

## Supreme Court Committee Reports

MONDAY, FEBRUARY 24, 1992

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1992 REPORT OF THE SUPREME COURT  
COMMITTEE ON CIVIL PRACTICEI. PROPOSED RULE AMENDMENTS RECOMMENDED  
A. Proposed Amendments to R. 1:2-1 -- Proceedings in  
Open Court; Robes

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

The proposed amendments to R. 1:2-1 follow:  
1:2-1. Proceedings in Open Court; Robes

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

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

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

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

The proposed amendments to R. 1:4-1 read as follows:  
1:4-1. Caption: Name and Addresses of Party and Attorney; Format

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

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

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

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

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

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

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

## 1:6-2. Form Of Motion; Hearing

- (a) ... no change  
(b) ... no change  
(c) ... no change

## (d) Civil and Family Part Motions - Oral Argument.

Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons

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Note: all proposed changes contained in the committee reports are highlighted in italic or italic bold text.

and shall be deemed denied unless the court otherwise advises, the request shall be granted as of right. Except as otherwise provided by paragraph (b) and insofar as is practicable, all subsequent motions in the cause, other

than motions directly addressed to the trial or arbitration calendar, shall be heard by the same judge who heard the first motion in the cause.

- (e) ... no change  
(f) ... no change

## Committee On Civil Practice

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Note: Source -- R.R. 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended ---- to be effective ----.

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

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

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

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

The proposed amendments to R. 1:7-4 read as follows:  
1:7-4. Findings by the Court in Non-Jury Trials and  
Motions

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

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

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

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

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

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

- (a) ... no change  
(b) ... no change

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

## (d) ... no change

Note: Adopted February 23, 1978 to be effective April 1, 1978. Any matter pending unheard before a County Ethics Committee as of April 1, 1978 shall be transferred, as appropriate, to the District Ethics Committee or the District Fee Arbitration Committee having jurisdiction. Any matter heard or partially heard by a county Ethics Committee on April 1, 1978

# Civil Practice

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shall be concluded by such Committee and shall be reported on in accordance with these rules; amended July 16, 1981 to be effective September 14, 1981. Caption amended and first two paragraphs amended and redesignated as paragraph (a); new paragraphs (b), (c) and (d) adopted January 31, 1984 to be effective February 15, 1984; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; *paragraph (c) amended to be effective* \_\_\_\_\_.

**1:20B-2. Appointment**

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

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

(b) ... no change

(c) ... no change

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

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

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

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

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

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

An attorney trust account shall be maintained only in New Jersey financial institutions approved by the Supreme Court which shall annually publish a list of such approved institutions. A financial institution shall be approved if it shall file with the Supreme Court an agreement, in a form provided by the Court, to report to the Office of Attorney Ethics in the event any properly payable attorney trust account instrument is presented against insufficient funds, irrespective of whether [or not] the instrument is honored; any such agreement shall apply to all branches of the financial institution and shall not be cancelled except upon 30 days notice in writing to the Office of Attorney Ethics. The agreement shall further provide that all reports made by said financial institution shall be in the following format: (1) in the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor; (2) in the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the attorney or law firm, the account number, the date of presentation for payment and the date paid, as well as the amount of the overdraft created thereby. Such reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor, if any; if an instrument presented against insufficient funds is honored, then the report shall be made within 5 banking days of the date of presentation for payment against insufficient funds. In addition to the reports specified above, approved financial institutions shall agree to cooperate fully with the Office of Attorney Ethics and to produce any attorney trust account or attorney business account records upon receipt of a subpoena therefor. Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable cost of producing the reports and records required by this rule. Every attorney or law firm in this state shall be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

(g) ... no change

(h) ... no change

(i) ... no change

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

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

**1:28-1. Purpose; Administration; Appointments**

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

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

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

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

(a) ... no change

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

(1) ... no change

(2) ... no change

(3) ... no change

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

(5) ... no change

(6) ... no change

(7) ... no change

(8) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

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

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

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

The Committee then sought the views of the Special Civil Part Practice Committee, as the issue of pro se partnership appearances is likely to arise in landlord-tenant matters. That group agreed that in most tenancy actions lay representation by a member of the landlord-business entity should be prohibited. The Special Civil Part Practice Committee, however,

would make an exception for general partnerships with four or fewer rental units.

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

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

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

(a) ...no change

(b) ...no change

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

(d) ...no change

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

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

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

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

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

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

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

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

(a) ...no change

(b) ...no change

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

(d) ...no change

(e) Appearances Before Office of Administrative Law.

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

(1) ...no change

(2) ...no change

(3) ...no change

(4) ...no change

(5) ...no change

(6) ...no change

(7) ...no change

No representation or assistance may be undertaken pursuant to subsection (e) by any disbarred or suspended attorney or by any person who receives any fee for such representation.

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

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

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

The proposed amendment reads as follows: 1:21-1A. Professional Corporations for the Practice of Law

(a) ...no change

(b) ...no change

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

(d) ...no change

(e) ...no change

(f) ...no change

Note: Adopted December 16, 1969 effective immediately; paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; paragraphs (a), (b), (c), (d) and (e) amended and paragraph (f) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended January 16, 1984, to be effective immediately; *paragraph (c) amended to be effective* \_\_\_\_\_.

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

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

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

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

**1:21-2. Appearances Pro Hac Vice**

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

(1) ...no change

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

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

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

(i) ...no change

(ii) ...no change

(iii) ...no change

(iv) ...no change

(v) ...no change

(vi) ...no change

(b) ...no change

(c) ...no change

(d) ...no change

Note: Source - R.R. 1:12-8. Amended December 16, 1969 effective immediately; caption and text amended November 27, 1974 to be effective April 1, 1975; amended January 10, 1979 to be effective immediately; former rule amended and redesignated as paragraphs (a) and (b) and paragraph (c) adopted

# Committee on Criminal Practice

This Report is divided into six sections. The first section includes rule amendments recommended for adoption; the second, rule amendments considered and rejected; the third, non-rule recommendations; the fourth, recommendations for legislative change; the fifth, matters held for future consideration; and the sixth, matters already acted upon by the Supreme Court. Section VI is included with respect to items already passed upon by the Supreme Court so there is a history of those rule amendments and administrative developments already adopted.

## I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

### 1. State v. Hall & Hudson

In *State v. Hall & Hudson*, 119 N.J. 165 (1990), two defendants, who had been released on bail pending trial, appeared in court on the morning of June 18, 1985 for a joint trial. The case was adjourned until the afternoon at which time the defendants failed to appear. The trial court ordered that the trial begin, finding that the defendants had voluntarily absented themselves. Defendants were tried and convicted in absentia. The Appellate Division reversed both convictions finding that the defendants had disappeared before the trial commenced as the "voluntary absence" provision of Rule 3:16 could not be invoked. The Supreme Court reversed holding that a "defendant's knowing, voluntary and unjustified absence before or after trial has commenced does not prevent trial from proceeding in absentia." Id. at 182. The Court instructed that R. 3:16 be amended to require trial courts to inform defendants at arraignment of the right to be present at trial and the consequences of their failure to do so. The Court also directed that the revised rule eliminate the distinction between defendants who elect to leave the trial after it commences and those who waive the right to be present before the trial begins. Ibid.

## REPORT OF THE SUPREME COURT COMMITTEE ON CRIMINAL PRACTICE 1990 - 1992 TERM

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#### VI. MATTERS ALREADY ACTED UPON BY THE SUPREME COURT

1. Uniform Defendant Intake Report
2. Trial of Criminal Offenses and Lesser Related Infractions

The Committee is recommending amendments to four rules in response to the Court's decision. An amendment to R. 3:9-1 is being proposed to require the court to inform the defendant at arraignment of his right to be present at trial and the consequences of his failure to appear for trial, including the possibility that the trial may occur in his absence. An amendment is also proposed to R. 3:16 which would

allow a defendant to waive his or her right to be present at trial. Such a waiver could be found from either the defendant's express written or oral waiver placed on the record, or through his or her conduct, if the conduct evidenced a knowing, voluntary, unjustified absence after he or she has received actual notice that his or her trial would commence that day

or on the next court date, or if the trial had commenced in the defendant's presence.

The Committee is recommending an amendment to R. 3:20-2 which would allow a defendant to make a motion for a new trial based on the claim that he did not waive his appearance for trial since there may be situations where the defendant may have had notice, but have had a legitimate reason for not being at trial, e.g., hit by a car on the way to court and unable to communicate that fact to the Court. The Committee is proposing, however, that there be a time limit for such motion, and that time limit be established as being prior to sentencing. Finally, the Committee is proposing amendment to R. 3:21-4(b) which would require that sentence not be imposed unless the defendant is present or has filed a written waiver of his right to be present.

The Committee, in proposing this rule, is doing so to comply with the Supreme Court request in *State v. Hall & Hudson*. However, Committee members have expressed concern about the scope of *Hall & Hudson* and the Committee believes that the practice of trials in absentia should be discouraged.

### 3:9-1. Arraignment

(a) *In Open Court*. Arraignment shall be conducted in open court and shall consist of reading the indictment or accusation to the defendant or stating to him the substance of the charge, and calling on him, after he is given a copy of the indictment or accusation, to plead thereto. The defendant may waive the reading of the indictment or accusation. At the arraignment, the dates for hearing of motions and a pretrial conference shall be set. *The court shall also inform the defendant of the right to be present at trial and the consequences of a failure to appear for trial.*

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it as herein prescribed within 7 days after the date it was signed unless the court otherwise orders therein.

(b) *Criminal Actions*. In criminal actions, unless otherwise provided by rule or court order, written motions (not made ex parte), briefs, affidavits, petitions, memoranda and other papers shall be served upon all attorneys of record in the action and upon parties appearing pro se.

Note: Source—R.R. 3:11-1(a), 4:5-1. Paragraph (a) amended July 16, 1979 to be effective September 10, 1979.

### COMMENT

The text of this rule as adopted as part of the 1969 revision made only minor language changes in the source rules. Paragraph (a) of the rule was amended effective September 1979 by the addition of the last sentence requiring the party obtaining an order or judgment to ensure its service on all other parties within seven days after its signing. This change was necessitated by the frequently occurring situation of failure of an opposing party to be timely notified of entry of the order and his consequent prejudice in taking further steps in the litigation within a prescribed time period triggered by the entry date. The effect of the rule is not only to impose the requirement upon the proponent attorney to make service, but also to monitor, as it were, the progress of his form of order or judgment from submission to signature.

Note that while this rule continues to except from service requirements judgments signed by the clerk, both R.R. 3:11-4(b) and 4:118-8 were eliminated. Those rules, which required the clerk of the court to give notice by ordinary mail to the interested parties (in criminal and civil actions, respectively) of the entry of orders had been generally complied with only in the case of final judgments, and such notice is generally superfluous and duplicative.

Failure of a moving party to comply with the service requirements of the rule will result either in the dismissal or adjournment of the motion. See *Zon. Bd. of Adj. v. Service Elec. Cable T.V.*, 198 N.J. Super. 370 (App. Div. 1985). See also R. 1:2-4 and Comment thereon.

### 1:5-2. Manner of Service

Service upon an attorney of papers referred to in R. 1:5-1 shall be made by mailing a copy to him at his office by ordinary mail, by handing it to him, or by leaving it at his office with a person in his employ, or, if his office is closed or he has no office, in the same manner as service is made upon a party. Service upon a party of such papers shall be made as provided in R. 4:4-4 or by registered or certified mail, return receipt requested, to his last known address; or if the party refuses to claim or to accept delivery, by ordinary mail to his last known address; or if no address is known, by ordinary mail to the clerk of the court. Where mailed

### 1:5-3. RULES OF GENERAL APPLICATION

Service is made upon a party, the modes of service may be made simultaneously.

Note: Source—R.R. 1:7-12(d), 1:10-10(b), 1:11-2(c), 2:11-2(c), 3:11-1(b), 4:5-2(a) (first four sentences); amended July 16, 1981 to be effective September 14, 1981.

### COMMENT

This rule, as adopted as part of the 1969 revision, followed the 1967 amendment of the source rules, which, in accordance with the then federal practice, permitted service of papers on attorneys to be made by ordinary mail. The 1969 version of the rule extended that practice to criminal actions as well as civil actions.

Also following the 1967 amendment of the source rule, this rule permits service by ordinary mail on parties who refuse or fail to accept certified or registered mail. Ordinary mail service, when certified or registered mail service fails, is also provided for under these circumstances by all of the rules permitting service of papers, including original process, by registered or certified mail. See, e.g. R. 4:4-4, 4:4-5. And see R. 1:5-4(a) and Comment thereon. This rule was amended, effective September, 1981, to permit ordinary mail service to be made simultaneously with registered or certified mail rather than after the failure of such mail service. The affidavit of service should, of course, recite the details pertaining to all mail modes employed. Cf. R. 6:2-3 and Comment thereon.

The final change in the practice made by the revised rule, is the provision that papers may be served on an attorney at his home only if he has no office or, at the time service is attempted, his office is closed. Cf. *Mestice v. Bd. of Adjustment of Neptune City*, 35 N.J. Super. 313, 317 (App. Div. 1955), disapproving service on an attorney by leaving papers in an unattended office after regular business hours.

Other related source rules were deleted for the following reasons:

R.R. 4:5-4 (service on corporation delinquent in taxes) was eliminated as obsolete, the applicable statute (N.J.S. 54:10A-20 and 54:10B-19) having been amended after the rule's adoption to require the Attorney General to proceed under the summary action rule.

R.R. 4:5-2(c) was eliminated for the reason that generally certification as true copies of papers to be served is unnecessary. The requirement of certification was however, retained by R. 4:67-3 (order to show cause), R. 4:60-7(h) (writ of attachment), and R. 6:7-2(b) (order for supplementary proceedings). Furthermore, if certification appears necessary under particular circumstances, the manner of making such certification may be provided for by court order without the need for a rule authorizing such an order.

### 1:5-3. Proof of Service

Proof of service of every paper referred to in R. 1:5-1 may be made (1) by an acknowledgment of service, signed by the attorney for a party or signed and acknowledged by the party, or (2) by an affidavit of the person making service, or (3) by a certificate of service appended to the paper to be filed and signed by the attorney for the party making service. The proof shall be filed with the court promptly and in any event before action is to be taken on the matter by the court. Where service has been made by registered or certified mail, the return receipt card shall be filed as part of the proof. Failure to make proof of service does not affect the

## Appendix D

### Referral Service

Advice on wills or by a new low-cost fee by the Middlesex

are income-eligible and Disabled Drug fee at an hourly rate \$ per will. Service has established zones presently are Patent/Copyright; Im-



Law). Lists to refer potential where they reside. The lists: Avenel; Carteret; Jersey and South Plain-

be included on the list if underrepresented. Please contact the mediation contact Monique



## Cape May Co. Files by Fax

Last year, the Cape May County Bar Association instituted a service to aid in the efficiency of filing documents with the Cape May County Courts at substantial savings to practitioners. The system has been extremely successful primarily with respect to motion practice. It has been, with proper permission, available for other pleading filings.

- 1.) Fax your document to the Cape May County Bar Office before 2 p.m. The Bar Association fax number is (609) 463-1656, the Bar office telephone number (for confirmation and special instructions) is (609) 463-0313.
- 2.) Your fax transmittal will be copied onto regular paper.
- 3.) Your papers will be delivered to the designated law or motions clerk before 4:30 p.m. that day.

The charge for the service, which is payable the next business day is as follows: \$30 for up to 15 pages, \$35 for up to 25 pages.

This service, previously available only to members of the Cape May and Atlantic County Bar Associations, is now available to any attorney.

The filing in service of the Cape May County Bar Association allows all practitioners, especially small and remote offices, ready, economical access to the courts. It aids the courts in their administration by making it easier to stick with the rule time guidelines.

Filing your court documents by fax is quick, easy and inexpensive. Contact the Cape May County Bar Association's Executive Director, Debra Wetherby, for more information.

The Middlesex County Bar Association has made arrangements with the United States Supreme Court to move the admissions of Middlesex County attorneys on May 4, 1992. We are currently making lodging arrangements for the weekend of May 2-3, and planning a trip to Washington in conjunction with the admission ceremony. Attorneys who



## CONTINUED FROM Preceding Page

including the possibility that a trial will take place in defendant's absence.

