
**1998 REPORT
OF
THE SUPREME COURT COMMITTEE
ON
CIVIL PRACTICE**

January 15, 1998

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APPENDIX

Report of the Subcommittee on Certification of Questions of Law to the
Supreme Court

I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendments to R. 1:2-2 -- Trial Court; Verbatim Record of Proceedings

The Appellate Division Rules Committee has recommended that R. 1:2-2 be amended to require that a verbatim record be made of any audio or video tape played during trial unless a transcript of the tape is marked into evidence. At present, it often happens that the content of tapes introduced into evidence does not find its way into the transcript. As a result, the Appellate Division is getting transcripts with lacunae. The proposed amendment, which the Civil Practice Committee endorses, is intended to address this problem.

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

1:2-2. Trial Courts; Verbatim Record of Proceedings

In the trial divisions of the Superior Court and in the Tax Court, all proceedings in court shall be recorded verbatim except, unless the court otherwise orders, pretrial and settlement conferences, calendar calls, and ex parte motions. A verbatim record shall also be made of the content of an audio or video tape played during the proceedings, unless a transcript thereof is marked into evidence. The tape itself shall also be marked into evidence as a court's exhibit and retained by the court. Ex parte proceedings pursuant to R. 4:52 and R. 4:67 shall, however, be recorded verbatim subject to the availability of either a court reporter or a recording device. In the municipal courts, the taking of a verbatim record of the proceedings shall be governed by R. 7:8-8.

Note: Source—R.R. 3:7-5 (first sentence), 3:7-10(d) (fifth sentence), 4:44-2 (first sentence), 4:44-5, 4:61-1(b). Amended June 20, 1979 to be effective July 1, 1979; amended December 20, 1983 to be effective December 31, 1983; amended July 26, 1984 to be effective September 10, 1984; amended January 5, 1998 to be effective February 1, 1998; amended to be effective.

Referral Service of an adjacent county. The summons shall also advise defendant that if he or she cannot afford an attorney, he or she may communicate with the Legal Services Office of the county of his or her residence or the county in which the action is pending. If the defendant is an individual not resident in this State, the summons shall similarly advise him or her, directing the defendant, however, to the appropriate agency in the county in which the action is pending. The reverse side or second page of the summons shall contain a current listing, by county, of [addresses and] telephone numbers of the Legal Services Office and the Lawyer Referral Office serving each county, which list shall be updated regularly by the Administrative Office of the Courts and made available to legal forms publishers and to any person requesting such list.

Note: Source—R.R. 4:4-2; amended November 27, 1974 to be effective April 1, 1975; amended July 29, 1977 to be effective September 6, 1977; amended July 21, 1980 to be effective September 8, 1980; amended July 16, 1981 to be effective September 14, 1981; amended December 20, 1983 to be effective December 31, 1983; amended June 29, 1990 to be effective September 4, 1990; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

O. Proposed Amendments to R. 4:4-3 -- By Whom Served; Copies

The director of a New York organization that serves process proposed that the New Jersey practice be changed to permit the use of private, licensed process servers at the outset -- *i.e.*, without having to first give the sheriff 40 days to try and serve initial pleadings, as is now required by R. 4:4-3.

This issue has been raised often over the past decade. The last time the Committee considered such a proposal was in the 1992-94 term; the compromise reflected in the current rule resulted. It was reported to the Committee that Sheriff's service officers believe the responsibility of serving initial process is onerous.

The Committee recommends that the market be allowed to determine who serves process -- Sheriff's officers, whose fees may be less but who may not effectuate service promptly, or private process servers, who may charge more to get the job done, and proposes a rule amendment that would give attorneys a choice between Sheriff's or private service.

The proposed amendments to R. 4:4-3 follow.

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 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 transmittal, by mailing or hand 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 usual place of abode of the defendant or a person authorized by rule or law to accept service for the defendant 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. Mail may be addressed to a post office box in lieu of a street address only as provided by R. 1:5-2.]

Summonses and writs shall be served, together with a copy of the complaint, by the sheriff, by a person specially appointed by the court for that purpose, or by plaintiff's attorney or the attorney's agent or by any other competent adult not having a direct interest in the litigation. If personal service cannot be effected after a reasonable and good faith attempt, which shall be described in the proof of service required by R. 4:4-7, service may be made by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, to the usual place of abode of the defendant or a person authorized by rule of law to accept service for the defendant 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. Mail may be addressed to a post office box in lieu of a street address only as provided by R. 1:5-2. 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 July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) deleted and new text added
to be effective.

P. Proposed Amendments to R. 4:4-7 -- Return

When service is made under *R. 4:4-3(b)*, the affidavit must include the facts of the affiant's "personal knowledge" of defendant's place of abode, business or employment. This is the only rule that imposes such a requirement. The Foreclosure Unit within the Superior Court Clerk's office sought clarification of the requirement -- specifically, whether "personal knowledge" means more than diligent inquiry.

The Committee agreed that the "personal knowledge" requirement was not intended to impose a higher standard of inquiry. At the Committee's recommendation, the Supreme Court issued an Order on November 4, 1996 relaxing *R. 4:4-7* to permit a party making service pursuant to *R. 4:4-3(b)* to make proof of service by affidavit that shall include the facts of the affiant's diligent inquiry to determine the defendant's place of abode, business or employment. The Order is intended to remain in effect until *R. 4:4-7* is amended accordingly.

The proposed amendments to *R. 4:4-7* follow.

B. Proposed Amendments to R. 1:3-4 -- Enlargement of Time

In *State v. Sirvent*, 296 N.J. Super. 279 (App. Div. 1997), the court held that the ten-day period in which the state may appeal from the pretrial dismissal of a municipal court complaint may be enlarged to a maximum of 20 days. Accordingly, the Criminal Practice Committee proposed amendments to *Rules* 1:3-4 and 3:24 to reflect this holding. The Civil Practice Committee supports the proposed amendments to *R.* 1:3-4.

The proposed amendments to *R.* 1:3-4 follow.

1:3-4. Enlargement of Time

(a) ... no change

(b) ... no change

(c) Enlargements Prohibited. Neither the parties nor the court may, however, enlarge the time specified by R. 1:7-4 (motion for amendment of findings); R. 3:18-2 (motion for judgment of acquittal after discharge of jury); R. 3:20-2, R. 4:49-1(b) and (c) and R. 7:10-1 (motion for new trial); R. 3:21-9 (motion in arrest of judgment); R.3:21-10(a) and R. 7:9-4 (motion for reduction or change of sentence); R. 3:23-2 (appeals to the Law Division from judgments of conviction in courts of limited criminal jurisdiction); R. 3:24 (appeals to the Law Division from interlocutory orders [of] and orders dismissing the complaint entered by courts of limited criminal jurisdiction); R. 4:40-2(b) (renewal of motion for judgment); R. 4:49-2 (motion to alter or amend a judgment); and R. 4:50-2 (motion for relief from judgment or order).

Note: Source—R.R. 1:27B(a) (b) (c) (d) (e), 4:6-1, 8:12-5(a)(b). Paragraph (c) amended July 7, 1971, effective September 13, 1971. Paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; paragraph (c) amended July 26, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended January 5, 1998 to be effective February 1, 1998; paragraph (c) amended
to be effective .

C. **Proposed Amendments to R. 1:5-6 -- Filing**

The Surrogates' Section of the County Officers Association sought an amendment to *R. 1:5-6(b)(4)* to make it clear that adoption actions are to be filed with the Surrogate of the county of venue -- the current and long-standing practice in New Jersey. Pending an amendment to the rule, the Supreme Court issued an Order, dated April 29, 1997, relaxing *R. 1:5-6* to reflect this practice. Now, the Civil Practice Committee recommends amendments to *R. 1:5-6(b)(4)* to embody the terms of the relaxation Order. These proposed amendments have been reviewed and endorsed by the Family Practice Committee, as well.

The proposed amendments to *R. 1:5-6* follow.

1:5-6. Filing

(a) ... no change

(b) What Constitutes Filing With the Court. Except as otherwise provided by R. 1:6-4 (motion papers), R. 1:6-5 (briefs), and R. 4:42-1(e) (orders and judgments), a paper is filed with the trial court if the original is filed as follows:

(1) In civil actions in the Superior Court, Law Division, and in actions in the Superior Court, Chancery Division, General Equity, except mortgage and tax foreclosure actions, with the deputy clerk of the Superior Court in the county of venue;

(2) In criminal actions in the Superior Court, Law Division, with the Criminal Division Manager in the county of venue, as designee of the deputy clerk of the Superior Court;

(3) In mortgage and tax foreclosure actions, with the Clerk of the Superior Court, unless and until the action is deemed contested and the papers have been sent by the Clerk to the county of venue, in which event subsequent papers shall be filed with the deputy clerk of the Superior Court in the county of venue;

(4) In actions in the Chancery Division, Family Part, with the deputy clerk of the Superior Court in the county of venue if the action is for dissolution of marriage, with the Surrogate of the county of venue if the action is for adoption, and in all other actions, with the Family Division

Manager in the county of venue, as designee of the deputy clerk of the Superior Court;

(5) In probate matters in the Surrogate's Court, with the Surrogate, and in actions in the Chancery Division, Probate Part, with the Surrogate of the county of venue as deputy clerk of the Superior Court;

(6) In actions of the Special Civil Part, as provided by Part VI of these rules;

(7) In actions in the Tax Court, as provided by Part VIII of these rules.

The foregoing notwithstanding, in any case the judge or, at the judge's chambers, a member of the staff may accept papers for filing if they show the filing date and the judge's name and office. The filed papers shall be forwarded forthwith to the appropriate office.

(c) ... no change

(d) ... no change

(e) ... no change

Note: Source—R.R. 1:7-11, 1:12-3(b), 2:10, 3:11-4(d), 4:5-5(a), 4:5-6(a) (first and second sentence), 4:5-7 (first sentence), 5:5-1(a). Paragraphs (b) and (c) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended November 26, 1990 to be effective April 1, 1991; paragraphs (b) and (c) amended, new text substituted for paragraph (d) and former paragraph (d) redesignated paragraph (e) July 13, 1994 to be effective September 1, 1994; paragraph (b)(1) amended, new paragraph (b)(2), adopted, paragraphs (b)(2), (3), (4), (5) and (6) redesignated paragraphs (b)(3), (4), (5), (6) and (7), and newly designated paragraph (b)(4) amended July 13, 1994 to be effective January 1, 1995; paragraphs (b)(1), (3) and (4) amended June 28, 1996 to be effective September 1, 1996;

D. Proposed Amendments to Rules 1:6-3, 1:5-4 and 4:46-1 -- re Motions

In the 1994-96 term, the Committee considered a proposal from the Family Practice Committee that called for amending *R. 1:6-3* to reduce the time for filing an answer or response to any opposing affidavit, certification or cross-motion from four to three days before the return date of the motion. The purpose of the proposed change was to give the moving party an additional business day to prepare reply papers to what may often be an answer to the motion including a cross-motion raising new issues. The Committee voted overwhelmingly against amending the rule as proposed by the Family Practice Committee, taking the position that the proposed change would reduce the court's preparation time unacceptably.

In the 1996-98 term, the Civil Practice Committee established a subcommittee, chaired by the Hon. Patrick J. McGann, Jr., to consider other solutions to the problem identified by the Family Practice Committee. In addressing the problem, the subcommittee unanimously recommended that cross-motions, returnable on the same date as the motion, be restricted, as they are in the Federal court, to applications that relate to the subject matter of the original motion. Although it is difficult to frame a precise definition of what "related to" means, the phrase is intended to signal trial judges that clearly unrelated applications are not to be characterized as cross-motions. For example, where there is a properly filed and served motion under *R. 4:23-5* to strike a pleading for failure to answer interrogatories and the adversary files a "cross-motion" to compel a deposition, the latter is not a proper cross-motion under the proposed amendment to *R. 1:6-3* and should instead be listed as a regular motion.

The subcommittee also recommended a revision to *R. 1:6-3* explicitly limiting the papers that may be filed with respect to an original motion to the motion and its supporting papers, opposition papers, and reply papers -- and no more. Too often, attorneys continue to send letter briefs and certifications beyond that which the rule contemplates. These excess papers should not be allowed. This same limitation should apply to summary judgment motions. Accordingly, the subcommittee recommended the corresponding change to *R. 4:46-1*.

For clarity, the subcommittee recommended several other, non-substantive changes to *Rules 1:6-3* and *4:46-1*. In addition, the reference to *R. 1:6-3* in *R. 1:5-4* has been revised to provide greater specificity to the applicable subparagraph of the rule.

The full Committee supports the recommendations of the subcommittee.

The proposed amendments to *Rules 1:6-3*, *1:5-4* and *4:46-1* follow.

1:6-3. [Time for Serving and Filing Motions, Cross Motions and Affidavits] Filing and Service of Motions and Cross-Motions

(a) Motions Generally. Other than an ex parte motion and [E]except as otherwise provided by R. 4:46-1 ([motion for] summary judgment) and R. 5:5-4(b) (post judgment motions), a notice of motion[, other than an ex parte motion,] shall be [served and] filed and served not later than 16 days before [the time specified for] the specified return date unless otherwise provided by [rule or] court order, which may be applied for ex parte. [For cause shown, such an order may be made on ex parte application. For example, a motion must be served and filed on Wednesday for a motion date falling on Friday 16 days later.] Thus, for example, if the return date of the motion is a Friday, the motion must be filed and served not later than the Wednesday, 16 days prior. If a motion is supported by affidavit or certification, the affidavit or certification shall be [served and] filed and served with the motion[; and,]_ [e]Except as provided by R. 4:49-1(b) (motion for new trial), any opposing affidavits, certifications[, cross-motions] or objections filed pursuant to R. 1:6-2 shall be [served and] filed and served not later than 8 days before the return date unless the court [permits them to be served at a later] relaxes that time. [For example, a response must be served and filed on Thursday for a motion date falling on Friday of the following week. Answers or responses] Thus, for example, if the return date

is on a Friday, any response must be filed and served no later than Thursday of the prior week. Reply papers responding to [any] opposing affidavits[,] or certifications [and cross-motions] shall be [served and] filed and served not later than 4 days before the return date unless the court otherwise orders. Thus, [F]for example, such papers [would have to be served and] must be filed and served on Monday for a [motion] return date [falling on] of the following Friday [of the same week]. No other papers may be filed without leave of court.

(b) Cross-Motions. A cross-motion may be filed and served by the responding party together with that party's opposition to the motion and noticed for the same return date only if it relates to the subject matter of the original motion. The original moving party's response to the cross-motion shall be filed and served as provided by paragraph (a) for reply papers. The court may, however, on request of the original moving party, or on its own motion, enlarge the time for filing an answer to the cross-motion, or fix a new return date for both. No reply papers may be served or filed by the cross-movant without leave of court.

(c) Completion of Service. For purposes of this rule, service of motion papers is complete only on receipt at the office of adverse counsel or the address of a pro se party. If service is by ordinary mail, receipt will be presumed on the third business day after mailing. [With respect to Family

Part motions, no other papers may be filed without leave of court.]

Note: Source—R.R. 3:11-1, 4:6-3(a); amended July 24, 1978 to be effective September 11, 1978; amended July 16, 1979 to be effective September 10, 1979; amended July 16, 1981 to be effective September 14, 1981; amended November 1, 1985 to be effective January 2, 1986; amended June 29, 1990 to be effective September 4, 1990; amended July 13, 1994 to be effective September 1, 1994; amended and paragraphs (a), (b) and (c) designated to be effective

1:5-4. Service by Mail or Courier: When Complete

(a) ... no change

(b) Service Complete on Mailing. Except for motions [, which] that are governed by R. 1:6-3(c), service by mail of any paper referred to in R. 1:5-1, when authorized by rule or court order, shall be complete upon mailing of the ordinary mail. If no ordinary mailing is made, service shall be deemed complete upon the date of acceptance of the certified or registered mail.

(c) ... no change

Note: Source—R.R. 4:5-2(a) (fifth sentence). Paragraph (a) adopted and former rule designated (b) June 29, 1973 to be effective September 10, 1973; amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended and paragraph (c) added July 13, 1994 to be effective September 1, 1994; paragraph (b) amended to be effective

4:46-1. Time for Making, Filing, and Serving Motion

A party seeking any affirmative relief[, including a declaratory judgment] may, at any time after the expiration of 35 days from the service of the pleading claiming such relief, [or after service of a motion for summary judgment by the adverse party,] move for a summary judgment or order upon all or any part thereof or as to any defense. A party against whom a claim for such affirmative relief is asserted may move at any time for a summary judgment or order as to all or any part thereof. Except as otherwise provided by R. 6:3-3 (motion practice in Special Civil Part) or unless the court otherwise orders, a motion for summary judgment shall be served and filed not later than 28 days before the time specified for the return date; opposing affidavits, certifications, briefs, [objections,] and cross-motions for summary judgment, if any, shall be served and filed not later than 10 days before the return date; and answers or responses to such opposing papers or to cross-motions shall be served and filed not later than 4 days before the return date. No other papers may be filed without leave of court.

Note: Source—R.R. 4:58-1, 4:58-2. Caption and text amended November 1, 1985 to be effective January 2, 1986; amended November 5, 1986 to be effective January 1, 1987; amended November 7, 1988 to be effective January 2, 1989; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended to be effective.

E. Proposed Amendments to Rules 1:7-4, 4:49-1 and 4:49-2 -- re Motions for Rehearing, New Trial or to Alter or Amend a Judgment or Order

The on-going discussion of motion practice (noted above in section I.D. of this report) led several Committee members to express the view that the current period within which motions for rehearing, new trial or to alter or amend an order or judgment must be made and served -- namely, ten days after service of the judgment or order or, in the case of a motion for new trial, ten days after the return of the verdict -- is too short. Pursuant to *R. 1:6-3*, service is complete on receipt of the motion papers by adverse counsel, which is presumed to be three business days after mailing. Thus, such motions must be crafted within seven days.

The Committee recommends that the ten-day period now prescribed in *Rules 1:7-4, 4:49-1 and 4:49-2* be extended to twenty days, and that the five-day period within which an opposing party may file a cross-motion for a new trial under *R. 4:49-1* be lengthened to ten days.

The proposed amendments to *Rules 1:7-4, 4:49-1 and 4:49-2* follow.

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 that 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] 20 days 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 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 that counsel believes the court has overlooked or on 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 July 14,
1992 to be effective September 1, 1992; amended _____
to be effective _____.

4:49-1. Motion for New Trial

(a) ... no change

(b) Time for Motion, Cross-Motion; Affidavits. A motion for a new trial shall be served not later than [10] 20 days after the court's conclusions are announced in nonjury actions or after the return of the verdict of the jury. The motion shall be noticed for hearing and argued no later than the second regular motion day following the service thereof, unless the court for good cause shown orders the hearing fixed for either an earlier or a later date. The opposing party may, within [5] 10 days after service of the motion, serve a cross-motion for a new trial returnable at the same time and place as the motion. If a motion for a new trial is based upon affidavits they shall be served with the motion; opposing affidavits shall be served within 10 days thereafter which period may be extended for an additional period not exceeding 20 days either by written stipulation of the parties or court order. The court may permit reply affidavits. Except in special circumstances the motion shall be decided by the judge on trial notes without awaiting a transcript of the testimony.

(c) On Initiative of Court. Not later than [10] 20 days after entry of judgment the court on its own motion may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter the court may grant a motion for a new trial timely served, for a reason

not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(d) ... no change

Note: Source—R.R. 4:61-1(a), 4:61-2, 4:61-3, 4:61-4, 4:61-5. Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (b) and (c) amended to be effective.

unanimous unless the parties have agreed on the record to a verdict by a lesser number); or

- 3) more than six jurors remain prior to commencement of deliberations, and the parties agree on the record to submit the case to the number remaining (in which case the verdict shall be by agreement of five-sixths of the deliberating jurors unless the parties have otherwise agreed on the record).

This last procedure, whereby the parties agree to more than six jurors deliberating, is intended to provide an option to the court's selecting alternate jurors.

As to innovative jury practices, the subcommittee met with a consultant and studied with interest the recently issued ABA Civil Trial Practice Standards, which deal extensively with jury practices. In accordance with these standards, the subcommittee recommended amendments to R. 1:8-8 to provide for "juror notebooks" and juror note-taking.

The juror notebooks are intended to provide each juror with his or her own copy of specific exhibits, as agreed upon by the parties and the court, to aid in their understanding of the exhibits. Pursuant to this procedure, the parties are not permitted to submit their own notebooks, which might put less affluent parties at a disadvantage. Rather, each juror would be given a single notebook into which copies of agreed upon, admitted exhibits could be inserted, over the course of the trial. The court will oversee the procedure, which is predicated on an initial finding that no party will be unduly prejudiced.

The full Committee was divided on the subject of juror notebooks, voting 16 to 11 in favor. The minority questioned whether jurors' attention would be distracted by the notebooks from the dynamics of the trial. It was the minority's view that while it is sensible to distribute individual copies of exhibits to the jurors to aid in understanding specific testimony rather than passing the exhibit among the jurors, giving the jurors a notebook into which items would be placed throughout the trial would encourage jurors to flip through the notebook when they should be attending to testimony. The subcommittee members indicated that studies did not support this objection. Other Committee members thought the procedure could become unwieldy -- how can copies of objects or bulky documents be made and distributed? The subcommittee reiterated that the court ultimately determines which exhibits are to be provided to the jurors.

The proposed amendments to *R.* 1:8-8(b) that explicitly permit juror note-taking merely codify current practice. The Committee endorsed this recommendation without opposition.

See section V. E. of this report for a discussion of jury-related issues held for consideration.

The proposed amendments to *Rules* 1:8-1, 1:8-2, 1:8-8, 1:8-9 and 1:8-10 follow.

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] 20 days 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 July 14, 1992 to be effective September 1, 1992; amended to be effective.

**F. Proposed Amendments to Rules 1:8-1, 1:8-2, 1:8-8, 1:8-9 and 1:8-10 --
re Juries**

In its Supplemental Report to the Supreme Court for the 1994-96 term, the Committee noted that it was holding for the next term (1996-98) two proposals concerning juries and jurors. The first was that possible advancements in the area of jury practices permitted in other jurisdictions be studied for use in New Jersey. The second was that R. 1:8-2 be amended to incorporate the holding in *Petrolia v. Estate of Nova*, 284 N.J. Super. 585 (App.Div. 1995), *i.e.*, that where alternate jurors have been empaneled, the implied stipulation of R. 1:8-2(c) permitting the case to proceed to trial with and the verdict reached by five does not apply. A subcommittee, chaired by the Hon. Barbara Byrd Wecker, was appointed in the 1996-98 term to study these issues.

With respect to the *Petrolia* issue, the Committee supports the subcommittee's recommendation that Rules 1:8-1, 1:8-2, 1:8-9 and 1:8-10 be amended to provide that a deliberating jury in a civil action shall consist of six persons (in which case the verdict shall be by agreement of five jurors), unless:

- 1) for good cause shown, the court orders a jury of twelve, pursuant to a request made in the jury demand (in which case the verdict shall be by agreement of ten jurors); or
- 2) fewer than six jurors remain prior to commencement of deliberations, and the parties agree on the record to submit the case to the number remaining (in which case the verdict shall be

1:8-1. Trial by Jury

(a) Criminal Actions. Criminal actions required to be tried by a jury shall be so tried unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial. In sentencing proceedings conducted pursuant to N.J.S.A. 2C:11-3(c)(1), the consent of prosecutor shall be required for such waiver.

(b) Civil Actions. Issues in civil actions triable of right by a jury shall be so tried only if a jury trial is demanded by a party in accordance with [the rules applicable to the court in which the action is to be tried] R. 4:35-1 or R. 6:5-3, as applicable, and is not thereafter waived. If a jury of twelve is requested, that request shall be included in the jury demand.

Note: Source—R.R. 3:7-1(a), 4:40-3; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; captions added to paragraphs (a) and (b) and paragraph (b) amended _____ to be effective

1:8-2. Number of Jurors

(a) Number Deliberating in Criminal Actions. [Juries] A deliberating jury in a criminal action shall consist of 12 persons, but at any time before verdict the parties may stipulate that the jury shall consist of any number less than 12 except in the trials of crimes punishable by death. Such stipulations shall be in writing and with the approval of the court.

(b) Number Deliberating in Civil Actions. [Juries] A deliberating jury in a civil action shall consist of six persons unless [the court for good cause shown shall order a jury of 12 persons.]:

(1) for good cause shown the court orders a jury of 12 persons pursuant to a demand made in accordance with R. 1:8-1(b); or

(2) fewer than six jurors remain prior to commencement of deliberations and the parties then agree on the record to submit the case to the remaining jurors; or

(3) more than six jurors remain prior to the commencement of deliberations and the parties then agree on the record that all remaining jurors shall deliberate.

(c) Verdict in Civil Actions. [In civil actions the verdict or finding shall be by five-sixths of the jurors unless the parties stipulate that a verdict or finding by a smaller majority of the jurors shall be taken as the verdict or finding of the jury. If a jury of 6 is impanelled and sworn, the parties shall be deemed to have stipulated that in

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the event one juror is excused, the trial shall proceed and a verdict may be rendered by 5 of the jury agreeing, unless at the time the jury was drawn, any party by statement on the record refuses to so stipulate. If a jury of 12 is impanelled and sworn, the parties shall be deemed to have stipulated that in the event one or 2 jurors are excused, the trial shall proceed and a verdict may be rendered by 10 or more of the jury agreeing, unless at the time the jury was drawn, any party by statement on the record refuses to so stipulate.]

(1) Unless the parties have agreed on the record prior to commencement of deliberations to accept a verdict or finding by a lesser number, the verdict or finding shall be by agreement of five jurors when six jurors deliberate, and by 10 jurors when 12 jurors deliberate.

(2) If the parties have agreed on the record to submit the case to fewer than six jurors, pursuant to paragraph (b) (2) of this rule, the verdict or finding shall be unanimous, unless the parties have also agreed on the record prior to submission to the jury to a verdict or finding by a lesser number.

(3) If the parties have agreed on the record to more than six jurors pursuant to paragraph (b) (3) of this rule, the verdict or finding shall be by agreement of five-sixths of the deliberating jurors, unless the parties have otherwise agreed on the record prior to submission to the jury.

(d) Alternate Jurors; Civil and Criminal Actions.

(1) All Actions. The court in its discretion may direct the impanelling of a jury of such number as [is appropriate

under the circumstances,] it deems necessary to insure that a sufficient number of jurors will remain to deliberate [having the same qualifications and impanelled and sworn in the same manner as a jury of 12]. If a juror is excused after being sworn but before [any opening statement is begun,] opening statements begin, another juror may be impanelled and sworn, but no juror may be empaneled and sworn thereafter. All the jurors shall sit and hear the case, but the court for good cause shown may excuse any of them from service provided the number of jurors is not reduced to less than 12 or 6 as the case may be or such other number as may be stipulated to. If more than such number are left on the jury at the conclusion of the court's charge, the clerk of the court in its presence shall [put their names on slips folded to conceal the names, shall place the slips in a suitable box and from it shall] randomly draw such number of names as will reduce the jury to the number required to determine the issues. Following the drawing of the names of jurors to determine the issues, the court may in its discretion order that the alternate jurors not be discharged, in which event the alternate jurors shall be sequestered apart from the other jurors and shall be subject to the same orders and instructions of the court, with respect to sequestration and other matters, as the other jurors. If the alternate jurors are not discharged and if at any time after submission of the case to the jury, a juror dies or is discharged by the court because of illness or other inability to continue, the court may direct the clerk to draw

the name of an alternate juror to take the place of the juror who is deceased or discharged. When such a substitution of an alternate juror is made, the court shall instruct the jury to recommence deliberations and shall give the jury such other supplemental instructions as may be appropriate.

