:

Hon. Howard H. Kestin, Chair
Dennis M. Cavanaugh, Esq.
Lorraine C. Parker, Esq.
Deanne Wilson Plank, Esq.

1:5-1 ...no change.

1:5-2 Manner of Service

(a) Service Upon An Attorney. Service upon an attorney of papers referred to in R. 1:5-1 shall be made by mailing a copy to [him] the attorney at his or her office by ordinary mail, by handing it to [him] the attorney, by transmitting a copy to the attorney's office by a full facsimile message (FAX) completed no later than 4 p.m. on the date on which service is due, or by leaving it at [his] the attorney's office with a person in [his] the attorney's employ, or, if [his] the attorney's office is closed or [he] the attorney has no office, in the same manner as service is made upon a party.

(b) Full Facsimile Message. For purposes of this rule, a full facsimile message shall consist of: (1) no more than 50 pages, unless otherwise consented to by the receiving attorney prior to transmission, with special sequential numbering of each page from beginning to end preceeded by the letter "F" to indicate facsimile transmission; (2) a legible copy of each page transmitted; (3) a transmittal sheet containing the date and time of transmission and number of pages being transmitted; the sender's name, address, telephone number and, if an attorney, the office fax number; the receiving attorney's name and office fax number; and the title and docket number of the proceeding to which the papers pertain; and

(4) a telephone verification initiated by sender immediately following the transmission confirming the number of pages received and their legibility. When the facsimile transmission has occurred after ordinary business hours, the telephone verification shall be made no later than 10 a.m. on the following business day.

(c) Service Upon A Party. Service upon a party of such papers shall be made as provided in R. 4:4-4 or by registered or certified mail, return receipt requested, to his last known address; or if the party refuses to claim or to accept delivery, by ordinary mail to his last known address; or if no address is known, by ordinary mail to the clerk of the court. Where mail service is made upon a party, the modes of service may be made simultaneously.

1:5-3. Proof of Service

Proof of service of every paper referred to in 3-1 may be made (1) by an acknowledgment of service, signed by the attorney for a party or signed and acknowledged by the party, or (2) by an affidavit of the person making service, or (3) by a certificate of service appended to the paper to be filed and signed by the attorney for the party making service. The proof shall be filed with the court promptly and in any event

before action is to be taken on the matter by the court. Where service has been made by registered or certified mail, the return receipt card shall be filed as part of the proof. Where service has been made by facsimile transmission, the proof shall recite full compliance with each of the particular requirements of R. 1:5-2(a) and(b). Failure to make proof of service does not affect the validity of the service, and the court at any time may allow the proof to be amended or supplied unless an injustice would result.

1:5-4 ... no change.

1:5-5 [Existing R. 1:5-5 to become R. 1:5-6]. Service by Facsimile Transmission; When Complete. Service by facsimile transmission shall be complete when a full facsimile message, as defined in R. 1:5-2(b), is received, except that where the transmission is made after 4 p.m., service shall be deemed complete on the next day which is neither a Saturday, Sunday or legal holiday, unless the parties otherwise agree.

1:5-6 [Existing R. 1:5-6 to become R. 1:5-7]

[Existing R. 1:5-5 without change]

THE SUPREME COURT OF MINNESOTA

RESEARCH AND PLANNING
STATE COURT ADMINISTRATION
1745 UNIVERSITY AVENUE
SUITE 302
ST. PAUL MINNESOTA 55104
(612) 649-5931

January 31, 1989

Hon. Howard Keston
Facsimile Transmission # 201-881-2832

Dear Judge Keston:

At the request of Sue Dosal, State Court Administrator, I have transmitted the following:

1. Draft order adopting criteria for court operated facsimile equipment (2 pages);

2. November 21, 1988 order adopting the use of facsimile transmission equipment and requesting consideration by rules committees (3 pages);

3. Rule 5.05 of the Minnesota Rules of Civil Procedure for the District Courts (1 page);

4. October 3, 1988 order continuing the use of facsimile transmission (1 page);

5. September 21, 1987 order regarding the experimental use of facsimile transmission (3 pages).

The draft order listed as item 1, which will likely be promulgated in the next several days, supplements the November 21 order (item 2) and Rule 5.05 (item 3). Rule 5.05 was adopted October 18, 1988 and became effective January 1, 1989. The orders listed as items 4 and 5 have expired; they have been included for your information.