Note: Source -- R.R. 3:5-1. Paragraph (b) deleted and new paragraph (b) adopted July 7, 1971, to be effective September 13, 1971; paragraph (b) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended and paragraph (b) deleted July 21, 1980 to be effective September 8, 1980 [.] ; paragraph (a) amended \_\_\_\_ to be effective \_\_\_\_

## 3:16. Presence of the Defendant

The defendant shall be present at every stage of the trial including impaneling of the jury and the return of the verdict, and at the imposition of sentence, unless otherwise provided by rule [ ], but the defendant's voluntary absence after trial has commenced in his presence shall not prevent its continuing to and including the return of the verdict. Nothing in this Rule, however, shall prevent a defendant from waiving the right to be present at trial. A waiver may be found either from (a) defendant's express written or oral waiver placed on the record, or (b) defendant's conduct evidencing a knowing, voluntary and unjustified absence after (1) defendant has received actual notice in court that his or her trial will commence that day, or on the next court date, or (2) trial has commenced in defendant's presence. A corporation shall appear by its attorney for all purposes. The defendant's presence is not required at a reduction of sentence under R. 3:21-10.

Note: Source -- R.R. 3:5-4(a)[.]; amended \_\_\_\_ to be effective \_\_\_\_

## 3:20-2. Time for Making Motion

A motion for new trial based on the ground of newly discovered evidence may be made at any time, but if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial based on a claim that the defendant did not waive his appearance for trial shall be made prior to sentencing. A motion for a new trial based on any other ground shall be made within 10 days after the verdict or finding of guilty, or within such further time as the court fixes during the 10-day period.

Note: Source -- R.R. 3:7-11(a)(third and fourth sentences)[.]; amended \_\_\_\_ to be effective \_\_\_\_

## 3:21-4. Sentence

- (a) . . . No change  
 (b) **Presence of Defendant; [Defendant's] Statement.** Sentence shall not be imposed unless the defendant is present or has filed a written waiver of the right to be present. Before imposing sentence the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The defendant may answer personally or by his attorney.  
 (c) . . . No change  
 (d) . . . No change  
 (e) . . . No change  
 (f) . . . No change  
 (g) . . . No change  
 (h) . . . No change

Note: Source -- R.R. 3:7-10(d). Paragraph (f) amended September 13, 1971, paragraph (c) deleted and paragraphs (d), (e) and (f) redesignated (c), (d) and (e) July 14, 1972 to be effective September 5, 1972; paragraph (e) adopted and former paragraph (e) redesignated as (f) August 27, 1974 to be effective September 9, 1974; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraphs (d) and (e) amended August 28, 1979 to be effective September 1, 1979; paragraph (d) amended December 26, 1979 to be effective January 1, 1980; paragraph (g) adopted July 26, 1984 to be effective September 10, 1984; paragraph (d) caption and text amended November 5, 1986 to be effective January 1, 1987; paragraph (d) amended November 2, 1987 to be effective January 1, 1988; paragraph (d) amended January 5, 1988 to be effective February 1, 1988; new paragraph (c) adopted and former paragraphs (c), (d), (e), (f) and (g) redesignated (d), (e), (f), (g), and (h) respectively June 29, 1990 to be effective September 4, 1990[.] ; paragraph (b) amended \_\_\_\_ to be effective \_\_\_\_

## 2. R. 3:26-3

In *State v. Misik*, 238 N.J. Super. 367 (Law Div. 1989) the court urged the Criminal Practice Committee to study the issues arising out of the detention of material witnesses pursuant to the Material Witness Statute (N.J.S.A. 2A:162-2 et. seq.) for the purpose of creating procedures for implementing the statute. In *Misik*, the court issued a warrant for the arrest of Misik as a material witness, based on an ex parte affidavit and complaint made by law enforcement authorities that Misik had essential and material knowledge concerning the commission of certain crimes, and that his arrest was necessary because he would not be available through service of a subpoena. At the time of the application, no criminal action or proceeding of any kind had been commenced by the State against Misik or against his employer. The court issued the warrant after an in camera discussion with the assistant prosecutor concerning the basis of the State's authority to obtain the warrant for the arrest of Misik.

Misik was arrested, brought to the prosecutor's office and subjected to a lengthy custodial interrogation, and thereafter, detained overnight in the county jail, where he was treated like an ordinary prisoner. The next morning he was brought before the court handcuffed and in prison garb. Thereafter, the court ordered his release from custody on his own recognizance on condition that he personally report to confirm his whereabouts on a weekly basis to the prosecutor's office for a period of one month. At that time, leave was granted to Misik's attorney to file a brief in support of his challenge to the statute, and in opposition to the continuation of any restriction on Misik's personal liberty.

The court upheld the statute, but concluded that notice and an opportunity to be heard were required

before a person could be apprehended and/or detained as a material witness. The court prescribed certain procedures to be followed in the absence of any court rule or legislation, and urged the Criminal Practice Committee to study the issues arising out of the detention of material witnesses for the purpose of creating procedures in the Court Rules which would implement the statute.

The Committee agreed that it was desirable to have a rule which sets forth uniform procedures to be followed in implementing the statute. The Committee, therefore, is recommending an amendment to R. 3:26-3. As drafted, the rule would allow a Superior Court judge to bind a material witness who can give testimony relevant to the prosecution for a crime. There was some debate as to whether or not there should be a parallel procedure which would allow the defendant or prospective defendant to seek a detention. The Committee did not agree this was desirable and therefore the proposal does not contain such a provision. The proposal sets forth a procedure to be followed when the presence of a material witness is being requested. The process involves an application by the prosecutor which sets forth the grounds for belief the person has material information and the reasons why the person is unable to respond to a subpoena. If the judge finds, by a preponderance of the evidence, that an order requiring the material witness to appear is necessary, the proposal calls for a copy of the order to be served personally on the material witness. The order advises the defendant of when the hearing will take place (service must be at least 48 hours before the hearing) and that he has a right to counsel. The proposal contains a provision for the immediate detention of a material witness if the judge finds by clear and convincing evidence, that the witness won't be available unless immediately detained. A special procedure for immediate transportation to a judge, with a subsequent hearing the next day, is provided when this provision is utilized.

The proposal makes it clear that the least restrictive method available to assure the material witness's presence must be used. Detention is the last resort. Should detention be required, the proposal makes it clear that the detention shall not be in a jail or prison but in comfortable quarters. Additionally, the proposal allows for the taking of a deposition to preserve the witness's testimony. If this method is utilized, the material witness order is to be vacated. The Committee proposes the following rule for adoption.

## 3:26-3 Bail For Witness

(a) **Authority to Issue.** A Superior Court judge may [Every judge shall, when the interest of justice requires], upon application, bind with sufficient surety all persons who can give testimony [against one accused of] relevant to a prosecution for a crime [punishable by death, or imprisonment in state prison, whether or not the offender is arrested, imprisoned or bailed].

(b) **Application.** The application shall be captioned in Superior Court and titled "In the Matter of (name of person alleged to be a material witness)". The application shall include a copy of the pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) the grounds for belief that the person has material and necessary information concerning the pending criminal action and (3) the reasons why the alleged material witness is unlikely to respond to a subpoena. If the application requests an arrest warrant, the affidavit shall set forth why immediate arrest is necessary.

(c) **Order to Appear.** If a preponderance of evidence supports issuance of a material witness order against the person named in the application, the judge may order the person to appear at a hearing to determine whether the person should be adjudged a material witness. The order and a copy of the application shall be served personally upon the alleged material witness at least 48 hours before the hearing and shall advise the person of: (1) the time and place of the hearing and (2) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one.

(d) **Warrant for Immediate Detention.** If there is clear and convincing evidence that the person will not be available as a witness unless immediately detained, the judge may issue an order requiring that the person be brought before the court immediately. If the detention does not take place during regular court hours, the person shall be brought to the emergency-duty Superior Court judge. The judge shall inform the person: (1) the reason for detention, (2) the time and place of the hearing to determine whether the person is a material witness, and (3) that the person has a right to an attorney and to have an attorney appointed if the person cannot afford one. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not be available as a witness unless detention is continued, the judge may order the person held until the material witness hearing which shall take place on the next calendar day.

(e) **Material Witness Hearing.** At the material witness hearing, the person shall have the rights: (1) to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) to be heard and to present witnesses and evidence and unless otherwise sealed by the court for good cause, (3) to have all of the evidence in support of the application and (4) to confront and cross-examine witnesses. If there is clear and convincing evidence that the person possesses information material to the prosecution of a pending criminal action and is unlikely to respond to subpoena, the judge shall: (1) set forth findings of facts on the record, and (2) set the conditions of release of the material witness.

(f) **Conditions of Release or Detention.** Conditions of release for a material witness or for a person held on an application for a material witness order shall be the least restrictive to effect the order of the court including but not limited to: (1) placing the witness in the custody of a designated person or organization agreeing to supervise the person, (2) restricting the travel, association, or place of abode of the person during the period of detention or (3) setting bail. No person may be detained in the absence of posting bail when any other alternative will secure the appearance

of the person. A person detained as a material witness or pending a material witness hearing shall be lodged in comfortable quarters and shall not be held in a jail or prison.

(g) **Deposition.** The prosecutor, defendant or material witness may apply to the Superior Court for an order directing that a deposition be taken to preserve the witness's testimony, for use at trial if the witness becomes unavailable, as provided by R. 3:13-2. When a deposition is taken, the judge shall vacate the material witness order.

Note: Source -- R.R. 3:9-4[.]; first paragraph redesignated paragraph (a) and paragraphs (b), (c), (d), (e), (f) and (g) added \_\_\_\_ to be effective \_\_\_\_

The New Jersey Division of Criminal Justice has filed a dissent to the Committee's rule recommendation on this proposal. That dissent is contained in Appendix I.

## 3. R. 3:19-2

The Criminal Practice and Civil Practice Committees have been asked to prepare rule changes following the Supreme Court's opinion in *The Matter of the Commitment of Edward S.*, 118 N.J. 118 (1990). Edward S. was found not guilty of the murder of his landlady by reason of insanity. He was thereafter committed to the New Jersey State Forensic Hospital for the Criminally Insane. At a review hearing in 1987, counsel for Edward requested an in camera hearing pursuant to Rule 4:74-7(e), the rule governing ordinary civil commitments. The trial court denied the request and ruled that periodic review hearings for a person found not guilty by reason of insanity should not be held in camera. The Supreme Court granted Edward S.'s motion for leave to appeal and held that the mandate that periodic review hearings be held in camera where a civil commitment is involved does not apply to persons committed after verdicts of not guilty by reason of insanity. The Court held that the rules did not intend an in camera hearing for such commitments. Furthermore, the Court held that where the charge was murder, the various interests involved would be best served by a rule that presumptively required that these proceedings be open to the public.

A joint subcommittee of the Criminal and Civil Practice Committees was established to review the rules governing periodic hearings for persons found not guilty by reason of insanity. That subcommittee recommended changes, which were subsequently adopted by both Committees, to Rules 3:19-2 and 4:74-7 to implement the Court's decision in *Edward S.* The recommended changes go further than the Court's holding in *Edward S.* The Committees believe that although the holding in *Edward S.* dealt with a person charged with murder, the public policy underlying the holding should be extended to review hearings for anyone found not guilty by reason of insanity. Thus, the Committees recommend the following rules for adoption.

## 3:19-2. Acquittal by Reason of Insanity

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

[Upon the return of a verdict of "Not Guilty by Reason of Insanity" or entering of judgment to that effect by a court sitting without a jury, (1) The procedure for disposition of the defendant shall be provided by N.J.S.A. 2C:4-8 and 2C:4-9 and R. 4:74-7, except that all hearings pursuant to R. 4:74-

7(e) shall be in open court unless good cause is shown for a hearing in camera.

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

## 4:74-7. Civil Commitment

- (a) . . . No change  
 (b) . . . No change  
 (c) . . . No change  
 (d) . . . No change

(e) **Hearing.** No final order of commitment shall be entered except upon hearing conducted in accordance with the provisions of these rules. The application for commitment shall be supported by the oral testimony of a psychiatrist on the patient's treatment team who has conducted a personal examination of the patient as close to the court hearing date as possible, but in no event more than five calendar days prior to the court hearing. If a licensed psychologist has examined the patient, the court may also require the psychologist to appear and testify in the matter. Other members of the patient's treatment team may also testify at the hearing, as may the patient's next-of-kin if the court so determines. The patient shall have the right to appear at the hearing, but may be excused from the courtroom during all or any portion thereof if the court determines that because of the patient's conduct at the hearing it cannot reasonably continue while the patient is present. In no case shall the patient appear pro se. The patient, through counsel, shall have the right to present evidence and to cross-examine witnesses. The hearing shall be held in camera, except as otherwise provided by R. 3:19-2 (acquittal by reason of insanity).

- (f) . . . No change  
 (g) . . . No change  
 (h) . . . No change  
 (i) . . . No change  
 (j) . . . No change  
 (k) . . . No change

Note: Source -- paragraphs (a) (b) (c) (d) (e) (f) and (g) captions and text deleted and new text adopted July 17, 1975 to be effective September 8, 1975; paragraphs (a) (b) (c) (e) (f) amended and (j) caption and text deleted and new caption and text adopted September 13, 1976, to be effective September 13, 1976; paragraphs (b), (d), and (f) amended July 24, 1978, to be effective September 11, 1978; paragraph (f) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; paragraphs (e) and (f) amended and paragraphs (g)

and (h) caption and text amended November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended, subparagraphs (b)(1) and (2) adopted, paragraphs (c), (d) and (e) amended, caption and text of paragraph (f) amended, and caption and text of subparagraphs (g)(1) and (2) amended November 7, 1988 to be effective immediately; November 7, 1988 amendments rescinded February 21, 1989 retroactive to November 7, 1988; November 7, 1988 amendments reinstated June 6, 1989 to be effective June 7, 1989; subparagraph (c)(2) amended June 6, 1989 and to be effective June 7, 1989; paragraph (g) re-captioned 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; paragraph (e) amended \_\_\_\_ to be effective \_\_\_\_

## 4. R. 1:8-3

The Supreme Court in *State v. Brunson*, 101 N.J. 132 (1985) asked the Committee to develop a standardized procedure for the implementation of the exercise of peremptory challenges in criminal cases where the number of challenges allocated to the defense and to the prosecution is uneven. In the Committee's 1988 Annual Report, it recommended an amendment to R. 1:8-3 to provide for an order of exercise of peremptory challenges. In single defendant cases where there is an equal number of peremptory challenges, the amendment provided for an alternating of challenges. In single defendant cases where there is an unequal number of challenges, or in multi-defendant cases, the amendment proposed would have provided that the order of exercise would be established by the trial court in advance of the exercise of the first challenge. The Supreme Court rejected the Committee's rule recommendation, and asked the Committee to review the various alternatives in cases where the number of challenges is unequal.

There was a consensus among Committee members that there would be too many problems to overcome in drafting a rule that would deal with the myriad of possibilities in cases where the number of peremptory challenges was unequal. So, rather than attempt to do so, the Committee considered two alternatives to address the Court's remand of the issue. The first suggestion was for an equalization in the number of peremptory challenges. It was argued that equalizing the number of peremptories between defense and prosecution would make the system fairer. However, this was strenuously objected to as many members felt that the criminal justice system was already heavily weighted in favor of the prosecution, and that the decision regarding inequality in the number of peremptories was a deliberate act on the part of the Legislature to aid the defense in certain cases. A second suggestion was to have the judge set the order of exercise of peremptory challenges, but to let the parties know, prior to the commencement of the jury selection process, what the process would be. It was argued that a major problem in *Brunson* was that the trial court did not inform the parties of the process it was using until after they had already started exercising peremptories.

The Committee agreed that the latter suggestion was preferable to the former as it gave maximum flexibility to the judge to tailor the needs of the individual case in setting the order of peremptories while also giving both parties the ability to be heard and to know, prior to the commencement of the jury selection process, what the order of exercise would be. The theory being that if either side objects, they could seek leave to appeal to the Appellate Division. The Committee recommends the following amendment to R. 1:8-3.