(2) Civil Actions. In civil actions, instead of selecting alternate jurors, the parties may agree on the record, pursuant to paragraph (b)(3) of this rule, that all remaining jurors shall deliberate and that the verdict or finding shall be returned by such number as is provided by paragraph (c)(3) of this rule.

Note: Source—R.R. 3:7-1(b), 3:7-2(d), 4:48-2, 4:49-1(a)(b). Amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (d) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (d) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; amended to be effective.

1:8-8. [Papers, Exhibits, Instructions, etc., to Jury Room]
Materials to be Submitted to the Jury; Note-taking

(a) Materials. The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties. The court, in its discretion, may submit a copy of all or part of its instructions to the jury for its consideration in the jury room. The court may also, in its discretion and at such time and in such format as it shall determine, permit the submission to the jury of individual copies of any exhibit provided an appropriate request to employ that technique was made prior to trial on notice to all parties and provided further that the court finds that no party will be unduly prejudiced by the procedure.

(b) Juror Note-taking. Prior to opening statements, the attorneys or any party may request that the jury be permitted to take notes during the trial or portion thereof, including opening and closing statements. If the court determines to permit note-taking after all parties have had an opportunity to be heard, it shall provide the jurors with note-taking materials and shall take such steps as will insure the security and confidentiality of each juror's notes.

Note: Source—R.R. 4:52-2; caption and text amended July 15, 1982 to be effective September 13, 1982; amended to be effective.

1:8-9. Return of Verdict

In every trial by jury the verdict shall be returned by the jury to the judge in open court. The verdict shall be unanimous in all criminal actions and shall be rendered [by at least five-sixths] in civil actions by the number required by R. 1:8-2(c).

Note: Source—R.R. 3:7-9(a), 4:40-4, 7:8-6; amended
to be effective

1:8-10. Polling of Jury

[If a verdict is returned and before it] Before the verdict is recorded, the jury shall be polled at the request of any party or upon the court's motion, and it shall be polled in every civil action if the verdict is not unanimous. If the poll discloses that there is not unanimous concurrence in a criminal action or concurrence by [five-sixths] the number required by R. 1:8-2(c) in a civil action, the jury may be directed to retire for further deliberations or discharged.

Note: Source—R.R. 3:7-9(d), 4:49-2; amended _____
to be effective _____.

G. Proposed Amendments to R. 1:8-7 -- Requests to Charge the Jury

The Appellate Division Rules Committee has proposed, and the Civil Practice Committee has endorsed, the addition of a requirement to *R. 1:8-7* that a verbatim record shall be made of any charge conference the court holds. On appellate review, the court now receives the transcript of the charge. A transcript of the charge conference would provide further insight.

The proposed amendments to *R. 1:8-7* follow.

1:8-7. Requests to Charge the Jury

(a) Generally. At or before the commencement of the trial, or thereafter but before the close of the evidence as to issues not anticipated prior to trial, any party may submit written requests that the court instruct the jury on the law as set forth in the requests. Copies of the requests shall be furnished all parties at the time they are submitted to the court. The court shall, on the record, rule on the requests prior to closing arguments to the jury. A verbatim record shall be made of any charge conference the court holds. Objections to the instructions to the jury shall be in accordance with R. 1:7-2.

(b) ... no change

Note: Source—R.R. 3:7-7(a), 4:52-1 (first and second sentences); amended July 21, 1980 to be effective September 8, 1980; paragraph (a) caption and new paragraph (b) added July 13, 1994 to be effective September 1, 1994; paragraph (a) amended to be effective .

H. Proposed Amendments to R. 1:10-3 -- Relief to Litigant

The Conference of Civil Presiding Judges considered the issue of attorneys' use of R. 1:10-3 to bring about the *ex parte* arrest and incarceration of a judgment debtor who had defaulted on an installment payment agreed to in a consent judgment. The Conference unanimously agreed that such a use of R. 1:10-3 is inappropriate. Arrest is not a collection remedy that should be countenanced; the proper remedy when a judgment debtor defaults is execution. Because the language of R. 1:10-3 seems to permit a "debtor's prison" scenario, however, the Conference recommended that the rule be amended to make it clear that, except with respect to family obligations, R. 1:10-3 may not be used to bring about the arrest and incarceration of a judgment debtor for failure to pay on the debt.

The Committee is in agreement with the Conference of Civil Presiding Judges.

The proposed amendments to R. 1:10-3 follow.

1:10-3. Relief to Litigant

Notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any action may seek relief by application in the action. A judge shall not be disqualified because he or she signed the order sought to be enforced. If an order entered on such an application provides for commitment, it shall specify the terms of release provided, however, that no order for commitment shall be entered to enforce a judgment or order exclusively for the payment of money, except for orders and judgments based on a claim for equitable relief including orders and judgments of the Family Part. The court in its discretion may make an allowance for counsel fees to be paid by any party to the action to a party accorded relief under this rule. An application by a litigant may be tried with a proceeding under R. 1:10-2(a) only with the consent of all parties and subject to the provisions of R. 1:10-2(c).

Note: Source—R.R. 4:87-5; amended July 26, 1984 to be effective September 10, 1984; former R. 1:10-3 recaptioned and redesignated R. 1:10-2(b), former R. 1:10-4 recaptioned and redesignated R. 1:10-2(c), and former R. 1:10-5 amended and redesignated R. 1:10-3 July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

I. Proposed Amendments to R. 1:11-2 -- Withdrawal or Substitution

An Appellate Division judge recommended that R. 1:11-2 be amended to permit a substitution of attorney to be filed in civil cases without leave of court, at any time, provided there is a certification that trial will not thereby be delayed and provided that every other party, in writing, waives notice and the right to be heard. Such a change is intended, in the view of the majority, to relieve both the court and the parties the burden of another unnecessary motion.

A narrow majority of the Committee approved such an amendment. A large minority, however, took the position that, when a case gets close to trial, the judge should have the opportunity to question the attorney on the record as to the likelihood of delay. The minority was of the view that the current rule provides the judge with a tool to prevent trial delay, and that that tool would be lost if the rule is amended as proposed.

The Committee also proposes amendments to this rule to reflect recent changes to R. 1:21 allowing law firms to practice as limited liability companies and limited liability partnerships. (See also section I. J. of this report.)

1:11-2. Withdrawal or Substitution

After the entry of a plea in a criminal action or after the pretrial conference or the fixing of a trial date, whichever is earlier in a civil action, an attorney may withdraw from the action [only by leave of court on written notice to all parties] without leave of court only by the filing of a written consent to the withdrawal executed by the client, a substitution of attorney executed by both the withdrawing and the substituted attorney, a written waiver by all other parties of notice and the right to be heard, execution of a substitution of attorney, and a certification by both the withdrawing and the substituted attorney that the withdrawal and substitution will not cause or result in delay. Prior to such time, an attorney may withdraw without leave of court upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear pro se. If the client will appear pro se, the withdrawing attorney shall file the substitution. An attorney retained by a client who had appeared pro se shall file a substitution.

In the event that a partnership or attorney assumes the status of a professional corporation, or limited liability entity, pursuant to Rules 1:21-1A, 1:21-1B or 1:21-1C, respectively, or in the event that a professional corporation or a limited liability entity for the practice of law dissolves and reverts to an unincorporated status, it shall not be necessary for the firm to file substitutions of attorney in its pending

matters provided that the firm name (except for the addition or deletion of the [corporate] entity designation) is not changed as a result of the change in status.

Note: Source—R.R. 1:12-7A; amended July 16, 1981 to be effective September 14, 1981; amended November 7, 1988 to be effective January 2, 1989; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

J. Proposed Amendments to Rules 1:14, 1:15-4, 1:20-20, 1:21-2 and 1:28A-2 -- re Limited Liability Entities

Effective January 1, 1997, *R.* 1:21 was amended to authorize law firms to practice as limited liability companies (LLCs) and limited liability partnership (LLPs). Specifically, *Rules* 1:21-1 and 1:21-6 were amended and new *Rules* 1:21-1B and 1:21-1C were adopted at that time. A subsequent search of the rules revealed several other Part I rules that needed amendment to add LLCs and LLPs to the universe of structures in which New Jersey law firms are now permitted to practice. Accordingly, the Committee recommends the necessary amendments.

See also section I. I. of this report for a discussion of the various amendments proposed to *R.* 1:11-2, which amendments include appropriate reference to limited liability entities.

The proposed amendments to *Rules* 1:14, 1:15-4, 1:20-20, 1:21-2 and 1:28A-2 follow.

RULE 1:14. CODES OF ETHICS

The Rules of Professional Conduct and the Code of Judicial Conduct of the American Bar Association, as amended and supplemented by the Supreme Court and included as an Appendix to Part I of these Rules, and the Code of Conduct for Judiciary Employees, also included as an Appendix to Part I of these Rules, shall govern the conduct of the members of the bar and the judges and employees of all courts of this State.

When appropriate, the words "partnership," "attorney," and "lawyer" shall be construed to include professional corporations and limited liability entities for the practice of law, as well as attorney employees, agents [and], shareholders and members thereof, and attorneys acting as "of counsel" thereto.

The Code of Professional Conduct for Interpreters, Translators, and Translators, also included as an Appendix to Part I of these Rules, shall govern the conduct of persons who are employed by or under contract to the Judiciary to interpret, transliterate, or translate.

Note: Source-R.R. 1:25. Canons of Professional Ethics of the American Bar Association deleted July 7, 1971 and the Code of Professional Responsibility, as amended and supplemented, adopted July 7, 1971 to be effective September 13, 1971; amended November 27, 1974 to be effective April 1, 1975, amended July 16, 1981 to be effective September 14, 1981; Disciplinary Rules of the Code of Professional Responsibility deleted and Rules of Professional Conduct, as amended and supplemented, adopted July 12, 1984, to be effective September 10, 1984; amended December 7, 1993, to be effective immediately; amended October 24, 1994 to be effective December 1, 1994; amended to be effective

1:15-4. Limitations Extended to Partners, etc.

Whenever R. 1:15 imposes limitations on the practice of law by an attorney, such limitations shall also extend to the attorney's partners, employers, employees, office associates, [or] shareholders in a professional corporation or members in a limited liability entity in which the attorney practices. As applied to partners, employers, employees, office associates [and], shareholders and members, the limitations imposed on the practice of law by judges of municipal courts by R. 1:15-1(b) shall extend only to the county in which the court of the judge or acting judge is located. Nor shall the limitations imposed by R. 1:15 on attorneys preclude assignments of partners, employers, employees, office associates or shareholders by the court for the representation of indigents.

Except for full-time municipal court judges and all judges appointed to the municipal court of the City of Atlantic City, this rule shall not apply to the two-year post-employment restrictions on casino industry related activities referred to in N.J.S.A. 52:13D-17.2(c) and imposed on municipal court judges by R. 1:15-1(b).

Note: Source—R.R. 1:26-4; amended July 16, 1981 to be effective September 14, 1981; amended November 1, 1985 to be effective January 2, 1986; amended July 13, 1994 to be effective September 1, 1994; amended to be effective.

1:20-20. Future Activities of Attorney Who Has Been Disciplined or Transferred to Disability Inactive Status

(a) ... no change

(b) ... no change

(c) ... no change

(d) Responsibility of Partners and Shareholders. An attorney who is disbarred or suspended for more than six months shall, when a member of a law firm or multi-member professional corporation or limited liability entity, comply with all the regulations hereof except those mentioned in paragraphs (10) and (11). An attorney who is affiliated with the disciplined or former attorney as a partner, [or] shareholder or member shall take reasonable actions to insure that the attorney complies with this rule. In lieu of compliance by the attorney with the requirement of paragraph (b)(10) and (b)(11), the firm, [or] corporation or limited liability entity may promptly notify all clients represented by the disciplined or former attorney of the attorney's inability to act and that the firm will continue to represent the client unless the client requests in writing that the firm withdraw from the matter and substitute a new attorney. Proof of compliance shall be by verified affidavit of a member of the firm, [or] shareholder or member filed with the Director within 30 days of the date of suspension, transfer or disbarment. The affidavit shall be accompanied by a copy of all notices sent to clients pursuant to this paragraph.

Note: Adopted February 23, 1978, to be effective April 1, 1978; amended January 31, 1984 to be effective February 15,

1984; amended July 13, 1994 to be effective September 1, 1994; paragraph (a) was former R. 1:21-8, new paragraphs (b), (c) and (d) adopted January 31, 1995 to be effective March 1, 1995; paragraph (d) amended to be effective
tive .

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 or limited liability entity 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.

(1) In both civil and criminal actions, the motion shall be supported by an affidavit or certification of the attorney stating that:

(i) the attorney is a member in good standing of the bar of the highest court of the state in which the attorney is domiciled or principally practices law;

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

(iii) the client has requested to be represented by said attorney.

(iv) no disciplinary proceedings are pending against the attorney in any jurisdiction and no discipline has previously been imposed on the attorney in any jurisdiction. If discipline has previously been imposed, the certification shall state the date, jurisdiction, nature of the ethics violation and the penalty imposed. If proceedings are pending, the certification shall specify the jurisdiction, the charges and the likely time of their disposition. An attorney admitted pro hac vice shall have the continuing obligation during the period of such admission promptly to advise the court of a disposition made of pending charges or of the institution of new disciplinary proceedings.

(2) 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.

(3) In civil actions the motion shall be granted only if the court finds, from the supporting affidavit, that there is good cause for such admission, which shall include at least one of the following:

(i) the cause in which the attorney seeks admission involves a complex field of law in which the attorney is a specialist, or

(ii) there has been an attorney-client relationship with the client for an extended period of time, or

(iii) there is a lack of local counsel with adequate expertise in the field involved, or

(iv) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(v) there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

(vi) such other reason similar to those set forth in this subsection as would present good cause for the pro hac vice admission.

(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 July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2) and (3) amended July 13, 1994 to be effective September 1, 1994;

paragraph (a)(1)(iv) added June 28, 1996 to be effective
September 1, 1996; paragraph (a) amended to
be effective.

1:28A-2. Attorney IOLTA Trust Accounts

(a) Attorney Participation. Commencing on the date established by regulations to be adopted by the Board of Trustees pursuant to Rule 1:28A-1(d), 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 or limited liability entity of which the attorney is a member, or in the name of the attorney or partnership of attorneys by whom employed, an IOLTA interest-bearing trust account or accounts for all clients' funds that are nominal in amount, are to be held for a short period of time, or otherwise are not likely to realize income for the clients in compliance with the following provisions:

(1) The IOLTA interest-bearing trust account may be established with any financial institution approved by the Supreme Court to hold attorney trust funds under R. 1:21-6(a) and insured by the Federal Deposit Insurance Corporation or an analogous federal government agency. Funds in each IOLTA interest-bearing trust account will be subject to withdrawal on request and without delay.

(2) Funds shall be deposited in an IOLTA interest-bearing trust account authorized by this Rule when either the amount of the funds or the period of time that the funds are held, if deposited in an interest-bearing account, would not earn interest in excess of the cost incurred to secure such interest, or when an attorney determines that because of particular

costs in accounting, administration, or attribution of income, as may occur when multiple parties or clients pool advance payments against the costs of litigation in a single fund, a client's funds should not be deposited in an interest-bearing account because they will not realize income. No ethical impropriety will attend an attorney's depositing such funds in an IOLTA interest-bearing trust account in accordance with this Rule. The Fund will be the owner of any interest generated by the funds deposited in an IOLTA interest-bearing trust account.

(3) An attorney or law firm shall maintain one or more IOLTA interest-bearing trust accounts and shall submit to the bank or banks with which his, her, or its short term, nominal, and other non-interest bearing funds are currently deposited, or to another bank or banks that are approved depositories, a form authorizing the bank to convert any existing non-interest bearing trust accounts to IOLTA interest-bearing trust accounts or to open IOLTA interest-bearing trust accounts, on forms prescribed by the Trustees, and provide a copy of such form to the IOLTA Fund Trustees. If such a form is not filed, the signed registration statement required by Rule 1:20-1 and Rule 1:21-6 shall constitute such authorization.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

Note: Adopted February 23, 1988, to be effective March 1, 1988; former rule deleted and R. 1:28A-3 renumbered as

1:28A-2 September 15, 1992, to be effective January 1, 1993; paragraph (a)(1) of former R. 1:28A-3 amended November 7, 1988, to be effective January 2, 1989; rule amended September 15, 1992, to be effective January 1, 1993; new paragraph (d) adopted and former paragraph (d) redesignated as paragraph (e) December 13, 1993, to be effective January 3, 1994; paragraph (a) amended _____ to be effective _____.

K. Proposed Amendments to Rules 1:19-9, 1:19A-1, 1:19A-2, 1:19A-3, 1:19A-4, 1:19A-5, 1:19A-6 and 1:19A-7; Proposed New R. 1:19A-8 -- re Committee on Attorney Advertising (CAA)

A Civil Practice Committee member pointed out that *Rules* 1:19A-4, 1:19A-5, 1:19A-6 and 1:19A-7 all contain erroneous references to various sections of *R. 1:20* (Discipline of Members of the Bar). Apparently, when *R. 1:20* was completely revised, effective January 1, 1995, the corresponding references within *R. 1:19A* were not updated.

Israel Dubin, Secretary to the Committee on Attorney Advertising (CAA), reviewed the proposed "housekeeping" amendments to *Rules* 1:19A-4, 1:19A-5, 1:19A-6 and 1:19A-7. He also advised the Civil Practice Committee of additional changes to *R. 1:19* and 1:19A that the CAA has approved.

The Civil Practice Committee endorsed both the housekeeping amendments, which correct the references in *R. 1:19A* to *R. 1:20*, and the more substantive amendments that the CAA has proposed.

The CAA proposed amendments are:

- *R. 1:19-9* -- revised to reflect that the Advisory Committee on Professional Ethics "hotline" also provides information and assistance on issues of advertising and solicitation with the CAA's jurisdiction.
- *R. 1:19A-1(a)* -- amends the maximum permissible term of service on the CAA from two to four three-year terms, consistent with the terms of service for the Advisory Committee on Profes-

sional Ethics, the Advisory Committee on Judicial Conduct and the Committee on the Unauthorized Practice of Law.

- R. 1:19A-2(c) and R. 1:19A-3(c) -- revised to require that all adopted attorney advertising guidelines must be published in the *New Jersey Lawyer* as well as the *Law Journal*.
- R. 1:19A-3(a) -- eliminates the requirement that any inquiry regarding the propriety of a particular advertisement be served on the Executive Director of the State Bar Association and the President of the County Bar Association where the lawyer or firm in question has its primary office. Inquirers have never complied with this requirement and the CAA has declined to enforce it. The presence of the requirement in the rule, in the CAA's opinion, has a chilling effect -- attorneys contemplating bringing a proposed advertisement to the CAA's attention do not want the bar associations, their constituencies and the inquirers' competitors to know what type of advertising they are contemplating, or the fact that they are contemplating advertising at all, regardless of whether the CAA may find the advertising to be appropriate.
- R. 1:19A-4(d) -- revised to provide that the CAA shall designate a presenter of a matter in which the sole issue is whether, and to what extent, discipline is required. The rule now provides that the Secretary to the CAA shall act as presenter. As the Secretary regularly counsels the CAA and makes recommendations concerning the disposition of grievances, his

acting as presenter would give rise to an appearance of impropriety if not an actual conflict of interest.

- R. 1:19A-8 -- a new rule providing that telephone inquiries to the CAA shall be made to the Advisory Committee on Professional Ethics "hotline", as is actual practice.

The proposed amendments to *Rules* 1:19-9, 1:19A-1, 1:19A-2, 1:19A-3, 1:19A-4, 1:19A-5, 1:19A-6, 1:19A-7 and 1:19A-8 follow.

1:19-9. Ethics Telephone Research Service

(a) Generally. The Advisory Committee on Professional Ethics shall operate a 900 telephone number and shall provide, with respect to issues of legal ethics within its jurisdiction, and issues of advertising and solicitation within the jurisdiction of the Committee on Attorney Advertising, general information and research assistance, but not legal advice or advisory opinions, to members of the bar of this state in good standing. The existence and limited nature of the research service shall be advertised regularly as a notice to the bar in the official publication designed by the Supreme Court. The Chair of the Advisory Committee, in consultation with the Chair of the Advertising Committee, shall hire and direct one full-time attorney and one secretary to provide this service. Staff shall assist attorneys requesting information to the extent that time and resources permit and to render general assistance and information to an inquiring attorney.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

Note: Adopted January 31, 1995 to be effective March 1, 1995; paragraph (a) amended to be effective

RULE 1:19A. COMMITTEE ON ATTORNEY ADVERTISING

1:19A-1. Appointment and Organization

(a) Appointment. The Supreme Court shall appoint a Committee on Attorney Advertising (hereinafter the Advertising Committee) consisting of seven members, five of whom shall be members of the bar and two of whom shall be public members. The initial members shall be appointed to terms of one, two, or three years. At the expiration of such terms all subsequent reappointments shall be for a term of three years. No member who has served [two] four full three-year terms shall be eligible for immediate reappointment. A vacancy occurring during a term shall be filled for the unexpired portion thereof.

(b) ... no change

(c) ... no change

Note: Adopted June 26, 1987, to be effective July 1, 1987; paragraph (a) amended to be effective

1:19A-2. Jurisdiction

(a) ... no change

(b) ... no change

(c) Advertising Guidelines. The Advertising Committee may adopt advertising guidelines consistent with the Rules of Professional Conduct set forth in section (a) and with these Rules, after affording the bar an opportunity to comment and after approval by the Supreme Court. Advertising guidelines may include by way of example, but not by way of limitation, disclosure requirements, restrictions beyond those set forth in RPC 7.2(a), time, place, and manner regulations, guidelines for determining the application of the "predominantly informational" and "extreme portrayal" requirements, and, generally, any guideline that the Advertising Committee deems either necessary or desirable in clarifying the application of the Rules governing advertisements and other communications within its jurisdiction. Upon adoption all advertising guidelines shall be published initially in the New Jersey Law Journal and New Jersey Lawyer.

(d) ... no change

(e) ... no change

(f) ... no change

Note: Adopted June 26, 1987 to be effective July 1, 1987;
paragraph (c) amended to be effective

1:19A-3. Advisory Opinions

(a) Form of Inquiry. All inquiries shall be addressed to the Secretary. The Advertising Committee shall accept inquiries from any member of the New Jersey bar. Inquiries shall be in writing and shall have appended to them a copy of the questioned advertisement or other related communication and shall contain a certificate that any opinion of the Advertising Committee will not affect the interests of the parties to any pending action. The inquiry shall be accompanied by a letter brief or brief citing the Rules of Court, Rules of Professional Conduct or Advertising Guidelines, if any, that are applicable, and shall state clearly the factual situation in detail and the inquirer's position as to the propriety of the advertisement or other related communication. [The letter brief or brief shall contain a certification that a copy of the inquiry has been served (personally or by mail) upon the Executive Director of the New Jersey State Bar Association and the President of the County Bar Association where the lawyer or law firm in question has its primary office for the practice of law in this state. The Bar Association need not take any action nor file any response to the inquiry unless the Advertising Committee specifically requests a response. Anyone submitting written comments in opposition to the inquiry shall serve a copy of such comments on the inquiring lawyer or law firm.]

(b) ... no change

(c) Effect of Opinions; Publication. An opinion approving an advertisement or other communication shall, until and unless revised in accordance with section (d) or reconsidered, be a bar to prosecution of ethical charges against the lawyer or law firm, except for a prosecution based on a charge that it is false or misleading in violation of RPC 7.1(a)(1). An opinion disapproving an advertisement or other related communication shall, until and unless revised in accordance with section (d) or reconsidered, be binding upon the inquirer and anyone with actual or constructive knowledge thereof so that such use of a disapproved advertisement or other related communication shall be per se unethical conduct.

When the Advertising Committee believes it to be in the best interest of the bar or the public, it may publish its opinion in the New Jersey Law Journal and New Jersey Lawyer. Published opinions shall constitute constructive notice to, and shall be binding on, all members of the bar and in connection with any ethics proceedings, unless revised pursuant to section (d) or reconsidered.

(d) ... no change

Note: Adopted June 26, 1987 to be effective July 1, 1987;
paragraphs (a) and (c) amended to be effective
tive.

1:19A-4. Ethics Grievances

(a) ... no change

(b) Initial Review and Dismissal by Advertising Committee.

At the conclusion of the expiration of time provided for the attorney's filing of any initial response the Advertising Committee shall review the matter. If it concludes there is a need for further investigation, the Advertising Committee shall direct the Secretary to proceed accordingly and it shall reconsider the matter following such further investigation. Upon any matter within its jurisdiction coming to its attention, the Advertising Committee may arrange an informal conference with the lawyer or law firm. If the Advertising Committee concludes that there is no unethical conduct, it shall dismiss the grievance and so notify the parties in writing, briefly stating the reasons therefor. An appeal from the decision of the Advertising Committee to dismiss a grievance shall be available in accordance with Rule [1:20-4(e)] 1:20-15(e), but the Disciplinary Review Board shall be limited in its review to the legal conclusion of the Advertising Committee as to whether there is unethical conduct.

(c) Formal Complaint and Answer. In all other cases where the Advertising Committee concludes that the facts may demonstrate by clear and convincing evidence that unethical conduct has occurred, it shall direct the Secretary to file a formal complaint in accordance with Rule [1:20-3(h)] 1:20-4(d). The Secretary shall serve the formal complaint upon the original grievant, if any, and upon the respondent, who shall be

required to file a formal answer within ten days of service of the formal complaint, all in accordance with Rule [1:20-3(i)] 1:20-4(e).

(d) Hearing Where Material Facts Not Disputed. Where in the opinion of the Advertising Committee there are no material controverted issues of fact, it shall bring the matter on for oral argument (which shall be electronically or stenographically recorded) on notice to the respondent. [The Secretary shall act as presenter.] The Advertising Committee shall designate a presenter. The sole issue before the Advertising Committee shall be whether, and the extent to which, discipline is required. The Advertising Committee shall prepare a written dated report containing its findings of fact on each issue presented in accordance with Rule [1:20-3(m) and (n)] 1:20-6(c)(2)(E). If public discipline is recommended, the report shall also contain a specific recommendation as to the extent thereof. Unless it dismisses the matter, the Advertising Committee shall promptly file its report and recommendation [within] with the Disciplinary Review Board, which shall proceed in accordance with Rule [1:20-4(f)] 1:20-15(f). Dismissals shall be appealable and notice thereof given, as set forth in section (b) above.