If you have any questions, please do not hesitate to contact our Information Officer Rebecca Fanning at (612) 296-6043.

Sincerely yours,

Michael B. Johnson
Staff Attorney

cc: Sue Dosal

APPENDIX 3

State of Minnesota

In Supreme Court

C2-87-1853

ORDER ADOPTING CRITERIA
FOR COURT OPERATED
FACSIMILE EQUIPMENT

WHEREAS, by Order #C2-87-1853 dated November 21, 1988, this Court authorized the filing of papers and issuance of warrants and orders by use of facsimile transmission equipment that satisfies the published criteria of this Court; and

WHEREAS, the fair and efficient administration of justice requires the establishment of a uniform standard for facsimile transmission equipment operated by the courts of this state; and

WHEREAS, the International Telegraph and Telephone Consultative Committee (CCITT) of the International Telecommunications Union has established standards for facsimile transmission equipment, and

WHEREAS, facsimile transmission equipment that meets the standards established for the CCITT category "Group 3" provides the highest operating speed and image resolution available for use over the public telephone network;

NOW, THEREFORE, IT IS HEREBY ORDERED that, until further order of this Court, facsimile transmission equipment operated by the courts of this state for the purposes of filing of papers and issuance of warrants and orders shall comply with the standards for Group 3 apparatus established by the CCITT [currently set forth in Recommendations T.4 and T.30, Vol. VII - Fascicle VII.3, CCITT Red Book; Malaga-Torremolinos 1984 (U.N. Bookstore Code ITU

6731)]. At the discretion of the court or judicial district operating such equipment, such equipment may also be compatible with machines in CCITT Groups 1 and 2.

IT IS FURTHER ORDERED that it is the responsibility of persons desiring to file documents with the courts of this state by the use of facsimile transmission equipment to utilize facsimile transmission equipment that is compatible with facsimile transmission equipment operated by the courts of this state.

Dated: January ___, 1989

BY THE COURT:

Proposed Order
Douglas K. Amdahl
Chief Justice

State of Minnesota

In Supreme Court

C2-87-1853

ORDER ADOPTING USE OF FACSIMILE TRANSMISSION AND REQUESTING CONSIDERATION BY RULES COMMITTEES

WHEREAS, by Order #C2-87-1853 dated October 3, 1988, this Court extended the authorization for filing of papers and issuance of orders and warrants by use of facsimile transmission equipment until January 1, 1989; and

WHEREAS, filing papers by the use of facsimile transmission has been incorporated into the Rules of Civil Procedure by an amendment effective January 1, 1989; and

WHEREAS, incorporation of the use of facsimile transmission, where appropriate, into other rules promulgated by this Court will provide clear notice of such use to all members of the practicing bar and the public;

NOW, THEREFORE, IT IS ORDERED that, effective January 1, 1989, facsimile transmission is allowed subject to the following conditions:

A. Equipment. Only facsimile transmission equipment that satisfies the published criteria of the Supreme Court shall be used for filing and issuance of orders and warrants under this Order.

B. Permitted Use.

(1) Issuance of Orders or Warrants.

(a) Facsimile transmission may be used for the issuance of all orders and warrants including, but not

limited to, the following circumstances:

(i) Criminal matters for the issuance of arrest and search warrants;

(ii) Juvenile matters for the issuance of orders or warrants for taking a juvenile into custody and for the release or detention of the juvenile;

(iii) Family matters for the issuance of ex parte temporary orders for protection; and

(iv) Civil cases for the issuance of temporary restraining orders.

(b) All procedural and statutory requirements for the issuance of a warrant or order, including the making of a record of the proceedings, shall be met.

(c) For all procedural and statutory purposes, the facsimile shall have the same force and effect as the original.

(d) The original order or warrant, along with any other documents, including affidavits, shall be delivered to the court administrator of the county where the request or application for the order or warrant was made.

(2) Filing. Filing of all papers in the district court shall be permitted by use of facsimile transmission pursuant to the terms and conditions of Rule 5.05 of the Minnesota Rules of Civil Procedure for the District Court.

IT IS FURTHER ORDERED that all advisory committees established by this Court in regard to rules governing procedure in appeals and criminal, juvenile, probate, commitment, and

family law matters shall consider the adoption of appropriate amendments that will incorporate the use of facsimile transmission into the rules of procedure and report their recommendations to this Court at the next available opportunity.