## 1:8-3 Examination of Jurors; Challenges

- (a) . . . No change  
 (b) . . . No change  
 (c) . . . No change  
 (d) . . . No change  
 (e) **Order of exercising of peremptory challenges.**  
 (1) In any case where each side is entitled to an equal number of challenges, these challenges shall alternate one by one, with the State in a criminal case and the plaintiff in a civil case exercising the first challenge.  
 (2) In any case where there is more than one defendant and/or an uneven number of peremptory challenges, the order of challenge will be established by the court, which shall set forth on the record prior to the commencement of the jury selection process.  
 (3) The passing of a peremptory challenge by any party shall not constitute a waiver of the right thereafter to exercise the same against any juror, unless all parties pass successive challenges.

Note: Source -- R.R. 3:7-2 (b) (c), 4:48-1, 4:48-3. Paragraphs (c) and (d) amended July 7, 1971 to be effective September 13, 1971; 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 22, 1983 to be effective September 12, 1983; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (d) amended November 5, 1986 to be effective January 1, 1987 [.] ; paragraph (e) added \_\_\_\_ to be effective \_\_\_\_

## 5. Pro Hac Vice

In *Fuller v. Diesslin*, 868 F.2d 604 (3d Cir. 1989) cert. denied \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 203 (1989), the defendant requested, through local counsel, that he be represented pro hac vice by out-of-state lawyers. The trial court denied the defendant's motion on his belief that local counsel was competent and that the case was going to be hotly contested and that out-of-state lawyers would inconvenience the proceedings. On appeal, the Appellate Division upheld the decision of the trial court and the New Jersey Supreme Court denied certification. The defendant filed a writ of habeas corpus to the district court which granted the writ. The district court found that because the trial court did not make an individual determination of potential delay based on the facts of the case, the denial of the defendant's pro hac vice application deprived him of his right to counsel of

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choice. The district court held that the deprivation of the right to counsel is per se reversible and does not require a showing of prejudice.

The Third Circuit Court of Appeals affirmed the district court's order concluding that the right to counsel pro hac vice is encompassed within the right to counsel of choice and thus must be examined within the framework applied to those cases. That framework specifies that "a trial court's arbitrary denial of defendant's request for her counsel of choice requires per se reversal." 868 F.2d at 608. The Court also held, consistent with prior caselaw, that there must be reason stated for denying a criminal defendant's request for admission of out-of-state counsel pro hac vice to represent him, and that the denial cannot be arbitrary, or in the absence of specific findings which balance "the right to counsel with the demands of the administration of justice", 868 F.2d at 611. In light of the court's holding, the Committee believes it is advisable to amend R. 1:21-2 so as not to discourage judges from granting pro hac vice applications in criminal cases.

The Committee, together with the Civil Practice Committee, submitted its recommendation for amendment to R. 1:21-2 to the Court prior to the completion of this term. However, the Court decided not to amend the rule at its May 6, 1991 Administrative Conference, but asked that the recommendation be brought back for the Court's consideration during the normal 1992 Rule cycle. Accordingly, the following rule is being recommended to the Court.

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

- (1) 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;
- (2) the attorney is associated in the matter with New Jersey counsel of record qualified to practice pursuant to R. 1:21-1;
- (3) the client has requested to be represented by said attorney [; and], In criminal actions a motion so supported shall be granted unless the court finds, for specifically stated reasons, that there are supervening considerations of judicial administration. In civil actions the motion shall be granted only if the court finds, from its supporting affidavit, that (4) 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)(4)(vii) added \_\_\_\_ to be effective \_\_\_\_.

## 6. Private Residence Within a School Zone

The Attorney General's Office, at the request of the Camden County Prosecutor's Office, asked the Committee to consider an amendment to R. 3:12A.2C:35-7 (Controlled Dangerous Substances Near or on School Property). N.J.S.A. 2C:35-7 provides an affirmative defense to prosecution if the prohibited conduct took place entirely within a private residence, no person 17 years of age or younger was present in such private residence at any time during the commission of the offense, and the prohibited conduct did not involve distributing, dispensing or processing with the intent to distribute or dispense any controlled dangerous substance or controlled

substance analog for profit. The prosecutors favor such a rule, as it would give them notice as to whether the defense is going to be interposed and since all other affirmative defenses are included in the Rule, it was suggested that this one should also be placed in the Rule. The Committee agreed and recommends the following amendment to R. 3:12A.

## 3:12A. Notice of Specific Criminal Code Defenses

A defendant shall serve written notice upon the prosecutor if he intends to rely on any of the defenses contained in the following sections of the Code of Criminal Justice: Ignorance or Mistake, 2C:2-4(c); Accomplice: Renunciation Terminating Complicity, 2C:2-6(e)(3); Intoxication, 2C:2-8(d); Duress, 2C:2-9(a); Entrapment, 2C:2-12(b); General Principles of Justification, 2C:3-1 to 2C:3-11; Criminal Attempt (renunciation of criminal purpose), 2C:5-1(d); Conspiracy (renunciation of criminal purpose), 2C:5-2(e); Murder, (affirmative defense, felony murder), 2C:11-3(a)(3); Criminal Restraint, 2C:13-2(b); Theft by Extortion, 2C:20-5; Perjury (retraction), 2C:28-1(d); [and] False Swearing (retraction), 2C:28-2(b); and Controlled Dangerous Substances Near or On School Property, 2C:35-7.

Within 30 days after he enters a plea, the defendant shall serve upon the prosecuting attorney a written notice of his intention to claim any of the defenses listed herein, and if the defendant requests or has received discovery pursuant to R. 3:13-3(a) he shall, pursuant to R. 3:13-3(b), furnish the prosecuting attorney with discovery pertaining to such defenses at the time he serves said notice. The prosecutor shall, within 10 days after receipt of such discovery, comply with R. 3:13-3(a) and (f) with respect to any defense for which he has received notice.

For good cause shown the court may extend the time of service of any of the foregoing, or make such other orders as interest of justice requires. If a party fails to comply with this rule, the court may take such action as the interest of justice requires. The action taken may include refusing to allow the party in default to present witnesses in support of that defense at the trial or the granting of an adjournment.

Note: Adopted July 26, 1984 to be effective September 10, 1984[.]; amended \_\_\_\_ to be effective \_\_\_\_.

## 7. Investigative Detention

The Committee was asked to consider an amendment to R. 3:5A-1 to permit an Assistant Attorney General to authorize an investigative detention application. The Rule presently provides that the Attorney General or a designated Deputy Attorney General can authorize an application for a temporary detention to obtain non-testimonial evidence. The position of Assistant Attorney General is most normally one into which high level supervising attorneys are promoted. For example, the operations and investigative supervisors in the Division of Criminal Justice are Assistant Attorney Generals as is the Director of the Division. Therefore, the Committee believes it is only logical to revise the rule so that an Assistant Attorney General can authorize an investigative detention application. The Committee agreed with the suggestion and is recommending that the Rule be revised to allow the Attorney General, or his designee, to authorize these applications.

## RULE 3:5A. INVESTIGATIVE DETENTION

### 3:5A-1. Authority to Issue

Prior to the filing of a formal criminal charge against a person, an order authorizing his temporary detention and compelling him to submit to non-testimonial identification procedures for the purpose of obtaining evidence of his physical characteristics may be issued by a judge of the Superior Court pursuant to this rule, upon an application authorized in writing by the Attorney General or his designee [designated Deputy Attorney General] or by the County Prosecutor or designated Assistant Prosecutor.

Note: Adopted July 26, 1984 to be effective September 10, 1984[.]; amended \_\_\_\_ to be effective \_\_\_\_.

## 8. Commencement of Probation Revocation Proceedings

The Committee was referred the Appellate Division's decision in *State v. Grabinski*, 245 N.J. Super. 402 (App. Div. 1991) wherein the court suggested that an amendment to R. 3:21-7(c) be drafted. In *Grabinski*, the defendant was sentenced on August 15, 1986 to concurrent three year probation terms. On August 8, 1989, a probation officer filed a complaint with the Warren County Clerk of the Superior Court alleging a violation of probation. The defendant was noticed August 28, 1989 of a September 15, 1989 hearing, appeared and pled not guilty. On April 5, 1990 the Law Division judge dismissed the complaint finding that the notice or summons must be issued prior to the probation period termination date. The Appellate Division reversed the order dismissing the complaint holding that the commencement of a probation revocation proceeding, by the formal filing with the court of petition or complaint by the probation officer, constitutes commencement of a probation revocation proceeding, so as to toll the probationary period. The court further held that the subsequent issuance of a summons or warrant within the time period thereby occurs prior to the termination of probation as the period of probation is tolled upon the filing of a notice or complaint. The court did not require the summons or warrant to issue prior to the termination of probation. However, the court in a footnote, recommended review of R. 3:21-7(c) which, if read literally, might preclude the court from revoking a suspension or probation after the period had terminated.

The Committee recommends that 3:21-7(c) be amended to address the concerns of the court in *State v. Grabinski*. The Committee is recommending that the Rule be amended to provide for a tolling of the

period of suspension or probation pursuant to N.J.S.A. 2C:45-3(c). N.J.S.A. 2C:45-3(c) provides that "the commencement of a probation revocation proceeding shall toll the probationary period until termination of such proceedings".

## 3:21-7. Probation and Suspended Sentence

- (a) . . . No change
- (b) . . . No change
- (c) *Revocation.* At any time before termination of the period of suspension or probation, unless that period is tolled pursuant to N.J.S.A. 2C:45-3(c), the court may revoke a suspension or probation pursuant to N.J.S.A. 2C:45-3.

Note: Source -- R.R. 3:7-10(g). Amended July 16, 1979 to be effective September 10, 1979; amended August 28, 1979 to be effective September 1, 1979[.]; paragraph (c) amended \_\_\_\_ to be effective \_\_\_\_.

## 9. R. 3:26-4

The Committee was asked to consider an amendment to R. 3:26-4(g) to address who files the affidavit of ownership of cash deposited as bail when a person other than the defendant puts up the money. The Rule presently provides that the defendant is responsible for filing the affidavit. The problem is that often the defendant is in jail and not in a position to know who owns the money which a friend or family member posts. This makes it difficult for him to file the affidavit.

The Committee agrees that the person who posts bail for the defendant should file the affidavit. Therefore, the Committee is recommending an amendment to Rule 3:26-4 to require that the person who posts cash be the person who files the affidavit.

## 3:26-4 Form and Place of Deposit; Location of Real Estate; Record of Recognizances, Discharges and Forfeiture Thereof

- (a) . . . No change
- (b) . . . No change
- (c) . . . No change
- (d) . . . No change
- (e) . . . No change
- (f) *Cash Deposit.* When cash is deposited in lieu of bond by a person other than the defendant, the [defendant] person making the deposit shall file an affidavit as to the lawful ownership thereof and upon discharge, such cash may be returned to the owner named in the affidavit.

(g) *Ten Percent Cash Bail.* Whenever bail is set pursuant to R. 3:26-1, unless the order setting bail specifies to the contrary, bail may be satisfied by the deposit in court of cash in the amount of ten percent of the amount of bail fixed and defendant's execution of a recognizance for the remaining ninety percent. No surety shall be required unless the court fixing bail specifically so orders. When cash equal to ten percent of the bail fixed is deposited pursuant to this rule, if the cash is owned by someone other than the defendant, the owner shall charge no fee for the deposit other than lawful interest and shall submit an affidavit with the deposit so stating and also listing the names of any other persons for whom the owner has deposited bail. The person making the deposit authorized by this subsection shall file an affidavit as to the lawful ownership thereof and upon discharge such cash may be returned to the owner named in the affidavit.

Note: Source -- R.R. 3:9-5(a) (b) (c) (d) (e) (f) (g), 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 (g) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989[.]; paragraphs (f) and (g) amended \_\_\_\_ to be effective \_\_\_\_.

## 10. Waiver of Right to Counsel

The Division of Criminal Justice asked the Committee to consider a rule which would set out a framework within which a trial judge must act in a case where the defendant is seeking to proceed pro se. It was suggested that lack of such framework may be responsible for trial judges not conducting a full enough inquiry of defendants seeking to waive their right to proceed pro se. This has caused reversals in a number of cases.

The Committee believes that adoption of a rule will aid judges, especially new judges or judges being transferred from other divisions to criminal, as the rule book is often the first source a judge goes to in seeking guidance. Although it recognizes that the Administrative Director recently sent a letter to Criminal Presiding Judges at the request of the Criminal Practice Committee circulating a form which contains questions trial judges should ask in waiver cases, the Committee is recommending a rule amendment. The purpose of the rule is to ensure that before a defendant is permitted to proceed pro se trial judges ensure that the searching inquiry required by state and federal law is conducted. See *Faretta v. California*, 422 U.S. 806 (1975) and *State v. Guerin*, 208 N.J. Super. 527 (App. Div. 1986). The requirements of the rule were adopted from *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) quoted in *State v. Cole*, 204 N.J. Super. 618, 623 (App. Div. 1985). See also *State v. Kordower*, 229 N.J. Super. 566, 577 (App. Div. 1989).

## 3:8-3 Waiver of Right to Counsel

When a criminal defendant seeks to proceed pro se, the trial judge before permitting defendant to do so shall question defendant to ensure that the waiver of counsel is knowing, voluntary and intelligent. To ensure that the waiver is knowing, the trial judge must: (1) make the defendant aware of the danger and disadvantages of self-representation; (2) make sure that defendant is aware of the nature of the charges and the range of sentences available on conviction; (3) discuss the possibility of defenses to the charges; and, (4) ensure that defendant is apprised of any other factors essential to his ability to make a knowing, voluntary and intelligent waiver of counsel.

Note: Adopted \_\_\_\_ to be effective \_\_\_\_.

## 11. Consolidation

In *State v. Pillot*, 115 N.J. 558 (1989) the defendant engaged in six armed robberies (three in Bergen County, three in Passaic County) over a nine week period. The defendant pleaded guilty in Bergen in exchange for the State's recommendation of a thirty year maximum with a ten year minimum. The defendant was sentenced to three concurrent fifteen year terms with five years parole ineligibility. The defendant pleaded guilty in Passaic, after the pleas were entered in Bergen but before sentence, in exchange for the State's recommendation that any custodial term not exceed twenty years, with a ten year minimum to run concurrently with the sentences in Bergen. In Passaic County she was sentenced to three concurrent twenty year custodial terms with ten years parole ineligibility. The judge in Bergen found three mitigating factors, the judge in Passaic found none. She appealed both sentences but they were affirmed by the Appellate Division. The defendant appealed to the Supreme Court arguing the sentences were excessive due to misapplication of the sentencing guidelines contained in the Code and due to unfairness because of disparity. The defendant argued the sentence inconsistencies could have been obviated if the sentences were imposed according to the procedural requirements relating to joinder and consolidation. While the Court disagreed that there was express authority requiring either joinder or consolidation under the current rules, the court stated that the defendant should have had the opportunity to be sentenced for her several offenses in a single proceeding before a single judge to promote the principles of sentencing consistency and uniformity. The Court modified the Rule in the opinion stating

Rule 3:25A-1 is hereby modified to enable a defendant to request consolidation of charges pending in multiple counties for purposes of offering pleas and for sentencing. Such an application may be made with respect to all charges pending against a defendant in different counties. An application by a defendant confronted with multiple charges in more than one county should be made, if at all possible, prior to the offer and entry of guilty pleas. On such an application the prosecutors of the respective counties should have the opportunity to be heard. [Id. at 577]

The Court went on to set out procedures to be followed in determining the application, id. at 577-587, but indicated the final contours of the rule should evolve in light of continued experience and study which may be promulgated through the regular rules procedures. Id. at 578.