(e) Hearings Where Material Facts Are Disputed. Where in the opinion of the Advertising Committee there are material controverted issues of fact (including, but not limited to, instances of alleged false, fraudulent, misleading, or deceptive advertisements or other communications), it may, after

the filing of a formal complaint and answer, (1) hear and determine the matter itself in accordance with Rule [1:20-3(1)] 1:20-6(a) and (c) (in which case the hearing shall be electronically or stenographically transcribed), or (2) refer the matter to the appropriate District Ethics Committee for hearings in accordance with Rule [1:20-3(1)] 1:20-6 and the filing of a report with the Advertising Committee, which report shall be limited to findings of fact on the issues presented, in accordance with Rule [1:20-3(m)] 1:20-6(c)(2)(E). In either event the Advertising Committee shall, unless it dismisses the matter, render its report and recommendation to the Disciplinary Review Board in accordance with Rule [1:20-3(m) and (n)] 1:20-6(c)(2)(E). If public discipline is recommended, the report shall also contain a specific recommendation as to the extent thereof. If the matter is dismissed, notification of parties and appeal shall be the same as set forth in section (b) above.

(f) Action by Disciplinary Review Board on Reports Recommending Discipline. Where the Advertising Committee files with the Board a report recommending discipline, the Board shall, except as stated below, proceed in accordance with Rule [1:20-4(f)] 1:20-15(f). In considering a report and recommendation of the Advertising Committee the Board shall accept the facts found as conclusive. The sole issues to be determined shall be the legal conclusion reached by the Advertising Committee as to whether there is unethical conduct and the extent of final discipline to be imposed.

(g) Attorney for Respondent; Subpoenas. Insofar as necessary, Rules [1:20-3(k) and (o)] 1:20-4(g)(2) and 1:20-7(i) shall be applicable to proceedings by the Advertising Committee. Subpoenas may be signed either by any member of the Advertising Committee, or by its Secretary.

(h) Dual Grievances. When the ethical issues presented in a grievance involve both aspects of advertising and other related communications within the jurisdiction of the Advertising Committee and also other ethical issues not ordinarily within its jurisdiction, the Advertising Committee shall take jurisdiction of the entire matter if the grievance is predominantly related to advertising and other related communications within its jurisdiction. In all other cases of dual grievances, the Advertising Committee may accept such grievances. If it accepts such grievances the Advertising Committee shall, to the extent necessary to conclude all aspects of the grievance, exercise all the jurisdiction and functions of a District Ethics Committee. Otherwise, the Advertising Committee may decline jurisdiction in writing and refer its entire file in the matter to the appropriate District Ethics Committee. A District Ethics Committee to whom a dual ethics grievance has been referred in accordance with this section shall take jurisdiction over the entire matter and proceed in accordance with Rule [1:20-3(f) "Preliminary Investigation."] 1:20-3(g). To the extent necessary to conclude all aspects of the grievance so referred, a District Ethics Committee shall exercise

all the jurisdiction and functions of the Advertising Committee.

Note: Adopted June 26, 1987 to be effective July 1, 1987; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraphs (b), (c), (d), (e), (f), (g) and (h) amended _____ to be effective _____.

1:19A-5. Records; Confidentiality

The Advertising Committee shall maintain such records and file such reports as shall be required by the Administrative Director of the Courts or the Supreme Court. With respect to requests for advisory opinions, both the request and the advisory opinion shall be available to the public; otherwise proceedings concerning advisory opinions shall be confidential except as ordered by the Supreme Court. With respect to ethics grievances, confidentiality shall be maintained in accordance with Rule [1:20-10] 1:20-9.

Note: Adopted June 26, 1987 to be effective July 1, 1987;
amended _____ to be effective _____

1:19A-6. Immunity

The Rules governing immunity of ethics and fee arbitration committee members and the Secretary thereof, as well as grievants, clients, and witnesses as set forth in [R. 1:20-11(a) and (b)] R. 1:20-7(e) and (f), shall apply to all proceedings of the Advertising Committee. This immunity shall not, however, extend to any publication or distribution of information in violation of the confidentiality provisions of Rule 1:19A-5.

Note: Adopted June 26, 1987 to be effective July 1, 1987;
amended to be effective

1:19A-7. Referral to Office of Attorney Ethics

Wherever appropriate the Advertising Committee may bring to the attention of the Director of the Office of Attorney Ethics facts that it believes may constitute cause for temporary suspension, including, but not limited to, an attorney's use of a disapproved advertisement or other related communication. The Director may take such action as appropriate, including an emergent application for temporary suspension pursuant to Rule [1:20-5(b)] 1:20-11.

Note: Adopted June 26, 1987 to be effective July 1, 1987;
amended July 13, 1994 to be effective September 1, 1994;
amended to be effective

1:19A-8. Telephone Inquiries

Telephone inquiries to the Committee on Attorney Advertising shall be made in accordance with R. 1:19-9.

Note: Adopted _____ to be effective _____.

L. Proposed Amendment to R. 1:20-10 -- Discipline by Consent

The Committee agreed that "effecting" should be changed to "affecting" in R. 1:20-10(a)(2).

The proposed amendment to R. 1:20-10 follows.

1:20-10. Discipline by Consent

(a) Disbarment by Consent.

(1) ... no change

(2) Affidavit of Consent. Consents to disbarment shall be by affidavit in the form approved by the Supreme Court in which the respondent asserts:

(A) the respondent has consulted with an attorney;
and

(B) the respondent's consent is freely and voluntarily given; the respondent has not been subjected to coercion or duress; the respondent is fully aware of the implications of submitting the consent; and

(C) the respondent is not under any disability, mental or physical, nor under the influence of any medication, intoxicants or other substances that would impair the respondent's ability to knowingly and voluntarily execute the disbarment by consent; and

(D) the respondent is aware that there is presently pending an investigation or proceeding involving allegations of ethical misconduct, which allegations are set forth in the consent form; and

(E) an acknowledgement that the material facts so alleged are true; and

(F) an acknowledgement that the allegations of ethical misconduct could not be successfully defended against;
and

(G) the understanding that the disbarment by consent, if accepted by the Supreme Court, is tantamount to disbarment and constitutes an absolute bar to reinstatement to the practice of law; and

(H) the understanding that disciplinary costs will be assessed by the Supreme Court in accordance with R. 1:20-17.

The affidavit of consent to disbarment shall not be received by the Director unless accompanied by a letter from the respondent's attorney certifying that an attorney has consulted with respondent and that, in so far as the attorney is able to determine, respondent's consent is knowingly and voluntarily given and that respondent is not under any disability [effecting] affecting respondent's capacity knowingly and voluntarily to consent to disbarment.

(3) ... no change

(b) ... no change

Note: Former R. 1:20-10 text deleted, new text adopted January 31, 1995 to be effective March 1, 1995; paragraph (a) (2) (H) amended to be effective

M. Proposed Amendments to Rules 2:6-1, 2:6-11, 2:9-4 and 2:11-6 -- re Appellate Practice

The following appellate rule amendments were recommended by the Appellate Division Rules Committee and endorsed by the Civil Practice Committee:

- R. 2:6-1 -- subparagraph (a)(1) is amended to require that, on appeals from a summary judgment, the appellant's appendix shall include a statement of all items submitted to the trial court on the summary judgment motion, as well as all such items themselves; subparagraph (a)(2) is added expressly to prohibit certain items, such as trial briefs, from being included in the appendix.
- R. 2:6-11 -- amended to clarify the transcript-filing procedure by expressly requiring the appellant to file three additional copies of the transcript with the clerk and serve the transcript as required by R. 2:16-12 within ten days after a complete set of transcripts is filed.
- R. 2:9-4 -- incorporates the Criminal Practice Committee's recommendation that the criterion of "no significant risk of flight" be added to the standard for admitting a criminal defendant to post-conviction bail.
- R. 2:11-6 -- revised to require a motion for reconsideration of an appellate decision to have annexed a copy of the opinion and of the judgment or order that is the subject of the motion.

2:6-1. Preparation of Appellant's Appendix; Joint Appendix; Contents

(a) Contents of Appendix.

(1) Required Contents. The appendix prepared by the appellant or jointly by the appellant and the respondent shall contain [(1)] (A) in civil actions, the complete pretrial order, if any, and the pleadings; [(2)] (B) in criminal, quasi-criminal or juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below; [(3)] (C) the judgment, order or determination appealed from or sought to be reviewed or enforced, including the jury verdict sheet, if any; [(4)] (D) the trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions; [(5)] (E) the statement of proceedings in lieu of record made pursuant to R. 2:5-3(f); [(6)] (F) the notice or notices of appeal; [(7)] (G) the transcript delivery certification prescribed by R. 2:5-3(e); and [(8)] (H) such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised. If the appeal is from a summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except that briefs in

support of and opposition to the motion shall be included only as permitted by subparagraph (2) of this rule.

(2) Prohibited Contents. Trial briefs shall not be included in the appendix, unless either the brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included. A document that is included in appellant's appendix shall not also be included in respondent's appendix unless appellant's appendix includes only a portion of the document and the complete document is required for a full understanding of the issues presented. If the same document has been annexed to more than one pleading or motion filed in the trial court, the document shall be reproduced in the appendix only with the first such pleading or motion and shall be referred to thereafter only by notation to the appendix page on which it appears.

(b) ... no change

(c) ... no change

(d) ... no change

Note: Source—R.R. 1:7-1(f), 1:7-2 (first six sentences), 1:7-3. Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a), (b) and (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) 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.] Within ten days after the filing of a complete set of transcripts pursuant to R. 2:5-3(e), the appellant shall file three additional copies with the clerk, as provided by R. 2:6-12(d), and shall serve the transcript as provided by R. 2:6-12(a). Except as otherwise provided by R. 2:9-11 (sentencing appeals), the appellant shall serve and file a brief and appendix within 45 days after the delivery to 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 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) ... no change

(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 July 14, 1992 to be effective September 1, 1992; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended to be effective.

2:9-4. Bail After Conviction

Except as otherwise provided by R. 2:9-5(a), the defendant in criminal actions shall be admitted to bail on motion and notice to the county prosecutor pending the prosecution of an appeal or proceedings for certification only if it appears that the case involves a substantial question [which] that should be determined by the appellate court [and], that the safety of any person or of the community will not be seriously threatened if the defendant remains [at large] on bail and that there is no significant risk of defendant's flight. Pending appeal to the Appellate Division, bail may be allowed by the trial court, or if denied, by the Appellate Division, or if denied by the Appellate Division, by the Supreme Court. Following disposition in the Appellate Division and pending proceedings in the Supreme Court, bail may be allowed by the Appellate Division or if denied by it, by the Supreme Court. A copy of an order entered by an appellate court granting bail shall be forwarded by the clerk of the appellate court to the sentencing court and clerk of the trial court. A trial court denying bail shall state briefly its reasons therefor. A judge or court allowing bail may at any time revoke the order admitting to bail. In no case shall a defendant who has received a sentence of death be admitted to bail.

Note: Source—R.R. 1:4-3(e), 1:4-4. Amended June 29, 1973 to be effective September 10, 1973. Amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; 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 25 pages 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. The motion shall have annexed thereto a copy of the opinion and judgment or order that is the subject thereof. 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 July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; amended
to be effective

N. Proposed Amendments to R. 4:4-2 -- Summons: Form

The rule now requires the second page of the summons form to contain a current listing of the addresses and telephone numbers of the legal service and lawyer referral service offices for each county. In fact, only the telephone numbers of such offices are provided, in the interest of keeping the summons form to one two-sided document.

The Committee recommends that R. 4:4-2 be amended to eliminate the requirement that the addresses of the county and regional legal service and lawyer referral service offices be provided on the second page of the summons. Provision of the telephone numbers is sufficient.

The proposed amendments to R. 4:4-2 follow.

4:4-2. Summons: Form

Except as otherwise provided by R. 5:4-1(b) (summary proceedings in family actions), the face of the summons shall be in the form prescribed by Appendix XII-A to these Rules. It shall be in the name of the State, signed in the name of the Superior Court Clerk and directed to the defendant. It shall contain the name of the court and the plaintiff and the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve an answer upon the plaintiff or plaintiff's attorney, and shall notify the defendant that if he or she fails to answer, judgment by default may be rendered for the relief demanded in the complaint. It shall also inform the defendant of the necessity to file an answer and proof of service thereof with the deputy clerk of the Superior Court in the county of venue, except in mortgage and tax foreclosure actions an answer shall be filed with the Clerk of the Superior Court in Trenton unless and until the action is deemed contested and the papers have been sent by the Clerk to the county of venue in which event an answer shall be filed with the deputy clerk of the Superior Court in the county of venue. If the defendant is an individual resident in this state, the summons shall advise that if he or she is unable to obtain an attorney, he or she may communicate with the Lawyer Referral Service of the county of his or her residence, or the county in which the action is pending, or, if there is none in either county, the Lawyer

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 such 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] or a court appointee, proof of service shall be by similar affidavit which shall include the facts of the affiant's diligent inquiry regarding defendant's place of abode, business or employment. [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)] by mail, the party making service shall make proof thereof by affidavit which shall also include the facts of the [sheriff's] failure to effect personal service and the facts of the affiant's [personal knowledge of] diligent inquiry to determine 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. Failure to make proof of service does not affect the validity of service.

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 July 14, 1992 to be effective September 1, 1992; amended July 13, 1994 to be effective September 1, 1994; amended to be effective

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

An attorney who practices in both the State and Federal courts recommended a rule, analogous in purpose to FRCP 34, that would require a party asserting an evidentiary or rule-based protection for non-disclosure of material requested in discovery to provide a "privilege log" specifying certain information about the material sought to be protected.

The Committee unanimously supports this recommendation.

See section II. K. of this report for a discussion of proposed amendments to R. 4:10-2 that the Committee considered and rejected.

The proposed amendments to R. 4:10-2 follow.

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) ... no change

(e) Claims of Privilege or Protection of Trial Preparation Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

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 July 14, 1992 to be effective September 1, 1992; paragraphs (c) and (d) (1) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (d) (1) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) added to be effective _____.

R. Proposed Amendments to R. 4:11-1 -- Before Action

N.J.S.A. 2A:53A-27 requires the plaintiff in a professional malpractice action, within 60 days after the filing of an answer, to provide the defendant with an affidavit from a person with expertise in the general area or specialty involved in the action, stating that there exists a reasonable probability that the defendant's actions did not meet accepted professional standards. This requirement is known as the "affidavit of merit statute." In *In re Petition of Woodrow Hall*, 147 N.J. 379 (1997), the Supreme Court held that current R. 4:11-1 did not permit the plaintiff to conduct depositions prior to the filing of the complaint for the purpose of complying with the affidavit of merit statute. The Court directed the Civil Practice Committee "...promptly to evaluate and determine whether, and if so under what circumstances and conditions, trial courts should be authorized to permit pre-suit discovery in order to prevent unjustified dismissals of meritorious malpractice suits [for failure to comply with the affidavit of merit statute]."

By a narrow majority, the Committee voted to amend R. 4:11-1 specifically to authorize the court to grant, in extraordinary circumstances, a precomplaint petition for depositions to enable compliance with the affidavit of merit statute. The minority was of the view that such pre-complaint depositions are unnecessary in light of the statutory protections, including the extended time period permitted for filing the affidavit of merit and the lesser standard required for such affidavits as compared to expert reports served for discovery purposes.

The proposed amendments to R. 4:11-1 follow.

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 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 the petitioner's interest therein; (3) the facts which the petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it; (4) the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known; (5) the names and addresses of the persons to be examined and the substance of the testimony which 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 court may also grant a pre-complaint petition for depositions filed pursuant to this rule by a person asserting that due to extraordinary circumstances, which shall be explained in detail by affidavit, such depositions are necessary to enable compliance with N.J.S.A. 2A:53a-27 to 29 (Affidavit of Merit Statute).

(b) ... no change

(c) ... no change

(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 July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended to be effective.

S. **Proposed Amendments to R. 4:14-1 -- When Depositions May Be Taken**

The Committee recommends amending R. 4:14-1, which now permits depositions to be noticed at 30 days after service, to conform with the fact that the period to answer a complaint has been extended from 20 to 35 days. It proposes that 45 days must pass after service before depositions may be noticed.

The proposed amendments to R. 4:14-1 follow.

4:14-1. When Depositions May Be Taken

Except as otherwise provided by R. 4:14-9(a), after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of [30] 45 days after service of the summons and complaint upon the defendant by any manner, except that leave is not required if the defendant has already served a notice of taking deposition or otherwise sought discovery. The attendance of witnesses may be compelled by subpoena as provided in R. 4:14-7. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

Note: Source—R.R. 4:16-1. Former rule deleted and new R. 4:14-1 adopted July 14, 1972 to be effective September 5, 1972 (formerly R. 4:10-1); amended July 21, 1980 to be effective September 8, 1980; amended to be effective

T. Proposed Amendments to R. 4:17-1 -- Service, Scope of Interrogatories

This rule mandates the use of standard form interrogatories for certain case types. These form interrogatories have been approved and promulgated by the Supreme Court as Appendix II of the Rules of Court. In the 1996-98 term, the Committee developed form interrogatories for product liability cases. Accordingly, the Committee recommends eliminating the reference in *R. 4:17-1(b)* to product liability cases as an exception for which form interrogatories need not be used.

See section II. L. of this report for proposed amendments to *R. 4:17-1* that the Committee considered and rejected.

See section III. A. of this report for proposed amendments to the form interrogatories and for the proposed new product liability interrogatories.

The proposed amendments to *R. 4:17-1* follow.

wrongful death, toxic torts, cases involving
issues of professional malpractice other than medical
malpractice + those products liability cases either

4:17-1. Service, Scope of Interrogatories *involving pharmaceu-*

- (a) ... no change *ticals or giving rise to*
- (b) Uniform Interrogatories in Certain Actions. *a toxic tort claim*

(i) Limitations on Interrogatories. In all actions seeking recovery for property damage to automobiles and in all personal injury cases other than those involving issues of products liability, toxic torts, professional malpractice other than medical malpractice, or wrongful death, the parties shall be limited to the interrogatories prescribed by Forms A, B and C of Appendix II, as appropriate, provided, however, that each party may propound ten supplemental questions, without subparts, without leave of court. Any additional interrogatories shall be permitted only by the court in its discretion on motion.

- (ii) ... no change
- (iii) ... no change

Note: Source—R.R. 4:23-1, 4:23-9. Last clause of second sentence and third and fourth sentences deleted (see R. 4:10-2(d) and R. 4:17-3) July 14, 1972 to be effective September 5, 1972; new caption for paragraph (a) and new paragraphs (b) (i) and (ii) adopted July 13, 1994 to be effective September 1, 1994; paragraph (b) (i) amended and paragraph (b) (iii) added June 28, 1996 to be effective September 1, 1996; paragraph (b) (i) amended to be effective

U. **Proposed Amendments to R. 4:18-1 -- Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes: Pre-Litigation Discovery**

An attorney proposed amending R. 4:18-1 to more closely reflect FRCP 34, on which it was modeled. The Committee approved adding to R. 4:18-1 the paragraph from the Federal rule that specifies how documents are to be produced under the rule.

See also section II. M. of this report for proposed amendments to R. 4:18-1 that the Committee considered and rejected.

The proposed amendments to R. 4:18-1 follow.

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 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. On motion, the court may allow a shorter or longer time. 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. The party submitting the request may move for an order under R. 4:23 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. 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.

(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 to be effective

V. **Proposed Amendments to Rules 4:21A-1, 4:21A-2, 4:21A-3, 4:21A-4, 4:21A-5, 4:21A-6 and 4:21A-8 -- re Arbitration**

The Committee recommends "housekeeping" changes to several of the rules dealing with arbitration of certain personal injury actions to correct the reference from "civil case manager" to "civil division manager".

The proposed amendments to *Rules* 4:21A-1, 4:21A-2, 4:21A-3, 4:21A-4, 4:21A-5, 4:21A-6 and 4:21A-8 follow.

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

(a) ... no change

(b) Voluntary Arbitration. Any automobile tort action or personal injury action not subject to mandatory arbitration pursuant to subsections (1) or (2) of paragraph (a) of this rule may be submitted to arbitration on written stipulation of all parties filed with the civil [case] division manager.

(c) ... no change

(d) Notice of Arbitration; Scheduling; Adjournment. The notice to the parties that the action has been assigned to arbitration shall also specify the time and place of the arbitration hearing and its date, which shall not be earlier than 45 days following the date of the notice. Unless the parties otherwise consent in writing, the hearing shall not be scheduled sooner than 160 days after the service of the complaint on all parties-defendants. Adjournments of the scheduled date shall be granted by the civil [case] division manager for good cause shown.

(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 July 14, 1992 to be effective September 1, 1992; paragraphs (a)(2) and (c)(1) amended July 13, 1994 to be effective September 1, 1994; paragraphs (b) and (d) amended _____ to be effective_____.

4:21A-2. Qualification, Selection and Assignment of Arbitrators

(a) By Stipulation. All parties to the action may stipulate in writing to the number and names of the arbitrators. The stipulation shall be filed with the civil [case] division manager within 14 days after the date of the notice of arbitration. The stipulated arbitrators shall be subject to the approval of the Assignment Judge and may be approved whether or not they met the requirements of paragraph (b) of this rule if the Assignment Judge is satisfied that they are otherwise qualified and that their service would not prejudice the interest of any of the parties.

(b) Appointment From Roster. If the parties fail to stipulate to the arbitrators pursuant to paragraph (a) of this rule, the arbitrator shall be designated by the civil [case] division manager from the roster of arbitrators maintained by the Assignment Judge on recommendation of the arbitrator selection committee of the county bar association. Inclusion on the roster shall be limited to retired judges of any court of this State who are not on recall and attorneys admitted to practice in this State having at least 7 years of experience in personal injury litigation. The arbitrator selection committee shall be appointed by the county bar association and shall consist of two attorneys regularly representing plaintiffs in personal injury litigation, two attorneys regularly representing defendants in personal injury litigation, and one member of the bar who does not regularly represent either.

The members of the arbitrator selection committee shall be eligible for inclusion in the roster of arbitrators. The Assignment Judge shall file the roster with the Administrative Director of the Courts. A motion to disqualify a designated arbitrator shall be made to the Assignment Judge on the date of the hearing.

(c) . . . no change

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

4:21A-3. Settlements; Offer of Judgment

If an action is settled prior to the arbitration hearing, the attorneys shall so report to the civil [case] division manager and an order dismissing the action shall be entered. The provisions of R. 4:58 shall apply to arbitration proceedings except that the references in R. 4:58 to judgment and verdict shall be construed to mean arbitration award or decision, the reference to trial date shall be construed to mean arbitration hearing date, and the reference to cost of suit shall be construed to mean cost of arbitration.

Note: Adopted November 1, 1985 to be effective January 2, 1986; amended _____ to be effective _____

4:21A-4. Conduct of Hearing

(a) Prehearing Submissions. At least 10 days prior to the scheduled hearing each party shall exchange and submit to the civil [case] division manager a concise statement of the factual and legal issues and may exchange and submit relevant documentary evidence.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended to be effective

4:21A-5. Arbitration Award

(a) Form; Filing. Within 10 days after the completion of the arbitration hearing, the arbitrator shall file the written award with the civil [case] division manager and shall mail a copy thereof to each of the parties. The award shall include a notice of the right to request a trial de novo and the consequences of such a request as provided by R. 4:21A-6.

(b) ... no change

(c) Compensation of Arbitrators.

(1) Designated Arbitrators. Except as provided by subparagraph (3) hereof, a single arbitrator designated by the civil [case] division manager shall be paid a per diem fee of \$350. If an arbitration panel consists of more than one arbitrator, that panel shall receive a per diem fee of \$450 to be divided equally between or among panel members.

(2) ... no change

(3) ... 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 (a) and (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c)(1) amended _____ to be effective _____.

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] division 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) ... 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 July 14, 1992 to be effective September 1, 1992; paragraph (c) amended May 3, 1994 to be effective July 1, 1994; paragraph (b) (1) amended _____ to be effective _____.

4:21A-8. Administration

(a) ... no change

(b) ... no change

(c) Civil [Case] Division Manager. The civil [case] division manager for the vicinage shall perform all of the functions specified by these rules and shall serve as arbitration administrator to perform all required non-judicial functions implementing the arbitration programs.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a), (b) and (c) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended to be effective _____.

W. Proposed Amendments to R. 4:23-5 -- Failure to Serve Answers to Interrogatories

At the close of the 1994-96 term, several suggested amendments to R. 4:23-5 were proposed. Because questions concerning the operation of the rule come up regularly, a subcommittee was appointed, chaired by the Hon. Maurice Gallipoli, to consider appropriate amendments in the 1996-98 term.

As a result of the subcommittee's review and recommendations, the Committee is proposing several changes to R. 4:23-5(a). These changes are intended to serve the primary purpose of the rule, which is to elicit answers to properly and timely served interrogatories, rather than to penalize the failure to answer.

- o As to R. 4:23-5(a)(1), the first tier of the procedure, providing for the remedy of dismissal or suppression without prejudice:
 - Amended to ensure that the delinquent party receives a copy of the order of dismissal or suppression as well as a notice, in the form prescribed by Appendix II-F, explaining the consequences of failure to respond to interrogatories and to file a timely motion to vacate the dismissal or restore the stricken pleading.
 - Also amended to make it clear that the fee of \$100 or \$300 that must accompany the motion to vacate or restore (the amount depending on the timing of the motion) is a restoration fee rather than a penalty.
 - Further amended to make clear that dismissal or suppression is not automatic if responsive answers to interrogatories are not served and a motion to vacate or restore not made within 90

days of the entry of the order. Rather, where the 90 days has run but no dismissal order with prejudice has yet been entered, the court may vacate the order of dismissal without prejudice and order the delinquent party to pay sanctions or counsel fees and costs, or both, as a condition of restoration.

- As to R. 4:23-5(a)(2), the second tier of the procedure, providing for the remedy of dismissal or suppression with prejudice:
 - Amended to increase from five to seven days before the return date the time for notification of the delinquent party of the pendency of a motion to dismiss with prejudice.
 - Also amended to ensure that the delinquent party was served with the order of dismissal without prejudice and the notice of consequences, and with notice, in the form prescribed by Appendix II-G (new), of the pendency of the motion to dismiss with prejudice. If the delinquent party is *pro se* and cannot be served, the moving party must submit a certification as to why service could not be made.
 - Further amended to permit the court to deny the motion to dismiss with prejudice if, prior to the return date of that motion, the defaulting party has moved to vacate the previously entered order of dismissal without prejudice and has either served fully responsive answers to interrogatories or has demonstrated exceptional circumstances.

- As to *R. 4:23-5(a)(3)*:
 - Amended to provide explicitly that the court shall, unless exceptional circumstances are demonstrated, take whatever appropriate action may be necessary to obtain compliance with the requirements of the rule, including ordering sanctions or counsel fees and costs, or both.

See also section II. B. of this report for proposed amendments to *Rules 1:6-2* and *4:23-5* that the Committee considered and rejected.

See also section III. B. of this report for proposed amendments to Appendix II-F and for proposed new Appendix II-G.

The proposed amendments to *R. 4:23-5* follow.

4:23-5. Failure to Serve Answers to Interrogatories

(a) Dismissal.

