2002 SUPPLEMENTAL REPORT OF THE SUPREME COURT CIVIL PRACTICE COMMITTEE

March 1, 2002

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *R.* 1:13-7 — Dismissal of Civil Cases for Lack of Prosecution

To correct an oversight in the original drafting of *R.* 1:13-7(a), the Conference of Civil Presiding Judges recommended an amendment to make it clear that the filing of any initial response to a complaint — that is, an answer, motion, acknowledgment or other response — will prevent dismissal of the filing party for lack of prosecution.

The proposed amendments to *R.* 1:13-7 follow.

1:13–7. Dismissal of Civil Cases for Lack of Prosecution

(a) Except in receivership and liquidation proceedings, in condemnation and foreclosure actions as otherwise specified by *R.* 4:43-2(d), and except as otherwise provided by rule or court order, whenever any civil action shall have been pending in any court for four months without any required proceeding having been taken therein, the court shall issue written notice to the parties advising that the action as to any or all defendants will be dismissed without prejudice 60 days following the date of the notice unless, within said period, proof of service of process has been filed, or an answer or other response by way of motion, acknowledgment or otherwise has been filed, or a motion has been filed asserting that the failure of service or the filing of an answer is due to exceptional circumstances. If the plaintiff fails to respond as herein prescribed, the court shall enter an order of dismissal without prejudice as to any named party defendant who has not been served or has not answered and shall furnish the plaintiff with a copy thereof. Reinstatement of the action after dismissal may be permitted only on motion for good cause shown. The court may issue the written notice herein prescribed in any action pending on the effective date of this rule amendment, and this rule shall then apply.

(b) ...no change.

Note: Source—*R.R.* 1:30–3(a) (b) (c) (d), 1:30–4. Amended July 7, 1971 to be effective September 13, 1971; former rule redesignated as paragraph (a) and paragraph (b) adopted July 15, 1982 to be effective September 13, 1982; paragraph (b) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; caption and paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended to be effective .

B. Proposed Amendments to *R.* 1:40-6 — Mediation of Civil, Probate and General Equity Matters

The Supreme Court Committee on Complementary Dispute Resolution recommended an amendment to *R.* 1:40-6(b) to extend from 10 to 14 days after the entry of an order referring a case to mediation the period within which the parties may stipulate to a mediator other than the one designated in the order.

The proposed amendments to *R.* 1:40-6 follow.

1:40-6. Mediation of Civil, Probate, and General Equity Matters

The CDR program of each vicinage shall include mediation of civil, probate, and general equity matters, pursuant to rules and guidelines approved by the Supreme Court.

(a) ...no change.

(b) Designation of Mediator. If the parties have not selected the mediator prior to entry of the mediation referral order, the court shall in its referral order designate a mediator from the court-approved roster. The parties may, however, within [10] 14 days after entry of the mediation referral order stipulate in writing to the designation of a different mediator. Within that [ten-day] fourteen day period, the stipulation shall be filed with the Civil CDR Coordinator and a copy thereof served upon the mediator designated by the mediation referral order. A mediator designated by such stipulation shall comply with all terms and conditions set forth in the mediation referral order.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) ...no change.

(g) ...no change.

Note: Adopted July 5, 2000 to be effective September 5, 2000 (and former Rule 1:40-6 redesignated as Rule 1:40-7); paragraph (b) amended _____ to be effective _____.

C. Proposed Amendments to *R.* 4:4-4 — Summons; Personal Service; In Personam Jurisdiction

The President of the New Jersey Professional Process Servers Association had asked the Committee to consider amending *R.* 4:4-4(b)(1)(A) to permit the same criteria governing who may make personal service in New Jersey to govern those persons making service of New Jersey process outside the state as well. After initially rejecting the proposal, upon reconsideration the Committee determined that service of New Jersey process outside the state should be able to be made in the same manner as if made within the state.

Rule 4:4-4(b)(1)(A) now limits the service of New Jersey process outside the state to 1) public officials having authority to serve civil process, 2) persons qualified to practice law in this State or in the jurisdiction where service is to be made, and 3) to persons specially appointed by the New Jersey courts. As a practical matter, however, attorneys do not engage in the service of process, persons specially appointed would require an ex parte application to the court, and many public officials such as sheriffs, constables and marshals have ceased the practice of serving process as a matter of course or as a result of the demands placed on their offices following the terrorist attacks of September 11, 2001. As private process servers may serve initial process within New Jersey, the proposed amendments would also allow for service by private process servers outside the state.

The proposed amendments to *R.* 4:4-4 follow.

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

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

(a) ...no change.

(b) Obtaining In Personam Jurisdiction by Substituted or Constructive Service.