The Committee is recommending an amendment to R. 3:25A-1 after debating at length what the appropriate scope of the rule should be -- just post-disposition, i.e., cases awaiting sentence, or also cases awaiting disposition. The rule presently addresses only consensual consolidation for purposes of sentencing, i.e., all parties agree to consolidation. As proposed, both non-consensual consolidation for purposes of sentencing and other consolidations requested prior to disposition are included. The former aspect is clearly stated in *State v. Pillot*. See 115 N.J. at 569, 577. The latter aspect, the Committee believes, is either explicitly covered in *State v. Pillot* or implicit from a fair reading of the language in the case or fundamental fairness independent thereof. See 115 N.J. at 577, 578. Thus, as proposed, a defendant could move for consolidation before pleading guilty to, or being found guilty of, charges in differing counties. The defendant would be able to move for consolidation if he or she intends to plead guilty to charges pending in different counties. Of course, if there is no prosecutorial consent the court may not dismiss counts to any indictment and the defendant would have to plead to all charges contained on the indictment. See R. 3:25-1. Nevertheless, the Committee believes a fair reading of the case, and the principles regarding sentencing uniformity underlying *Pillot*, require that the defendant be able to move for consolidation even before he or she has entered guilty pleas. The proposal calls for the motion to be supported by a certification which must include information which is necessary for the court to consider in considering consolidation. The rule is also being amended to require the criminal presiding judge, or a judge designated to hear these motions, in the vicinage in which consolidation is sought, hear the motion for consolidation. This is proposed to reduce the opportunity for judge-shopping. The proposal also requires written notice, and opportunity to be heard, to every prosecutor of every county in which charges subject to the consolidation application are pending and would also give county prosecutors the right to participate fully in the disposition of the case once consolidation is ordered.

The proposal also expands upon the factors, set forth in *Pillot*, that the judge must consider before deciding to order consolidation. The proposal would also require the judge to consider before ordering consolidation the rights of the victims and any impact consolidation may have on their opportunity to be heard and adds a "catch-all" factor.

Finally, the proposal adds verbiage to make clear that in the event there are any other open charges following any disposition after consolidation they are to be returned to the county of origin. That would also occur, for example, if no plea is entered or if a plea is entered and subsequently withdrawn or vacated.

## 3:25A-1 Application for Disposition

Notwithstanding the provisions of R. 3:14, [upon a conviction after trial or upon the entry of any plea of guilty or non-vult pursuant to R. 3:9-2, or upon dismissal of an indictment, accusation or complaint or counts thereof pursuant to R. 3:25-1, upon application of the prosecutor of the county in which the disposition occurred, with the consent of the defendant and the prosecutors of all other counties in which charges are to be disposed of or after opportunity to be heard concerning same given to the prosecutors of such other counties, the judge may accept a plea of guilty or non-vult as provided by R. 3:9-2, or may dismiss pursuant to R. 3:25-1, any other indictment, accusation or complaint, or any count thereof, pending in any county or municipality

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in the State.] when a defendant has charges pending in more than one county at any stage prior to sentencing, either the defendant, or the prosecutor in any such county with the consent of the defendant, may move before the presiding judge of the criminal part in the county in which consolidation is sought, or before any judge designated to hear such motion, for consolidation for purposes of entering a plea or for sentencing. Written notice of such motion and an opportunity to be heard shall be given to the prosecutor in each county where such a charge is pending. The motion shall be supported by certification that includes the information the court is required to consider under this rule.

In deciding whether to order consolidation and, if so, the county to be the forum for the consolidated charges, the judge shall consider: (1) the nature, number and comparative gravity of crimes committed in each of the respective counties; (2) the similarity or connection of the crimes committed including the time span within which the crimes were committed; (3) the county in which the last crime was committed; (4) the county in which the most serious crime was committed; (5) the defendant's sentencing status; (6) the rights of the victims and the impact on any victim's opportunity to be heard; and (7) any other relevant factor.

Each county prosecutor of the county in which a charge is pending shall be allowed to participate fully in the disposition of that charge after consolidation is ordered. If a plea agreement is entered that resolves less than all of the consolidated charges, the judge in the forum county shall order each unresolved charge to be returned immediately to the originating county. In the event that the consolidated charges have not been resolved within a reasonable period of time after consolidation, the judge in the forum county shall order each charge to be returned immediately to the originating county.

Note: Adopted July 17, 1975 to be effective September 8, 1975[.]; amended \_\_\_\_ to be effective \_\_\_\_

## 12. R. 3:21-2

The Committee was asked to consider an amendment to R. 3:21-2 to change the language "probation service of the court" to "court support staff". The cited language identifies who prepares presentence reports.

Recently, different court reports were prepared by distinct units which were often composed of court officers who may or may not have been probation officers. Presentence reports were normally prepared by the presentence unit comprised of probation officers from the county probation department. Other units (bail, P.T.I., Section 27) prepared other court reports. These units were staffed by either probation officers or other court officers hired under Rule 1:33. The historical fact that presentence reports were prepared by Probation officers is memorialized in the rule.

With the restructuring of the Criminal Division the separate bail, P.T.I. and presentence units were merged under the auspices of the Criminal Division Manager. The report writing staff is comprised of both probation officers and Rule 1:33 employees who often serve on teams headed by a team leader who may or may not be a probation officer. This staff is responsible for writing all court reports. In many counties one officer prepares the bail, pretrial intervention and presentence reports in a case. Thus, Rule 1:33 officers, in many counties, are assigned to write presentence reports, as well as other reports. The proposed amendment to the rule is intended to conform the rule to practice. A conforming amendment to N.J.S.A. 2C:44-6b while not necessary may be desirable.

## 3:21-2. Presentence Procedure

(a) Investigation. Before the imposition of a sentence or the granting of probation [the probation service of the court] court support staff shall make a presentence investigation in accordance with N.J.S.A.

2C:44-6 and report to the court. The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant and the prosecuting attorney. In cases where the death penalty will be imposed, a presentence report shall not be prepared.

(b) . . . No change

(c) Transmittal of Reports. If a custodial sentence is imposed, [the probation service of the court] court support staff shall, within 15 days thereafter, transmit a copy of the presentence report and the examination report, if any, to the person in charge of the institution to which the defendant is committed.

Note: Source-R.R. 3:7-10(b). Amended July 7, 1971 to be effective September 13, 1971; amended June 29, 1973 to be effective September 10, 1973; amended August 27, 1974 to be effective September 9, 1974; amended July 29, 1977 to be effective September, 1977; amended July 16, 1979 to be effective September 10, 1979; paragraph designations and new paragraph (b) adopted and paragraph (c) amended August 28, 1979 to be effective September 1, 1979; paragraph (a) amended September 28, 1982 to be effective immediately[.]; paragraph (a) and (c) amended \_\_\_\_ to be effective \_\_\_\_

## 13. R. 1:33-7

An amendment is proposed to Rule 1:33-7 which would change the term "case manager" to "division manager" where it appears in the rule. Since the later title is the correct title for the position, the Committee endorses the change.

## 1:33-7. [Case] Division Managers

There shall be on the staff of the Trial Court Administrator a [Case] Division Manager for each court support unit within the vicinage who shall be appointed by the Administrative Director after consultation with the Assignment Judge. The [Case] Division Manager's responsibilities shall include the

management, under the direction of the Presiding Judge and Trial Court Administrator, of such judicial support personnel and resources as have been allocated to the [Case] Division Manager's functional unit by the Assignment Judge and Trial Court Administrator.

Note: Adopted October 26, 1983 to be effective immediately; amended June 29, 1990 to be effective September 4, 1990[.]; amended \_\_\_\_ to be effective \_\_\_\_

## 14. R. 3:6-4

The Committee was asked to consider an amendment to R. 3:6-4 which would substitute the word "foreperson" for "foreman" where it appears in the Rule. Although it was argued that since the statute used the word foreman the rule should mirror the statute, the Committee endorses making this change because it believes the language is outdated.

## 3:6-4 Foreperson[man]; Deputy Fore person[man]

The Assignment Judge shall appoint one of the jurors to be foreperson[man] and another to be deputy foreperson[man]. The foreperson[man] shall have power to administer oaths and shall endorse all indictments. During the absence of the foreperson[man], the deputy foreperson[man] shall act as for person[man].

Note: Source -- R.R. 3:3-4[.]; amended \_\_\_\_ to be effective \_\_\_\_

## II. RULE AMENDMENTS CONSIDERED AND REJECTED

## 1. Complex Criminal Cases

The Committee was asked by the Attorney General's Office to consider a proposed rule amendment which had as its purpose assuring that complex criminal cases, returned by the State Grand Jury, were handled in a more expeditious manner. It was argued that these complex cases, which in many instances are organized crime cases, languish for years without being tried because they take so long to try.

The Committee discussed the problem and decided against recommending a rule amendment for three reasons: (1) the present rules contain provisions which would help expedite these cases if it was necessary (See, for example, Rule 3:25-2, Order for Trial); (2) the Assignment Judges did not favor special treatment for State Grand Jury cases, and opposed any rule giving special designation to these cases; (3) these cases should not be made so complex and that the government should frequently make them more compact, thus more triable. The Committee believed that the problem, when it occurred, could be remedied at the local level, or by the Attorney General asking the Chief Justice for some special assistance.

## 2. Anonymous Juries

The Committee was asked to consider the advisability of development of a court rule to facilitate the use of anonymous juries in appropriate cases. A proposal is pending before the New York Legislature which would authorize use of anonymous juries in certain situations. The New York proposal would permit the Court to issue an order precluding disclosure of jurors' and prospective jurors' names and addresses upon a showing by the State that such an order was necessary to prevent bribery, jury tampering or physical injury to or harassment of the jurors or prospective jurors.

The Committee discussed the issue and decided against recommendation of a rule amendment for the following reasons: (1) such a rule would put the defendant in a criminal case at a distinct disadvantage as he would not be able to obtain the names of jurors and thus be unable to investigate whether the juror was related to a witness or a law enforcement officer; (2) jurors would know it was a different type of case when the jury was being selected anonymously and this would prejudice the defendant; (3) there was no reason to believe that there was a problem in New Jersey which required creation of a rule on anonymous juries; (4) the whole area was regulated by statute, see N.J.S.A. 2A:70-1, and, given that, the court need not be involved via the rule-making process; and (5) a hearing, as envisioned by the New York statute, which requires testimony by the State to prove the order was necessary would be prejudicial to the defendant.

## 3. Rule for Child Witnesses

The Committee was asked to consider the advisability of adopting court rules, similar to the ones being considered in the Federal courts, governing testimony of children. The request was made in early 1990, prior to the Supreme Court's decision in *State v. Crandall*, 120 N.J. 649 (1990). In *Crandall*, the State moved for an order, pursuant to N.J.S.A. 2A:84A-32.4, permitting a young victim of a sexual assault to testify via closed-circuit television. The defendant moved to dismiss the motion arguing the statute was unconstitutional as it contravened his confrontation clause rights. The statute allows testimony, in criminal prosecutions for sexual offenses and child abuse, of child witnesses who are 16 years of age or younger, by closed-circuit television. The closed-circuit television can be ordered by the Court on a finding that there is substantial likelihood that the witness would suffer severe emotional or mental distress if required to testify. The trial court ruled that the statute was constitutional. The Appellate Division agreed with the trial court's determination but remanded for more specific findings concerning likelihood of distress resulting from in-court testimony. *State v. Crandall*, 231 N.J. Super. 124, 134 (App. Div. 1990). The Supreme Court held that the statute was constitutional both on its face, and as applied, as it provided the safeguards required under *Maryland v. Craig*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 3157, 110 L. Ed. 2d 666 (1990).

The Committee was of the opinion that given *Crandall*'s upholding of the statute governing child victim/witness testimony, there was little need to develop separate rules governing this problem. Thus, the Committee decided not to recommend any rule revisions.

## 4. Intensive Supervision Program

Last term, at the request of the prosecutors and representatives of the Attorney General's Office, the Committee considered whether amendments should be made to the rules governing the Intensive Supervision Program (ISP) as they relate to eligibility and the right to appeal decisions by the ISP Panel in first and second degree cases. At that time, the Committee voted to defer consideration of the rule amendment until this term. In the meantime, the Committee and the Prosecutor's Association agreed to monitor developments, especially as they relate to admissions into ISP on first and second degree cases.

The Committee discussed the proposal for a rule amendment and decided against recommending a rule amendment at this time. Since the issue of the rights of the prosecutor appeal in first and second degree crimes is before the Supreme Court in *State v. Cannon*, cert. granted 122 N.J. 363 (1990), a resolution of that case might moot any decision the Committee might make. Additionally, the general sentiment among Committee members appeared to be that the numbers of persons admitted into ISP for first and second degree crimes, especially during 1991, decreased.

## 5. Juror Interview Cards

The American Trial Lawyers Association expressed interest in an Atlantic County practice wherein jurors were asked to complete a nine question "interview card" while in the juror assembly area. The cards ask basic information including anything which might prevent service as a juror and are intended to permit voir dire to progress more quickly by having attorneys review the cards before going to the courtroom. The Administrative Director of the Courts asked the Criminal Practice and Civil Practice Committees to consider the issue of the advisability of the use of juror interview cards as a general practice.

A joint subcommittee of the Criminal and Civil Practice Committees was formed and recommended that juror interview cards not be recommended for routine use. The subcommittee identified the following difficulties in practice with these interview cards: (1) few attorneys avail themselves of the opportunity to review these cards; (2) there is an additional imposition on the staff resources of the Jury Management Office; (3) some jurors fail to complete the cards; and (4) attorneys generally still wish to observe jurors' demeanor in actually responding to questions. The Committee endorsed the recommendation of the joint subcommittee and recommends no rule change in this area.

## 6. Inquiry of Defendants at Arraignments

The Committee was forwarded a letter which the Chief Justice had received from the Atlantic County Solicitor. In the letter, the Solicitor proposed a rule amendment that would require the arraigning judge to inquire of defendants in custody whether they had suffered any abuse at the hands of police. This issue was discussed by the Municipal Practice Committee which decided not to recommend a rule amendment.

The Committee concurs with the decision of the Municipal Practice Committee. The Committee does not recommend an amendment to the rules on this subject as it deems it an unnecessary additional burden to place on the arraigning judge.

## 7. Notice to Prosecutor Upon Request of Public Defender Request to Prepare Transcripts

The Public Defender's Office asked the Committee to consider a problem that had arisen in Warren County, where a court reporter was advising the prosecutor whenever a criminal defense attorney ordered transcripts of previous proceedings (in the absence of a sanction). The objection was that the defense attorney did not want to disclose his trial strategy to the prosecutor, which may occur if the prosecutor is given notice of what the defense attorney is seeking. It was reported that the court reporter was advising the prosecutor when a public defender ordered a transcript of a witness who already testified in an ongoing trial, because of a possible need to impeach the witness.

The Committee discussed this issue and believes that the problem was an isolated one. Given this, the public defender withdrew his request that the Committee consider this issue. The Assignment Judge in the vicinage, who is a member of the Committee, has dealt with the problem.

## 8. Anticipatory Search Warrants

The Attorney General's Office asked that the Committee consider amending the rules to allow for anticipatory search warrants. This concept is being considered for amendment to the Federal Rules of Criminal Practice. The process is intended to encourage the use of search warrants.

Prior to Committee consideration of this matter, the matter was withdrawn from consideration at the request of the Attorney General's Office pending further study.

## 9. Complaints From Inmates

The Committee was asked by the American Civil Liberties Union to consider an amendment to R. 3:2 to permit acceptance of complaints from confined inmates through the regular mail after the complaint was sworn to in the presence of a notary public.

R. 3:2 requires that the complaint be made upon oath before a judge or other person empowered by law to take complaints. Thus, before an inmate can file a complaint, he or she must either obtain a court order mandating that he or she be transported to the appropriate courthouse to swear out a complaint or a court clerk must go to the prison or jail to take the complaint. It was suggested that neither of these options happen often, thus inmates who want to file complaints are effectively barred from doing so.

Two options were suggested which would resolve the problem. The first was to amend R. 3:2 and set up alternate procedures to be followed where inmates are filing complaints. The other option was to recommend amendment to N.J.S.A. 2A:8-27 to include corrections officers to the list of officials empowered by law to take complaints.

The Committee was not in favor of setting up two sets of rules for handling complaints. Nor did it agree that N.J.S.A. 2A:8-27 should be amended. To do so

might open the floodgates for inmates who want to file unfounded complaints just to get out of prison, or jail, for a court appearance.

## 10. Written Jury Instructions

The Committee was asked by the Supreme Court to consider the issue of the use of written jury instructions in criminal cases. The issue arose in *State v. Domingo Castillo*, an unpublished Appellate Division decision. In *Castillo*, the defendant was charged with murder, possession of a handgun with intent to use it unlawfully, possession of a weapon without a permit and possession of hollow-point bullets. The matter was tried before a jury. The judge fully charged the jury before it began deliberations and then again during deliberations in response to a request from the jury. On a third occasion the jury requested a brief written summary of the law, which the Court provided. The defendant was found guilty of passion-provocation manslaughter, possessing a weapon without a permit and possession of hollow-point bullets.