(1) Without Prejudice. If timely answers to interrogatories are not served and no motion for an extension has been made pursuant to R. 4:17-4(b), the party entitled to the answers may 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 [further] stating that the moving party is not in default in answering, pursuant to R. 4:17-4(a), [the] any interrogatories served by the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Forthwith upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall 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 serve fully responsive and certified answers to interrogatories 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[, provided] at any time before the entry of an order of dismissal or suppression with prejudice. [t]The motion [is]

shall be supported by affidavit [stating] reciting that fully responsive and certified answers to interrogatories have been served[. If granted, the order of vacation shall be conditioned on the delinquent party paying costs] and shall be accompanied by payment of a \$100 restoration fee [in the amount of \$100.00] to the Clerk of the Superior Court if the motion to vacate is made within 30 days after entry of the order of dismissal [without prejudice] or suppression, [and] or a \$300[.00] restoration fee if the motion is made thereafter [and shall provide that if payment of the required fee is not made within ten days after the delinquent party's receipt of the order, the order of vacation will become void]. If, however, the motion is made more than 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) With Prejudice. If an order of dismissal or suppression without prejudice has been entered and not thereafter vacated, the party entitled to the answers [or the court on its own motion] may, after the expiration of 90 days from the date of the order, move[,] on notice[,] for an order of dismissal or suppression with prejudice. [The motion shall be granted unless exceptional circumstances are demonstrated.] The attorney for the delinquent party shall, not later than [5] 7 days prior to the return date of the motion, file and serve an affidavit [stating] reciting that the client [has been notified of the pendency of the motion or that the

attorney is unable, despite diligent inquiry, to determine the client's whereabouts. The notification to the client shall be in the form appearing as Appendix II-F to these rules, and the attorney's appearance on the return date of the motion shall be mandatory] was previously served as required by subparagraph (a) (1) and has been served with an additional notification, in the form prescribed by Appendix II-G, of the pendency of the motion to dismiss or suppress with prejudice. In lieu thereof, the attorney for the delinquent party may certify that despite diligent inquiry, which shall be detailed in the affidavit, the client's whereabouts have not been able to be determined and such service on the client was therefore not made. If the delinquent party is appearing pro se, the moving party shall attach to the motion a similar affidavit of service of the order and notices or, in lieu thereof, a certification as to why service was not made. Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party. The moving party need not appear but may be required to do so by the court. The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either fully responsive and certified answers to interrogatories have been served or exceptional circumstances are demonstrated.

(3) General Requirements. All motions made pursuant to this rule shall be accompanied by an appropriate form of

order. All affidavits in support of relief under paragraph (a) (1) shall include a [certification] representation of prior consultation with or notice to opposing counsel or pro se party as required by R. 1:6-2(c). If the attorney for the delinquent party fails to timely serve the client with the original order of dismissal or suppression without prejudice, fails to file and serve the affidavit and the notifications required by this rule, or fails to appear on the return date of the motion to dismiss or suppress with prejudice, the court shall, unless exceptional circumstances are demonstrated, proceed by order to show cause or take such other appropriate action as may be necessary to obtain compliance with the requirements of this rule. If the court is required to take action to ensure compliance or the motion for dismissal or suppression with prejudice is denied because of extraordinary circumstances, the court may order sanctions or counsel fees and costs, or both. An order of dismissal or suppression shall be entered only in favor of the moving party.

(b) ... no change

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 to be effective

X. Proposed Amendments to R. 4:25-4 -- When No Pretrial Conference Held; Designation of Trial Counsel

By Order of October 24, 1994, the Supreme Court relaxed R. 4:25-4 so that the trial court, on adequate notice to the parties, might waive trial counsel designation in any tort case three or more years old when unavailability of designated counsel is delaying trial. The Order took effect on July 1, 1995, to expire on January 1, 1997.

Prior to the expiration of the Order, the Conference of Civil Presiding Judges discussed how often such waiver is used, whether it is an effective tool and whether the Order should be continued. The Conference reported to the Supreme Court that the relaxation is used sparingly and that it is an effective tool in resolving scheduling impasses in older tort cases. The Conference recommended that the Order authorizing the waiver of trial counsel designation in certain cases be continued until the provisions of the Order could be embodied in court rule. Accordingly the Supreme Court continued the relaxation order through September 1, 1998, when an amendment to R. 4:25-4 incorporating the terms and intent of the Order, will take effect.

Thereafter, the Conference reconsidered the matter, at the request of a group of attorneys who objected to the continuation of the Order. At its October 1997 meeting, however, the Conference again endorsed the waiver Order and its earlier recommendation that the Order be embodied in court rule.

The Committee approved the proposed amendments reflecting the recommendation of the Conference of Civil Presiding Judges.

4:25-4. When No Pretrial Conference Held; Designation of Trial Counsel

If no pretrial conference is held, counsel shall, either in the first pleading or in a writing submitted prior to the weekly call, notify the Assignment Judge that a member or associate, or outside counsel is to try the case, and set forth the name specifically. No change in such designated counsel shall be made without leave of court if such change will interfere with the trial schedule. In tort cases pending for more than 3 years, however, the court, on such notice to the parties as it deems adequate in the circumstances, may disregard the designation if the unavailability of designated counsel will delay trial. If the name of trial counsel is not specifically set forth, the court and opposing counsel shall have the right to expect any partner or associate to proceed with the trial of the case, when reached on the calendar.

Note: Source—R.R. 4:29-3A(a); amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

Y. **Proposed Amendments to Rules 4:30A, 4:5-1, 4:28-1 and 4:29-1 -- re Entire Controversy Doctrine**

In *Olds v. Donnelly*, 150 N.J. 424, 428 (1997), the Court held that "the party-joinder requirements of the entire controversy doctrine do not extend to claims of attorney malpractice." At the conclusion of its opinion, the Court took note of the State Bar Association's argument, supported by various scholarly commentaries, that the party joinder requirements of the entire controversy doctrine should be eliminated. The Court observed that "[c]ritics of the doctrine assert that ... mandatory party joinder complicates, prolongs, and increases the cost of litigation[,] ... generates uncertainty and is too difficult for lawyers and judges to understand[,] ... impairs valuable relationships by requiring the assertion of claims against parties one otherwise would not sue[,] and ... proceeds from the incorrect assumption that mandatory party joinder is necessary to avoid unfairness to absent defendants and others." *Id.* at 444-45. The Court concluded that "the wealth of suggestions" regarding the elimination or modification of the party joinder requirements of the entire controversy doctrine "deserves our careful consideration," and that "[o]ur biennial review of proposed amendments to the Rules of Practice, which we will undertake next term, provides a suitable occasion to review proposals for modifications of the entire controversy doctrine, expanded use of party joinder, and other suggestions to improve the administration of justice." *Id.* at 446. Accordingly, the Court asked the Entire Controversy Doctrine Subcommittee of the Civil Practice Committee "to consider initially the various proposals concerning the doctrine." *Ibid.*

In response to the Court's referral, the Subcommittee held two meetings at which it discussed all aspects of the party joinder requirements of the entire controversy doctrine. Based on its discussions, the Subcommittee recommended to the Civil Practice Committee that the rule of compulsory party joinder presently codified in *Rule* 4:30A should be replaced by rule amendments which would expand a litigant's obligation to disclose the names of other potentially liable persons to the trial court and to the other parties and which would give the court authority to require such persons to be given notice of the action or to be joined. The Civil Practice Committee adopted the Subcommittee's recommendations, except that the Committee as a whole concluded that while a trial court should have the authority to require notice to be given to unjoined potentially liable persons whose identity is disclosed, it should not have the authority to compel the joinder of those noticed persons who neither seek to intervene nor are joined by any other party.

As the Court noted in *Olds*, "the goals of the [entire controversy] doctrine are to [1] promote judicial efficiency, [2] assure fairness to all parties with a material interest in an action, and [3] encourage the conclusive determination of a legal controversy." 150 *N.J.* at 431.

It is the unanimous view of the Committee based on nearly a decade of experience of trial lawyers and judges that the current party joinder requirements of the entire controversy doctrine do not effectively promote these goals. The Committee believes that rather than serving the interests of judicial efficiency, the expansive party joinder requirements of *Cogdell* and its progeny have actually increased the complexity and costs of litigation.

One way the *Cogdell* rule complicates litigation is by requiring attorneys and courts to expend substantial time litigating disputes as to its requirements and the consequences of failures to comply. Because the parameters of this rule are still unclear, there are a substantial number of motions in the trial courts as well as appeals to the Appellate Division and Supreme Court which raise issues as to its applicability and effect. Another way the *Cogdell* rule adds to the complexity of litigation is by encouraging the joinder of parties who otherwise would be omitted from an action. The naming of such additional parties adds to the costs incurred by litigants in serving papers, conducting discovery and preparing for trial, and also makes it more difficult for the courts to schedule trials. Moreover, because motions for leave to file amended complaints to join additional parties are frequently made late in the pretrial process after discovery discloses additional potentially liable parties, the *Cogdell* rule frequently prolongs litigation. Although a subsequent action may be required whenever a potentially liable person is omitted from an initial action, the disposition of the initial action often will obviate the need for further proceedings. And in most cases where joinder actually would serve the interests of judicial efficiency, it may be expected that some party to the action will join the unnamed person to protect its own interests or that a noticed unnamed person will seek to intervene.

The Committee also concludes that an expansive compulsory joinder rule is not required to assure fairness to non-parties. In most cases, a person with a remote or contingent potential liability is not joined in an initial action because the parties believe their claims can be satisfied without such joinder. If that expectation turns out to be correct, there will be no

subsequent litigation against the persons omitted from the first action. Consequently, to the extent that *Cogdell* results in the joinder of such parties, it imposes a burden of defending litigation upon persons who otherwise never would have been sued. Moreover, even when subsequent litigation is brought against a party omitted from the first action, that party is more likely to realize strategic benefits from the litigation of the first action than to be disadvantaged by nonjoinder. See the discussion in Allan R. Stein, *Commentary: Power, Duty and the Entire Controversy Doctrine*, 28 *Rutgers L. J.* 27, 33-36 (1996). The Committee further notes that there are other traditional preclusionary rules that may bar a second action. See, e.g., *Restatement (Second) of Judgments* §§ 39-62 (1982).

In any event, the Committee believes that any risk of prejudice resulting from the nonjoinder of persons with a material interest in litigation can be addressed by procedural measures which avoid the adverse consequences of the current expansive party joinder rule. The Committee's recommendation is that *Rule* 4:5-1(b)(2) be amended to expand the certification which *Rule* 4:5-1(b) already requires to be submitted with a first pleading, identifying "any other party who should be joined in the action," to also include "[any other party] who may be liable to any party on the basis of the same transactional facts."¹ The Committee's proposed amendment of *Rule* 4:5-1(b)(2) also would confer authority upon trial courts to "require notice of the action to be given to any party whose name is disclosed in accordance with this rule." A party who received such notice could then

¹ Consistent with the party joinder requirements formerly imposed by *Rule* 4:30A, the draft rule only requires the identification of other potentially liable parties and not other possible plaintiffs.

move to intervene pursuant to *Rule* 4:33. Under these rule amendments, the *Cogdell* rule would be replaced by procedures designed to assure that any person with a material interest in litigation who has not been named as a party receives notice of the action and is afforded an opportunity to decide whether to seek intervention. These procedures also will assure that all parties to an action will be notified whenever any one party becomes aware of another potentially liable person.

The Committee considered requiring notice to be given as a matter of course to any potentially liable non-party. However, the Committee concluded that there may be some cases in which compliance with such a requirement would be unduly onerous because of the number of potentially liable non-parties. Therefore, the Committee decided to confer responsibility upon trial courts to determine whether such notice should be required. The Committee anticipates that whenever a trial court perceives a genuine risk of prejudice as a result of non-joinder, it will liberally exercise its authority under *Rule* 4:5-1(b)(2) to require notice to be given to other potentially liable parties.

The Entire Controversy Doctrine Subcommittee recommended to the Committee that trial courts should be given authority not only to require notice of an action to be provided to other potentially liable parties but also to compel their joinder. The Subcommittee felt this proposal would serve to implement the Court's pronouncement in *Olds* that "issues concerning joinders [should be submitted] to the discretion of the trial court, which then can decide how best to manage them." 150 *N.J.* at 447. However, the Subcommittee also felt that decisions as to joinder generally should be made

by the named parties and other potentially liable persons who receive notice of the action pursuant to *Rule* 4:5-1(b)(2), and that trial courts should compel joinder only in exceptional circumstances. Therefore, the proposed *Rule* 4:29-1(b) recommended by the Subcommittee would provide that "[t]he court shall not order ... joinder unless it finds for specific reasons stated on the record that the interests of judicial economy and of non-parties which would be served by such joinder substantially outweigh the interests of the named parties in not joining additional parties."

The Committee as a whole rejected this recommendation by a twenty-one to eight vote and concluded that trial courts should only be authorized to require notice to be provided to other potentially liable parties. The Committee believes that any significant risk of prejudice resulting from the nonjoinder of a potentially liable person can be avoided by giving such a person notice of the action. Upon receiving notice, that person can decide whether his or her interests would be served by intervention. The Committee believes that if the interested person is not joined by the other parties and elects to stay out of the action, the trial court should not second-guess those decisions. The majority also believes that there are few, if any, cases in which compulsory joinder may be desirable solely in the interests of judicial economy. Moreover, trial courts generally do not become sufficiently involved in the pretrial stages of cases to make informed judgments concerning the probable litigation consequences of either joinder or nonjoinder of a potentially liable person.

Finally, the Committee concluded that to assure compliance with the notice obligations imposed by *Rule* 4:5-1(b)(2), trial courts should be

authorized to impose sanctions for violations. However, consistent with the Court's view in *Olds* that "preclusion is a remedy of last resort," 150 N.J. at 446, the Subcommittee concluded that an action should be dismissed because of a party's violation of *Rule* 4:5-1(b)(2) only if the violation was "egregious" and "the right of the unnamed party to defend the successive action has been substantially prejudiced by not having been joined in the prior action." Except in those extraordinary circumstances, a court should impose only a lesser sanction, such as "the imposition upon the defaulting party of litigation expenses which could have been avoided by compliance with this rule." Some members of the Committee felt that trial courts should not be authorized to dismiss an action based on a violation of *Rule* 4:5-1(b)(2) under any circumstances, but the Committee decided by a sixteen to fourteen vote to accept the Subcommittee's recommendation that a trial court should be authorized to dismiss a subsequent action as a remedy of last resort in extraordinary circumstances.

The Committee's recommended rule amendments follow. These amendments include not only the previously discussed proposed amendments to *Rule* 4:30A and *Rule* 4:5-1(b)(2) but also technical amendments to *Rule* 4:28-1(e) and *Rule* 4:29-1(a) to reflect the elimination of the party joinder requirement of *Rule* 4:30A. Although not endorsed by the Committee as a whole, the Subcommittee's recommended amendment of *Rule* 4:29-1(b), which would authorize trial courts to compel joinder, and a corresponding version of the proposed new *Rule* 4:5-1(b)(2), which cross-references this proposed *Rule* 4:29-1(b), are attached as alternatives for the Court's consideration.

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 July 14, 1992 to be effective September 1, 1992; amended _____ to be effective _____.

4:5-1. General Requirements for Pleadings

(a) ... no change

(b) Requirements for First Pleadings.

(1) ... no change

(2) Notice of Other Actions and Potentially Liable Persons. Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any [other party] non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. [The court may compel the joinder of parties in appropriate circumstances, either upon its own motion or that of a party.] The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule. If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party

whose existence was not disclosed or the imposition upon the defaulting party of litigation expenses which could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was egregious and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.

(c) ... no change

Note: Source—R.R. 4:7-1; amended July 26, 1984 to be effective September 10, 1984; caption and text amended November 26, 1990 to be effective April 1, 1991; paragraph (c) added July 13, 1994 to be effective September 1, 1994; paragraph (b) (2) amended to be effective

4:28-1. Joinder of Persons Needed for Just Adjudication

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) Applicability; Exceptions. This rule is applicable to the personal representatives of a deceased person described by R. 4:28-1(a). This rule is, furthermore, subject to the provisions of [R. 4:30A (entire controversy doctrine) and] R. 4:32 (class actions).

Note: Source—R.R. 4:32-1, 4:32-2, 4:32-3, 4:32-4, 4:32-5; paragraphs (a) and (e) amended June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (e) amended to be amended.

4:29-1. Permissive Joinder

(a) [Generally.] Joinder by Parties. [Subject to R. 4:30A (entire controversy doctrine), a] All persons may join in one action as plaintiffs or be joined as defendants jointly, severally, in the alternative, or otherwise, if the right to relief asserted by the plaintiffs or against the defendants arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) ... no change

Note: Source—R.R. 4:33-1(a) (b); paragraph (b) (1), (2) and (3) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (b) (1) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended to be effective

Alternative R. 4:5-1.

(recommended by the Entire Controversy Doctrine Subcommittee
but not endorsed by a majority of the full Committee)

4:5-1. General Requirements for Pleadings

(a) ... no change

(b) Requirements for First Pleadings.

(1) ... no change

(2) Notice of Other Actions and Potentially Liable Persons. Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any [other party] non-party who should be joined in the action pursuant to R. 4:28 or who is subject to joinder pursuant to R. 4:29-1(b) because of potential liability to any party on the basis of the same transactional facts. Each party shall have a continuing obligation during the course of the litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. [The court may compel the joinder of parties in appropriate circumstances, either upon its own motion or that of a party.] The court may require notice of the action to be given to any non-party whose name is disclosed in accordance with this rule

or may compel joinder pursuant to R. 4:29-1(b). If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed or the imposition upon the defaulting party of litigation expenses which could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was egregious and the right of the undisclosed party to defend the successive action has been substantially prejudiced by not having been identified in the prior action.

(c) ... no change

Note: Source—R.R. 4:7-1; amended July 26, 1984 to be effective September 10, 1984; caption and text amended November 26, 1990 to be effective April 1, 1991; paragraph (c) added July 13, 1994 to be effective September 1, 1994; paragraph (b) (2) amended _____ to be effective _____

Alternative R. 4:29-1.

(recommended by the Entire Controversy Doctrine Subcommittee
but not endorsed by a majority of the full Committee)

4:29-1. Permissive Joinder

(a) [Generally.] Joinder by Parties. [Subject to R. 4:30A (entire controversy doctrine), a] All persons may join in one action as plaintiffs or be joined as defendants jointly, severally, in the alternative, or otherwise, if the right to relief asserted by the plaintiffs or against the defendants arises out of or in respect of the same transaction, occurrence, or series of transactions or occurrences and involves any question of law or fact common to all of them. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

(b) Joinder by Order of the Court. The court on its own motion may order the joinder of any person subject to service of process whose existence was disclosed by the notice required by R. 4:5-1(b)(2) or by any other means who may be liable to any party on the basis of the same transactional facts. The court shall not order such joinder unless it finds for specific reasons stated on the record that the interests of judicial economy and of non-parties which would be served by such joinder substantially outweigh the interests of the named parties in not joining additional parties.

(c) Certain Tax Foreclosure and Condemnation Actions.

Anything in paragraph (a) of this rule to the contrary notwithstanding:

(1) A purchaser of a tax sale certificate (other than a municipality) or the purchaser's heirs or assigns may file a complaint to foreclose the right of redemption and may join therein 2 or more separate causes of action, or causes of action founded upon 2 or more certificates of sale of the same municipality and of the same or different tracts of land, covering but not exceeding 15 tax sale certificates.

(2) Where a municipality has acquired lands by purchase at sales held to enforce a tax or other municipal lien, it may join in an action to foreclose the right of redemption of such lands, causes of action to foreclose such rights of redemption, covering but not exceeding 15 tax sale certificates.

(3) The plaintiff in an action under N.J.S.A. 54:5-104.29 et seq. (In Rem Tax Foreclosure Act) may join in the action not more than 200 tax sale certificates.

(4) The plaintiff in an action under R.S. 54:8-3 (Destruction or Loss of Public Tax Records) may join in the action any number of separate parcels of land of the same owner.

(5) The plaintiff in an action for condemnation may join in the action not more than 10 separate parcels of land, except by leave of court.

(6) The court may order any action to which this rule applies severed and the provisions of R. 4:4-4 and R. 4:4-5

for service with process of a copy of the complaint upon all defendants may not be relaxed.

Note: Source—R.R. 4:33-1(a)(b); paragraph (b)(1), (2) and (3) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (b)(1) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended, new paragraph (b) added and caption and text of former paragraph (b) redesignated as paragraph (c) to be effective

Z. Proposed Amendments to R. 4:46-2 -- Motions and Proceedings Thereon

A Committee member recommended, and the full Committee agreed, that R. 4:46-2 should be amended to make it clear that all the sufficiently supported material facts in the movant's statement of facts are deemed admitted only for purposes of the summary judgment motion, and not for purposes of the case itself.

The proposed amendments to R. 4:46-2 follow.

4:46-2. Motion and Proceedings Thereon

(a) ... no change

(b) Requirements in Opposition to Motion. A party opposing the motion shall file a responding statement either admitting or disputing each of the facts in the movant's statement. Subject to R. 4:46-5(a), all material facts in the movant's statement which are sufficiently supported will be deemed admitted for purposes of the motion only, unless specifically disputed by citation conforming to the requirements of paragraph (a) demonstrating the existence of a genuine issue as to the fact. An opposing party may also include in the responding statement additional facts that the party contends are material and as to which there exists a genuine issue. Each such fact shall be stated in separately numbered paragraphs together with citations to the motion record.

(c) ... no change

Note: Source—R.R. 4:58-3. Amended July 14, 1972 to be effective September 5, 1972; amended June 29, 1973 to be effective September 10, 1973; amended and subparagraphs designated June 28, 1996 to be effective September 1, 1996; paragraph (b) amended to be effective

AA. Proposed Amendments to R. 4:58-1 -- Time and Manner of Making and Accepting Offer

An attorney pointed out that R. 4:58-1, as it now reads, requires an offer of judgment to be made more than twenty days prior to "the first scheduled trial date or daily or weekly call (whichever is earliest)". He noted that a long period of time may pass between the first scheduled trial date and the actual trial date. To prohibit the making of an offer of judgment during this period does not seem consistent with the goal of judicial economy.

The Committee considered whether offers of judgment should be permitted at any time before trial. This would encourage such offers, and, in any case, recovery of attorney's fees is limited to those incurred after the offer is rejected. A majority of the Committee, however, favored a specific cut-off point before trial by which the offer must be made, and a subsequent vote supported twenty days before the actual trial date as the appropriate cut-off point.

The proposed amendments to R. 4:58-1 follow.

4:58-1. Time and Manner of Making and Accepting Offer

Except in a matrimonial action, any party may, at any time more than 20 days before the [first scheduled] actual trial date [or daily or weekly call (whichever is earliest)], serve upon any adverse party, without prejudice, and file with the court, an offer to take judgment in the offerer's favor, or as the case may be, to allow judgment to be taken against the offerer, for a sum stated therein or for property or to the effect specified in the offer (including costs). If at any time on or prior to the 10th day before the [first scheduled] actual trial date [or daily or weekly call (whichever is earliest)] the offer is accepted, the offeree shall serve upon the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the [first scheduled] actual trial date [or daily or weekly call (whichever is earliest)] or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

Note: Source-R.R. 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

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

The Special Civil Part Practice Committee recommended, and the Civil Practice Committee concurs, that R. 4:59-1(e) should be amended to make it clear that all the procedures set forth in R. 6:7-2, including issuance of information subpoenas to parties and non-parties, are available to civil litigants to assist in the collection of judgments.

The proposed amendments to R. 4:59-1 follow.

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 successor in interest appearing of record, may examine any person, including the judgment debtor, by proceeding as provided by these rules for the taking of depositions or the judgment creditor may proceed 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. 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 July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (f), and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended 1998 to be effective 1998.

CC. Proposed Amendments to R. 4:64-3 -- Surplus Moneys

The unpublished trial court and Appellate Division opinions in *National Mortgage Company v. Syriaque* suggest the need to amend R. 4:64-3 to require that notice of a petition for surplus moneys in a foreclosure action must be provided to all parties, including defaulting defendants, whose claims are not directed to be paid out of sale proceeds.

Both the Superior Court Clerk and the Chief of the Foreclosure Unit support such an amendment. Indeed, based on *Resolution Trust Corp. v. Griffin*, 290 N.J. Super. 88 (Ch. Div. 1994), the Foreclosure Unit routinely provides the broader notice called for in *Syriaque*.

The proposed amendments to R. 4:64-3 follow.

4:64-3. Surplus Moneys

Petitions for surplus moneys in foreclosure actions may be presented at any time after the sale and may be heard by the court on motion and notice to all parties, including defaulting defendants whose claims are not directed in the execution to be paid out of the proceeds of sale [including defaulting defendants]. If any order is made for the payment of such surplus before the delivery of the deed, the sheriff or other officer making the sale shall accept the receipt or order of the person to whom such surplus, or any part of it, is ordered to be paid, as payment to that extent of the purchase money, or may pay the same to such person. Payments shall be made in accordance with R. 4:57-2.

Note: Source-R.R. 4:82-4; amended July 29, 1977 to be effective September 6, 1977; amended July 16, 1981 to be effective September 14, 1981; amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

DD. Proposed Amendments to R. 4:80-7 -- Use of Photostatic Copy Where Will Is Probated in Another State

The Committee recommends that R. 4:80-7 be amended to correct the reference to Rule of Evidence 902(d). The rule now refers to former Rule of Evidence 68, which was superseded in 1993.

The proposed amendments to R. 4:80-7 follow.

4:80-7. Use of Photostatic Copy Where Will Is Probated in
Another State

If the will of a person resident in this State at death has been probated in another state or jurisdiction under the laws of which it cannot be removed therefrom or cannot remain in this State for permanent filing, a photocopy thereof attached and certified pursuant to Rule [68] 902(d) of the Rules of Evidence (proof of official record) may be admitted to probate in lieu of the original will.

Note: Source—R.R. 4:99-10; former R. 4:80-11 amended and rule redesignated June 29, 1990 to be to be effective September 4, 1990; amended _____ to be effective _____

EE. Proposed Amendments to R. 4:88-1 -- Affidavit of Accountant's Services

The Committee recommends amending *R. 4:88-1* to conform the rule with *N.J.S.A. 3B:18-25* and other statutes governing commissions allowed in the administration of estates.

The proposed amendments to *R. 4:88-1* follow.

4:88-1. Affidavit of Accountant's Services

On every application for commissions on corpus, [if the gross corpus receipts have exceeded \$200,000,] where the allowance of such commissions is within the discretion of the court, the applicant shall file with the court at least 20 days prior to the day on which the account is settled an affidavit stating in detail the nature of the services rendered in administering the estate and specifying the amount of the commissions requested.

Note: Source—R.R. 4:107-1; amended June 29, 1990 to be effective September 4, 1990; amended to be effective _____.

II. PROPOSED AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to R. 1:5-2 -- Manner of Service

The New Jersey Defense Association proposed amending R. 1:5-2 to permit the consensual service of pleadings by fax.

The Committee did not recommend the proposed amendment, noting that the language of the current rule permits consensual fax service.