(1) *By Mail or Personal Service Outside the State.* If it appears by affidavit satisfying the requirements of *R.* 4:4–5(c)(2) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, in personam jurisdiction may be obtained over any defendant as follows:

(A) personal service in a state of the United States or the District of Columbia, in the same manner as if service were made within this State[, except that service shall be made] or by a public official having authority to serve civil process in the jurisdiction in which the service is made or by a person qualified to practice law in this State or in the jurisdiction in which service is made [or by a person specially appointed by the court for that purpose]; or

(B) ...no change.

(C) ...no change.

(2) ...no change.

(3) ...no change.

(c) ...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 July 14, 1992 to be effective September 1, 1992; text deleted and new text substituted July 13, 1994 to be effective September 1, 1994; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraph (b)(1)(A) amended to be effective .

D. Proposed Amendments to *R.* 4:5A-2 — Notice of Track Assignment; Change of Assignment

In response to a proposal from the New Jersey State Bar Association, and in accordance with the recommendation of the Conference of Civil Presiding Judges, the Supreme Court has directed that *R.* 4:5A-2 be amended to eliminate reference to the disparate "good cause" and "exceptional circumstances" standards. The amended rule provides instead that, subsequent to the filing of a certification of good cause by any party within 30 days of receipt of the track assignment notice, a track assignment may be changed by the court or on motion if the essential nature of the case has changed (*e.g.*, if what began as a Track II auto negligence action was revealed during discovery to be predominantly a Track III product liability or medical malpractice matter) or if the case type and track were erroneously identified on the Case Information Statement or erroneously entered by court staff into the automated system. The amendments also state explicitly that under no circumstances shall a track assignment be changed because additional discovery is needed or because the case has become more complex.

The proposed amendments to *R.* 4:5A-2 follow.

4:5A-2. Notice of Track Assignment; Change of Assignment

(a) Notice of Track Assignment[; Change of Assignment for Good Cause Shown]. Within ten days after the filing of the complaint, the court shall mail a notice of track assignment to the plaintiff. The plaintiff shall annex a copy of the notice to process served on each defendant.

(b) [Change of Assignment for Exceptional Circumstances. A motion for change of track assignment made thereafter may be granted only on a showing of exceptional circumstances, except that the court may sua sponte at any time, on notice to the parties, order a change of track assignment for good cause, which shall be placed on the record.] Change of Track Assignment. Within 30 days after receipt of the track assignment notice, plaintiff may apply to the court for a change of track assignment by filing a certification of good cause. Any party other than the plaintiff seeking a change of track assignment shall file and serve a certification of good cause with its first pleading and any objection thereto shall be made by responding certification filed and served within ten days. Any party aggrieved by the court's determination on such application may seek relief therefrom by motion filed and served within 15 days thereafter. After the expiration of the time periods herein prescribed, a track assignment may be changed by the court on its own motion or motion of a party only if the fundamental cause or causes of action have changed or if the case type or track was erroneously identified on a party's Case Information Statement or erroneously entered into the automated docket. A track assignment shall not, however, be changed, during or after the time periods herein prescribed, either because of the alleged complexity of the case or on a representation by a party that additional discovery is required. In such event, relief may be sought pursuant to *R.* 4:24-1.

Note: Adopted July 5, 2000 to be effective September 5, 2000; paragraphs (a) and (b) amended to be effective _____.

E. Proposed Amendments to *Rules* 4:18-1, 4:19, 4:23-2 and 4:23-5 — re Motions to Compel

In response to a proposal from the New Jersey State Bar Association, and in accordance with the recommendation of the Conference of Civil Presiding Judges, the Supreme Court has directed that *R.* 4:23-5 be amended to provide for alternative procedures to enforce certain types of discovery, namely, a motion to dismiss or a motion to compel. If the latter procedure is chosen and the delinquent party does not comply with the order to compel, the aggrieved party may seek an order of dismissal or suppression without prejudice, or motion. The notice provisions of *R.* 4:23-5 apply to both alternatives, and dismissal or suppression with prejudice would be the next step if the required discovery is not provided.

The amendments to *R.* 4:23-5, as described above, require conforming amendments to *Rules* 4:18-1, 4:19, and 4:23-2 as well.

The Civil Practice Committee has also proposed amending *R.* 4:23-5 to clarify precisely which discovery failures are included under the umbrella of the rule.

The proposed amendments to *Rules* 4:18-1, 4:19, 4:23-2 and 4:23-5 follow.

RULE 4:18. DISCOVERY AND INSPECTION OF DOCUMENTS

AND PROPERTY; COPIES OF DOCUMENTS

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

(a) ...no change.

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A copy of the request shall also be simultaneously served on all other parties to the action. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The party upon whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within 35 days after service of the summons and complaint upon that defendant. On motion, the court may allow a shorter or longer time. The written response, without documentation annexed but which shall be made available to all parties on request, shall be served by the party to whom the request was made upon all other parties to the action. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request. The party submitting the request may move for an order of

dismissal or suppression or an order to compel pursuant to *R.* 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested.