The defendant, on appeal to the Appellate Division, argued that the Court's submission of a partial written summary of the law was unprecedented and prejudicial. The Appellate Division, in an unpublished decision, found that the written instructions weren't confusing, incomplete or misleading and found that they did not prejudice the defendant. The Supreme Court denied certification but referred the issue to the Committee for study.

The Committee has considered the issue and has decided against recommending a rule change. R. 1:8-8 presently provides, in part that

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 Committee believes the Rule correctly places the decision whether to provide written copies of the charge with the trial judge who is in the best position to ascertain whether they are necessary and/or helpful given the unique facts of the case and the position of the parties. Additionally, the Committee does not believe that the issue of providing written instructions to juries is creating a problem, other than in isolated instances which are best dealt with as they arise. Thus, it deems further refinement of the rule unnecessary and unwise.

## III. OTHER RECOMMENDATIONS

## 1. Consequences To Alien Defendants

The New Jersey State Bar Association's Board of Trustees asked the Committee to consider an amendment to R. 3:9-2 to require the court taking a guilty plea to first inquire about the citizenship of the defendant and affirmatively explain the consequences of a guilty plea where the defendant is an alien.

The Committee considered this proposal and decided not to recommend a rule amendment. The Committee is of the opinion that the subject of consequences of a guilty plea to an alien is already covered adequately on the present plea form, see CP0114, and is properly included in the judge's standard colloquy prior to the acceptance of the plea. The Committee deems it inappropriate to "single out" in the rule itself particular consequences of a guilty plea, in light of the view that the failure to include an item may be deemed a purposeful omission, and there is governing caselaw on the subject. Therefore, the Committee has decided not to recommend the rule amendment to the court. Further, it is now clear that deportation is a "collateral" and not a "direct" consequence of a guilty plea, and a plea is not defective if a defendant is not advised of the possibility of same. See *State v. Kiett*, 121 N.J. 483, 488 (1990).

The Committee, however, does recommend that the Administrative Office of the Courts remind judges hearing criminal cases to consider asking defendants about their citizenship, and to inquire of aliens about their understanding of the possible consequences of a guilty plea.

As per the Committee's request, Director Lipscher sent a memo to Criminal Presiding Judges on the subject on January 25, 1991.

## 2. Eviction From Residential Housing For Certain Criminal Offenders

The Committee was asked for direction in regard to implementation of an amendment to N.J.S.A. 2A:18-61.1 which requires the court to notify landlords of the convictions of tenants for violations of certain offenses under circumstances set forth in the statute. Problems have arisen because a legislative mandate is being interpreted differently in different vicinages, and there was a suggestion that there is a need for uniform State policy.

The Committee disagreed that there was a need for uniformity, and suggested that the Administrative Office of the Courts send a letter to trial judges reminding them of this legislative enactment.

## 3. Collection of Penalties

The Committee was asked by the Administrative Director of the Courts to consider a study performed by Arthur Anderson and Company entitled "Operations Review of Non-Child Support Collections", hereafter "Anderson Report". The report detailed how the Judiciary handles the collection of court-imposed financial obligations. The report made a series of recommendations to achieve more effective collection performance. The Committee was asked for their suggestions regarding the recommendations.

The Committee believes that the involvement, in terms of time, of probation officers in the collection of court-imposed financial obligations is escalating into a serious problem. As the "Anderson Report" highlights, a significant portion of probation officer time (20% in 1989) is spent as collection agents. This is time that formerly was spent supervising probationers. The Committee is concerned that given increasing caseload, probation officers' time would be better spent supervising cases. It is with that concern that the Committee makes the following recommendations:

1. Payment terms and rates of payment should be specified by the sentencing judge at sentencing and be contained in the judgment of conviction.

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The "Anderson Report" found that the rate of collection is highest when collection terms and rates are specified by the sentencing judge, as opposed to those "ordered" by the probation department. Since caselaw already states that this is the judge's duty, see *State v. Harris*, 70 N.J. 586 (1976); *State in Interest of D.G.W.*, 70 N.J. 488 (1976) and *State v. Rhoda*, 206 N.J. Super. 584 (App. Div. 1986), this recommendation is both consistent with what the Committee perceives is preferred practice and with caselaw. See also N.J.S.A. 2C:44-2, 45-2c. The Administrative Director of the Courts should remind sentencing judges of their obligation to determine the amounts and terms of payment of financial obligations.

2. A statutory change should be enacted which would require that all balances remaining at the end of the maximum probation term be vacated and reduced to a civil judgment.

The Committee believes that due diligence should be paid to attempting to collect financial obligations during the period of probation. In establishing the terms and conditions of probation, the judge should consider the time in which defendant can reasonably make installment payments and the term of probation may be enlarged or subject to a five year maximum, in order to assure collections of financial obligations. N.J.S.A. 2C:45-2c. However, the Committee does not believe valuable probation officer time should be wasted in attempting to collect financial obligations after the period of probation has been finished. As it is likely to be of continued diminishing return the Committee recommends that at that point the balance be reduced to a civil judgment and be collectible as such. N.J.S.A. 2C:46-2(b) and (c) should be amended to clarify its application to unpaid financial obligations ordered as a condition of probation but not paid before discharge (Note that probation cannot be revoked based on a defendant's non-willful failure to pay).

3. Presentence Reports should contain accurate and complete defendant financial information.

The Committee was told that the amount of financial background information received by judges differs from county to county. In some counties extremely complete information is received, in others the information is sketchy. The Committee believes that it is critical for the sentencing judge to have complete information at his or her disposal so that appropriate sentences can be imposed and terms of payment can be set. See N.J.S.A. 2C:43-3, 44-2. Therefore, the Committee is recommending that presentence reports contain accurate and complete information on the defendant's financial background to the extent they do not already do so.

4. Community Service should not be allowed in lieu of cash payments.

The Committee does not endorse the suggestion that community service be used as a substitute for financial obligations where the defendant is unable to pay the obligation. The Committee believes to do so creates a situation akin to involuntary servitude where only the poor would be forced to perform community service. Probation cannot be revoked for non-willful failure to pay a financial obligation. See N.J.S.A. 2C:45-3c. See also N.J.S.A. 2C:46-2 and note that community service may well be considered a proper sentence to be imposed initially. See N.J.S.A. 2C:43-2b (5), 45-b (13).

5. Money posted as bail should not be used automatically to satisfy financial obligations set at sentencing.

The Committee recommends against use of money posted as bail to satisfy financial obligations imposed as conditions of the sentence. The Committee is concerned that doing so will increase the number of offenders who will flee prior to court events. Additionally, doing so frustrates the purpose of bail which is to secure the defendant's appearance at court events.

## IV. RECOMMENDATIONS FOR LEGISLATIVE CHANGE

A recommendation for statutory change is contained within Section III, number 3. See page 70 infra.

## V. MATTERS HELD FOR FUTURE CONSIDERATION

### 1. Motion Practice

A private attorney wrote to the Committee asking it to consider amendments to Part III and VII of the

rules regarding motions to dismiss. Because the letter dealt with motion practice in Municipal Courts, and because the Municipal Court Committee is also endeavoring to develop a whole set of rules unique to Municipal Courts, to be embodied in Part VII, independent of the rules in Part III, the Committee decided to defer action on the letter until which time the Municipal Committee developed its proposal for redrafting Part VII. After the Municipal Court Committee reviews the matter, the Committee will consider its report and recommendations in the normal course to evaluate whether input from the Committee is appropriate or necessary.

### 2. Post Arrest Procedures

In its 1987 Annual Report the Committee asked that the Administrative Director of the Courts issue a directive clarifying under what circumstances a probable cause determination is necessary prior to the issuance of a summons in light of the decision in *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983).

The Committee, in its 1988 Report, proposed an amendment to R. 3:4-1 which sought to assure that initial probable cause determinations, as required by *Gerstein v. Pugh*, 420 U.S. 103 (1979), were held in all cases within 48 hours of arrest. However, because the Committee was concerned that the post-arrest procedures presently embodied in the rules were the result of piecemeal changes over the years, it decided to conduct a comprehensive review of all of the procedures occurring after arrest.

During its 1989 term, the Committee reviewed these two recommendations plus another issue which dealt with whether the rules should be changed with regards to the requirement in the rules that complaints from inmates alleging that criminal offenses have been committed against them be sworn out in front of a court clerk.

During its 1989 term, the Supreme Court also decided *State v. Gonzalez*, 114 N.J. 592 (1989). In *Gonzalez*, the Supreme Court found no requirement for an independent determination of probable cause for a complaint charging the commission of a traffic offense. Although the Court specifically limited its holding to traffic offenses, it noted that two Appellate Division decisions have required probable cause determinations on non-traffic offenses. See *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983) holding a summons may not issue when a private citizen files a complaint unless there is a finding of probable cause by a judicial officer and *State v. Salzman*, 228 N.J. Super. 109 (App. Div. 1987) holding that a probable cause hearing is necessary on a complaint signed by a police officer after the issuance of a summons. Since these decisions identify a need for clarification of court rules, the Court asked for a review by both the Criminal Practice Committee and the Municipal Practice Committees. The Committees decided to form a joint subcommittee to explore the Court's request.

The subcommittee viewed its mandate broadly in light of *Gonzalez*. In that vein it reviewed not only the Rules governing probable cause but the entire post-arrest process including the determination of bail. This furthered the decision made by the Criminal Practice Committee, in its 1988 Annual Report, to review all post-arrest procedures.

During this term, the subcommittee completed its work and filed its report with both Committees. The Criminal Practice Committee reviewed the report and made suggested changes. The Municipal Practice Committee is presently finalizing its review of the report. Subsequent to the Committee's consideration of the issue the Supreme Court rendered the decision in *The Matter of Judge Dominick C. Santini*, 126 N.J. 291 (1991). In *Santini*, a case arising out of a complaint filed by the Advisory Committee on Judicial Conduct, the Court, in disposing of the disciplinary complaint, discussed an issue peripheral to the central issue in the case. In *Santini* a citizen was arrested after failing to appear on a zoning violation that did not threaten the public health or safety. The Court chastised the municipal judge for ordering the arrest and asked the

Committee on Criminal Practice to consider the feasibility of amending Rule 3:3-1, which deals with non-indictable offenses cognizable in the municipal court, to include a . . . provision [similar to that contained in Rule 7:6-3 relating to traffic offenses] for a written notice instead of the issuance of an arrest warrant.

[Id. at 297]

The Municipal Practice Committee is now considering the effect of *Santini*. Once that Committee's consideration of the issue is complete, the recommendations made by both Committees will be reconciled and a supplemental report will be filed in the Spring of 1992.

### 3. Discovery

The Committee was asked to consider the desirability of consolidation, and refinement, of the various rules governing discovery practice. In light of the tremendous changes that have occurred in how cases are processed due to the Speedy Trial Program, the Committee believes the discovery rules should be reviewed. A subcommittee was set up late in the term to conduct the review. Its report will be considered next term.

### 4. Case Management Rule Changes

A series of draft rule changes were submitted to the Committee for its consideration. The changes were designed to conform the rules with current management practices. The Committee asked that the Criminal Presiding Judges review the proposals. It was agreed that once the Criminal Presiding Judges have reviewed and commented on the proposals the Committee will consider the rules.

### 5. Fresh Complaint

In *State v. Hill*, 121 N.J. 150 (1990) the Court was faced with two issues regarding fresh complaint testimony. The first was whether a complaint elicited

through questioning could qualify under the fresh complaint doctrine. The second was whether trial courts should exclude cumulative fresh complaint evidence.

*Hill* involved the rape of a 16 year old woman. M.K. was raped on April 14, 1985 but did not make an allegation about the rape until May 25, 1985. The initial allegation surfaced during a conversation with another young woman (D.R.) who said she was raped by the same man. On June 2, 1985, during an investigation initially involving another incident, unrelated to either rape, but which subsequently broadened into an allegation of rape regarding D.R., M.K. blurted out that she also had been raped. At trial, the testimony of three witnesses were admitted into evidence under the fresh complaint rule. The defendant was convicted of rape and appealed, arguing it was inappropriate to admit two of the witnesses testimony as it was cumulative fresh complaint evidence. The Appellate Division held that the admission of the two witnesses' fresh complaint testimony was unduly prejudicial to the defendant and reversed the conviction.

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Committee on the Rules of Evidence and the . . . Criminal Practice Committee the task of recommending proposed procedures relating to the admissibility in the State's case of fresh complaint evidence, defendant's right to elicit and rely on the absence of fresh complaint, and the desirability of special instructions dealing with the issue.

[Id. at 166]

The issues and plans for developing the proposals are now under consideration.

## VI. MATTERS ALREADY ACTED UPON BY THE SUPREME COURT

### 1. Uniform Defendant Intake Report

In the Committee's 1990 Annual Report, it recommended Supreme Court approval of a package of forms which were developed to replace existing forms prepared by court support staff for use by judges in making bail, pre-trial intervention, conditional discharge and sentencing decisions. There was much debate over whether certain information, contained on the U.D.I.R. form regarding a defendant's physical/mental health and drug/alcohol use, and which is contained on the intake form (U.D.I.R.) should be subject to a rule making the information confidential. Instead of recommending a rule, the Committee decided to delete the information from the form. After reviewing the Committee's report the Supreme Court decided to approve the forms package but instructed that the information which the Committee deleted be put back on the form. The Court asked the Committee to draft a rule which would protect the defendant from use of this information to his disadvantage. The Committee considered the Court's request and could not reach a consensus on the extent to which the use of the information obtained from the intake form should be deemed confidential. The Committee considered three proposals, none of which was favored by a majority of the Committee.

The position of the prosecutors, including representatives of the Division of Criminal Justice, was that there should be some confidentiality to protect the defendant from improper use of the intake form, such as prohibiting it from being introduced as substantive evidence before the Grand Jury or at trial, and exempting it from subpoena power of the prosecutor. However, there should also be an exception to such confidentiality in order to let prosecutors use information contained on the form as a basis for cross-examination of the defendant when that information is inconsistent with the defendant's testimony at a bail hearing or at trial.

An alternative proposal, supported by the public defender, was to have the information on the form, and anything derived therefrom, immunized from future use without the consent of the defendant, except for purposes of bail, appointment of counsel, and admission to pre-trial intervention. Other than for these specified proceedings, information collected on the intake form would not be able to be utilized for subsequent court events over the defendant's objections.

A third proposal was to prohibit the use of the information obtained from the intake form against the defendant in a Civil or Criminal trial, but not to prohibit its use at a subsequent court proceeding such as at sentencing or pre-trial intervention determination. This was the position taken by the Conference of Criminal Presiding Judges in connection with an earlier version of the U.D.I.R. Forms.

Due to belief on the part of the Court and the Committee that this matter should be handled on an expedited basis, a letter was sent to the Court requesting it consider the matter. (Copy of letter from Judge Stern appended as Appendix II). The Supreme Court, at its January 14, 1991 Rules Conference, decided to require use of the Uniform Defendant Reporting System to replace, effective no later than January 1, 1992, the forms presently being utilized by Criminal Division support staff for intake, bail, pre-trial intervention, and sentencing reports. The Court directed use of the forms under the following guidelines: (1) information contained on the intake form can be used by the court without restriction for purposes of the setting of bail, appointment of counsel, and pre-trial intervention; (2) the information on the intake form is prohibited from use in Grand Jury proceedings and at trial, even for purposes of cross-examination; and (3) information contained on the intake form may be used at sentencing unless the defendant objects. Should the defendant object, the information cannot be used over his or her objection.

Directive 7-91 to Assignment Judges and Criminal Presiding Judges was issued August 21, 1991 by the Administrative Director at the Court's instruction.

### 2. Trial of Criminal Offenses and Lesser Related Infractions

In its 1988 Report, the Committee recommended adoption of a new rule, R. 3:15-3, which would provide for joinder of criminal offenses with lesser, related infractions. The Committee asked that the court defer consideration of the rule, however, pending a decision in *State v. Muniz*, 118 N.J. 319 (1990). The Committee asked the Court to consider adoption of the rule once *Muniz* was decided.