B. Proposed Amendments to Rules 1:6-2 and 4:23-5 -- re Motions for Discovery

An attorney requested some explicit interface between *Rules* 1:6-2 and 4:23-5 to provide that one party may not move to compel discovery from another party if the former has not complied with the latter's discovery demands. The Committee does not recommend such an amendment. *Rule* 4:23-5(a)(1) now prevents a motion for dismissal for failure to answer interrogatories unless the movant is not in default in answering the interrogatories served by the delinquent party. The Committee does not see the need at this time to amend the rules further in this respect.

See also section I. W. of this report for proposed amendments to *R.* 4:23-5 that the Committee recommends.

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

The Conference of Civil Presiding Judges recommended that *R. 1:6-5* be revised to provide that motion briefs be limited to 25 pages. The Committee rejects that recommendation as arbitrary, and inappropriate in many cases.

D. Proposed Amendments to R. 1:36-3 -- Unpublished Opinions

Rule 1:36-3, as it now reads, generally prohibits the citing of unpublished opinions by any court, and permits the citing of unpublished opinions to the court only when all parties are served with a copy of the opinion and of all other relevant unpublished opinions known to counsel, including those adverse to the client.

The issue of whether unpublished opinions should be citable and, if so, by whom and to whom, has come before the Committee often in the past decade. With unpublished opinions readily available through Westlaw and other information dissemination media, the question again was raised as to whether unpublished New Jersey opinions should be able to be cited. A subcommittee, chaired by Professor Robert Carter, was appointed to study the matter.

The subcommittee did not recommend any change to *R.* 1:36-3. Although there are now many avenues through which attorneys and the court may gain access to unpublished opinions, it is nonetheless still difficult to research and use these opinions as many are very fact-specific. Thus, there appears to be no need to loosen restrictions on their citation. Conversely, there is no need to prohibit or further restrict their citation, as they can be cited to the potential benefit of the court and all parties, provided all relevant information is disclosed, as *R.* 1:36-3 now requires.

The Committee concurs in the subcommittee's recommendation against amending *R.* 1:36-3.

E. Proposed Amendments to R. 1:40-4 -- Mediation - Generally

The Supreme Court Committee on Complementary Dispute Resolution approved an amendment to R. 1:40-4 that would provide for parties to share the mediator's fees equally when referred to mediation by the court. At present, under the civil mediation pilot program, the first six hours of mediation are free; thereafter, a flat fee of \$150 is to be split among the parties.

The Committee vigorously opposed the proposed amendments, questioning whether the court has the authority to order parties to mediation for which they must not only pay the mediator but their own attorneys, as well. If this initial hurdle is overcome, a question still remains as to whether the parties should have to negotiate the mediator's cost. The Federal court has dealt with this issue by imposing a flat fee for mediators serving in its program. It was also noted that it may be inadvisable to have two different systems operating in the state -- the Federal system, which provides six hours of free mediation with a \$150/hour fee thereafter (like the state pilot program) and the proposed system whereby mediators may charge market rates from the outset.

The Committee will consider at a future meeting the issue of the court's authority to refer a case to a mediator who charges fees directly to the parties. (See also section V. A. of this report.)

F. **Proposed Amendments to R. 2:12 -- Appeals on Certification to the Supreme Court**

An attorney proposed amending R. 2:12 to require the Supreme Court to provide reasons for denial of certification, so that counsel are not left with the burden of speculating when explaining to clients why their case is over. The Committee did not support this proposal.

G. Proposed Amendments to Rules 4:4-7 and 4:43-1 -- re Return of Service/Default

The Conferences of Civil Presiding Judges and Civil Division Managers recommended eliminating the requirement of *R. 4:4-7* that the summons routinely be filed with the court. When proof of service is needed to obtain default, the return of service could be appended to the affidavit in support of the application for default. This recommendation was made as part of a re-examination of civil procedures necessitated by severe staffing shortages in the counties. The Committee does not support this proposed amendment.

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

An attorney proposed a rule amendment that would explicitly set forth the procedure to be followed when a case has been remanded from Federal to state court. He cited disparate procedures being followed in two counties. Upon investigation, it became evident that a mix-up had occurred with respect to the attorney's case in one county. Given the aberrational origin of the proposal, the Committee sees no need to amend the rule.

I. Proposed Amendments to R. 4:7-6 -- Additional Parties May Be Brought In

An attorney sought clarification as to whether *R. 4:7-6* permits a new party, related to the plaintiffs, to be named as an additional defendant on the counterclaim. The Committee took the position that *R. 4:7-6* does so permit, and so no change to the language of the rule is necessary.

J. Proposed Amendments to R. 4:9-1 -- Amendments

A General Equity judge proposed amending R. 4:9-1 to require leave of court to amend a pleading that served as the basis for issuance of a temporary restraining order. The Committee does not endorse amending the language of the rule to address a difficulty that, although real, most likely arises only rarely.

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

An attorney proposed amending R. 4:10-2 to make it clear that a treating physician who is not serving as an expert on liability or damages is not entitled to an appearance fee for attending a deposition.

The Committee determined that no change to the rule is necessary. Only expert witnesses are entitled to a fee under R. 4:10-2. Non-expert witnesses who are subpoenaed or subject of a motion to compel testimony may apply to the court to have their fees set.

See section I. Q. of this report for proposed amendments to R. 4:10-2 that the Committee recommends.

L. Proposed Amendments to R. 4:17-1 -- Service, Scope of Interrogatories

Rule 4:17-1(b)(i) now permits each party to propound, without leave of court, ten supplemental questions, without subparts, when using the uniform interrogatories mandated for certain case types. In connection with developing form product liability interrogatories, the Discovery Subcommittee, chaired by the Hon. Leonard Arnold, recommended that twenty supplemental interrogatories be permitted in product liability cases.

The full Committee does not support that recommendation.

See section I. T. of this report for a discussion of amendments to *R.* 4:17-1 that the Committee recommends.

See section III. A. of this report for the proposed form product liability interrogatories.

M. Proposed Amendments to R. 4:18-1 -- Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes: Pre-Litigation Discovery

An attorney proposed amending R. 4:18-1 to curb alleged abuses of the "notice to produce" procedure. The Discovery Subcommittee, chaired by the Hon. Leonard Arnold, considered this proposal and recommended that the rule be amended to make it clear that the "notice to produce" procedure may not be used to obtain information properly obtainable through interrogatories nor to unduly burden or harass the other party. The full Committee, however, declined to adopt such an amendment, noting that the remedy to overbroad requests for production of documents is simply to object.

See also section I. U. of this report for proposed amendments to R. 4:18-1 that the Committee recommends.

N. Proposed Amendments to Rules 4:23-1 and 4:23-2 -- re Sanctions for Failure to Make Discovery

An Appellate Division judge pointed out an apparent inconsistency, as to whether a non-party is subject to *R.* 4:23 sanctions for failure to make discovery, between the language in *Rules* 4:23-1 and 4:23-2 and the comment to the rules, which relies on dictum in *B. & H.S. Corp. v. Holly*, 198 N.J. Super. 83 (App. Div. 1984) *certif. denied* 101 N.J. 255 (1985).

The Committee agreed that the language of the rules is clear and should not be changed -- non-parties are in fact subject to *R.* 4:23 sanctions. Judge Pressler will consider modifying the comment accordingly.

P. Proposed Amendments to Rules 4:43-1 and 4:43-2 -- re Default/Default Judgment

The Superior Court Clerk noted that when default judgment is entered by the clerk, it is a one-step process performed simultaneously with granting the motion to enter default. Accordingly, the notice requirement inserted into *R. 4:43-1* effective September 1, 1996 cannot be met.

The Committee took the position that no change to the rule is necessary to address the issue of clerk-entered default judgments. The defaulting defendant will still be given notice when default judgment is entered, and then has the opportunity to move to set aside the judgment.

The Committee also considered whether one-step court-entered default judgments can be granted under the rules, using the same rationale as that applied to clerk-entered default judgments. In the Committee's view, one-step court-entered default judgments are permissible if entered on motion made six months after the actual default. In this way, the defaulting defendant will receive adequate notice that default judgment may be entered against him or her.

Accordingly, the Committee does not recommend any changes to *Rules 4:43-1* and *4:43-2*.

O. **Proposed Amendments to R. 4:42-11 -- Interest; Rate on Judgments; in Tort Actions**

The Special Civil Part Practice Committee recommended a change to R. 4:42-11(a) that would make the post-judgment interest rate the same (the average rate of return of the New Jersey Cash Management Fund, plus 2%) for **all** judgments, regardless of amount. The Special Civil Part Practice Committee notes that only one other state (Maine) has different rates of interest based on the amount of the judgment, and that the rate of return on trust funds held by the Superior Court Clerk is the same regardless of the amount.

The Civil Practice Committee does not support this proposal, noting that the current rule was intended to create a disincentive for large judgment debtors not to pay without burdening consumers. The two-tier rate embodied in the rule used \$10,000 as the amount below which the additional 2% should not be applied because this amount was a cut-off point already existing in the rules.

Q. Proposed Amendments to R. 4:86-4 -- Order for Hearing

The Deputy Director of the Public Defender's Division of Mental Health and Guardianship Advocacy asked that the current requirement of R. 4:86-4(b), calling for the counsel for the alleged incompetent to interview the alleged incompetent *personally*, be modified to permit the Division of Mental Health and Guardianship Advocacy to continue to use its staff of specially trained investigators to interview individuals receiving services from the Division of Developmental Disabilities.

The Judiciary-Surrogates Liaison Committee, which recommended the recent change to R. 4:86-4 that requires court-appointed counsel to personally interview the alleged incompetent, reviewed the proposal and took the position that a rule amendment is unnecessary. Rather, it suggested that the standard order utilized for appointment of the Division expressly state that an investigator will perform the required duties.

The Committee agrees with this approach and so does not recommend any changes to the current rule.

R. Proposed Amendments to Civil Summons -- Appendix XII-A

An attorney suggested that a separate summons form be developed and mandated for use in General Equity and probate cases. The Committee does not see the need for a separate summons, and so does not support the proposal.

The Committee also does not favor another attorney's suggestion that the language of the summons include information as to the possible waiver of the filing fee for indigent defendants. Legal services representatives on the Committee did not perceive the current absence of such information to be a problem.

S. Settlement Cut-off

The chair of the Discovery Subcommittee, the Hon. Leonard Arnold, sought the Committee's views on whether it would be advisable to consider establishment of a civil settlement cut-off, comparable to the plea cut-off in criminal cases, to ensure calendar credibility and to encourage early settlement efforts.

The Committee did not support consideration of such a proposal, noting that enforcement of a settlement cut-off in civil cases would be self-defeating.

T. Enforcement of Settlements/Payment of Counsel Fees and Interest

An attorney seeks a rule or rule amendment that would enable a plaintiff to enforce a settlement against a defendant who reneged, and still emerge financially whole -- *i.e.*, with monies spent to file a motion under R. 1:10-3, counsel fees and post-judgment interest awarded.

The Committee determined no rule change is necessary. Provision for counsel fees to enforce the settlement and for other monetary losses can be put into the stipulation.

U. Fee Shifting for Discovery Motions

To quell the rising tide of motion practice (about 190,000 motions were filed statewide in 1996), an attorney proposed that, with respect to discovery motions only, the amount of the filing fee should by rule be assessed against the non-prevailing party.

The Committee does not support the proposal, noting that the setting of fees is the province of the Legislature.

V. Attorney Fee Schedules in PIP Arbitration

N.J.S.A. 39:6A-5(c) vests in the Supreme Court the authority to promulgate attorney fee schedules in PIP arbitration matters. To date, no such fee schedules have been promulgated, and the Committee does not recommend that the Court do so.

W. Multiple Plaintiffs

A trial judge (and Committee member) proposed a rule change expressly prohibiting an attorney from filing a single complaint on behalf of multiple plaintiffs, alleging similar (but not necessarily identical) injuries. The Committee does not endorse the proposal. Current *R. 4:38* should be sufficient to govern the situation.

III. OTHER RECOMMENDATIONS

A. Proposed Amendments to Appendix II -- Interrogatory Forms

In the 1992-94 term, at the direction of the Supreme Court, the Committee, through its Discovery Subcommittee which was and is chaired by the Hon. Leonard N. Arnold, developed standard form interrogatories for use by plaintiff and defendant in personal injury and property damage to motor vehicles cases in the Law Division, Civil Part. The Court adopted the form interrogatories, which now appear as Forms A, B and C in Appendix II to the Rules of Court, and charged the Committee with developing additional form interrogatories for use in other types of cases.

In the 1994-96 term, the subcommittee developed, the Committee endorsed and the Court adopted the following form interrogatories, to be answered in addition to the basic Form A interrogatories (for plaintiffs in all personal injury actions) or the basic Form C interrogatories (for defendants in all personal injury actions):

Form A(1) -- to be answered by plaintiffs in medical malpractice cases

Form C(1) -- to be answered by defendants in auto negligence cases

Form C(2) -- to be answered by defendants in falldown cases

Form C(3) -- to be answered by defendant in medical malpractice cases

In the 1996-98 term, the Discovery Subcommittee developed standard form interrogatories for plaintiffs and defendants in product liability cases. The initial drafts were developed after the subcommittee met with a number of product liability practitioners and reviewed the interrogatories they regularly use. The full Committee reviewed the initial drafts and its

suggestions were incorporated. The revised drafts were then published for comment in the *Law Journal* and *New Jersey Lawyer*. The subcommittee reviewed the comments received, incorporated those it felt appropriate and presented the final version to the full Committee. In addition, the Subcommittee made minor revisions to basic Forms A and C to ensure that, when appropriate, both plaintiffs and defendants are asked the same questions.

The full Committee approved the proposed amendments to basic Forms A and C, and the proposed new uniform product liability interrogatories, that is, Forms A(2) and Form C(4).

See also section I. T. of this report for proposed amendments to R. 4:17-1, governing the scope of interrogatories.

The proposed amendments to Appendix II, Forms A, A(2), C and C(4) follow.

FORM A. UNIFORM INTERROGATORIES TO BE ANSWERED BY PLAINTIFF

IN ALL PERSONAL INJURY CASES: SUPERIOR COURT

(Caption)

1. Full name, present address and date of birth.
2. Describe in detail your version of the accident or occurrence setting forth the date, location, time and weather.
3. Detailed description of nature, extent and duration of any and all injuries.
4. Detailed description of injury or condition claimed to be permanent together with all present complaints.
5. If confined to a hospital, state its name and address, and dates of admission and discharge.
6. If any diagnostic tests were performed, state the type of test performed, name and address of place where performed, date each test was performed and what each test disclosed. Attach a copy of the test results.
7. If treated by any health care provider, state the name and present address of each health care provider, the dates and places where treatments were received and the date of last treatment. Attach true copies of all written reports provided

to you by any such health care provider whom you propose to have testify in your behalf.

8. If still being treated, the name and address of each doctor or health care provider rendering treatment, where and how often treatment is received and the nature of the treatment.

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

10. If employed at the time of the accident, state: (a) name and address of employer; (b) position held and nature of work performed; (c) average weekly wages for past year; (d) period of time lost from employment, giving dates; and (e) amount of wages lost, if any.

11. If there has been a return to employment or occupation, state: (a) name and address of present employer; (b) position held and nature of work performed; and (c) present weekly wages, earning, income or profit.

12. If other loss of income, profit or earnings is claimed: (a) state total amount of the loss; (b) give a

complete detailed computation of the loss; and (c) state the nature and source of the loss of income, profit and earnings, and the dates of the deprivation.

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

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

15. Identify all documents that may relate to this action, and attach copies of each such document.

[15.] 16. State the names and addresses of all eyewitnesses to the accident or occurrence, their relationship to you and their interest in this lawsuit.

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

18. If any photographs, videotapes, audio tapes or other forms of electronic recording, sketches, reproductions, charts or maps were made with respect to anything that is relevant to the subject matter of the complaint, describe: (a) the number

of each; (b) what each shows or contains; (c) the date taken or made; (d) the names and addresses of the persons who made them; (e) in whose possession they are at present; and (f) if in your possession, attach a copy, or if not subject to convenient copying, state the location where inspection and copying may take place.

[17.] 19. If you claim that the defendant made any admissions as to the subject matter of this lawsuit, state: (a) the date made; (b) the name of the person by whom made; (c) the name and address of the person to whom made; (d) where made; (e) the name and address of each person present at the time the admission was made; (f) the contents of the admission; and (g) if in writing, attach a copy.

18. 20. If you or your representative and the defendant have had any oral communication concerning the subject matter of this lawsuit, state: (a) the date of the communication; (b) the name and address of each participant; (c) the name and address of each person present at the time of such communication; (d) where such communication took place; and (e) a summary of what was said by each party participating in the communication.

[19.] 21. If you have obtained a statement from any person not a party to this action, state: (a) the name and present address of the person who gave the statement; (b) whether the

statement was oral or in writing and if in writing, attach a copy; (c) the date the statement was obtained; (d) if such statement was oral, whether a recording was made, and if so, the nature of the recording and the name and present address of the person who has custody of it; (e) if the statement was written, whether it was signed by the person making it; (f) the name and address of the person who obtained the statement; and (g) if the statement was oral, a detailed summary of its contents.

[20.] 22. If you claim that the violation of any statute, rule, regulation or ordinance is a factor in this litigation, state the exact title and section.

[21.] 23. State the names and addresses of any and all proposed expert witnesses. Set forth in detail the qualifications of each expert named and attach a copy of each expert's current resume. Also attach true copies of all written reports provided to you by any such proposed expert witnesses.

With respect to all expert witnesses, including treating physicians, who are expected to testify at trial and with respect to any person who has conducted an examination pursuant to Rule 4:19, who may testify, state each such witness's name, address and area of expertise and attach a true copy of all written reports provided to you. If a report

is not written, supply a summary of any oral report provided to you.

State the subject matter on which your experts are expected to testify.

State the substance of the facts and opinions to which your experts are expected to testify and a summary of the grounds for each opinion.

[22.] 24. State whether you have ever been convicted of a crime. YES (____) or NO (____).

If the answer is "yes", state: (a) date; (b) place; and (c) nature.

TO BE ANSWERED ONLY IN AUTOMOBILE ACCIDENT CASES

[23.] 25. Do you have insurance coverage and/or PIP benefits under an applicable policy or policies of automobile insurance? As to each such policy provide the name and address of the insurance carrier, policy number, the named insured and attach a copy of the declaration sheet.

If you are making a claim for property damage to a motor vehicle, provide answers to the uniform interrogatories contained in Form B, questions 1 through 18.

FOR MEDICAL MALPRACTICE CASES, ALSO ANSWER FORM A(1)
FOR PRODUCT LIABILITY CASES (OTHER THAN PHARMACEUTICAL
AND TOXIC TORT CASES), ALSO ANSWER A(2)

CERTIFICATION

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts, written or oral, are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

FORM C. UNIFORM INTERROGATORIES TO BE ANSWERED BY DEFENDANT
IN ALL PERSONAL INJURY CASES: SUPERIOR COURT

(Caption)

1. State: (a) the full name and residence address of each defendant; (b) if a corporation, the exact corporate name; and (c) if a partnership, the exact partnership name and the full name and residence address of each partner.

2. Describe in detail your version of the accident or occurrence setting forth the date, location, time and weather.

3. If you intend to set up or plead or have set up or pleaded negligence or any other separate defense as to the plaintiff or if you have or intend to set up a counterclaim or third-party action, (a) state the facts upon which you intend to predicate such defenses, counterclaim or third-party action; and (b) identify a copy of every document relating to such facts.

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

5. State (a) the name and address of any person who has made a statement regarding this lawsuit; (b) whether the statement was oral or in writing; (c) the date the statement

was made; (d) the name and address of the person to whom the statement was made; (e) the name and address of each person present when the statement was made; and (f) the name and address of each person who has knowledge of the statement.

Unless subject to a claim of privilege, which must be specified: (g) attach a copy of the statement, if it is in writing; (h) if the statement was oral, state whether a recording was made and, if so, set forth the nature of the recording and the name and address of the person who has custody of it; and (i) if the statement was oral and no recording was made, provide a detailed summary of its contents.

6. If you claim that the plaintiff made any statements or admissions as to the subject matter of this lawsuit, state: (a) the date made; (b) the name of the person by whom made; (c) the name and address of the person to whom made; (d) where made; (e) the name and address of each person present at the time the admission was made; (f) the contents of the admission; and (g) if in writing, attach a copy.

7. If you contend that the plaintiff's damages were caused or contributed to by the negligence of any other person, set forth the name and address of the other person and the facts upon which you will rely in establishing that negligence.

8. State the names and addresses of all eye witnesses to the accident or occurrence, their relationship to you and their interest in this lawsuit.

9. If any photographs, videotapes, audio tapes or other forms of electronic recording, sketches, reproductions, charts or maps were made with respect to anything that is relevant to the subject matter of the complaint, describe: (a) the number of each; (b) what each shows or contains; (c) the date taken or made; (d) the names and addresses of the persons who made them; [and] (e) in whose possession they are at present; and (f) if in your possession, attach a copy, or if not subject to convenient copying, state the location where inspection and copying may take place.

10. State the names and addresses of any and all proposed expert witnesses. Set forth in detail the qualifications of each expert named and attach a copy of each expert's current resume. Also attach true copies of all written reports provided to you by any such proposed expert witnesses.

With respect to all expert witnesses, including treating physicians, who are expected to testify at trial, and with respect to any person who has conducted an examination pursuant to Rule 4:19, state each such witness's name, address and area of expertise and attach a true copy of all written

reports provided to you. If a report is not written, supply a summary of any oral report provided to you.

State the subject matter on which your experts are expected to testify.

State the substance of the facts and opinions to which your experts are expected to testify and provide a summary of the factual grounds for each opinion.

11. If you contend or intend to contend at the time of trial that the plaintiff sustained personal injuries in any prior or subsequent accident, state: (a) the date of said accident; (b) the injuries you contend that plaintiff sustained; (c) the parties involved in said accident; (d) the source from which you obtained the information; and (e) attach a copy of any written documents regarding this information.

12. If you intend to rely on any statute, rule, regulation or ordinance, state the exact title and section.

13. Pursuant to R. 4:10-2(b), state whether there are any insurance agreements including excess policies under which any person or firm carrying on an insurance business may be liable to satisfy part or all of a judgment that may be entered in

this action or to indemnify or reimburse for payments made to satisfy the judgment. YES (____) or NO (____).

If the answer is "yes", attach a copy of each insurance agreement or policy, or in the alternative state: (a) number; (b) name and address of insurer or issuer; (c) inception and expiration dates; (d) names and addresses of all persons insured thereunder; (e) personal injury limits; (f) property damage limits; (g) medical payment limits; (h) name and address of person who has custody and possession thereof; and (i) where and when each policy or agreement can be inspected and copied.

14. Identify all documents that may relate to this action, and attach copies of each such document.

[14.] 15. State whether you have ever been convicted of a crime. YES (____) or NO (____).

If the answer is "yes", state: (a) date; (b) place; and (c) nature.

FOR AUTOMOBILE CASES, ALSO ANSWER FORM C(1).

FOR FALLDOWN CASES, ALSO ANSWER FORM C(2).

FOR MEDICAL MALPRACTICE CASES, ALSO ANSWER FORM C(3).

FOR PRODUCT LIABILITY CASES (OTHER THAN PHARMACEUTICAL AND TOXIC TORT CASES), ALSO ANSWER FORM C(4).

CERTIFICATION

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts, either written or oral, are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; entire text deleted and new text added June 28, 1996 to be effective September 1, 1996; amended _____ to be effective _____.

FORM A(2). UNIFORM INTERROGATORIES TO BE ANSWERED BY
PLAINTIFF IN PRODUCT LIABILITY CASES
(OTHER THAN PHARMACEUTICAL AND TOXIC TORT CASES) ONLY:

SUPERIOR COURT

(Caption)

1. Describe in detail and with specificity the product involved in the incident that is the subject of this lawsuit, including the manufacturer's name, brand name, model number, serial number or other identifying decal or feature on the product.

If the product involved is a motor vehicle or any other product with component parts or systems, describe any part(s) or system(s) claimed to be defective or negligently designed, manufactured or distributed, or otherwise complained of.

2. Do you claim (a) that the product was defectively designed; (b) that the product was defectively manufactured; and/or (c) that the labelings or warnings on, attached to or accompanying the product were inadequate, misleading or insufficient? If so, set forth all facts (not legal conclusions) in support of your contention(s).

3. Do you claim that the defendant was negligent? If so, set forth all facts (not legal conclusions) in support of your contention. Do you claim that the defendant breached a

warranty? If so, set forth all facts (not legal conclusions) in support of your contention. Set forth why any claims of negligence or breach of warranty are not subsumed in the product liability claim.

4. Identify all correspondence between plaintiff and the defendant or its representatives, and attach copies.

5. How did plaintiff come into possession of or contact with the product involved in the accident incident?

6. How long had the product involved in this incident been in the possession of or used by the plaintiff before the incident?

7. During the time given in response to the immediately preceding interrogatory, where was the product kept?

8. Where was the product immediately after the incident?

9. With respect to the product involved in the incident, set forth: (a) the name and address of the person presently having custody of the product; (b) the present location of the product; and (c) the last date that the product was in your possession.

10. State whether the product is currently in the same condition as immediately after the incident. If not, fully describe the changes that have occurred, who made them, the reason for such changes and the date they were made.

11. Did the product have any words or symbols on it or its packaging, or any written or pictured warnings attached to it? If so, set forth each writing and describe each symbol or picture.

12. Was an owner's manual or other literature provided with the product? If so, attach such manual or literature or, if a copy is not available, describe the manual or other literature and summarize its contents.

13. Have you ever pursued a workers' compensation claim for injuries sustained as a result of the incident that is the subject of this lawsuit? If so, set forth: (a) the title and venue of every workers' compensation proceeding to which you have been a party; (b) the date upon which each such proceeding was instituted; (c) the date on which each such proceeding was tried and settled; (d) the name and address of each doctor who examined you in connection with each such proceeding; (e) the amount of the award you received from each such proceeding; and (f) the name and address of every employer or insurance company that has actually paid you workers' compensation benefits.

14. Do you contend that the design, labeling and warnings, manufacture or distribution of the product was governed by any governmental and/or industry codes, standards, regulations or advisories? If so: (a) state the name and address of the governmental agency or department, or the industry office; and (b) specifically identify the codes, standards, regulations or advisories by title and numerical, alphabetical or other coded designation.

15. Did you sustain any property damage or other economic loss as a result of the incident that is the subject of this lawsuit? If so, specify all such damages.

16. Do you contend that the product contained a design defect? If so, set forth your contention as to how the product should have been designed in a safer, more appropriate manner.

CERTIFICATION

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or

reports provided by them; that the existence of other reports of said doctors or experts, written or oral, are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: New form interrogatory adopted to be effective

FORM C(4). UNIFORM INTERROGATORIES TO BE ANSWERED BY
DEFENDANT IN PRODUCT LIABILITY CASES
(OTHER THAN PHARMACEUTICAL AND TOXIC TORT CASES) ONLY:

SUPERIOR COURT

(Caption)

In propounding the interrogatories, plaintiff should provide this information:

- (a) A description of the product, as specific as possible.
- (b) The date and place of purchase, if known.
- (c) The make, model and any serial number or other identifying decal or feature on the product.
- (d) Any words printed on the product.
- (e) If the product involved is a motor vehicle or has component parts, a description of any part(s) or system(s) claimed to be defective or negligently designed, manufactured or distributed, or otherwise complained of.
- (f) A general description of the manner in which plaintiff claims to have been injured.