Dated: ~~October~~ November 21, 1988.

BY THE COURT

Douglas K. Amdahl
Chief Justice

Rule 5.05. Facsimile Transmission.

Any paper may be filed with the court by facsimile transmission. Filing shall be deemed complete at the time that the facsimile transmission is received by the court and the filed facsimile shall have the same force and effect as the original. Only facsimile transmission equipment that satisfies the published criteria of the Supreme Court shall be used for filing in accordance with this rule.

Within five (5) days after the court has received the transmission, the party filing the document shall forward the following to the court:

(a) a $5 transmission fee; and

(b) the original signed document; and

(c) the applicable filing fee, if any.

Upon failure to comply with the requirements of this rule, the court in which the action is pending may make such orders as are just, including but not limited to an order striking pleadings or parts thereof, staying further proceedings until compliance is complete, or dismissing the action, proceeding, or any part thereof.

SUBCOMMITTEE ON SERVICE OF PROCESS RULES

REPORT TO THE

CIVIL PRACTICE COMMITTEE

11/4/91

The Civil Practice Committee's Subcommittee on Service of Process Rules met on October 24, 1991 to examine alternatives to sheriff's service of initial process in Law Division cases. At the meeting the Subcommittee considered an AOC staff memorandum detailing the Judiciary's recent problems with private process servers/ constables and alternative solutions to those problems, proposed but unadopted amendments to the Federal rule on service of process and a memorandum that Judge Kestin wrote to members of the original subcommittee.

The Subcommittee first assessed the nature of the problem with service of Law Division process. The general consensus was that there are some problems with the current system of personal service by the sheriffs and that these problems have resulted in some members of the bar turning to private process servers. The Subcommittee agreed, however, that as a general matter, service of process by uniformed officers under the control of public officials is preferable to private service of process and that drastic changes in the present system should not be made in the absence of more complete information. Such information can only be gathered by a survey of the sheriffs and the bar, regarding the timeliness and effectiveness of service, and their views should be sought regarding possible solutions to any problems that such a survey would reveal. The Subcommittee concluded that it could not undertake and complete such an information-gathering process in time for the full Committee's January, 1992 report to the Supreme Court. The Committee's guidance is sought as to whether the Subcommittee should proceed with such a study in the next few months and report to the Committee sometime in 1992.

The Subcommittee then considered alternatives for providing some form of interim relief where there are problems with the timeliness or effectiveness of service. It was agreed that there are insufficient means to control service of process by private process servers or constables on a volume basis. The Subcommittee rejected, for now, the idea contained in the existing or the unadopted Federal rule of imposing costs on the party who refuses to accept mail service because the costs would have to be high in order to be effective and if such a system were effective, it would constitute the kind of radical change the Subcommittee is not prepared to propose without sufficient information that it is needed. The corollary is that while the imposition of modest costs would result in a less radical change, it would not produce effective service if defendants were willing to absorb the costs. The

Subcommittee likewise felt that utilizing Special Civil Part Officers to serve Law Division process would be too drastic a change in view of the limited information presently available on the nature and extent of the problems with service by the sheriffs and that such a proposal would likely spur an unfortunate and probably unnecessary clash between the two groups. The Subcommittee also considered the possibility of allowing attorneys personally to serve process without a court order but rejected the idea because of the hazards that might be involved in confronting an adverse party. Further, the Subcommittee felt that the uneconomical use of attorneys to serve process would be avoided by most law offices and the innovation would thus provide no real relief where it might be needed.

The Subcommittee concluded that the best way to provide some measure of relief where personal service of initial process is problematic, without making a major change in the basic system, would be to permit substituted service by mail (certified or registered and regular) when the sheriff has returned the process unserved or has not made a return of service within 40 days. As a safeguard to ensure that service of process by mail is consistent with due process of law, the Subcommittee felt that when the defendant does not answer, the affidavit submitted by the moving party with the request for entry of default should recite the factual basis for believing that the address to which the mail was sent is accurate.