The Rule requires mandatory joinder of any pending non-indictable complaint for trial with a criminal offense based on the same conduct or arising from the same episode, unless the defendant or the state is prejudiced by such joinder. The rule further provides that a Superior Court judge shall sit as a Municipal Court judge to hear the non-indictable complaint, regardless of whether the jury is the fact finder on the criminal offense, unless the non-indictable complaint charges an offense which must be submitted to the jury pursuant to statute. As to evidence admissible at trial for the non-indictable complaint, but inadmissible at trial for the criminal offense, the rule specifies that the court shall hear the evidence outside of the jury's presence. It also requires that the court not render its verdict on the complaint until the jury has decided on the offense or has been dismissed.

The Rule also addresses the consequences of failure to join non-indictable complaints with criminal offenses. Under the proposed rule, failure to join would not constitute grounds for barring a subsequent prosecution of the complaint, unless the bar is required by statute or by federal or state constitutions, or unless the prosecutor is aware of the complaint and the court's failure to join resulted from the prosecutor's failure to apprise the court of the complaint. The proposal in no way affects present policy that no non-indictable offense be disposed before a related indictable. See *State v. Dively*, 92 N.J. 573 (1983) and *State v. DeLuca*, 108 N.J. 98 (1987).

With regard to the provision on the consequences of failing to join complaints with offenses, the Attorney General dissented from that portion of the Committee's recommendation (and the resulting rule), which places responsibility on the prosecutor to apprise the court of the non-indictable complaint. It was the Committee's position that there should be some mechanism to enhance the likelihood that the trial judge will be apprised of complaints relating to the offense that should be joined, and that the burden of making such complaints known to the judge should fall on the prosecutor, who has the greatest interest in avoiding bars to subsequent prosecutions. The Attorney General, however, argued that such a provision erects an additional barrier to insuring that a defendant is tried for indictable offenses and related complaints by establishing a set of circumstances where the State would be unable to try the defendant for both type of matters. While the proposed rule enhances the prosecutor's incentive to seek joinder, it diminishes the defendant's incentive to do so. Thus, the Attorney General would have the rule bar the subsequent prosecution of a complaint not joined with a related offense, only where required by statute or by federal or state constitutions.

The Court, at its January 14, 1991 Administrative Conference, adopted R. 3:15-3(a) and (b) as proposed by the Committee. However, the Court accepted the position of the Division of Criminal Justice in its dissent from the Committee's recommendation for section (c). That section was revised to provide that a failure to join will not bar a subsequent prosecution of a complaint except as required by statute or by the federal and state constitutions. The Court instructed that the rule would not become effective until September 1, 1992 so that it could be subject to further review once the Committee's Report is published for comment.

Respectfully submitted:

Honorable Edwin H. Stern, Chairman  
Honorable Wilfred P. Diana, Vice Chairman  
Honorable Thomas C. Brown  
Honorable Kevin G. Callahan  
Honorable Marilyn C. Clark  
Honorable Robert P. Figarotta  
Honorable Peter J. Giovine  
Honorable James A. Kennedy  
Honorable Lawrence M. Lawson  
Honorable John P. Mariano  
Honorable Paul R. Porreca  
Honorable Mathias E. Rodriguez  
Honorable Isaac I. Serata  
Honorable Stephen F. Smith, Jr.  
Honorable Isaiah Steinberg  
Honorable Shirley A. Tolentino  
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## APPENDIX I



State of New Jersey  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF CRIMINAL JUSTICE  
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ROBERT T. WINTER  
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January 10, 1992

Honorable Edwin H. Stern, J.A.D.  
Chairman, Supreme Court Committee on Criminal Practice  
Four Headquarters Plaza  
Suite 1101  
Box 158  
Morristown, New Jersey 07960-3965

Re: Objection to the Proposed Amendment  
of R. 3:26-3

Dear Judge Stern:

This letter is intended to set forth our dissent from that portion of the proposed Report of the Supreme Court Committee on Criminal Practice, 1990-1992 term, which urges amendment of R. 3:26-3. It formally memorializes the objections which we raised at the April 22, 1991 Committee meeting. The New Jersey Division of Criminal Justice opposes this amendment.

The current version of the Rule is taken essentially verbatim from N.J.S.A. 2A:162-2 (which "remain[s] in full force and effect," N.J.S.A. 2C:98-3). In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the Law Division judge promulgated certain procedures pertaining to the administration of this statute and this Rule, whose promulgation, she concluded, was compelled, inter alia, by the Due Process Clause of the federal Constitution. Her reasoning was, in part, both spontaneous and advisory; that is, she went beyond the issues advanced by the parties (id. at 375), and her primary constitutional analysis followed her resolution of the case (id. at 377) on other grounds.

The judge concluded that the statute (and thus, likewise the Rule) was deficient for failure to include adequate constitutional safeguards. However this deficiency "does not necessarily mandate the conclusion that the statute is unconstitutional." Id. at 384. Rather she salvaged the statute (and likewise the Rule) by glossing it with the constitutional safeguards that she deemed advisable pending further action by the Supreme Court (with respect to the Rule) or by the Legislature (with respect to the statute). Id. at 385.

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January 10, 1992

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Thus, while the statute (like the Rule) provided a flexible "interest of justice" standard to guide the court in dealing with material witnesses, the guidelines mandated by Misik provided considerably greater restrictions upon the judge's discretion. For example, material witnesses may be detained only with respect to a "pending" criminal action evidenced by an indictment, complaint or accusation.<sup>1</sup> An order requiring a material witness to appear in court must be supported by a "preponderance of the evidence" rather than probable cause. A warrant for the forthwith arrest of a material witness requires the State to provide "clear and convincing proof" to support a claim of exigency. At the subsequent hearing the material witness has the right to counsel and generally the right to confront and cross-examine the State's witnesses. Id. at 385-387. It is not clear whether the reference to the "State's witnesses" was intended to mean those witnesses establishing the commission of a crime (e.g., eyewitnesses), or simply those establishing probable cause (e.g., investigating police officers).

In establishing these guidelines the Misik opinion acknowledged that part of its holding was directly contrary to that of the opinion in State v. Hand, 101 N.J. Super. 43 (Essex Cty. Ct. 1968). However the opinion concluded that "[i]n the absence of appellate authority this court is under no obligation to follow the reasoning in the Hand case." Id. at 375 n.4. The opinion did not acknowledge but perhaps should have acknowledged that its result was also implicitly contrary to the opinion in State v. Price, 108 N.J. Super. 272 (Law Div. 1970), which seemingly approved of the "interest of justice" flexible standard set forth in the statute and the Rule.

In proposing the amendment to R. 3:26-3, the Committee essentially adopts the guidelines suggested in Misik. Our opposition to this proposal is two-fold. First, we are not fully persuaded by the analysis in Misik. Like the Law Division judge in Misik, the Committee "is under no obligation to follow the reasoning in the [Misik] case" (238 N.J. Super. at 375 n.4) at least "[i]n the absence of appellate authority" (id.), especially since that reasoning is propped upon spontaneous dicta and is explicitly at odds with a second Law Division opinion, implicitly at odds with a third.

Second, the subject matter at least implicates the

<sup>1</sup> This was one of the restrictions which, in the judge's opinion, was mandated both by a State-law construction of the statute (238 N.J. Super. at 375) and also as a "gap-filling" mechanism so that the statute (and the Rule) will comport with due process. Id. at 385.

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distinction between procedural matters regulated by the New Jersey Supreme Court and substantive matters regulated by the Legislature. See Winberry v. Salisbury, 5 N.J. 240 (1950). After all, the Rule is taken from a statute, and the proposed amendment pertains to substantive rights allegedly possessed by a material witness whose implementation could substantively affect the course of a criminal prosecution. The Misik opinion itself endorsed legislative input on these issues. 238 N.J. Super. at 385.

In this respect, the Office of the Attorney General, the Division of Criminal Justice, and the New Jersey County Prosecutors Association have been working with the New Jersey Law Revision Commission concerning an appropriate amendment of N.J.S.A. 2A:162-2. A copy of the proposal recommended by our office is annexed to this letter. While the Law Revision Commission has yet to finalize its version, it is apparent that legislative action is forthcoming and may indeed conflict with provisions in the instant Rule amendment.

Nothing suggests the need for undue urgency; no one has contended that prosecutors are routinely abusing the Material Witness statute, and even absent explicit guidelines our judges are certainly able to administer the statute (and likewise the Rule) in a fashion comporting with due process. Thus prudence would suggest a more deliberate approach to the Misik issues which would involve the Legislature in a fashion less likely to trample upon the Legislature's province.

For these reasons the Committee's representatives from the New Jersey Division of Criminal Justice voted against the proposed amendment. For these reasons the Division continues to dissent from the Committee's recommendations.

Very truly yours,

Richard T. Carley  
Assistant Attorney General

c: Honorable Richard C. Hare, President,  
New Jersey County Prosecutors Association

Joseph J. Barraco, Esq., Chief  
Criminal Court Services, AOC

## 1. Material Witness order; defined

A material witness order is a court order fixing conditions necessary and adequate to secure the appearance of a person who has information material to the prosecution of a pending criminal action or to a criminal investigation pending before a grand jury and who is unlikely to respond to or be subject to a subpoena.

## 2. Application for an order compelling appearance at a material witness hearing

a. The Attorney General or county prosecutor may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing if there is probable cause to believe that the person possesses information material to the prosecution of a pending criminal action or to a criminal investigation pending before a grand jury and that the person will not respond to or be subject to a subpoena. The application for an order compelling appearance may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application for an order compelling appearance at a material witness hearing shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts and circumstances giving rise to the belief that the person possesses information material to the pending criminal action or investigation and (4) a summary of the facts giving rise to the belief that the alleged material witness will not respond to or be subject to a subpoena. If there is an application for an arrest warrant, the affidavit shall set forth the factual basis for the belief that arrest is necessary.

## 3. Issuance and service of an order to appear; arrest warrant

a. If there is probable cause to believe that a material

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# Criminal Practice

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The "Anderson Report" found that the rate of collection is highest when collection terms and rates are specified by the sentencing judge, as opposed to those "ordered" by the probation department. Since caselaw already states that this is the judge's duty, see *State v. Harris*, 70 N.J. 586 (1976); *State in Interest of D.G.W.*, 70 N.J. 488 (1976) and *State v. Rhoda*, 206 N.J. Super. 584 (App. Div. 1986), this recommendation is both consistent with what the Committee perceives as preferred practice and with caselaw. See also N.J.S.A. 2C:44-2, 45-2c. The Administrative Director of the Courts should remind sentencing judges of their obligation to determine the amounts and terms of payment of financial obligations.

2. A statutory change should be enacted which would require that all balances remaining at the end of the maximum probation term be vacated and reduced to a civil judgment.

The Committee believes that due diligence should be paid to attempting to collect financial obligations during the period of probation. In establishing the terms and conditions of probation, the judge should consider the time in which defendant can reasonably make installment payments and the term of probation may be enlarged or subject to a five year maximum, in order to assure collections of financial obligations. N.J.S.A. 2C:45-2c. However, the Committee does not believe valuable probation officer time should be wasted in attempting to collect financial obligations after the period of probation has been finished. As it is likely to be of continued diminishing return the Committee recommends that at that point the balance be reduced to a civil judgment and be collectible as such. N.J.S.A. 2C:46-2(b) and (c) should be amended to clarify its application to unpaid financial obligations ordered as a condition of probation but not paid before discharge (Note that probation cannot be revoked based on a defendant's non-willful failure to pay).

3. Presentence Reports should contain accurate and complete defendant financial information.

The Committee was told that the amount of financial background information received by judges differs from county to county. In some counties extremely complete information is received, in others the information is sketchy. The Committee believes that it is critical for the sentencing judge to have complete information at his or her disposal so that appropriate sentences can be imposed and terms of payment can be set. See N.J.S.A. 2C:43-3, 44-2. Therefore, the Committee is recommending that presentence reports contain accurate and complete information on the defendant's financial background to the extent they do not already do so.

4. Community Service should not be allowed in lieu of cash payments.

The Committee does not endorse the suggestion that community service be used as a substitute for financial obligations where the defendant is unable to pay the obligation. The Committee believes to do so creates a situation akin to involuntary servitude where only the poor would be forced to perform community service. Probation cannot be revoked for non-willful failure to pay a financial obligation. See N.J.S.A. 2C:45-3c. See also N.J.S.A. 2C:46-2 and note that community service may well be considered a proper sentence to be imposed initially. See N.J.S.A. 2C:43-2b (5), 45-b (13).

5. Money posted as bail should not be used automatically to satisfy financial obligations set at sentencing.

The Committee recommends against use of money posted as bail to satisfy financial obligations imposed as conditions of the sentence. The Committee is concerned that doing so will increase the number of offenders who will flee prior to court events. Additionally, doing so frustrates the purpose of bail which is to secure the defendant's appearance at court events.

#### IV. RECOMMENDATIONS FOR LEGISLATIVE CHANGE

A recommendation for statutory change is contained within Section III, number 3. See page 70 infra.

#### V. MATTERS HELD FOR FUTURE CONSIDERATION

##### 1. Motion Practice

A private attorney wrote to the Committee asking it to consider amendments to Part III and VII of the

rules regarding motions to dismiss. Because the letter dealt with motion practice in Municipal Courts, and because the Municipal Court Committee is also endeavoring to develop a whole set of rules unique to Municipal Courts, to be embodied in Part VII, independent of the rules in Part III, the Committee decided to defer action on the letter until which time the Municipal Committee developed its proposal for redrafting Part VII. After the Municipal Court Committee reviews the matter, the Committee will consider its report and recommendations in the normal course to evaluate whether input from the Committee is appropriate or necessary.

##### 2. Post Arrest Procedures

In its 1987 Annual Report the Committee asked that the Administrative Director of the Courts issue a directive clarifying under what circumstances a probable cause determination is necessary prior to the issuance of a summons in light of the decision in *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983).

The Committee, in its 1988 Report, proposed an amendment to R. 3:4-1 which sought to assure that initial probable cause determinations, as required by *Gerstein v. Pugh*, 420 U.S. 103 (1979), were held in all cases within 48 hours of arrest. However, because the Committee was concerned that the post-arrest procedures presently embodied in the rules were the result of piecemeal changes over the years, it decided to conduct a comprehensive review of all of the procedures occurring after arrest.

During its 1989 term, the Committee reviewed these two recommendations plus another issue which dealt with whether the rules should be changed with regards to the requirement in the rules that complaints from inmates alleging that criminal offenses have been committed against them be sworn out in front of a court clerk.

During its 1989 term, the Supreme Court also decided *State v. Gonzalez*, 114 N.J. 592 (1989). In *Gonzalez*, the Supreme Court found no requirement for an independent determination of probable cause for a complaint charging the commission of a traffic offense. Although the Court specifically limited its holding to traffic offenses, it noted that two Appellate Division decisions have required probable cause determinations on non-traffic offenses. See *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983) holding a summons may not issue when a private citizen files a complaint unless there is a finding of probable cause by a judicial officer and *State v. Saltzman*, 228 N.J. Super. 109 (App. Div. 1987) holding that a probable cause hearing is necessary on a complaint signed by a police officer after the issuance of a summons. Since these decisions identify a need for clarification of court rules, the Court asked for a review by both the Criminal Practice Committee and the Municipal Practice Committees. The Committees decided to form a joint subcommittee to explore the Court's request.

The subcommittee viewed its mandate broadly in light of *Gonzalez*. In that vein it reviewed not only the Rules governing probable cause but the entire post-arrest process including the determination of bail. This furthered the decision made by the Criminal Practice Committee, in its 1988 Annual Report, to review all post-arrest procedures.

During this term, the subcommittee completed its work and filed its report with both Committees. The Criminal Practice Committee reviewed the report and made suggested changes. The Municipal Practice Committee is presently finalizing its review of the report. Subsequent to the Committee's consideration of the issue the Supreme Court rendered the decision *In The Matter of Judge Dominick C. Santini*, 126 N.J. 291 (1991). In *Santini*, a case arising out of a complaint filed by the Advisory Committee on Judicial Conduct, the Court, in disposing of the disciplinary complaint, discussed an issue peripheral to the central issue in the case. In *Santini* a citizen was arrested after failing to appear on a zoning violation that did not threaten the public health or safety. The Court chastised the municipal judge for ordering the arrest and asked the

Committee on Criminal Practice to consider the feasibility of amending Rule 3:3-1, which deals with non-indictable offenses cognizable in the municipal court, to include a . . . provision [similar to that contained in Rule 7:6-3 relating to traffic offenses] for a written notice instead of the issuance of an arrest warrant.