Answers to these interrogatories should be furnished within the context of the information provided by plaintiff in (a) through (f), above.

1. Did you manufacture the product? If so, state:
(a) the date and place of manufacture; (b) the date you sold or otherwise distributed the product; and (c) the name and address of the person or entity that purchased the product from you. If you did not manufacture the product, state the name and address of the person or firm who did so. State the name and address of the person or entity from which you purchased the product.

2. Did you sell or otherwise distribute the product? If so, state: (a) the date on which you sold or otherwise distributed the product; (b) the names and addresses of all persons and entities that sold or otherwise distributed the product; and (c) the dates of sale and distribution for each such person or entity.

3. State the name and address of any person, firm or entity that did the following with respect to the product (if the product is a motor vehicle or has component parts, this question pertains to the subpart(s) or system(s) complained of): (a) designed it; (b) manufactured it; (c) assembled it; (d) packaged it; (e) distributed it, through sale or otherwise; (f) advertised it; (g) installed it; and (h) serviced or otherwise maintained it.

4. Were there any writings or warnings on the product itself, on its packaging, or on anything attached or appended

to the product, when it left your control? If so, state specifically and fully the exact words used and their location. If a warning was given in other than words, attach copies of any and all symbols or depictions used.

5. State whether you provided to a distributor, possible user or any person or firm that you expected to come in contact with the product, any form of written material, such as an owner's manual, repair manual, parts manual or any other writing pertaining to the product. If so, attach a copy of any such written material. If you do not have a copy, state specifically what was written or depicted.

6. Have you or any other person or entity repaired, altered, or otherwise changed the design or specifications of the product (in the case of a motor vehicle or a product with component parts, this question refers to the subpart(s) or system(s) complained of) from the date of manufacturing to the date of the incident? If so, state: (a) the name and address of the person or entity who made the repair, alteration or change; (b) the date of each such change; (c) the specific details of the change; (d) the name and address of the officer, managing agent or other person(s) in your organization most involved with such change; and (e) the names and addresses of all your employees or agents who were involved in such change. If the change is displayed on plans, specifications, blueprints or other drawings, or described in any

document, attach a legible copy of such plans, specifications, blueprints, drawings or documents.

7. If, from the date the product was manufactured until the date of the incident, any writings or warnings pertaining to the product were added, altered, or otherwise changed, state: (a) the date of each such change; (b) the specific words or symbols used in each such change; (c) the name and address of the officer, managing agent or other person(s) in your organization most involved with such change; and (d) the names and addresses of all of your employees who were involved in such change.

8. Identify all correspondence between plaintiff and the defendant or its representatives, and attach copies.

9. State whether you intend to assert any defenses at the time of trial.

(a) If so, and the defenses are based upon the common-law, state the principle involved and fully provide the factual basis for any such defense.

(b) If so, and the defenses are based upon a statute, regulation or other written rule, identify each such statute, regulation or rule and fully provide the factual basis for any such defense.

(c) If so, and your defense is based upon an alteration, use, misuse of or other change in the product, indicate each

such defense and fully provide the factual basis for any such defense.

10. State whether at any time prior to answering these interrogatories and subsequent to the date of manufacturing or distribution of the product itself or similar products by this defendant any person complained or alleged that he, she or anyone suffered bodily injuries or death as a result of using the product in the manner in which plaintiff claims to have used the product when the injury occurred. If so: (a) identify all such claimants and their attorneys; (b) describe as specifically as possible the product involved, including but not limited to the model and serial numbers; and (c) if a lawsuit was instituted against the defendant, state the names and addresses of the claimants, their attorney(s) and the court in which such claim was instituted.

11. If you allege that any other person or entity or product manufactured by any other person or entity is responsible for the incident, provide the name and address of that person or entity, identify the product, if any, and fully provide the factual basis for the allegation.

12. Are you a member of or affiliated with any trade organization or industry group that promulgates written standards, habits or customs pertaining to the product involved in the accident? If so, provide the address of each

such organization or group, and attach a copy of the written standards promulgated.

13. Do you contend that the design, manufacture or distribution of the product was governed by any governmental and/or industry codes, standards, regulations or advisories? If so: (a) state the name and address of the governmental agency or department, or the industry office; and (b) specifically identify the codes, standards, regulations or advisories by title and numerical, alphabetical or other coded designation.

CERTIFICATION

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts, written or oral, are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: New form interrogatory adopted to be effective

B. Proposed Amendments to Appendix II-F and Appendix II-G --

Notices to Client

In connection with the revision of *R. 4:23-5*, the *R. 4:23-5* Subcommittee, chaired by the Hon. Maurice Gallipoli, recommended a complete revision of Appendix II-F, Notice to Client Pursuant to *R. 4:23-5(a)(1)*, and a completely new form, Appendix II-G, Notice to Client Pursuant to *R. 4:23-5(a)(2)*.

Use of these forms is mandated by the amended rule, to provide notice to the litigant who is delinquent in responding to interrogatories as to the consequences of such inaction and as to what must be done to avoid such consequences.

See also section I. W. of this report for proposed amendments to *R. 4:23-5* that the Committee recommends.

The proposed amendments to Appendix II-F and Appendix II-G follow.

APPENDIX II-F

NOTICE TO CLIENT/PRO SE PARTY PURSUANT TO R. 4:23-5 (a)(1)

[PLEASE BE ADVISED that a motion has been made in the above entitled matter seeking to

- dismiss your complaint
- suppress your answer
- dismiss your counterclaim

for your failure to answer the interrogatories of the _____ in this matter.

Said motion will be heard on the _____ day of _____ 19__ at 9:00 a.m. before the Superior Court of New Jersey, _____ Division, _____ County, at the _____ Courthouse, _____, New Jersey, before Judge _____.

You have the right to appear and be heard at this time and place.

Very truly yours,

Attorney for

_____]

Enclosed is a copy of the court's order which

- dismisses your complaint.
- strikes your answer and defenses.
- other (be specific).

This order can be vacated only by a formal motion. You must supply fully responsive and certified answers to the

interrogatories served on behalf of _____ (name) _____
prior to the filing of such a motion, and you must pay a
restoration fee of \$100.00 if the motion to vacate is made
within 30 days after entry of this order and in the amount of
\$300.00 if the motion is made thereafter.

Failure to file such a motion within 90 days after the
entry of this order may result in the imposition of counsel
fees and the assessment of costs against you or may forever
preclude the restoration of the pleading(s) filed on your
behalf.

Please be guided accordingly.

Note: Amended _____ to be effective _____
_____.

APPENDIX II-G

NOTICE TO CLIENT/PRO SE PARTY PURSUANT TO R. 4:23-5(a)(2)

Please be advised that a motion has been filed with the court by _____ (name of party) seeking to dismiss with prejudice the pleading(s) filed on your behalf. This relief is being requested because a previous order of dismissal without prejudice was entered and you have still not furnished fully responsive and certified answers to interrogatories. If this motion is granted, your claim will be dismissed and may not be subject to restoration or your answer will be stricken and judgment by default may be entered against you.

This motion will be heard at the courthouse, _____ (address) _____, New Jersey, on _____ (date) _____, 199_, at 9:00 a.m., before Judge _____.

You have the right to appear before the court and you will be afforded the opportunity to explain any exceptional circumstances that may exist to preclude the court from granting the relief requested. If you are pro se, your appearance before the court on the return date of the motion is mandatory.

Please be guided accordingly.

Note: Adopted _____ to be effective _____.

IV. PROPOSED RULE AMENDMENTS AND OTHER RECOMMENDATIONS TRANSMITTED TO THE SUPREME COURT OUT-OF-CYCLE

The Civil Practice Committee operates on a two-year term, with its report to the Supreme Court due in mid-January of the second year. Those recommended rule amendments that the Supreme Court adopts normally take effect in the September following the submission of the report. On occasion, however, the Supreme Court directs the Civil Practice Committee to consider a matter, and make recommendations for rule amendments, on an emergent basis. The following matters have been handled in this manner, and the Committee's recommendations already submitted to the Court.

A. Proposed Amendments to Rules 1:2-2, 1:3-4, 1:9-1, 1:21-1, 1:38, 1:40-7 and 4:70-4 -- "Housekeeping"

The Supreme Court approved a completely revised and expanded Part VII of the Rules of Court, addressing practice in the municipal courts. These new Part VII rules take effect on February 1, 1998.

A search of Parts I and IV of the rules revealed several references to the municipal court rules that must be changed to reflect revised Part VII. The "housekeeping" amendments to *Rules* 1:2-2, 1:3-4, 1:9-1, 1:21-1, 1:38, 1:40-7 and 4:70-4, which correctly referenced the newly adopted Part VII rules, were submitted to the Court on January 5, 1998 to take effect on February 1, 1998.

The amendments to *Rules* 1:2-2, 1:3-4, 1:9-1, 1:21-1, 1:38, 1:40-7 and 4:70-4 follow.

1:2-2. Trial Courts; Verbatim Record of Proceedings

In the trial divisions of the Superior Court and in the Tax Court, all proceedings in court shall be recorded verbatim except, unless the court otherwise orders, pretrial and settlement conferences, calendar calls, and ex parte motions. Ex parte proceedings pursuant to R. 4:52 and R. 4:67 shall, however, be recorded verbatim subject to the availability of either a court reporter or a recording device. In the municipal courts, the taking of a verbatim record of the proceedings shall be governed by [R. 7:4-5] R. 7:8-8.

Note: Source—R.R. 3:7-5 (first sentence), 3:7-10(d) (fifth sentence), 4:44-2 (first sentence), 4:44-5, 4:61-1(b). Amended June 20, 1979 to be effective July 1, 1979; amended December 20, 1983 to be effective December 31, 1983; amended July 26, 1984 to be effective September 10, 1984; amended January 5, 1998 to be effective February 1, 1998.

1:3-4. Enlargement of Time

(a) ... no change

(b) ... no change

(c) Enlargements Prohibited. Neither the parties nor the court may, however, enlarge the time specified by R. 1:7-4 (motion for amendment of findings); R. 3:18-2 (motion for judgment of acquittal after discharge of jury); R. 3:20-2, R. 4:49-1(b) and (c) and [R. 7:4-7] R. 7:10-1 (motion for new trial); R. 3:21-9 (motion in arrest of judgment); R.3:21-10(a) and [R. 7:4-6(f)] R. 7:9-4 (motion for [correction or] reduction or change of sentence); R. 3:23-2 (appeals to the Law Division from judgments of conviction in courts of limited criminal jurisdiction); R. 3:24 (appeals to the Law Division from interlocutory orders of courts of limited criminal jurisdiction); R. 4:40-2(b) (renewal of motion for judgment); R. 4:49-2 (motion to alter or amend a judgment); and R. 4:50-2 (motion for relief from judgment or order).

Note: Source—R.R. 1:27B(a) (b) (c) (d) (e), 4:6-1, 8:12-5(a) (b). Paragraph (c) amended July 7, 1971, effective September 13, 1971. Paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; paragraph (c) amended July 26, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended January 5, 1998 to be effective February 1, 1998.

1:9-1. For Attendance of Witnesses; Forms; Issuance; Notice
in Lieu of Subpoena

A subpoena may be issued by the clerk of the court or by an attorney or party in the name of the clerk or as provided by [R. 7:3-3] R. 7:7-8 (subpoenas in certain cases in the municipal court). It shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. If the witness is to testify in a criminal action for the State or an indigent defendant, the subpoena shall so note, and shall contain an order to appear without the prepayment of any witness fee. The testimony of a party who could be subpoenaed may be compelled by a notice in lieu of subpoena served upon the party's attorney demanding that the attorney produce the client at trial. If the party is a corporation or other organization, the testimony of any person deposable on its behalf, under R. 4:14-2, may be compelled by like notice. The notice shall be served in accordance with R. 1:5-2 at least 5 days before trial. The sanctions of R. 1:2-4 shall apply to a failure to respond to a notice in lieu of a subpoena.

Note: Source—R.R. 3:5-10(a)(b), 4:46-1, 6:3-7(a), 7:4-3 (second paragraph), 8:4-9(a)(b); caption and text amended November 27, 1974 to be effective April 1, 1975; amended July 13, 1994 to be effective September 1, 1994; amended January 5, 1998 to be effective February 1, 1998.

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

(a) ... no change

(b) ... no change

(c) Prohibition on 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)] R. 7:6-2(a) (pleas in municipal court), [R. 7:4-4(a)] R. 7:8-7(a) (presence of defendant in municipal court) and by [R. 7:7-4] R. 7:12-4(d) (municipal court violations bureau), a business entity other than a sole proprietor shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(d) ... no change

(e) ... no change

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 and paragraph (e)(8) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e), and (e)(7) amended, and paragraph (e)(9) added July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (e) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended January 5, 1998 to be effective February 1, 1998.

RULE 1:38. CONFIDENTIALITY OF COURT RECORDS

All records which are required by statute or rule to be made, maintained or kept on file by any court, office or official within the judicial branch of government shall be deemed a public record and shall be available for public inspection and copying, as provided by law, except:

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

(g) Records of programs approved for operation under [R. 7:3-2] R. 7:8-1;

(h) ... no change

(i) ... no change

(j) ... no change

Note: Source—R.R. 1:29-2 (second and third sentences), 1:35. Paragraph (f) adopted April 1, 1974 effective immediately; paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (e), (f) and (g) amended and paragraphs (h) and (i) adopted November 7, 1988 to be effective January 2, 1989; paragraph (j) adopted July 13, 1994 and new text amended December 9, 1994, to be effective January 1, 1995; paragraph (g) amended January 5, 1998 to be effective February 1, 1998.

1:40-7. Mediation of Minor Disputes in Municipal Court

Actions

(a) Referral. A mediation notice may issue pursuant to [R. 7:3-2] R. 7:8-1 requiring the parties to appear at a mediation session to determine whether mediation pursuant to these rules and guidelines is an appropriate method for resolving the minor dispute. No referral to mediation shall be made if the complaint involves (1) serious injury, (2) repeated acts of violence between the parties, (3) clearly demonstrated psychological or emotional disability of a party, (4) incidents involving the same persons who are already parties to a Superior Court action between them, or (5) matters arising under the Domestic Violence Act.

(b) ... no change

Note: Adopted July 14, 1992 to be effective September 1, 1992; paragraph (a) amended January 5, 1998 to be effective February 1, 1998.

4:70-4. Penalties; Payment; Hearing

(a) Payment Upon Plea of Guilty. For violations where the statutory penalty does not exceed \$50 for each offense, including where the minimum statutory penalty does not exceed \$50 for each offense, the defendant at any time before the hearing date, upon presentation of a signed plea of guilty and waiver of trial endorsed on the summons, may pay the penalty and costs by appearing before the court or violations clerk or by mailing the same to the court or violations clerk subject to the limitations prescribed in [R. 7:7] R. 7:12-4.

(b) ... no change

(c) ... no change

Note: Source—R.R. 7:13-6A, 7:13-7, 7:13-8, 7:13-9; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended January 5, 1998 to be effective February 1, 1998.

B. Proposed Amendments to Rules 4:74-7 and 4:74-7A -- re Civil Commitment of Adults and Minors

The Supreme Court in *In the Matter of the Commitment of N.N.*, 146 N.J. 112 (1996), directed the Civil Practice Committee to develop a court rule consistent with the holding in that case. The Civil Practice Committee's Mental Commitments Subcommittee drafted amendments to *R. 4:74-7* to apply specifically to the civil commitment of adults and prepared a new rule, *R. 4:74-7A*, to conform with *N.N.* and to apply specifically to the civil commitment of minors. The Supreme Court adopted the amendments to *R. 4:74-7* and new *R. 4:74-7A* on January 22, 1997 to take effect on March 1, 1997.

The amendments to *Rules 4:74-7* and *4:74-7A* follow.

4:74-7. Civil Commitment - Adults

(a) Applicability; Definitions. [The] This rule applies to the civil commitment of persons 18 years of age or older, and the definitions contained in N.J.S.A. 30:4-27.2 apply [to this rule].

(b) Commencement of Action. An action for commitment shall be commenced either through a screening service referral or upon independent application for a temporary court order. All clinical and screening certificates shall be in the form prescribed by the Department of Human Services subject to the approval of the Administrative Director of the Courts.

(1) Screening Service Referral. A person who has been involuntarily admitted to a short-term care or psychiatric facility or special psychiatric hospital on referral by a screening service may be detained by the facility or hospital without court order for not more than 72 hours from the time the original screening certificate was executed. During that period the facility or hospital may institute proceedings by filing with the court both the original clinical certificate completed by a psychiatrist on the patient's treatment team and the original screening certificate executed by a psychiatrist or other physician affiliated with the screening service. A copy of the certificates shall be filed with the office of the county adjuster.

(2) Independent Applications. If the screening service procedure is not employed, proceedings for involuntary commitment may be initiated by filing an application supported by

two clinical certificates, at least one of which is prepared by a psychiatrist, stating that the person is in need of involuntary commitment. The originals shall be filed with the court and copies with the office of the county adjuster. If the application is made after a voluntary patient requests discharge from a facility or hospital, the patient may be detained for not more than 48 hours after the request or until the end of the next working day, whichever is later. If proceedings are instituted by independent application, there shall be no involuntary commitment prior to entry of a temporary commitment order by the court.

[All clinical and screening certificates shall be in the form prescribed by the Department of Human Services subject to approval by the Administrative Director of the Courts.]

[(i)] (3) Certificates for Adults.

(A) Contents. If the patient is an adult, the certificates shall state with particularity the facts upon which the psychiatrist, physician or mental health screener relies in concluding that (1) the patient is mentally ill, (2) that mental illness causes the patient to be dangerous to self or others or property as defined by N.J.S.A. 30:4-27.2h and -.2i, and (3) appropriate facilities or services are not otherwise available.

[(ii)] Certificates for Minors. If the patient is a minor, the certificates may alternatively state with particularity the facts upon which the psychiatrist, physician or mental health screener relies in concluding that the patient is in

need of intensive psychiatric therapy that cannot practically or feasibly be rendered in the home or in the community or on an outpatient basis.]

[(iii)] (B) [Non-Execution of Certificates.] Persons Disqualified. A person who is a relative by blood or marriage of the person being examined shall not execute any certificate required by this rule. If the screening service referral procedure is used, the same psychiatrist shall not sign both the screening certificate and the clinical certificate unless that psychiatrist has made a reasonable but unsuccessful attempt to have another psychiatrist conduct the evaluation and execute the certificate.

(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. [In the case of a minor, the hearing shall be within 14 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 14 days [for an adult and not more than seven days for a minor].

2. Assignment of counsel to present the case for involuntary commitment as required by statute.

3. Assignment of counsel to represent an unrepresented patient[. If the patient is a minor, a guardian ad litem shall be appointed to represent 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 majority, and no guardian ad litem appointed pursuant to this rule shall be relieved without court order. Assigned counsel and guardian ad litem] , whose fees shall be fixed by the court after hearing and paid pursuant to paragraph (i) of this rule.

4. The persons to be notified by the county adjuster of the admitting county of the time and place of hearing, the mode of service of the notice, and the time within which notice must be served. [In no case of adult commitment, however, shall n]Notice shall be served not less than 10 days prior to the date of the hearing, nor shall any mode of service of the notice on the patient be permitted other than personal service. [In the case of the initial hearing for a minor, notice shall be served no less than five days prior to the hearing.] In addition to the patient, the patient's

counsel, and the patient's guardian or guardian ad litem, if any, notice shall also be given to the county counsel, the nearest relatives of the patient, the county adjuster of the county in which the patient has legal settlement, and the director, chief executive officer or other individual who has custody of the patient. The court may order notice to be served on any other person. The form of notice served upon the patient and the patient's counsel or guardian ad litem shall include a copy of the temporary court order, a statement of the patient's rights at the hearing and the screening or clinical certificates and supporting documents.

(d) Discovery. Any rule, regulation or policy of confidentiality notwithstanding, the patient's counsel or guardian ad litem shall have the right to inspect and copy all records relating to the patient's mental condition, including the patient's clinical chart. The court may also order testing or examination of the patient by an independent psychiatrist, psychologist or other expert. The cost of such examination and the expert's fee for testifying, if any, shall be borne by the person or public body charged with the patient's legal settlement.

(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. Any expert witness who is to testify shall prepare a written report and shall make it available to the court and all counsel no later than one business day prior to the hearing. The report shall be in a form prescribed by the Department of Human Services and subject to approval by the Administrative Director of the Courts, and designed to minimize the burden on hospital administrative and clinical resources while still accomplishing its objective. 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) Final Order of Commitment, Review.

(1) Entry of Order. The court shall enter an order authorizing [the] involuntary commitment [of an adult patient] if it finds, by clear and convincing evidence presented at the

hearing that the patient is in need of continued involuntary commitment by reason of the fact that (1) the patient is mentally ill, (2) mental illness causes the patient to be dangerous to self or dangerous to others or property as defined in N.J.S.A. 30:4-27.2h and -.2i, (3) the patient is unwilling to be admitted to a facility for voluntary care, and (4) the patient needs care at a short-term care or psychiatric facility or special psychiatric hospital because other services are not appropriate or available to meet the patient's mental health care needs. [Alternatively, if the patient is a minor, the order may be entered if the court finds that the patient is in need of intensive psychiatric therapy that cannot practically or feasibly be rendered in the home or in the community or on an outpatient basis.]

(2) Review. [If the patient is an adult, the] The order shall provide for periodic reviews of the commitment no later than (1) three months from the date of the first hearing, and (2) nine months from the date of the first hearing, and (3) 12 months from the date of the first hearing, and (4) at least annually thereafter, if the patient is not sooner discharged. The court may schedule additional review hearings but, except in extraordinary circumstances, not more than once every 30 days. If the court determines at a review hearing that involuntary commitment shall be continued, it shall execute a new order. [If the patient is a minor, the commitment shall be reviewed every three months from the date of its entry until the minor is discharged or reaches majority.] All

reviews shall be conducted in the manner required by paragraph (e) of this rule except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration of two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no more than three months prior thereto. The court may, in its discretion, at a review hearing, where the advanced age of the mental patient or where the cause or nature of the mental illness renders it appropriate, and where it would be impractical to obtain the testimony of a psychiatrist (as required in paragraph (e)), support its findings by the oral testimony of a physician on the patient's treatment team who has personally conducted an examination of the patient as close to the hearing date as possible, but in no event more than five days prior to the hearing date. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(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 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) Discharge.

(1) Order of Discharge. If the court concludes at the review hearing that the evidence does not warrant continued commitment, it shall order that the patient be discharged. The facility shall discharge the patient as soon as practicable but no later than 48 hours after the court's verbal order or by the end of the next working day, whichever is later. An order discharging the patient may contain conditions for discharge, such as attendance at a non-residential mental health facility or other form of supervision provided the court finds that the patient's history indicates a high risk of rehospitalization because of the patient's failure to comply with discharge plans. Conditions shall be recommended by the facility and mental health agency staff and developed with the participation of the patient, shall be specific, and shall not exceed 90 days in duration except as otherwise provided by law. The continuation of any such conditions shall be subject to periodic review as provided by paragraph (f) hereof.

(2) Order of Conditional Extension Pending Placement. If a patient otherwise entitled to discharge cannot be immediately discharged due to the unavailability of an appropriate placement, the court shall enter an order conditionally extending the patient's hospitalization and scheduling a placement review hearing within 60 days thereafter. If the patient is not sooner discharged, a second placement review hearing shall be held no later than six months after the

initial placement review hearing and subsequently at no greater than six-month intervals. At all placement review hearings the court shall inquire into and receive evidence of the patient's placement as is necessary to support the entry of an order conditionally extending the patient's hospitalization. At all placement review hearings, the hospital employee who has primary responsibility for placing the patient shall prepare a written report and shall make it available to the court and all counsel no later than one business day prior to the hearing. The report shall be in a form prescribed by the Department of Human Services and subject to approval by the Administrative Director of the Courts, and designed to minimize the burden on hospital administrative and clinical resources while still accomplishing its objective. If the court is advised at a hearing that an appropriate placement is available, it shall forthwith order such placement. If an appropriate placement becomes available during the interval between scheduled hearings, the patient may be administratively discharged to said placement.

The patient shall have the right to counsel in all placement review proceedings. Notice of the date, time and place of all hearings shall be given the patient and patient's counsel no later than ten days prior to the hearing. The patient's counsel shall be entitled to inspect and copy all records relating to the patient's condition including the patient's clinical chart and all records relating to place-

ment, to introduce evidence and to cross-examine adverse witnesses.

(3) Access to Appropriate Records for Placement. Whenever a person is or has been voluntarily admitted or involuntarily committed to [an institution] a facility under N.J.S.A. Title 30, Article 4, and whose certificates, applications, records and reports, therefore, are controlled by N.J.S.A. 30:4-24.3 and it appears that disclosure of said records is necessary to plan for or implement the placement of the person in a less restrictive or alternative environment, and the patient is unable or unwilling to give informed consent for said disclosure, a petition for the release of such records and the authority to execute any and all documents necessary to effectuate such placement, including but not limited to any and all applications and financial forms, may be made pursuant to R. 1:6 as follows:

[(i)] (A) Contents. The petition shall set forth the person or facility making the application, the name of the patient, the type of facility in which placement is sought, the commitment status of the patient, the reasons for the request, the response of the patient and his or her next-of-kin, and the relief requested.

[(ii)] (B) Service; Protective Order. A copy of the petition shall be served on the patient and the patient's attorney, if any. The court may in its discretion appoint an attorney to represent an unrepresented patient. The court

shall enter a protective order to preserve the confidentiality of the records to the greatest extent possible.

(i) Order for Payment.

(1) The patient's legal settlement and provision for payment of the expenses of the patient's care and treatment shall be determined by the court on petition of the county adjuster, which shall be accompanied by a report stating the results of the county adjuster's investigation and the county adjuster's recommendations. The county adjuster's petition and report shall be served upon the patient or the patient's legal guardian if any, the patient's attorney, and any person who may be legally responsible for payment. The petition shall set forth the name and address of the county adjuster and the address of the court and shall state that any objection to the recommendations of the county adjuster shall be filed with the court and served upon the county adjuster within 20 days after service of the petition and report. The petition shall further state that if no objection is filed within the 20-day period, the court may enter an order imposing liability in accordance with the recommendations of the report of the county adjuster. If no objection is filed, the court may enter an appropriate order based on the petition. If an objection is filed, an order may be entered only after a hearing on notice, which may be summary in nature.

(2) The person or public body charged with the responsibility for payment of the expenses of the patient's care and treatment shall also be charged with the fee of assigned

counsel and guardian ad litem and reasonable costs, including the costs of experts, incurred by either of them in representing the patient. If the assigned counsel or guardian ad litem is employed by a legal services project, counsel's fee shall be ordered payable thereto. If counsel is employed by the State or county, no fee allowance shall be made.