The Subcommittee decided that these changes could best be accomplished by amending R. 4:4-4(e), which deals with substituted service, and R. 4:43-1, which deals with entry of default. The Subcommittee then noted that the filing of the affidavit of diligent inquiry and effort required by R. 4:4-4(e) serves no purpose unless default is later requested, because no order is required for substituted service. Although members of the Subcommittee felt that there may be some benefit in the present requirement of preparing a contemporaneous affidavit while the facts are fresh, on balance this was outweighed by the administrative burden of filing unnecessary papers. Hence, the Subcommittee proposes to remove the affidavit requirement from R. 4:4-4(e) and insert it into R. 4:43-1. The result is that no affidavit will be filed unless it is needed to support the entry of default or service of process is otherwise challenged. The Subcommittee noted further that filing of the same kind of affidavit is required by R. 4:4-5, which deals with service of process in proceedings in rem where the owner of property cannot be served, and proposes the same excision of the affidavit requirement from R. 4:4-5 and its insertion into R. 4:43-1. Again, the result is that the affidavit will be filed only if it is needed.

The Subcommittee has added the words "in the same manner" to the last sentence of R. 4:4-4(e) to make it clear that the method of service being authorized is not confined to in rem proceedings, although the method is being borrowed from the rule (4:4-5) that deals with service on absent defendants in actions affecting property. The Subcommittee queries whether the last sentence of R. 4:4-4(e) should be retained and, if so, does it need further clarification.

Finally, the Subcommittee recommends that R. 4:4-3 be amended to remove the language "other officer authorized by law," since it can think of no such officer and the phrase may have contributed to the confusion in some quarters as to who can serve civil process. The words, "by a person expressly authorized by these rules," are added to be consistent with the provisions of Rules 4:4-4(e) and 4:4-5(a) allowing service outside the State by certain public officials and attorneys.

The proposed amendments to Rules 4:4-3, 4:4-4(e), 4:4-5 and 4:43-1 are attached to this report.

Respectfully submitted,

Hon. Murry D. Brochin, Chair
Hon. Donald W. deCordova
Lorraine C. Parker, Esq.
Mary F. Thurber, Esq.
Robert D. Pitt, Esq., AOC Staff

REPORT OF THE SUBCOMMITTEE ON MENTAL COMMITMENTS
CIVIL PRACTICE COMMITTEE

INTRODUCTION

The Subcommittee recommends that R. 4:74-7(g) be amended so as to provide for notice of hearings for voluntary patients. The Subcommittee also recommends that patients who are admitted voluntarily and patients who convert from involuntary to voluntary status be present at their hearings unless the court is satisfied that they do not wish to attend. It is also recommended that R. 4:74-7(c)1 be amended to allow adjournments for up to fourteen days.

THE NEED FOR THE PROPOSED AMENDMENTS

During the 1990-1991 Committee year, the Subcommittee met with representatives from the Division of Mental Health and Hospitals of the Department of Human Services, the County Adjusters Association and the New Jersey Hospital Association. At these meetings, the Subcommittee focused on questions of notice in connection with hearings required for voluntary patients under subparagraphs (1) and (2) of R. 4:47-7(g). The rule in its present form is silent with respect to notice.

re notice for vol. patients

During the Subcommittee discussions with both the representatives of outside groups and among the members it became evident that, without any guidance from the rule, the counties have been handling the notice issue differently, i.e., some counties have not provided notice at all; others

have provided notice as required under R. 4:47-7(c)(4) for involuntary hearings; and yet others have provided notice as required by R. 4:74-7(c)(4) except that notice has not been provided to the patients' relatives.

The Subcommittee became concerned about 1) the inconsistent practice statewide and 2) the more difficult question of what kind of notice, if any, should be given in the voluntary patient setting. Representatives of short-term care facilities from the New Jersey Hospital Association, among others, told the Subcommittee that voluntary patients frequently were concerned about notification of relatives because they considered their choice to seek treatment to be a private decision. The Subcommittee unanimously concluded that patients voluntarily admitted for psychiatric treatment have a privacy interest to be protected and that notice to relatives should not be given unless the patient requests such notice in writing. The Subcommittee also determined that, except for the patients' relatives, notice should automatically be given as required by R. 4:74-7(c)(4) (to patients, their counsel, their guardians or guardians ad litem, if any, county counsel, the county adjusters of the county in which the patients have legal settlement, and the director, chief executive officer or other individual who has custody of the patients).

Upon the recommendation of the Subcommittee in its Interim Report, the Civil Practice Committee conveyed these

concerns to Administrative Director Robert D. Lipscher. Mr. Lipscher wrote to Alan Kaufman, Director, Division of Mental Health and Hospitals of the Department of Human Services, who implemented a change to the intake forms used to gather information on voluntary patients. This form now includes a check off section whereby the patient indicates whether he/she wishes to have notices of hearings sent to nearest relatives. The proposed rule amendment would codify this practice.