[Id. at 297]

The Municipal Practice Committee is now considering the effect of *Santini*. Once that Committee's consideration of the issue is complete, the recommendations made by both Committees will be reconciled and a supplemental report will be filed in the Spring of 1992.

##### 3. Discovery

The Committee was asked to consider the desirability of consolidation, and refinement, of the various rules governing discovery practice. In light of the tremendous changes that have occurred in how cases are processed due to the Speedy Trial Program, the Committee believes the discovery rules should be reviewed. A subcommittee was set up late in the term to conduct the review. Its report will be considered next term.

##### 4. Case Management Rule Changes

A series of draft rule changes were submitted to the Committee for its consideration. The changes were designed to conform the rules with current management practices. The Committee asked that the Criminal Presiding Judges review the proposals. It was agreed that once the Criminal Presiding Judges have reviewed and commented on the proposals the Committee will consider the rules.

##### 5. Fresh Complaint

In *State v. Hill*, 121 N.J. 150 (1990) the Court was faced with two issues regarding fresh complaint testimony. The first was whether a complaint elicited

through questioning could qualify under the fresh complaint doctrine. The second was whether trial courts should exclude cumulative fresh complaint evidence.

*Hill* involved the rape of a 16 year old woman. M.K. was raped on April 14, 1985 but did not make an allegation about the rape until May 25, 1985. The initial allegation surfaced during a conversation with another young woman (D.R.) who said she was raped by the same man. On June 2, 1985, during an investigation initially involving another incident, unrelated to either rape, but which subsequently broadened into an allegation of rape regarding D.R., M.K. blurted out that she also had been raped. At trial, the testimony of three witnesses were admitted into evidence under the fresh complaint rule. The defendant was convicted of rape and appealed, arguing it was inappropriate to admit two of the witnesses testimony as it was cumulative fresh complaint evidence. The Appellate Division held that the admission of the two witnesses' fresh complaint testimony was unduly prejudicial to the defendant and reversed the conviction.

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Committee on the Rules of Evidence and the . . . Criminal Practice Committee the task of recommending proposed procedures relating to the admissibility in the State's case of fresh complaint evidence, defendant's right to elicit and rely on the absence of fresh complaint, and the desirability of special instructions dealing with the issue.

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The issues and plans for developing the proposals are now under consideration.

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Due to belief on the part of the Court and the Committee that this matter should be handled on an expedited basis, a letter was sent to the Court requesting it consider the matter. (Copy of letter from Judge Stern appended as Appendix II). The Supreme Court, at its January 14, 1991 Rules Conference, decided to require use of the Uniform Defendant Reporting System to replace, effective no later than January 1, 1992, the forms presently being utilized by Criminal Division support staff for intake, bail, pre-trial intervention, and sentencing reports. The Court directed use of the forms under the following guidelines: (1) information contained on the intake form can be used by the court without restriction for purposes of the setting of bail, appointment of counsel, and pre-trial intervention; (2) the information on the intake form is prohibited from use in Grand Jury proceedings and at trial, even for purposes of cross-examination; and (3) information contained on the intake form may be used at sentencing unless the defendant objects. Should the defendant object, the information cannot be used over his or her objection.

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The Rule also addresses the consequences of failure to join non-indictable complaints with criminal offenses. Under the proposed rule, failure to join would not constitute grounds for barring a subsequent prosecution of the complaint, unless the bar is required by statute or by federal or state constitutions, or unless the prosecutor is aware of the complaint and the court's failure to join resulted from the prosecutor's failure to apprise the court of the complaint. The proposal in no way affects present policy that no non-indictable offense be disposed before a related indictable. See *State v. Dively*, 92 N.J. 573 (1983) and *State v. DeLuca*, 108 N.J. 98 (1987).

With regard to the provision on the consequences of failing to join complaints with offenses, the Attorney General dissented from that portion of the Committee's recommendation (and the resulting rule), which places responsibility on the prosecutor to apprise the court of the non-indictable complaint. It was the Committee's position that there should be some mechanism to enhance the likelihood that the trial judge will be apprised of complaints relating to the offense that should be joined, and that the burden of making such complaints known to the judge should fall on the prosecutor, who has the greatest interest in avoiding bars to subsequent prosecutions. The Attorney General, however, argued that such a provision erects an additional barrier to insuring that a defendant is tried for indictable offenses and related complaints by establishing a set of circumstances where the State would be unable to try the defendant for both type of matters. While the proposed rule enhances the prosecutor's incentive to seek joinder, it diminishes the defendant's incentive to do so. Thus, the Attorney General would have the rule bar the subsequent prosecution of a complaint not joined with a related offense, only where required by statute or by federal or state constitutions.

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Respectfully submitted:

Honorable Edwin H. Stern, Chairman  
 Honorable Wilfred P. Diana, Vice Chairman  
 Honorable Thomas C. Brown  
 Honorable Kevin G. Callahan  
 Honorable Marilyn C. Clark  
 Honorable Robert P. Figarotta  
 Honorable Peter J. Giovine  
 Honorable James A. Kennedy  
 Honorable Lawrence M. Lawson  
 Honorable John P. Mariano  
 Honorable Paul R. Porreca  
 Honorable Mathias E. Rodriguez  
 Honorable Isaac I. Serata  
 Honorable Stephen F. Smith, Jr.  
 Honorable Isaiah Steinberg  
 Honorable Shirley A. Tolentino  
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# Criminal Practice

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The "Anderson Report" found that the rate of collection is highest when collection terms and rates are specified by the sentencing judge, as opposed to those "ordered" by the probation department. Since caselaw already states that this is the judge's duty, see *State v. Harris*, 70 N.J. 586 (1976); *State v. Interest of D.G.W.*, 70 N.J. 488 (1976) and *State v. Rhoda*, 206 N.J. Super. 584 (App. Div. 1986), this recommendation is both consistent with what the Committee perceives is preferred practice and with caselaw. See also N.J.S.A. 2C:44-2, 45-2c. The Administrative Director of the Courts should remind sentencing judges of their obligation to determine the amounts and terms of payment of financial obligations.

2. A statutory change should be enacted which would require that all balances remaining at the end of the maximum probation term be vacated and reduced to a civil judgment.

The Committee believes that due diligence should be paid to attempting to collect financial obligations during the period of probation. In establishing the terms and conditions of probation, the judge should consider the time in which defendant can reasonably make installment payments and the term of probation may be enlarged or subject to a five year maximum, in order to assure collections of financial obligations. N.J.S.A. 2C:45-2c. However, the Committee does not believe valuable probation officer time should be wasted in attempting to collect financial obligations after the period of probation has been finished. As it is likely to be of continued diminishing return the Committee recommends that at that point the balance be reduced to a civil judgment and be collectible as such. N.J.S.A. 2C:46-2(b) and (c) should be amended to clarify its application to unpaid financial obligations ordered as a condition of probation but not paid before discharge (Note that probation cannot be revoked based on a defendant's non-willful failure to pay).

3. Presentence Reports should contain accurate and complete defendant financial information.

The Committee was told that the amount of financial background information received by judges differs from county to county. In some counties extremely complete information is received, in others the information is sketchy. The Committee believes that it is critical for the sentencing judge to have complete information at his or her disposal so that appropriate sentences can be imposed and terms of payment can be set. See N.J.S.A. 2C:43-3, 44-2. Therefore, the Committee is recommending that presentence reports contain accurate and complete information on the defendant's financial background to the extent they do not already do so.

4. Community Service should not be allowed in lieu of cash payments.

The Committee does not endorse the suggestion that community service be used as a substitute for financial obligations where the defendant is unable to pay the obligation. The Committee believes to do so creates a situation akin to involuntary servitude where only the poor would be forced to perform community service. Probation cannot be revoked for non-willful failure to pay a financial obligation. See N.J.S.A. 2C:45-3c. See also N.J.S.A. 2C:46-2 and note that community service may well be considered a proper sentence to be imposed initially. See N.J.S.A. 2C:43-2b (5), 45-b (13).

5. Money posted as bail should not be used automatically to satisfy financial obligations set at sentencing.

The Committee recommends against use of money posted as bail to satisfy financial obligations imposed as conditions of the sentence. The Committee is concerned that doing so will increase the number of offenders who will flee prior to court events. Additionally, doing so frustrates the purpose of bail which is to secure the defendant's appearance at court events.

## IV. RECOMMENDATIONS FOR LEGISLATIVE CHANGE

A recommendation for statutory change is contained within Section III, number 3. See page 70 infra.

## V. MATTERS HELD FOR FUTURE CONSIDERATION

### 1. Motion Practice

A private attorney wrote to the Committee asking it to consider amendments to Part III and VII of the

rules regarding motions to dismiss. Because the letter dealt with motion practice in Municipal Courts, and because the Municipal Court Committee is also endeavoring to develop a whole set of rules unique to Municipal Courts, to be embodied in Part VII, independent of the rules in Part III, the Committee decided to defer action on the letter until which time the Municipal Court Committee developed its proposal for redrafting Part VII. After the Municipal Court Committee reviews the matter, the Committee will consider its report and recommendations in the normal course to evaluate whether input from the Committee is appropriate or necessary.

### 2. Post Arrest Procedures

In its 1987 Annual Report the Committee asked that the Administrative Director of the Courts issue a directive clarifying under what circumstances a probable cause determination is necessary prior to the issuance of a summons in light of the decision in *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983).

The Committee, in its 1988 Report, proposed an amendment to R. 3:4-1 which sought to assure that initial probable cause determinations, as required by *Gerstein v. Pugh*, 420 U.S. 103 (1979), were held in all cases within 48 hours of arrest. However, because the Committee was concerned that the post-arrest procedures presently embodied in the rules were the result of piecemeal changes over the years, it decided to conduct a comprehensive review of all of the procedures occurring after arrest.

During its 1989 term, the Committee reviewed these two recommendations plus another issue which dealt with whether the rules should be changed with regards to the requirement in the rules that complaints from inmates alleging that criminal offenses have been committed against them be sworn out in front of a court clerk.

During its 1989 term, the Supreme Court also decided *State v. Gonzalez*, 114 N.J. 592 (1989). In *Gonzalez*, the Supreme Court found no requirement for an independent determination of probable cause for a complaint charging the commission of a traffic offense. Although the Court specifically limited its holding to traffic offenses, it noted that two Appellate Division decisions have required probable cause determinations on non-traffic offenses. See *State v. Ross*, 189 N.J. Super. 67 (App. Div. 1983) holding a summons may not issue when a private citizen files a complaint unless there is a finding of probable cause by a judicial officer and *State v. Salzman*, 228 N.J. Super. 109 (App. Div. 1987) holding that a probable cause hearing is necessary on a complaint signed by a police officer after the issuance of a summons. Since these decisions identify a need for clarification of court rules, the Court asked for a review by both the Criminal Practice Committee and the Municipal Practice Committees. The Committees decided to form a joint subcommittee to explore the Court's request.

The subcommittee viewed its mandate broadly in light of *Gonzalez*. In that vein it reviewed not only the Rules governing probable cause but the entire post-arrest process including the determination of bail. This furthered the decision made by the Criminal Practice Committee, in its 1988 Annual Report, to review all post-arrest procedures.

During this term, the subcommittee completed its work and filed its report with both Committees. The Criminal Practice Committee reviewed the report and made suggested changes. The Municipal Practice Committee is presently finalizing its review of the report. Subsequent to the Committee's consideration of the issue the Supreme Court rendered the decision in *The Matter of Judge Dominick C. Santini*, 126 N.J. 291 (1991). In *Santini*, a case arising out of a complaint filed by the Advisory Committee on Judicial Conduct, the Court, in disposing of the disciplinary complaint, discussed an issue peripheral to the central issue in the case. In *Santini* a citizen was arrested after failing to appear on a zoning violation that did not threaten the public health or safety. The Court chastised the municipal judge for ordering the arrest and asked the

Committee on Criminal Practice to consider the feasibility of amending Rule 3:3-1, which deals with non-indictable offenses cognizable in the municipal court, to include a . . . provision [similar to that contained in Rule 7:6-3 relating to traffic offenses] for a written notice instead of the issuance of an arrest warrant.

[Id. at 297]

The Municipal Practice Committee is now considering the effect of *Santini*. Once that Committee's consideration of the issue is complete, the recommendations made by both Committees will be reconciled and a supplemental report will be filed in the Spring of 1992.

### 3. Discovery

The Committee was asked to consider the desirability of consolidation, and refinement, of the various rules governing discovery practice. In light of the tremendous changes that have occurred in how cases are processed due to the Speedy Trial Program, the Committee believes the discovery rules should be reviewed. A subcommittee was set up late in the term to conduct the review. Its report will be considered next term.

### 4. Case Management Rule Changes

A series of draft rule changes were submitted to the Committee for its consideration. The changes were designed to conform the rules with current management practices. The Committee asked that the Criminal Presiding Judges review the proposals. It was agreed that once the Criminal Presiding Judges have reviewed and commented on the proposals the Committee will consider the rules.

### 5. Fresh Complaint

In *State v. Hill*, 121 N.J. 150 (1990) the Court was faced with two issues regarding fresh complaint testimony. The first was whether a complaint elicited

through questioning could qualify under the fresh complaint doctrine. The second was whether trial courts should exclude cumulative fresh complaint evidence.

*Hill* involved the rape of a 16 year old woman. M.K. was raped on April 14, 1985 but did not make an allegation about the rape until May 25, 1985. The initial allegation surfaced during a conversation with another young woman (D.R.) who said she was raped by the same man. On June 2, 1985, during an investigation initially involving another incident, unrelated to either rape, but which subsequently broadened into an allegation of rape regarding D.R., M.K. blurted out that she also had been raped. At trial, the testimony of three witnesses were admitted into evidence under the fresh complaint rule. The defendant was convicted of rape and appealed, arguing it was inappropriate to admit two of the witnesses testimony as it was cumulative fresh complaint evidence. The Appellate Division held that the admission of the two witnesses' fresh complaint testimony was unduly prejudicial to the defendant and reversed the conviction.

The Supreme Court held that in order to qualify as a fresh complaint the statements made by a victim shouldn't be extracted during coercive questioning. The Court left it up to the discretion of the trial judge to determine whether questioning was benign or coercive. The Court also held that trial courts may exclude cumulative fresh complaint testimony that is prejudicial to a defendant. *State v. Hill*, supra, at 170. The Court referred to the

Committee on the Rules of Evidence and the . . . Criminal Practice Committee the task of recommending proposed procedures relating to the admissibility in the State's case of fresh complaint evidence, defendant's right to elicit and rely on the absence of fresh complaint, and the desirability of special instructions dealing with the issue.

[Id. at 166]

The issues and plans for developing the proposals are now under consideration.

## VI. MATTERS ALREADY ACTED UPON BY THE SUPREME COURT

### 1. Uniform Defendant Intake Report

In the Committee's 1990 Annual Report, it recommended Supreme Court approval of a package of forms which were developed to replace existing forms prepared by court support staff for use by judges in making bail, pre-trial intervention, conditional discharge and sentencing decisions. There was much debate over whether certain information, contained on the U.D.I.R. form regarding a defendant's physical/mental health and drug/alcohol use, and which is contained on the intake form (U.D.I.R.) should be subject to a rule making the information confidential. Instead of recommending a rule, the Committee decided to delete the information from the form. After reviewing the Committee's report the Supreme Court decided to approve the forms package but instructed that the information which the Committee deleted be put back on the form. The Court asked the Committee to draft a rule which would protect the defendant from use of this information to his disadvantage. The Committee considered the Court's request and could not reach a consensus on the extent to which the use of the information obtained from the intake form should be deemed confidential. The Committee considered three proposals, none of which was favored by a majority of the Committee.