(c) ...no change.

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 July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended _____ to be effective _____.

RULE 4:19. PHYSICAL AND MENTAL EXAMINATION OF PERSONS

In an action in which a claim is asserted by a party for personal injuries or in which the mental or physical condition of a party is in controversy, the adverse party may require the party whose physical or mental condition is in controversy to submit to a physical or mental examination by a medical or other expert by serving upon that party a notice stating with specificity when, where, and by whom the examination will be conducted and advising, to the extent practicable, as to the nature of the examination and any proposed tests. The time for the examination stated in the notice shall not be scheduled to take place prior to 45 days following the service of the notice, and a party who receives such notice and who seeks a protective order shall file a motion therefor, returnable within said 45-day period. The court may, on motion pursuant to *R.* 4:23-5, either compel the discovery or dismiss the pleading of a party who fails to submit to the examination, to timely move for a protective order, or to reschedule the date of and submit to the examination within a reasonable time following the originally scheduled date. A court order shall, however, be required for a reexamination by the adverse party's expert if the examined party does not consent thereto. This rule shall be applicable to all actions, whenever commenced, in which a physical or mental examination has not yet been conducted.

Note: Source — *R.R.* 4:25–1; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended _____ to be effective _____.

4:23–2. Failure to Comply With Order

(a) ...no change.

(b) Other Matters. If a party or an officer, director, or managing or authorized agent of a party or a person designated under *R.* 4:14–2(c) or 4:15–1 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under *R.* 4:23–1, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof with or without prejudice, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Note: Source — *R.R.* 4:27–2(a)(b). Former rule deleted and new *R.* 4:23–2 adopted July 14, 1972 to be effective September 5, 1972; paragraph (b)(2) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000. paragraph (b)(3) amended to be effective .

4:23–5. Failure to Make Discovery

(a) Dismissal.

(1) Without Prejudice. If a demand for discovery [authorized by these rules]pursuant to *Rules* 4:17, 4:18-1, or 4:19 is not complied with and no timely motion for an extension or a protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and stating that the moving party is not in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II–F of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore. If the delinquent party is appearing pro se, service of the order and notice hereby required shall be made by counsel for the moving party. The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court if the motion to vacate is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. If, however, the motion is not made within 90 days after entry of the order of dismissal or suppression, the

court may also order the delinquent party to pay sanctions or counsel fees and costs, or both, as a condition of restoration.

(2) ...no change.

(3) ...no change.

(4) ...no change.

(b) ...no change.

(c) Motion to Compel. Prior to moving to dismiss pursuant to subparagraph (a)(1) of this rule, a party may move for an order compelling discovery demanded pursuant to *Rules* 4:18-1 or 4:19. An order granting a motion to compel shall specify the date by which compliance is required. If the delinquent party fails to comply by said date, the aggrieved party may apply for dismissal or suppression pursuant to subparagraph (a)(1) of this rule by promptly filing a motion to which the order to compel shall be annexed, supported by a certification asserting the delinquent party's failure to comply therewith.

Note: Source — *R.R.* 4:23–6(c)(f), 4:25–2 (fourth sentence); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) caption amended and subparagraphs (a)(1) captioned and amended, and (a)(2) and (3) captioned and adopted, June 29, 1990 to be effective September 4, 1990; paragraph (a)(3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; caption amended, paragraphs (a)(1) and (a)(2) amended, and new paragraph (a)(4) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended and new paragraph (c) added _____ to be effective _____.

F. Proposed Amendments to *R.* 4:70-1 — re Summary Proceedings for Collection of Statutory Penalties

The Committee was asked to consider amendments to *R.* 4:70-1 to make it clear that the rule does not apply to penalty enforcement actions brought in the municipal courts. As *R.* 7:11 governs such municipal court proceedings, the Committee determined that the proposed amendments limiting the application of *R.* 4:70-1 are appropriate.

The proposed amendments to *R.* 4:70-1 follow.

4:70–1. Applicability of Rule

(a) Any penalty imposed by any statute or ordinance which may be collected or enforced by a summary civil proceeding shall be collected and enforced pursuant to *R.* 4:70 in [every court upon which jurisdiction is conferred by the statute imposing the penalty] a trial court of the Law Division. This rule shall not, however, be applicable if a statute requires a civil penalty to be collected by a plenary action. Proceedings for the confiscation or forfeiture of chattels shall conform, insofar as possible, with the provisions of *R.* 4:70.

(b) ...no change.