(j) Filing. All documents referred to in this rule shall be filed in the County [Clerk's] Adjuster's office together with an affidavit of service of all notices herein required. The files of the County [Clerk] Adjuster shall not, however, be open to inspection by any person other than assigned counsel, guardian ad litem and the [county adjuster] Deputy Clerk of the Superior Court except on court order in exceptional circumstances and for good cause shown.

[(k) Institutionalization of Minors.]

A minor shall be institutionalized for the treatment of mental illness only upon court order entered in accordance with the procedures prescribed by paragraphs (b) through (g), inclusive, of this rule except that, irrespective of whether the standard of involuntary commitment stated by this rule is met, any minor 14 years of age or over may request admission to an institution for psychiatric treatment provided the court on a finding that the minor's request is voluntary, enters an order approving the admission. If an order approving a voluntary admission of a minor is entered, the minor may discharge himself or herself from the institution in the same manner as an adult who has voluntarily admitted himself or

herself. An order approving a voluntary admission shall be reviewable as provided by paragraph (f) of this rule, however, said review may be summary. This rule shall not be construed to require any court procedure or approval for the admission of a minor by the minor's parent, parents, or other person in loco parentis to any institution for the evaluation or diagnosis of a mental condition provided the admission does not exceed seven days. If further hospitalization is then required, the applicant shall proceed in accordance with paragraph (e) of this rule. If an application for commitment is made during such admission, the final hearing shall be held within 20 days of the initial inpatient admission to the facility, adjournable only in accordance with subparagraph (c)(1) of this rule.]

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 July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2), (c)(1) and (4), (e), (f), (h)(2), (i)(1) and (2) and (k)

amended July 13, 1994 to be effective September 1, 1994;
amended January 22, 1997 to be effective March 1, 1997.

4:74-7A. Civil Commitment - Minors

(a) Definitions.

(1) Minor. A minor is any person who has not yet reached the age of eighteen.

(2) Childhood Mental Illness. Childhood mental illness means a current substantial disturbance of thought, mood, perception, or orientation which differs from that which is typical of children of a similar developmental stage, and which significantly impairs judgment, behavior, or capacity to recognize reality when also compared with children of a similar developmental stage. A seizure disorder, a developmental disability, organic brain syndrome, a physical or sensory handicap, or a brief period or periods of intoxication caused by alcohol or other substances is not sufficient by itself to meet the criteria for childhood mental illness.

(3) Dangerous to Self, Others or Property. The definitions in N.J.S.A. 30:4-27.2h and -27.2i shall apply to minors. With respect to a minor under 14 years of age, dangerous to self shall also mean that there is a substantial likelihood that the failure to provide immediate, intensive, institutional, psychiatric therapy will create in the reasonably foreseeable future a genuine risk of irreversible or significant harm to the child arising from the interference with or arrest of the the child's growth and development and, ultimately, the child's capacity to adapt and socialize as an adult.

(4) Children's Crisis Intervention Service. Children's crisis intervention service means a community-based acute care inpatient psychiatric service designated by the Commissioner

of the Department of Human Services to provide assessment, crisis stabilization, evaluation and treatment to children in need of involuntary commitment or eligible for parental admission or voluntary admission.

(b) Applicability. All provisions of R. 4:74-7 (Civil Commitment - Adults) shall be applicable to the commitment of minors, except as follows:

(1) The certificates required by R. 4:74-7(b) shall state with particularity the facts upon which the psychiatrist, physician or mental health screener relies in concluding that (a) the minor suffers from childhood mental illness, (b) the childhood mental illness causes the minor to be dangerous to self or others or property as defined in R. 4:74-7A(a) (3), and (c) the minor is in need of intensive psychiatric treatment that can be provided at a psychiatric hospital, special psychiatric hospital or children's crisis intervention service and which cannot be provided in the home, the community or on an outpatient basis.

(2) The order of temporary commitment prescribed by R. 4:74-7(c) shall fix a date certain for the commitment hearing within 14 days after the initial inpatient admission to the facility, which 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 seven days. Notice shall be served not less than five days prior to the hearing.

(3) A guardian ad litem, other than the applicant for the commitment, shall be appointed to represent the patient. 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, unless relieved by court order, continue to represent the minor in respect of all matters arising under this rule until the minor is either released or reaches majority. Assigned counsel and guardian ad litem fees shall be fixed by the court after hearing and paid pursuant to R. 4:74-7(i).

(4) A final order of commitment pursuant to R. 4:74-7(f) may be entered if the court finds that either:

(i) a minor fourteen years of age or older (a) suffers from childhood mental illness, (b) that the childhood mental illness causes the minor to be dangerous to self or others or property as defined by N.J.S.A. 30:4-27.2h and -27.2i and (c) that the minor is in need of intensive psychiatric treatment that can be provided at a psychiatric facility, special psychiatric hospital, or children's crisis intervention service and which cannot be provided in the home, the community or on an outpatient basis; or

(ii) a minor under fourteen years of age (a) suffers from childhood mental illness, (b) that the childhood mental illness causes the minor to be dangerous to self or others or property as defined by R. 4:74-7A(a) (3) and (c) that the minor is in need of intensive psychiatric treatment that can be provided at a psychiatric facility, special psychiatric hospital, or children's crisis intervention service and which cannot be provided in the home, the community or on an outpatient basis.

(5) The commitment shall be judicially reviewed no later than every three months from the date of its last entry until the minor is discharged or reaches the age of 18.

(6) The hearings on an application to convert to voluntary status pursuant to R. 4:74-7(g) shall be held within 14 days rather than the 20 days prescribed for adults.

(c) Voluntary Admission. Irrespective of whether the standard of involuntary commitment stated by this rule is met, any minor 14 years of age or over may request admission to a psychiatric facility, special psychiatric hospital, or children's crisis intervention service provided the court on a finding that the minor's request is informed and voluntary, enters an order approving the admission. If an order approving a voluntary admission of a minor is entered, the minor may discharge himself or herself from the facility in the same manner as an adult who has voluntarily admitted himself or herself. An order approving a voluntary admission shall be reviewable as provided by paragraph (b)(5) of this rule, however, said review may be summary.

(d) Parental Admission and Discharge.

(1) Admission. This rule shall not be construed to require any court procedure or approval for the admission of a minor by the minor's parent, parents, or other person in loco parentis to a psychiatric facility, special psychiatric hospital, or children's crisis intervention service for the evaluation or diagnosis of a childhood mental illness provided the admission is independently approved by a physician on the staff of the facility and does not exceed seven days. If

further hospitalization is then required, the applicant shall proceed in accordance with R. 4:74-7(e). If an application for commitment is made during such admission, the final hearing shall be held within 14 days of the initial inpatient admission to the facility, adjournable only in accordance with paragraph (b) (2) of this rule.

(2) Discharge. The admitting parent or other person in loco parentis shall have the right to have the minor discharged upon oral or written request. The psychiatric facility, special psychiatric hospital, or children's crisis intervention service shall discharge the minor as soon as practicable but no later than 48 hours after the request unless the facility obtains a temporary order of commitment.

Note: New rule relating to the commitment of minors adopted January 22, 1997 to be effective March 1, 1997.

C. **Recommendations Relating to Real Estate Practice (In Re Opinion 26 of the Committee on the Unauthorized Practice of Law)**

In *In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 N.J. 323 (1995), the Supreme Court held that the practice of conducting real estate closings without the presence of attorneys representing the buyer and the seller does not constitute the unauthorized practice of law so long as the broker satisfies certain notice requirements. The Civil Practice Committee was directed to make recommendations for practical means of achieving the Court-imposed notice requirements and for developing such additional protections for unrepresented parties at real estate closings as it may deem necessary and desirable in light of the Court's decision.

In accordance with the Court's instructions, the Committee established a Subcommittee on Real Estate Practice (Opinion 26), chaired by retired Appellate Division Judge Richard S. Cohen and including a number of experienced real estate practitioners. The essential recommendation of the subcommittee was the mandatory inclusion, as the first page of the broker-prepared contract, of a notice to buyer and seller pointing out the pitfalls of proceeding without an attorney. The subcommittee's recommendations were endorsed by the full Committee and approved by the Supreme Court in the 1994-96 term.

Thereafter, the New Jersey State Bar Association voiced several additional concerns with respect to Opinion 26, which the Court directed the Committee to address. The subcommittee held an additional hearing on the issues raised by the Bar, which had to do primarily with the kind of title

exceptions that only an attorney can clear as opposed to those that a real estate person may clear.

The subcommittee concluded and the full Committee agreed that no further action on the part of the Committee or the Court with respect to the Bar-proposed classification of title exceptions was appropriate or necessary. A recommendation to this effect was submitted to the Supreme Court.

D. Report of the Assignment Judges' Committee to Review the Use of Peremptory Challenges

The Supreme Court asked for the views of the Civil and Criminal Practice Committees "before the end of this calendar year" on the recommendations of the Assignment Judges' Committee that a) the number of peremptory challenges be significantly reduced in both civil and criminal cases, and b) that programs on conducting more effective *voir dire*s be made part of judicial education and training. The Civil Practice Committee asked its Jury Subcommittee for its views and recommendations. The subcommittee took the position, in which the full Committee concurs, that the problem lies not in the number of peremptory challenges allowed but in the cursory manner in which many judges conduct *voir dire*. The quality of the *voir dire* must improve significantly before reduction in the number of permissible peremptory challenges can be considered.

The Committee chair advised the Court of the Committee's position.

V. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to R. 1:40-4 -- Mediation - Generally

The Supreme Court Committee on Complementary Dispute Resolution approved an amendment to R. 1:40-4 that would provide for parties to share the mediator's fees equally, when referred to mediation by the court. At present, under the civil mediation pilot program, the first six hours of mediation are free; thereafter, a flat fee of \$150 is to be split among the parties.

The Committee vigorously opposed the proposed amendments, identifying many problems with the proposed amendments, including questioning whether the court has the authority to order parties to mediation for which they must not only pay the mediator but their own attorneys, as well.

The Complementary Dispute Resolution Committee will be advised of the Civil Practice Committee's views. The latter group will consider at its next meeting the issue of the court's authority to refer a case to a mediator who charges fees directly to the parties.

See section II. E. of this report for a discussion of the reasons for the Committee's rejection of the proposed amendments to R. 1:40-4.

B. Proposed Amendments to Rules 4:12-4 and 4:14-6 -- re Certified Shorthand Reporters

The Certified Shorthand Reporters Association of New Jersey recommended amendments to two rules:

- R. 4:12-4, to prohibit a court reporter from working in a case in which he or she is under contract to a party
- R. 4:14-6(a), to add to the certification requirement that neither the reporter nor his or her employer is in a contractual relationship with any party or attorney in the action.

The Committee tabled this matter pending receipt of additional information describing more fully the nature of the problem the proposed amendments purport to address.

C. **Proposed Amendments to R. 4:14-7 -- Subpoenas for Taking Depositions**

A trial attorney proposed revising R. 4:14-7 to address conducting depositions of out-of-state experts using video conferencing technology. The Committee noted that the rule as now written would certainly allow such a procedure, provided all parties agreed. It was also noted that the Judiciary is now piloting video arraignments, which pilots would test the efficacy of video technology for court proceedings.

This proposal was referred to the Discovery Subcommittee, which will review it in the next term.

D. Proposed Amendments to Rules 4:68, 4:87-4 and 4:90 -- re Escheat

The Deputy Attorney General who handles escheat matters provided a recommendation for amending the court rules to conform with the Uniform Unclaimed Property Act and other substantive law. The Committee tabled the item until a future meeting, so that the proposal could be studied thoroughly.

E. Further Amendments to R. 1:8 -- re Juries

In the 1996-98 term, the Jury Subcommittee, chaired by the Hon. Barbara Byrd Wecker, intends to take up the following issues:

- allowing limited juror questions
- permitting attorneys to make interim opening and closing arguments
- providing jurors with written copies of appropriate charges

See section I. F. of this report for proposed amendments to R. 1:8 that the Committee recommends.

F. Local Rules/Sanctions

The Supreme Court asked the Committee to evaluate the problem of local sanctions and make recommendations for rule amendments, if any, needed to deal with the problem.

The Committee took the unanimous position that local rules of any kind -- apart from those connected with court-approved pilots and special programs -- are indefensible, but enforcement of a policy prohibiting local rules can only be carried out by the Chief Justice.

The Committee was divided on whether the court has the inherent authority to impose sanctions not specifically provided for by rule, although there was agreement that, if such authority exists, it may be exercised in individual cases only. The Committee will consider this issue and others relating to local rules and sanctions in the next term.

G. Fair Foreclosure Act

The Fair Foreclosure Act Subcommittee, chaired in the 1996-98 term by the Hon. Patrick J. McGann, Jr., deferred any recommendations for rule changes until experience was gained under the Act and under the "interim procedures" the Supreme Court has put in place to guide practitioners in complying with the Act. The subcommittee will review the issue in the next term.

VI. MISCELLANEOUS MATTERS

A. Rule 1:21-7 -- Contingent Fees

A Committee member and member of the 1994-96 term's Contingent Fee Subcommittee pointed out that the disparity between the fee on a \$1 million recovery for an adult versus a minor under the old (*i.e.*, pre-September 1, 1996) schedule as opposed to the same recovery under the new schedule may tend to encourage trials rather than settlements of cases involving minors, thereby placing the minor's recovery at risk. The Committee did not feel it necessary formally to advise the Supreme Court of this possible but unintended outcome of the amended rule.

**B. Proposed Amendments to Rules 2:12-2, 2:12-3 and 2:12-10 -- re
Petition for Certification**

A trial judge recommended several appellate rule amendments to ensure that the trial court receives notice of the petition for certification and of the Supreme Court's decision on the petition. This proposal was sent to the Appellate Division Rules Committee for consideration. That committee does not support the proposed amendments.

C. Proposed Amendments to R. 4:4-2 -- Summons: Form

A local bar association proposed an amendment to *R. 4:4-2* to remove language that seems to imply that an individual is entitled to free legal representation from the bar association in certain Family Part proceedings. In addition, an attorney proposed changes to the summons form contained in Appendix XII-A of the rules to make it more usable in Family Part actions. The Committee declined to recommend the proposed changes to *R. 4:4-2* and to the language of the summons form itself, but referred these items to the Family Practice Committee so that it may determine if any changes to Part V of the rules are necessary or if a separate Family Part summons form should be developed.

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

Philip Geron, president of the New Jersey Association of Process Servers, has urged that the Court establish controls over private process servers, *e.g.*, by licensing them. He submitted for the Committee's review proposed legislation to this effect.

The Committee determined not to act on this issue until some form of licensing legislation is introduced.

E. Proposed Amendments to Rules 4:4-4 and 4:4-5 -- re Service of Process

The Law Revision Commission's (LRC's) Tentative Report on the Service of Process proposes eliminating all legislation relating to service of process except those provisions addressing substituted service. The Committee voted to support the proposal. John Cannel, Esq., Executive Director of the LRC, was advised of the Committee's position. If and when the legislation is passed, the Committee will revise *Rules* 4:4-4 and 4:4-5 accordingly.

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

The Law Revision Commission's (LRC's) Tentative Report on Civil Arrest calls for the repeal of the statutes relating to *capias ad satisfaciendum* and *capias ad respondendum*. The Committee voted to support the proposal. John Cannel, Esq., Executive Director of the LRC, was advised of the Committee's position. If and when the *capias* statutes are repealed, the Committee will revise R. 4:51 accordingly, leaving the *ne exeat* provisions of the rule intact.

G. Proposed Amendments to R. 4:65-2 -- Notice of Sale; Posting and Mailing

Rule 4:65-2 was amended effective July 3, 1995 to except mortgage foreclosure actions from the rule's expanded notice requirements. As a result of work by the Law Revision Commission, S-1433 was introduced in July 1996, which would further modify notice procedures relating to public sales. The Committee drafted amendments to *R. 4:65-2* to conform with the pending legislation. At the writing of this report, however, S-1433 was awaiting Senate vote. As such a vote was not scheduled to occur in the final legislative session of 1997, the bill will die.

If and when legislation affecting notice requirements for public sales is passed, the Committee will recommend appropriate amendments to *R. 4:65-2*.

H. Proposed Amendments to Rules 4:86-4 and 4:86-6 -- re Guardianship of an Incompetent

The Assistant General Counsel for the New Jersey Hospital Association proposes rule changes to require that incompetency hearings be held within a brief, specified time period after the complaint is filed and to allow for the appointment of a temporary guardian.

The same proposal was also sent to the Judiciary-Surrogates Liaison Committee. The chair of that committee responded to the author of the proposal, advising that, upon a showing of urgency, the court can under the present rules set a short date for the incompetency hearing and can also, when appropriate, appoint a temporary guardian.

I. **Proposed New R. 5:4-4 -- Service of Process in Non-Dissolution Paternity and Support Proceedings**

The Committee does not object to, and has no comment on, the Family Practice Committee's proposal to adopt a new rule that would permit the entry of child support and paternity orders by default, based on mailed service of process. The Civil Practice Committee takes the position that the proposed amendments are entirely within the expertise and jurisdiction of the Family Practice Committee.

J. Certification of Questions of Law

The Supreme Court asked the Committee to consider whether New Jersey should adopt a rule that would establish, for litigation pending elsewhere that involves an important but unsettled question of New Jersey law, a procedure for the out-of-state court to "certify" that question of law to the New Jersey Supreme Court for resolution. Professor Robert Carter chaired the subcommittee that was appointed to study the issue. The subcommittee was unable to come to agreement on the matter, and issued both a majority and minority report.

The majority report of the subcommittee recommended the adoption of a rule that would allow the Court, in its own discretion, to resolve unsettled and important questions of New Jersey law that may be certified to it by Federal circuit courts and by the highest appellate courts of other states. Such a rule is in place in 43 other states; these states were surveyed and reported that the certification mechanism is used sparingly but that its existence is beneficial.

The minority report of the subcommittee expressed the view that the constitutional problems raised by the proposed certification mechanism are too serious and the benefits of the procedure too insignificant to warrant the Committee's recommendation of such a rule.

The full Committee voted in favor of making no recommendation as to the constitutionality of a certification procedure. It strongly opposed a rule establishing a procedure for certifying questions of law from state appellate courts. The full Committee was evenly divided, however, on the

issue of establishing a procedure for certifying questions of law from Federal circuit courts.

The majority and minority reports of the Subcommittee on Certification of Questions of Law are included as an appendix to this report.

Respectfully submitted,

Hon. Sylvia B. Pressler, Chair
Hon. Stephen Skillman, Vice-Chair
Hon. Leonard N. Arnold
Philip G. Auerbach, Esq.
Frank G. Basile, Esq.
Michael S. Berger, Esq.
Glenn P. Callahan, Esq.
Hon. John F. Callinan
Prof. Robert A. Carter
John C. Carton, Esq.
Gail W. Chester, Esq.
Hon. Richard S. Cohen
Karol Corbin-Walker, Esq.
Hon. David S. Cramp
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Richard Kahn, Esq.
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M. Karen Thompson, Esq.
Mary F. Thurber, Esq.
Sandra Thaler-Gerber, Esq.
Hon. Barbara Byrd Wecker
Hon. Lawrence Weiss

Jane F. Castner, Esq., AOC Staff

Dated: January 15, 1998

APPENDIX

Committee on Civil Practice Meeting of April 7, 1997

Report of the Subcommittee on Certification of Questions of Law to the Supreme Court

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Majority Report of the Subcommittee on Certification

The Subcommittee was asked to consider whether New Jersey should adopt a Court rule that would establish, for litigation pending elsewhere that involves an important unsettled question of New Jersey law, a process for the referring court to "certify" such a legal question to our State Supreme Court for its disposition.

As of 1995 forty-three states¹ had adopted some form of a certification process. Last year the Executive Committee of the State Bar Association met with members of the Court and advocated that the Court institute such a procedure. The Bar Association currently is lobbying for legislation that would purport to require the Supreme Court to do so. In addition, some of the federal judges in the Third Circuit have written opinions encouraging the New Jersey Supreme Court to establish such a process. A formal recommendation to that effect was set forth in the 1996 Annual Assessment Report of the United States District Court for New Jersey. Evidently Chief District Judge Thompson also has raised the idea informally with Chief Justice Poritz.

The Supreme Court accordingly has requested the Civil Practice Committee to provide it with recommendations on the subject.

Summary. A majority (four out of six) of the Subcommittee members recommends that the Court adopt a Rule that would enable the Court, *in its own discretion*, to resolve unsettled important questions of New Jersey law that may be certified to it by federal *circuit* courts and the *highest appellate* courts of *other states*. The majority members believe that such a Rule would be useful to have available in diversity cases and other matters where federal and other state courts could make erroneous guesses about New Jersey law. Opinions based on such mistaken speculation can produce unjust outcomes for the parties. They also can mislead legal researchers that would look to such cases as persuasive authority in the absence of a New Jersey decision on point. The dissenting Subcommittee members believe that a certification process would create undue litigation delay and expense, would needlessly burden the Court, and would place the Court in an essentially advisory role inconsistent with its ordinary appellate functions. The majority shares the dissenters' concerns, but believes that the institutional advantages of having such a process outweigh the disadvantages, particularly since our Supreme Court would retain the discretion, under the Subcommittee's recommended Rule, to refuse to accept certification in any given case.

All of the Subcommittee members, albeit to various degrees, have concerns about the constitutionality of such a Rule under the Judicial Article of the 1947 State Constitution. Article VI literally confines the Supreme Court's appellate jurisdiction to specified categories of "causes" that come before it, *see* Art. VI, §II, ¶2 and §V, ¶1. It also grants the Court original jurisdiction, but only "as may be necessary to the complete determination of any cause on review." Art. VI, §V, ¶3. In a typical certification process, the referring courts would retain jurisdiction to render judgment in the actual cases involved; the New Jersey Supreme Court

¹ The other states without a certification process appear to be Arkansas, California, Missouri, North Carolina, Pennsylvania and Vermont.

would be simply answering specific legal questions posed to it. Further, the Court has historically indicated that it is constitutionally forbidden from issuing advisory opinions. Although the certification scenario differs from the classic instance of an "advisory opinion," in that there is a live, litigated controversy between adversarial parties, there may be enough similarities to conclude that certification is likewise beyond the Court's constitutional role. On the other hand, it has been suggested that the Court could justify a certification rule under its plenary authority to regulate "practice and procedure" in Article VI, §II, ¶3.

The Subcommittee majority believes that there is a sufficiently colorable argument of constitutionality to warrant presenting a proposed certification Rule to the Supreme Court, recognizing that the Court itself would be the final arbiter of any constitutional challenge to such a Rule. If a constitutional amendment is indeed required to establish a certification process, the Subcommittee *unanimously* disfavors the pursuit of such an amendment. This issue is not of such importance to warrant such a major undertaking.

Assuming, *arguendo*, that the Court wanted to establish a certification procedure, all of the Subcommittee members believe that such a procedure should be highly restrictive. We believe that a certification Rule should be designed in a manner that gives the Supreme Court the maximum flexibility to decline or to reformulate any certified question, and to determine the manner in which it chooses to address it. In that vein, the Subcommittee drafted a proposed Rule that attempts to enumerate those principles.

Discussion. The Subcommittee reviewed a sizeable amount of the literature on certification. Among other sources, it considered various materials helpfully assembled by Magistrate Hedges of the District Court, including a 1995 American Judicature Society study of certification; a staff paper from the Federal Judicial Center; a segment from the 1995 "long-range plan" prepared by the United States Administrative Office of the Courts; and a staff memorandum from the National Center for State Courts. The Subcommittee also reviewed memoranda on the subject prepared by Magistrate Hedges, which included the results of several interviews that he had conducted with federal judicial officers from around the country concerning their experiences with certification. The Subcommittee further examined a number of judicial opinions and orders involving certified questions of law, as well as the 1967 and 1995 versions of a model certification rule contained in the Uniform Laws Annotated.

It appears that the number of states with a certification process has grown in recent decades. The first state to adopt such a procedure was Florida in 1945. More states did the same, particularly after the United States Supreme Court held in 1974 in *Lehman Bros. v. Schein*, 416 U.S. 386, that federal courts in diversity cases could refer state-law questions to state courts with a certification process. Between 1983 and 1995 the states having a certification process increased from 25 to the present 43.

Despite the widespread availability of certification in most states, it does not appear that the process is frequently utilized in practice. A 1983 study by the Federal Judicial Center (FJC) reported that the median number of cases that were certified, over a three year period, by each federal judge within the FJC survey was only 2.18. Likewise, one of the memoranda from

Magistrate Hedges indicated that the Third Circuit Court of Appeals only rarely has certified questions of law to the courts of Delaware (the only state in the Circuit that presently has a certification process), perhaps two or three times before. It appears from the materials that federal judicial officers are generally cautious in certifying questions to state tribunals (although it should be noted that the 1983 FJC study did indicate that one of the judges it surveyed had used certification eleven times in a three year period).

The state supreme court justices with certification experience who responded to the American Judicature Society's 1995 survey "indicated a high level of satisfaction" with the certification process. About 87% of the state court justices told the ALS that they were either "very satisfied" or "somewhat satisfied" with their most recent certification experience. According to the AJS, "[a]lmost all of the justices" who responded to its survey felt that the federal judges certifying questions to them had correctly concluded that there were no controlling decisions on the state-law point in question. The ALS also reported that most of the responding state justices thought that the certified questions which had been referred to them had been framed with sufficient clarity.

Perhaps the most pointed endorsement of a certification process for New Jersey was articulated by Circuit Judge Becker in his 1995 dissent in *Hakimoglu v. Trump Taj Mahal Associates*, 70 F.3d 291 (3d Cir. 1995):

The lack of a certification procedure disadvantages both New Jersey and the federal judiciary. Especially in cases such as this where little authority governs the result, the litigants are left to watch the federal court spin the wheel. Meanwhile, federal judges, by no means a high-rolling bunch, are put in the uncomfortable position of making a choice. In effect, we are forced to make important state policy, in contravention of basic federalism principles. See Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671 (1992). The possibility that federal courts may make interpretive assumptions that differ from those of the state court further complicates this process. States like New Jersey lacking certification procedures face the threat that federal courts will misanalyze the state's law, already open to varied interpretations, by inadvertently viewing it through the lens of their own federal jurisprudential assumptions.

* * *

Certification is not a panacea, and can inflict delay on litigants. See Geri Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 Ark. L. Rev. 305 (1994). But this is an argument for exercising the authority wisely--not for denying it altogether.

Id., 70 F.3d at 302, 303 (footnotes deleted). Judge Becker was "enthusiastically joined" in this

part of his dissent by Judges Alito and Nygaard. As a recent illustration, Federal District Judge Orlovsky noted last year in a diversity case involving an unsettled question of New Jersey's entire controversy doctrine, that he would have certified the question to the New Jersey Supreme Court if our State had a certification procedure. *Hulmes v. Honda Motor Co.*, 924 F. Supp. 673, 677 (D.N.J. 1996).