The Subcommittee also recognized that notice to patients who were initially admitted involuntarily is covered under R. 4:47-7(c)(4) and that the relatives of these patients would be given notice under that provision. The members therefore concluded that upon the conversion of this group of patients to voluntary status, it made sense to follow the notice requirements of R. 4:74-7(c)(4), including notice to relatives, prior to the conversion hearing.

It further came to light during the Subcommittee's deliberations that the quality of legal representation at voluntary patients' hearings varies greatly. Patients represented by the Public Advocate meet with both a field representative and an attorney prior to the day of the hearing. In contrast, the Director of Social Work of a short-term care facility informed the Subcommittee that she introduces the patient to both the judge and the patient's attorney at the voluntary hearings. Obviously, in those cases

the patient has not had an opportunity to talk to the attorney beforehand.

The Subcommittee members were also informed that there are patients who are frightened because they believe that the purpose of the voluntary hearing is to commit them to a state psychiatric hospital. In balancing these two concerns, the Subcommittee decided to recommend that patients should be required to attend the hearing unless the court is satisfied that they do not wish to attend. It appeared to the Subcommittee that in such cases it is particularly important for the judge to have an opportunity to observe the patient in order to make the determination whether the patient is, in fact, a voluntary admission. When patients do attend they can be questioned by the judge, thereby providing an added safeguard for individuals whose attorneys have not met with them beforehand. At the same time, this approach allows the court to respect the desire of some patients not to be present at the voluntary hearing.

During the year, the Subcommittee learned that, for practical reasons, hearings are often adjourned for fourteen days. The rule states at R. 4:74-7(c)(1) that initial hearings shall be adjourned for no longer than ten days. Although hearings at the state psychiatric hospitals take place weekly, the counties alternate hearing dates so that each county's patients may only be scheduled as frequently as every fourteen days. County and short-term care psychiatric

facilities hold hearings on a biweekly basis and thus adjournments until the next available hearing dates are for 14 days. Additionally, the Subcommittee was informed that the county adjusters give ten days notice for adjourned hearings, as is required for initial hearings. To make the rule reflect the reality of the commitment hearing process and to allow an appropriate amount of time for notice to be given, the Subcommittee has proposed a rule amendment allowing adjournments for up to fourteen days.

OTHER MATTERS CONSIDERED

During the year, the Subcommittee monitored the progress of the drafting of a bill to govern the commitment of juveniles. When the bill is enacted, changes to the civil commitment rule will be necessary. In the interim, the Subcommittee plans to review the draft bill and provide comments prior to its introduction in the Legislature.

At the request of the Public Advocate, the Subcommittee considered the need for court review of patients who were admitted voluntarily or who converted to voluntary status prior to the court rule amendments requiring voluntary hearings (R. 4:74-7(g) amended September 4, 1990). The Subcommittee supports the provision of hearings for this group of patients. It appears, however, that a rule amendment is not necessary since hearings for these patients have been phased in at the institutions through the cooperative effort

of the Department of Human Services' Division of Mental Health and Hospitals and the Public Advocate's Division of Mental Health Advocacy.

Also during the course of the year, the Subcommittee was asked by an attorney who practices in the area of civil commitments to consider amending the court rule to include a procedure for determining whether a patient is indigent. The attorney explained that the Public Advocate's Division of Mental Health Advocacy does not make such an inquiry although required to do so by statute. See N.J.S.A. 52:27E-24. The representative of the Public Advocate informed the Subcommittee that this issue is being reviewed by his Office. The Subcommittee concluded that the matter is governed by statute and that a court rule is not necessary.

The Subcommittee considered whether to amend the court rule at (g) to change the time period in which voluntary patients must receive a hearing. The rule presently requires the hearing to be held within twenty days of the patient's hospitalization. Representatives of the New Jersey Hospital Association and from short-term care facilities told the Subcommittee that they have experienced difficulties in holding hearings for voluntary patients. Alan Kaufman, Director of the Division of Mental Health and Hospitals, recommended that the rule be amended to require hearings for voluntary patients at short-term care facilities only when they are expected to be transferred to another facility for

continued care. The basis for this recommendation is that the average patient stay varies between fourteen and twenty days and that therefore most patients leave the facility prior to their scheduled hearings. The Public Advocate representative, for the same reason, recommended that voluntary patients' hearings be scheduled between the twentieth and thirtieth day of treatment.