Note: Source—*R.R.* 4:89, 5:2–6(a) (c) (first sentence), 7:13–1, 7:14. Amended July 14, 1972 to be effective September 5, 1972; former rule redesignated paragraph (a) and paragraph (b) adopted July 24, 1978 to be effective September 11, 1978; paragraph (a) amended _____ to be effective _____.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to *R.* 4:14-3 — Examination and Cross-Examination; Record of Examination; Oath; Objections

An attorney suggested that to eliminate the problem of lengthy, irrelevant questions at depositions, *R.* 4:14-3(c) should be amended to allow the deponent's attorney to direct the deponent not to answer a question if it could not lead to the discovery of relevant evidence.

Attorney members on the Committee were of the view that the rule as currently written is working well. Even when opinion testimony is elicited from fact witnesses, the matter can be remedied at trial. The Committee concluded that there is no need to amend the rule at this time.

B. Contention Interrogatories and Document Review

1. Contention Interrogatories — An attorney asked the Committee to amend the discovery rules explicitly to permit the use of contention interrogatories, *i.e.*, interrogatories that seek to discover the factual basis for specific allegations contained in the pleadings. The Committee members agreed that interrogatories often seek such information now, and so there is no need to amend the discovery rules specifically to reference contention interrogatories.

2. Document Review — An attorney sought clarification from the Committee on the apparent conflict that exists regarding the right of a questioning attorney to review documents examined by a deponent prior to a deposition. The conflict derives from the holding of the trial court in *PSE&G Shareholder Litigation*, 320 *N.J. Super*. 112 (Ch. Div. 1998) (documents used to refresh a witness's recollection must be produced) and the Third Circuit's holding in *Sporck v. Peil*, 759 *F*.2d 312 (3d Cir. 1985) (if the documents reviewed by the witness prior to testimony are selected by the attorney, the identity of the documents is protected from disclosure by the attorney work-product privilege).

   The Committee considered and rejected the suggestion that a rule be drafted to reconcile the two cases, concluding it was not its function to arbitrate between state and federal law and that case law, as it develops, will resolve any conflicts or confusion.

C. Proposed Amendments to *Rules* 4:47 and 4:52-3 — re Protection of Assets

An attorney suggested that *R.* 4:47 be amended to make clear that the prompt entry of a judgment upon the return of a verdict should be the uniform procedure unless "exceptional good cause" exists to delay the judgment entry. The attorney also suggested that *R.* 4:52-3 be amended to conform to the federal rule by making the posting of a bond mandatory upon the issuance of any temporary restraining order or preliminary injunction. On the other hand, the attorney suggested that if the rule making the posting of injunction bonds discretionary is to be continued, the rules ought to be explicit in stating that a bond would ordinarily be required upon the issuance of a temporary restraint or preliminary injunction unless "extraordinary good cause" is demonstrated.

The Committee considered the suggestions and concluded that no amendments should be made. They reasoned that the delay in the entry of a judgment is an administrative problem that does not require a rule change and the posting of a bond need not be mandatory as a bond is rarely requested and making its posting mandatory may result in restricting access to the courts.

III. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to *R.* 4:10-3 — Protective Orders

In *Estate of Frankl v. Goodyear*, MER-L-3052-99, the trial court suggested several procedural additions to the requirements for obtaining a protective order of confidentiality relative to documents exchanged in discovery. Specifically, the court would require a supporting affidavit detailing the need for confidentiality to be filed as a matter of course along with the proposed Order. Additionally, a citation to legal authority should be included where the governing law is in doubt. Finally, where a *prima facie* showing of good cause is not clear from the moving papers or where there are substantial reasons for denying the order, an evidentiary hearing, *in camera* if warranted, could be held to provide the moving party with the opportunity to prove its entitlement to the protective order.

The Committee discussed whether *R.* 4:10-3 should be amended to incorporate these requirements and agreed that the matter should be submitted to a newly formed Protective Order Subcommittee to study the current practice and to recommend whether *R.* 4:10-3 should be more specific in its requirements and more clear in its allocation of the burden of proof.

B. Proposed Amendments to *R.* 4:58-3 — Consequences of Non-Acceptance of Offer of Party Not a Claimant

In *Frigon v. DBA Holdings, Inc.,* No. A-1316-00T1, decided January 9, 2002, the Appellate panel referred *R.* 4:58-3 to the Civil Practice Committee to consider whether the token or nominal limitation on offers of judgment in cases with unliquidated damages should be applied as well to cases with liquidated damages. The issue was submitted to the newly formed Offer of Judgment Subcommittee. The subcommittee will consider whether offers of judgment should be treated differently in unliquidated damage cases from cases with liquidated damages and, if not, whether *R.* 4:58-3 should be amended to extend the existing limitations on offers in unliquidated damage cases to offers in matters with liquidated damages or whether some alternative approach is preferable. The subcommittee will also consider a definition of what constitutes "token or nominal" offers.

Respectfully submitted,

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