One of the key practical concerns of the Subcommittee was whether the record of a case would be sufficiently developed before a question of law raised in that case would be certified to the Supreme Court of New Jersey. The Supreme Court should not be burdened with abstract or insignificant legal questions, or questions that should not be answered without the benefit of a substantial factual context. The Subcommittee majority felt that such dangers would be minimized by limiting certification to cases referred to the Supreme Court by *appellate* courts. By the appellate stage of litigation, it is more likely that the issues are sharpened and the case record sufficiently developed to provide a proper context for the Supreme Court's consideration. In addition, there ordinarily already would be a judicial opinion in the case (e.g., by the federal district court) analyzing the novel issue of New Jersey law involved. Such a prior decision would function as the equivalent of an "opinion below" to help provoke the Supreme Court's own analysis. For these reasons, all of the Subcommittee members were opposed to allowing trial-level courts (e.g., federal *district* courts) to certify questions to the Supreme Court, despite the practice of many other states to permit such referrals.

The Subcommittee was divided on whether the certification process, if one is adopted in New Jersey, should enable referrals from *state* appellate courts in addition to the federal *circuit* courts. Four of the Subcommittee members favored the inclusion of the highest state appeals courts in a proposed certification Rule, finding no principled difference between the highest state courts and the federal circuit courts for these purposes. Two of the Subcommittee members (including one of the general supporters of a certification Rule) would prefer to limit the process to the federal circuit courts, noting that the quality of state appellate systems varies widely across the country. One of the dissenters on this point also felt that certification is a poor way to deal with inter-state conflict problems that are best left to principles of choice of law. The other dissenter indicated that he would support certification from other state courts if those states reciprocally would allow New Jersey courts to certify questions of law to such states.

The entire Subcommittee had reservations about the length of time that certification might consume for the litigants. Some of the data in the materials indicated that certification in other states often takes over two years to run its full course. There were also concerns about whether the availability of a certification procedure might lead to dilatory tactics by attorneys with cases in other jurisdictions. For example, counsel might conjure up an "unsettled" New Jersey law question for certification as a means of running up legal expenses, harassing adversaries, or staving off an adverse judgment. Certification also presents opportunities for forum-shopping. Nevertheless, the majority of the Subcommittee believed that these legitimate concerns of timing and expense could be addressed on a case-by-case basis, and that both the referring courts and our own Supreme Court would be apt to recognize (and deal with) dilatory tactics when they are manifest. While no one on the Subcommittee felt it appropriate to have a

Rule "mandate" a time-line for our Supreme Court's disposition of a certified question, the Subcommittee expected that the Court would, as a practical matter, be sensitive to the need to avoid protracting the process unnecessarily.

All of the Subcommittee members thought that any certification Rule should make clear that the Supreme Court would retain the discretionary authority to decline to answer a certified question, to reformulate it, or to answer it only in part if the Court deemed it appropriate. The members also envisioned that the Court ordinarily would render its disposition of the question in the form of a written opinion, and that such an opinion of the Court would have the same precedential value as any other of its opinions. Precedential treatment would make the certification process advantageous to the public at large (in authoritatively resolving open questions of New Jersey law) rather than just the litigants involved.

The Subcommittee deliberately refrained from endorsing any specific procedure to be followed in the Supreme Court upon its receipt of a certified question. The consensus was that the Court itself would know best (1) what sorts of papers, briefs, appendices, record materials and legal arguments that it would want in order to decide whether to accept the certified question and (2) if the question is accepted, on how to go about answering it. The Subcommittee believes that the Court itself should determine what, if any, role the litigants in the underlying case should be allowed to play in the Supreme Court's proceedings. Other than the actual certified question, a brief statement of the relevant facts, and a listing of counsel of record, the Subcommittee did not believe that a proposed certification Rule should require any other materials to go initially to the Supreme Court, unless and until the court directed otherwise. This would limit the burdens imposed by the certification process on the Court, at least at the initial phase in screening matters referred from other jurisdictions.

Attached to this memorandum is a modified version of the 1995 Uniform Certification of Questions of Law Rule, which reflects revisions made by the Subcommittee consistent with our views as expressed above.

Conclusion. As a final word, it should be mentioned that no one on the Subcommittee thought it imperative that New Jersey adopt a certification process, or that if one were adopted that the process would be employed with much frequency. The majority members of the Subcommittee did think that such a process would be useful--at least in the few instances where it *would* be invoked--as an avenue for clarifying unsettled questions of New Jersey law and reducing the instances of erroneous predictions about the status or meaning of our state law by other jurisdictions. Such a rule also would help promote comity between our own state courts and the other courts in our federal system. In any event, the Subcommittee hopes that this memorandum proves helpful to the full Committee in formulating a response to the Court's request for our input on this subject.

Minority Report of the Subcommittee on Certification

Summary. The minority of the subcommittee believes that constitutional problems raised by the proposed certification remedy are too serious and the benefits of the procedure too insignificant to justify the Committee in recommending any change.

Discussion. The Majority Report suggests that "there is a sufficiently colorable argument of constitutionality to warrant presenting a proposed certification Rule to the Supreme Court." We do not agree. We confine our dissent to the constitutional point.

1. The Appellate Jurisdiction.

The subject matter jurisdiction of the Supreme Court is set forth in N.J. Const., art. VI, sec. II, par. 2,² and art. VI, sec. V, par. 1³ and par. 3.⁴ The Court's legislative and administrative jurisdiction is set forth in art. VI, sec. II, par. 3⁵. Aside from the power to commence disciplinary proceedings against a sitting judge or justice by certifying his incapacity to the Governor pursuant to art. VI, sec. VI, par. 3, no other provision of the Constitution of 1947 grants power to the Court.

The New Jersey State Bar Association is lobbying for a statute adopting a certification procedure.⁶ The association necessarily must take the position that certified questions may be characterized as "appeals" within art. VI, sec. II, par. 1, for the only way in which the

² "2. The Supreme Court shall exercise appellate jurisdiction in the last resort in all cases provided in this Constitution."

³ "1. Appeals may be taken to the Supreme Court:

- (a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;
- (b) In causes where there is a dissent in the Appellate Division of the Superior Court;
- © In capital causes;
- (d) On certification by the Supreme Court to the Superior Court and, where provided by the rules of the Supreme Court, to the inferior courts; and
- (e) In such causes as may be provided by law."

⁴ "3. The Supreme Court and the Appellate Division of the Superior Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause or review."

⁵ "3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

⁶ *Hulmes v. Honda Motor Co.*, 924 F. Supp. 673, 678 n. 6.

Legislature may affect the Supreme Court's jurisdiction is by specifying "such causes as may be provided by law" under par. 1(e). Advocates of certification might find this characterization tempting, for "law" could be read to mean Rule of Court as well as statute. But, this reading would do violence to the ordinary meaning of the word "appeal." A question certified by a federal or other foreign court would not be heard for the purpose of revising errors of law or fact made in a judgment reached below, nor would it followed by a binding mandate on an inferior court. U.S. Magistrate-Judge Ronald J. Hedges, a supporter of certification, was unwilling to adopt the association's theory.⁷ We believe the Supreme Court would share his dislike for it.

2. The Original Jurisdiction.

Philip J. LiVolsi, a member of the New Jersey bar, wishing to contest the constitutionality of mandatory fee arbitration, filed an action in the U.S. District Court for the District of New Jersey. While that action was pending, the Supreme Court, exercising original jurisdiction, invited him to file a direct petition "for determination of the constitutionality of R.1:20A and further, to determine the intended scope and meaning of the aforementioned Rule." The bar association was permitted to file amicus and the attorney general filed to defend the rule, which was held constitutional. *In re LiVolsi*, 85 N.J. 576 (1981). The Court made clear that *LiVolsi* did not fall within the general grant of original jurisdiction.

It could be argued that we are exclusively an appellate body because the only explicit grant of original jurisdiction to this Court comes from N.J. Const. (1947), Art. VI, s. V, par. 3 . . . which permits original jurisdiction "as may be necessary to the complete determination of any cause on review." Plainly, this provision grants us original jurisdiction only over matters related to causes already before us. [Citations omitted.] We find, however, that N.J. Const. (1947) Art. VI, s. II, par. 3 provides this Court with an independent basis for exercising original jurisdiction in the case before us. This provision grants us "jurisdiction" over the "discipline of persons admitted" to the Bar.

LiVolsi, at 583.

As another example of "this Court's expansive authority" under art. VI, sec. II, par. 3, the Court cited *In re Gaulkin*, 69 N.J. 185 (1976) (Original jurisdiction exercised to hear challenge to Court determination that judges' spouses must refrain from political activity.) *Gaulkin*, the Court said, arose under the clause of sec. II, par. 3 giving power to make rules governing administration of all the courts, and so to "formulate court rules and policy." There is a third granting clause in par. 3, authorizing the Court to "make rules . . . subject to law, governing practice and procedure." Might that clause be the source of a third kind of original jurisdiction, in which certifications might be heard? We

⁷ "I assume that certification could never fall within the appellate jurisdiction of the Supreme Court." Hedges, *Memorandum to Cynthia Jacob, Esq.*, Sept. 10, 1996, p.4, n.2.

believe not. The two kinds of original jurisdiction created by *LiVolsi* and *Gaulkin* arise under constitutional clauses granting quasi-legislative power over substantive matters. The practice and procedure power is explicitly subject to (substantive) law, and any original jurisdiction arising under it would be limited to adjective matters. Certifications, by definition, involve questions of substantive state law. Judge Hedges would agree.⁸

3. Extraconstitutional Sources of Power.

Finding no power in the constitution, Judge Hedges would go outside it. He cites the Ohio and Oklahoma supreme courts, which have held that they may answer certified questions despite the absence of provisions granting jurisdiction in their state constitutions. The Ohio court's argument has two branches. The first is that deciding a certified question requires no jurisdiction.

"Jurisdiction" means "[t]he power to hear and determine a cause. . . ." *Sheldon's Lessee v. Newton*, (1854) 3 Ohio St. 494, 499. By answering a state-law question certified by a federal court, we may affect the outcome of the federal litigation, but the federal court still hears and decides the cause. Therefore, answering a certified question is not an exercise of jurisdiction.

Scott v. Bank One Trust Co., 62 Ohio St. 3d 39, 42; 577 N.E.2d 1077, 1079 (1991).

The Majority Report agrees with the Ohio court.

In a typical certification process, the referring courts would retain jurisdiction to render judgment in the actual cases involved; the New Jersey Supreme Court would be simply answering specific legal questions posed to it.

It seems to us that two things are wrong with this position. The first is that "jurisdiction" is not just the issuance of a coercive final order. We believe "simply answering specific legal questions," should properly be considered as much an exercise of jurisdiction in connection with certifications as it is with declaratory judgments. See, e.g., *Bergen County v. Port of N.Y. Authority*, 32 N.J. 303 (1960). This is particularly true when certification answers are to be given the effect of binding precedent, as the Majority Report advocates, and as is the practice with states which allow certification. See, *In re Richards*, 223 A.2d 827, 832 (Me. 1966); Wright, Miller & Cooper, *Federal Practice and Procedure*, sec. 4248 at 179 (1988 and 1990 Supp.)

Our second objection is that, even if answering a certification is not jurisdiction, that does not mean the Court can carry out the task without some source for the power to

⁸ "Certification implicates neither the appellate jurisdiction nor the original jurisdiction of the Supreme Court. Accordingly, if considered in jurisdictional terms, it would appear that a constitutional amendment would be required to empower the Supreme Court to answer a question certified to it." *Id.* at p. 2.

do so. The Ohio court finds that source in *Erie v. Tompkins*, 304 U.S. 64 (1938).

[O]ur jurisdiction under Section 2, Article IV cannot be the source of our power to answer such questions. If we have such power, we must seek it elsewhere. In our view, such power exists by virtue of Ohio's very existence as a state in our federal system. . . . Since federal law recognizes Ohio sovereignty by making Ohio law applicable in federal courts, the state has power to exercise and the responsibility to protect that sovereignty. Therefore, if answering certified questions serves to further the state's interest and preserve the state's sovereignty, the appropriate branch of state government--this court--may constitutionally answer them. The state's sovereignty is unquestionably implicated when federal courts construe state law. If the federal court errs, it applies law other than Ohio law, in derogation of the state's right to prescribe a "rule of decision." By allocating rights and duties incorrectly, the federal court. . . frustrates the state's policy that would have allocated rights and duties differently.

Scott v. Bank One Trust Co., 62 Ohio St. 3d 39, 42; 577 N.E. 1077, 1079-80 (1991).⁹

We are not convinced that the New Jersey Supreme Court would regard *Erie* as an affirmative grant of power to it from the federal government.¹⁰ Even if it were to do so, it is unclear where the Court would get the capacity to accept such a gift from a foreign sovereign.

There is one more possibility. The Florida supreme court, the first ever to accept certification, held that its Legislature had the ability to give it an extra-constitutional power to answer certified questions because

[I]t has been many times held by this court that, while the Legislature cannot restrict or take away jurisdiction conferred by the constitution, constitutional jurisdiction "can be enlarged by the legislature in all cases where such enlargement does not result in a diminution of the constitutional jurisdiction of some other court, or where such enlargement is not forbidden by the constitution." [Citations omitted].

Sun Insurance Office v. Clay, 133 So. 2d 735, 742 (1961).

⁹ The Oklahoma court's theory is similar:

This court needs no explicit grant of jurisdiction to answer certified questions from the federal court; such power comes from the United States Constitution's grant of state sovereignty.

Shebester Stallion Station v. Triple Crown Insurers, 826 P.2d 603, 606 n.4 (Okla. Sup. Ct. 1992).

¹⁰ *Erie* famously lays down what purports to be a constitutional principle without ever citing a particular constitutional provision for it. The most convincing defense of *Erie* doctrine as constitutional, Harlan's concurrence in *Hanna v. Plumer*, 308 U.S. 460 (1965), argues that the rule flows from the structure of the constitution as a document of delegated powers; the reason that state law is the rule of decision in diversity is that the states never gave to the federal government the power to make it otherwise.

Under our constitution any legislative attempt to enlarge the original jurisdiction of the Supreme Court diminishes the constitutional jurisdiction of another court. *Brady v. N.J. Redistricting Commission*, 131 N.J. 594, 606 (1992) (Statute vesting original jurisdiction in Supreme Court unconstitutional as violative of art. VI, sec. III, par. 2, granting Superior Court "original jurisdiction throughout the state in all cases.")

For the above-stated reasons, we question whether any rule providing for certification to the Supreme Court of questions of law from foreign courts would be constitutional.

Respectfully submitted,
Hon. Howard Kestin, J.A.D.
R. Carter

April 7, 1997

Draft Certification Rule¹

2:2-2A Answering Certified Questions of Law

- (a) The Supreme Court may answer a question of law certified to it by any appellate court of the United States, *or by the highest court of another state*², if the answer would be determinative of a pending litigation in the certifying court and New Jersey law on the issue is unsettled.
- (b) The Supreme Court may reformulate a question of law certified to it.
- © A certification shall contain:
- (I) The question or questions to be answered.
 - (ii) A statement of the facts relevant to the question.
 - (iii) The names and addresses of the counsel of record and of parties appearing without counsel.
- (d) The Supreme Court may require the certifying court to supply it with the record of the matter certified, or a portion thereof.
- (e) No papers, other than those described in subsections © and (d) of this rule, may be filed in connection with a certification, except by leave of court.
- (f) [Reserved].³

1. This draft was prepared by the Subcommittee on Certification on the basis of certain sections of the Uniform Certification of Questions of Law Act (1995).

2. The subcommittee voted 4-2 to include provision for certification from the highest court of another state; no subcommittee member favored the inclusion (provided for by the Uniform Act) of certification requests from "the highest court . . . of a tribe" or the highest court of "Canada, a Canadian province or territory, Mexico or a Mexican state."

3. This subsection is reserved for the technical requirements to be laid down for the filing of certification papers. It is suggested that it contain cross-references to appropriate portions of R.1:4 and R.2:6.

SUPPLEMENTAL REPORT
OF
THE SUPREME COURT COMMITTEE
ON
CIVIL PRACTICE

March 13, 1998

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I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendments to R. 2:13-1 -- Presiding Justice or Judge

The Committee supports two amendments to R. 2:13-1, proposed by the Clerk of the Supreme Court. The first, to paragraph (a), makes it clear that Orders signed by the Chief Justice relate to the administration of the court system and not to Supreme Court cases. The second, to paragraph (b), deletes language that currently, and erroneously, provides that the presiding judges of the Appellate Division parts must sign all orders.

The proposed amendments to R. 2:13-1 follow.

2:13-1. Presiding Justice or Judge

(a) Supreme Court. The Chief Justice or, pursuant to R. 1:33-1, the Acting Chief Justice, shall preside over sessions and conferences of the court and shall sign all orders [and other papers on behalf of the court] relating to the administration of the judicial system. If the Chief Justice is absent or unable to serve, the senior justice shall serve temporarily as presiding justice. Seniority shall be determined by order of taking of oath as a member of the court.

(b) Appellate Division. The presiding judge of each part, designated by the Chief Justice, shall preside over its sessions and conferences [and shall sign all orders and other papers on behalf of the part]. If the presiding judge is absent or unable to serve or if none has been designated, the senior judge attending shall serve temporarily as presiding judge. Seniority shall be determined by length of service on the Appellate Division. The Chief Justice shall designate one presiding judge to be responsible for the administration of the Appellate Division pursuant to R. 1:33-4.

Note: Source—R.R. 1:1-4, 1:1-6, 2:1-5, 2:1-8. Paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

B. Proposed Amendments to R. 4:4-4 -- Summons; Personal Service; In Personam Jurisdiction

The Clerk of the Superior Court suggested that, in conjunction with the Committee's recommendation to amend R. 4:4-3 to permit private service of process (see 1998 Report of the Supreme Court Committee on Civil Practice, January 15, 1998, section I.O.), the Committee also conform the out-of-state service provision of R. 4:4-4(b)(1)(A) by eliminating the requirement that service be made by a "public official." The Committee agreed to recommend this change.

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 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 (b)(1)(A) amended to be effective.

II. PROPOSED AMENDMENTS CONSIDERED AND REJECTED

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

The Special Civil Part Practice Committee recommended a change to R. 4:42-11(a) that would make the post-judgment interest rate the same for all judgments, regardless of amount. At present, the post-judgment interest rate for all judgments exceeding the monetary jurisdiction of the Special Civil Part (\$10,000) is the average rate of return of the New Jersey Cash Management Fund plus 2%; for judgments under \$10,000, the post-judgment interest rate is simply the average rate of return of the New Jersey Cash Management Fund. The Special Civil Part Practice Committee noted that only one other state (Maine) has different rates of interest based on the amount of the judgment, and that the rate of return on trust funds held by the Superior Court Clerk is the same regardless of the amount.

The chair of the Civil Practice subcommittee that studied this issue in the past reminded the Committee at its 12/8/97 meeting that the current rule was intended to create a disincentive for large judgment debtors not to pay without burdening consumers. The two-tier rate embodied in the current rule used \$10,000 as the amount below which the additional 2% should not be applied because this amount was a cut-off point already existing in the rules. Accordingly, the Committee voted against the Special Civil Part Practice Committee's proposal.

When the Committee's position was reported to the Special Civil Part Practice Committee, the chair of that committee wrote to his Civil Practice

Committee counterpart asking that representatives of the two committees meet to try to work out an acceptable approach to the problem. In accordance with that request, two conference calls were held, involving former members of the Civil Practice Committee's now disbanded Post-Judgment Subcommittee and members of the Special Civil Part Practice Committee's Post-Judgment Subcommittee.

The Civil Practice subcommittee recommended that the differentiated interest rate be maintained. It reminded the Committee that another rationale in support of the additional 2% for judgments over \$10,000 is to make it less attractive for defendants (carriers) to take an appeal than to pay.

The full Committee unanimously agreed to recommend maintaining the current, differentiated rate structure.

B. Proposed Amendments to R. 1:8-8 -- Papers, Exhibits, Instructions, etc., to Jury Room

In its January 15, 1998 report to the Supreme Court (see section I.F.), the Civil Practice Committee recommended amendments to R. 1:8-8(a) to provide that the court may, under certain circumstances, permit "in its discretion and at such time and in such format as it shall determine" the submission to the jury of individual copies of any exhibit. Subsequently, the Jury Subcommittee, chaired by the Hon. Barbara Byrd Wecker, proposed a further amendment to this rule, explicitly to permit the use of juror notebooks.

The Committee does not support this proposed additional amendment, noting that the proposed amendment recommended in the January 15, 1998 report is broad enough to encompass submission of exhibits to the juror in many formats, without explicitly identifying notebooks.

III. OTHER RECOMMENDATIONS

A. Local Sanctions

The Civil Practice Committee reviewed a considerable amount of information, a great deal of which was supplied by the Acting Administrative Director of the Courts, evidencing a wide variety of practices from vicinage to vicinage and from courtroom to courtroom regarding the imposition of sanctions on lawyers for failure either to comply with a rule of practice or with a procedural order of the court. The Committee's concern is with the imposition of fines on lawyers, as opposed to the imposition of counsel fees and costs, for conduct which is not expressly so sanctionable by a rule of court, for example, R. 1:2-4 and R. 1:4-8.

Insofar as the Committee is able to discern from the information it has, there are three general variations on the theme. First is a directive by the Assignment Judge that predefined conduct will be uniformly sanctioned in a uniform manner and notice of the directive has been published at some time but not on a regular or continuing basis in a state-wide publication. Second is similar action by the Assignment Judge, notice of which is published only in the bar journal of the vicinage and is not the subject of statewide notice. Third is the non-institutionalized imposition of sanctions on an ad hoc case-by-case basis by a trial judge on the assumption of the inherent authority to do so. In this last case, the amount of the sanction imposed and the circumstances evoking the sanction vary widely. Where the sanctions are imposed by Assignment Judge directive, there is at least substantial uniformity in the amount of the sanction.

This described situation concerns the Civil Practice Committee on a number of levels, namely, the propriety of promulgating local rules, either with or without notice to the Bar at large, but without authorization by the Supreme Court;¹ whether there is, in fact, inherent authority in judges to impose sanctions beyond those expressly authorized by the rules; and whether, if there is authority, that authority should be exercised without any circumstantial or monetary guidelines, as is apparently now the case.

The issues are significant and complex, and the Committee's long-range plan is a Subcommittee study and report with a recommendation made by the Committee as a whole as early as possible during the next cycle. Such a Subcommittee was designated and instructed to start its work forthwith.

Recognizing, however, that the chaotic and disparate current practice should not be allowed to continue in its present form until a recommendation is made and the Supreme Court acts, the Committee voted with near unanimity to make the following interim recommendations for the following reasons.

1. Any local rule respecting sanctions, including a directive by an Assignment Judge or Presiding Judge, must be approved by the Supreme Court, as in the case of a pilot project, before the practice can either be instituted or continued. If the Supreme Court gives its approval, an

¹ The Civil Practice Committee has repeatedly over the years urged that local rules not be countenanced because of the extent to which they undermine the concept and the functioning of a unitary court system.

appropriate notice to the bar shall be published periodically in a journal of state-wide circulation.

2. The Committee was almost evenly divided with respect to the issue of whether or not the judges have the inherent authority to impose sanctions not expressly provided for by the rules, about half the Committee taking the view that it does and the other half taking the view that it does not. There appears, however, to be, at least preliminarily, general concurrence by the Committee with the proposition that judges should have that authority under stated egregious circumstances and monetary guidelines because of its utility in enforcement of the rules and of court orders without having to resort either to the contempt power or to the initiation of ethics proceedings.

Presumably those circumstances and monetary limitations will be addressed by the Subcommittee. In the interim, the Committee recommends that the trial bench be again instructed to report to the Acting Administrative Director any imposition of sanctions (other than counsel fees and costs), specifying the sanctioned attorney, the egregious sanctioned conduct, and the amount of the sanction. The Committee is of the view that this information will be of substantial assistance to the Subcommittee in its formulations and recommendations, although it recognizes that such a directive to the trial bench may have the counter-productive effect of suggesting to judges who do not now follow this practice that they have the power to do so, a still questionable proposition.

The Committee urges that these two interim recommendations, namely, reporting of information by individual judges and the obtaining of

IV. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to Rules 4:5-1 and 4:25-4 -- re Dual Representation of a Single Party

In *Venuto v. The Oak Tavern* (A-5308-95T2), decided October 8, 1997, the Appellate Division referred to the Committee the issue of whether the Court Rules should be amended, or a new rule adopted, to address a situation in which insurance carriers for a single defendant are represented by separate, potentially adversarial, counsel at trial.

A subcommittee, chaired by Richard A. Cohen, was appointed to study the matter of split representation, which also arises when punitive damages are at issue. The subcommittee will provide the Committee with its report and recommendations in the next term.

B. Rule Amendments to Rules 4:12-4 and 4:14-6 -- re Certified Shorthand Reporters

The Certified Shorthand Reporters Association of New Jersey recommends amendments to two rules:

- R. 4:12-4, to prohibit a court reporter from working in a case in which he or she is under contract to a party or attorney in the action
- R. 4:14-6(a), to add to the certification requirement that neither the reporter nor his or her employer is in a contractual relationship with any party or attorney in the action

The rules now prohibit a court reporter from working in a case when employed by a party in the action. The CSR Association proposal would extend the prohibition to situations in which the court reporter has a formal (written or oral), ongoing contractual relationship with a party or an attorney in the case, thus owing, or appearing to owe, some allegiance to the party or attorney.

Insofar as the proposal stems from issues of competition and economics -- *e.g.*, smaller court reporting firms finding it difficult to compete with larger firms that are "on retainer" to carriers and large corporations -- the Committee took the position that this is not a matter to be addressed by a rule change.

On the other hand, if the proposal is to address ethical issues, the Committee is willing to consider a rule amendment as a remedy. It tabled a full consideration of this aspect of the matter until the next term.

C. **Proposed Amendments to Rules 4:42-9 and 4:42-11 -- re Enforcement of Settlements**

In its January 15, 1998 report to the Supreme Court, the Committee declined to recommend an attorney's proposal for a rule amendment that would provide for an award of counsel fees, costs and post-judgment interest on a successful motion to enforce a settlement (see section II.T.). Subsequently, another attorney proposed changes to *Rules* 4:42-9 and 4:42-11 to encourage the honoring of settlement agreements by providing for attorney's fees in a successful motion to enforce a settlement and by adding a provision on settlements to *R.* 4:42-11.

The Committee agreed to consider this issue more fully in the next term.

D. Proposed Amendments to Rules Dealing with Mental Incompetency

Recently enacted legislation (P.L. 1997, c. 379) changed the designation of "mental incompetent" to "incapacitated person" in all laws, rules, regulations and documents.

The Committee determined to consider in the next term whether the rules of court should be amended in accordance with the statute, but also noted that the designation "incapacitated" is too broad, as the term encompasses both mental and physical incapacitation.

V. MISCELLANEOUS MATTERS

A. Jury Pilot

The Jury Subcommittee, chaired by the Hon. Barbara Byrd Wecker, proposed amendments to *R. 1:8-8* to permit (a) jurors' submission of written questions to be asked of witnesses by the judge, after consultation with the attorneys, and (b) interim opening and closing arguments, at the judge's discretion, in appropriate complex cases.

The Committee declined at this time to recommend amendments to *R. 1:8-8* to implement these proposals, but instead recommends that the Jury Subcommittee design a pilot, with three or four judges who would be willing to try the procedures. The Committee would consider the proposed amendments after some experience is gained with the pilot.

Respectfully submitted,

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Dated: March 13, 1998