After much discussion over several meetings, the Subcommittee members agreed that because of the rights involved, the period of time in which patients can be in a facility before a hearing is scheduled should not be extended. The purpose of the voluntary hearing remains the same even if the patient's stay in the facility is short, that is, to determine whether the patient is truly voluntary and is able to understand what voluntary admission means. The Subcommittee expressed support for shortening the time period rather than lengthening it beyond the twenty days but determined not to recommend a rule amendment at this time since the twenty day period is statutorily mandated for patients who are involuntarily committed.

The practice in some vicinages of rotating the judges assigned to preside over commitment hearings was also discussed by the Subcommittee. The Subcommittee members believe it is important to emphasize the need for consistency in the commitment hearing process, particularly in institutions which provide long term care. Consistent

treatment and knowledge of a patient is an important aspect of his or her hearing, which is absent when a different judge presides over the process each month. Although this subject is not addressed by the court rule and the Subcommittee makes no such recommendation, it is an important matter which the Subcommittee wished to bring to the attention of the Civil Practice Committee.

Respectfully submitted,

Deborah T. Poritz

Deborah T. Poritz, Esq., Chair

Hon. John J. Callahan
Professor Robert A. Carter
Michael Haas, Esq., Representative of Attorney General
Jack Harrington, Esq.
Melville D. Miller, Esq.
Hon. Richard S. Rebeck
Alma L. Saravia, Esq., Representative of the Public Advocate
Theresa L. Burnett, Esq., AOC Staff

4:74-7. Civil Commitment

(a) ...no change

(b) ...no change

(c) Temporary Commitment. The court may enter an order of temporary commitment authorizing the admission to or retention of custody by a facility pending final hearing if it finds probable cause, based on the certificates filed in accordance with paragraph (b) of this rule, to believe that the person is in need of involuntary commitment. The order of temporary commitment shall include the following terms:

1. A place and day certain for the commitment hearing, which shall be within 20 days after the initial inpatient admission to the facility. The date shall not be subject to adjournment except that in exceptional circumstances and for good cause shown in open court and on the record the hearing may be adjourned for a period of not more than [10] 14 days.

2. ...no change

3. Assignment of counsel to represent an unrepresented patient. If the patient is a minor, a guardian ad litem shall be appointed to represent him, who shall not be the applicant for the commitment. If the court, for good cause shown, appoints a guardian ad litem who is not an attorney, counsel for the guardian ad litem shall also be appointed. The guardian ad litem shall continue to represent the minor in respect of all matters arising under this rule until the minor is either released or reaches his majority, and no guardian ad litem appointed pursuant to this rule shall be relieved

without court order. Assigned counsel and guardian ad litem fees shall be fixed by the court after hearing and paid pursuant to paragraph [(h)] (i) of this rule.

4. ...no change

(d) ...no change

(e) ...no change

(f) ...no change

(g) Conversion to Voluntary Status; Voluntary Admission Through a Screening Service.

(1) When a patient has been involuntarily committed to a short-term care facility, a psychiatric facility or a special psychiatric hospital, as defined in N.J.S.A. 30:4-27.2, and thereafter seeks to convert to voluntary status, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to convert to voluntary status and whether the decision was made knowingly and voluntarily. Counsel previously appointed shall represent the patient at that hearing and notice shall be given in accordance with paragraph (c)(4) of these rules. The patient shall attend the hearing unless the court is satisfied that the patient does not wish to attend.

(2) When a patient has been evaluated by a screening service and thereafter admitted to a short-term care facility or a psychiatric facility as a voluntary patient and when no court order of temporary commitment has been entered, the court shall hold a hearing within 20 days to determine whether

the patient had the capacity to make an informed decision to be admitted voluntarily and whether the decision was made knowingly and voluntarily. Counsel shall be appointed to represent the patient at this hearing and notice shall be given in accordance with paragraph (c)(4) of these rules, except that notice to the nearest relatives of the patient shall be given only as requested in writing by the patient. The form of notice served upon the patients and their counsel or guardians ad litem shall include a statement of the patient's rights at the hearing and the screening documents. The patient shall attend the hearing unless the court is satisfied that the patient does not wish to attend.

(h) ...no change

(i) ...no change

(j) ...no change

(k) ...no change