The position of the prosecutors, including representatives of the Division of Criminal Justice, was that there should be some confidentiality to protect the defendant from improper use of the intake form, such as prohibiting it from being introduced as substantive evidence before the Grand Jury or at trial, and exempting it from subpoena power of the prosecutor. However, there should also be an exception to such confidentiality in order to let prosecutors use information contained on the form as a basis for cross-examination of the defendant when that information is inconsistent with the defendant's testimony at a bail hearing or at trial.

An alternative proposal, supported by the public defender, was to have the information on the form, and anything derived therefrom, immunized from future use without the consent of the defendant, except for purposes of bail, appointment of counsel, and admission to pre-trial intervention. Other than for these specified proceedings, information collected on the intake form would not be able to be utilized for subsequent court events over the defendant's objections.

A third proposal was to prohibit the use of the information obtained from the intake form against the defendant in a Civil or Criminal trial, but not to prohibit its use at a subsequent court proceeding such as at sentencing or pre-trial intervention determination. This was the position taken by the Conference of Criminal Presiding Judges in connection with an earlier version of the U.D.I.R. Forms.

Due to belief on the part of the Court and the Committee that this matter should be handled on an expedited basis, a letter was sent to the Court requesting it consider the matter. (Copy of letter from Judge Stern appended as Appendix II). The Supreme Court, at its January 14, 1991 Rules Conference, decided to require use of the Uniform Defendant Reporting System to replace, effective no later than January 1, 1992, the forms presently being utilized by Criminal Division support staff for intake, bail, pre-trial intervention, and sentencing reports. The Court directed use of the forms under the following guidelines: (1) information contained on the intake form can be used by the court without restriction for purposes of the setting of bail, appointment of counsel, and pre-trial intervention; (2) the information on the intake form is prohibited from use in Grand Jury proceedings and at trial, even for purposes of cross-examination; and (3) information contained on the intake form may be used at sentencing unless the defendant objects. Should the defendant object, the information cannot be used over his or her objection.

Directive 7-91 to Assignment Judges and Criminal Presiding Judges was issued August 21, 1991 by the Administrative Director at the Court's instruction.

### 2. Trial of Criminal Offenses and Lesser Related Infractions

In its 1988 Report, the Committee recommended adoption of a new rule, R. 3:15-3, which would provide for joinder of criminal offenses with lesser, related infractions. The Committee asked that the court defer consideration of the rule, however, pending a decision in *State v. Muniz*, 118 N.J. 319 (1990). The Committee asked the Court to consider adoption of the rule once *Muniz* was decided.

The Rule requires mandatory joinder of any pending non-indictable complaint for trial with a criminal offense based on the same conduct or arising from the same episode, unless the defendant or the state is prejudiced by such joinder. The rule further provides that a Superior Court judge shall sit as a Municipal Court judge to hear the non-indictable complaint, regardless of whether the jury is the fact finder on the criminal offense, unless the non-indictable complaint charges an offense which must be submitted to the jury pursuant to statute. As to evidence admissible at trial for the non-indictable complaint, but inadmissible at trial for the criminal offense, the rule specifies that the court shall hear the evidence outside of the jury's presence. It also requires that the court not render its verdict on the complaint until the jury has decided on the offense or has been dismissed.

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## APPENDIX I



State of New Jersey  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF CRIMINAL JUSTICE

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January 10, 1992

Honorable Edwin H. Stern, J.A.D.  
Chairman, Supreme Court Committee on Criminal Practice  
Four Headquarters Plaza  
Suite 1101  
Box 158  
Morristown, New Jersey 07960-3965

Re: Objection to the Proposed Amendment  
of R. 3:26-3

Dear Judge Stern:

This letter is intended to set forth our dissent from that portion of the proposed Report of the Supreme Court Committee on Criminal Practice, 1990-1992 term, which urges amendment of R. 3:26-3. It formally memorializes the objections which we raised at the April 22, 1991 Committee meeting. The New Jersey Division of Criminal Justice opposes this amendment.

The current version of the Rule is taken essentially verbatim from N.J.S.A. 2A:162-2 (which "remain[s] in full force and effect," N.J.S.A. 2C:98-3). In State v. Misik, 238 N.J. Super. 367 (Law Div. 1989), the Law Division judge promulgated certain procedures pertaining to the administration of this statute and this Rule, whose promulgation, she concluded, was compelled, inter alia, by the Due Process Clause of the federal Constitution. Her reasoning was, in part, both spontaneous and advisory; that is, she went beyond the issues advanced by the parties (id. at 375), and her primary constitutional analysis followed her resolution of the case (id. at 377) on other grounds.

The judge concluded that the statute (and thus, likewise the Rule) was deficient for failure to include adequate constitutional safeguards. However this deficiency "does not necessarily mandate the conclusion that the statute is unconstitutional." Id. at 384. Rather she salvaged the statute (and likewise the Rule) by glossing it with the constitutional safeguards that she deemed advisable pending further action by the Supreme Court (with respect to the Rule) or by the Legislature (with respect to the statute). Id. at 385.

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January 10, 1992

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Thus, while the statute (like the Rule) provided a flexible "interest of justice" standard to guide the court in dealing with material witnesses, the guidelines mandated by Misik provided considerably greater restrictions upon the judge's discretion. For example, material witnesses may be detained only with respect to a "pending" criminal action evidenced by an indictment, complaint or accusation.<sup>1</sup> An order requiring a material witness to appear in court must be supported by a "preponderance of the evidence" rather than probable cause. A warrant for the forthwith arrest of a material witness requires the State to provide "clear and convincing proof" to support a claim of exigency. At the subsequent hearing the material witness has the right to counsel and generally the right to confront and cross-examine the State's witnesses. Id. at 385-387. It is not clear whether the reference to the "State's witnesses" was intended to mean those witnesses establishing the commission of a crime (e.g., eyewitnesses), or simply those establishing probable cause (e.g., investigating police officers).

In establishing these guidelines the Misik opinion acknowledged that part of its holding was directly contrary to that of the opinion in State v. Hand, 101 N.J. Super. 43 (Essex Cty. Ct. 1968). However the opinion concluded that "[i]n the absence of appellate authority this court is under no obligation to follow the reasoning in the Hand case." Id. at 375 n.4. The opinion did not acknowledge but perhaps should have acknowledged that its result was also implicitly contrary to the opinion in State v. Price, 108 N.J. Super. 272 (Law Div. 1970), which seemingly approved of the "interest of justice" flexible standard set forth in the statute and the Rule.

In proposing the amendment to R. 3:26-3, the Committee essentially adopts the guidelines suggested in Misik. Our opposition to this proposal is two-fold. First, we are not fully persuaded by the analysis in Misik. Like the Law Division judge in Misik, the Committee "is under no obligation to follow the reasoning in the [Misik] case" (238 N.J. Super. at 375 n.4) at least "[i]n the absence of appellate authority" (id.), especially since that reasoning is propped upon spontaneous dicta and is explicitly at odds with a second Law Division opinion, implicitly at odds with a third.

Second, the subject matter at least implicates the

<sup>1</sup> This was one of the restrictions which, in the judge's opinion, was mandated both by a State-law construction of the statute (238 N.J. Super. at 375) and also as a "gap-filling" mechanism so that the statute (and the Rule) will comport with due process. Id. at 385.

Honorable Edwin H. Stern, J.A.D.  
Chairman, Supreme Court Committee on Criminal Practice  
January 10, 1992

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distinction between procedural matters regulated by the New Jersey Supreme Court and substantive matters regulated by the Legislature. See Winberry v. Salisbury, 5 N.J. 240 (1950). After all, the Rule is taken from a statute, and the proposed amendment pertains to substantive rights allegedly possessed by a material witness whose implementation could substantively affect the course of a criminal prosecution. The Misik opinion itself endorsed legislative input on these issues. 238 N.J. Super. at 385.

In this respect, the Office of the Attorney General, the Division of Criminal Justice, and the New Jersey County Prosecutors Association have been working with the New Jersey Law Revision Commission concerning an appropriate amendment of N.J.S.A. 2A:162-2. A copy of the proposal recommended by our office is annexed to this letter. While the Law Revision Commission has yet to finalize its version, it is apparent that legislative action is forthcoming and may indeed conflict with provisions in the instant Rule amendment.

Nothing suggests the need for undue urgency; no one has contended that prosecutors are routinely abusing the Material Witness statute, and even absent explicit guidelines our judges are certainly able to administer the statute (and likewise the Rule) in a fashion comporting with due process. Thus prudence would suggest a more deliberate approach to the Misik issues which would involve the Legislature in a fashion less likely to trample upon the Legislature's province.

For these reasons the Committee's representatives from the New Jersey Division of Criminal Justice voted against the proposed amendment. For these reasons the Division continues to dissent from the Committee's recommendations.

Very truly yours,

Richard T. Carley  
Assistant Attorney General

c: Honorable Richard C. Hare, President,  
New Jersey County Prosecutors Association

Joseph J. Barraco, Esq., Chief  
Criminal Court Services, AOC

## 1. Material Witness order; defined

A material witness order is a court order fixing conditions necessary and adequate to secure the appearance of a person who has information material to the prosecution of a pending criminal action or to a criminal investigation pending before a grand jury and who is unlikely to respond to or be subject to a subpoena.

## 2. Application for an order compelling appearance at a material witness hearing

a. The Attorney General or county prosecutor may apply to a judge of the Superior Court for an order compelling a person to appear at a material witness hearing if there is probable cause to believe that the person possesses information material to the prosecution of a pending criminal action or to a criminal investigation pending before a grand jury and that the person will not respond to or be subject to a subpoena. The application for an order compelling appearance may be accompanied by an application for an arrest warrant when there is probable cause to believe that the person will not appear at the material witness hearing unless arrested.

b. The application for an order compelling appearance at a material witness hearing shall include a copy of any pending indictment, complaint or accusation and an affidavit containing: (1) the name and address of the person alleged to be a material witness, (2) a summary of the facts believed to be known by the alleged material witness and their relevance to the pending criminal action or investigation, (3) a summary of the facts and circumstances giving rise to the belief that the person possesses information material to the pending criminal action or investigation and (4) a summary of the facts giving rise to the belief that the alleged material witness will not respond to or be subject to a subpoena. If there is an application for an arrest warrant, the affidavit shall set forth the factual basis for the belief that arrest is necessary.

## 3. Issuance and service of an order to appear; arrest warrant

a. If there is probable cause to believe that a material

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witness order may issue against the person named in the application, the judge shall:

- (1) issue an order to be personally served upon the person at least 24 hours before the hearing, unless the judge finds that the interests of justice require a shorter notice period, directing the person to appear at a hearing to determine whether the person should be adjudged a material witness and further advising the person of the time, date and place of the hearing and of the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one; and
- (2) issue an arrest warrant for the alleged material witness if there is also probable cause to believe that the person named in the application will not appear at the material witness hearing unless arrested.

#### 4. Arrest of a material witness without a warrant under exigent circumstances

a. When an officer reasonably believes that he is confronted with an emergency in which the delay necessary to obtain an arrest warrant or order to appear would result in the unavailability of a person who is a material witness, the officer may arrest the person without a warrant.

b. Following a warrantless arrest of a material witness, the officer shall immediately bring the person before the court at which time the court shall proceed as if upon application for an order to appear at a material witness hearing pursuant to Section 2 and shall dispose of the application in accordance with the procedures set forth in Sections 3 and 5.

c. If the arrest precedes the initiation of a grand jury investigation or the filing of a criminal complaint or accusation, the court shall release the person unless the Attorney General or county prosecutor or his or her designee represents to the court at the initial appearance: (1) that the alleged material witness was arrested in furtherance of an investigation of a crime and (2) that the filing of a criminal complaint or accusation or the initiation of a grand jury investigation is imminent.

#### 5. Procedures following arrest

a. The arresting officer shall bring the alleged material witness before the court immediately after arrest.

b. At the initial appearance the judge shall provide the person with a copy of the order to appear and supporting application and inform the person: (1) of the reason for arrest, (2) of the time and place of the hearing to determine whether the person is a material witness, and (3) that the person has a right to an attorney and to have an attorney appointed if the person cannot afford one.

c. The judge shall set conditions for release, or if there is clear and convincing evidence that the person will not appear at the material witness hearing unless detained, the judge may order the person held until the material witness hearing which shall take place within 48 hours of the arrest.

#### 6. Material witness hearing

a. At the material witness hearing, the following rights shall be afforded to the person: (1) the right to be represented by an attorney and to have an attorney appointed if the person cannot afford one, (2) the right to be heard and to present witnesses and evidence, (3) the right to disclosure at the hearing of evidence in support of the State's application where disclosure of such evidence will neither interfere with nor obstruct the ongoing criminal investigation or prosecution recited in support of the application and (4) the right to confront and cross-examine witnesses.

b. If the applicant proves by a preponderance of the evidence that the person possesses information material to the prosecution of a pending criminal action or to a criminal investigation pending before a grand jury and is unlikely to respond to or be subject to a subpoena, the judge shall issue a material witness order declaring the person a material witness and imposing constraints necessary and adequate to secure the attendance of the witness at future proceedings. Constraints ordered may include measures such as the following: (1) placing

the witness in the custody of a designated person or organization agreeing to supervise the person, (2) restricting the travel, association, or place of abode of the person until the witness's testimony has been secured, (3) setting bail and (4) detention.

c. The court shall set forth on the record all findings of fact and reasons supporting the issuance or denial of the order.

d. Any person detained as a material witness shall be comfortably lodged and provided for, and shall not be held in a jail or prison. A person detained as a material witness shall be paid the sum of \$3 per day for each day of confinement in such custody.

#### 7. Orders appealable

An order granting or denying an application for a material witness order shall constitute a final order for purposes of appeal, but on motion may be reconsidered at any time by the court which entered the order. The court which entered the order shall have the discretion to determine whether or not testimony shall be taken at any reconsideration hearing.

## APPENDIX II

### SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

EDWIN H. STERN  
Judge



FOUR HEADQUARTERS PLAZA  
SUITE 1101  
BOX 158  
MORRISTOWN, NJ 07960-3965

November 5, 1990

Hon. Robert D. Lipscher  
Administrative Director of the Courts  
Richard J. Hughes Justice Complex  
CN 037  
Trenton, NJ 08625

Re: Uniform Defendant Reporting System (UDIR)

Dear Director Lipscher:

In its 1990 Annual Report, the Criminal Practice Committee recommended the "approval of a package of forms which were developed to replace existing forms prepared by court support staff for use by judges in making bail, pretrial intervention, conditional discharge and sentencing decisions." Report at page 52. The form package was designed to expedite the collection of relevant information and to avoid duplication by assuring "that information is collected only once but can be used for a number of court events." *Id.* The UDIR is deemed the "foundation report" for each of the "key decision points" during the pretrial and post-disposition process. *Id.*

Notwithstanding the strong belief that the UDIR was beneficial, particularly with respect to the promotion of early and better bail decisions and determinations with respect to pretrial release, there was much debate within the Committee concerning whether certain information regarding a defendant's physical-mental health and drug-alcohol use contained on the intake form should be the subject of a rule making the information confidential. While many judges find the information helpful in making a bail decision, and indeed judges in some counties were obtaining this information for years while using predecessor bail forms, a public defender cannot now be assigned to represent a defendant without prior court approval. A form must be filled out to secure the information relevant to a determination with respect to representation, *see N.J.S.A. 2A:158A-14, -15.1*, and if the form also contains the information relevant for bail setting, it will of necessity be prepared before counsel is assigned. If all relevant information is not collected at the outset and awaits the appointment of counsel, bail may be delayed or set on inadequate information, and duplicate administrative time and expense may be required.

Traditionally bail has been set based on information collected by staff and criminal history record information well before counsel has been assigned, even when the public defender decided his own jurisdiction to represent the defendant. The problem we now face, however, flows because the quality and quantity of information now deemed relevant to the bail-pretrial release decision may, at least in some cases, be more than in the past and may also be deemed relevant to the substantive offense, and there is an administrative desire to collect information at one time for use in multiple court reports. The legal issues involved with respect to use of the form and confidentiality have existed for many years. The present debate stems because Committee review has resulted in identification of legal questions which have never previously been raised.

Our 1990 report addressed the issue which arose as a result of the proposed use of an intake form with all relevant information included thereon. After consideration of questions concerning utilization of the form as addressed by the Presiding Judges of the

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# Committee on Family Practice

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### VI. FAMILY DIVISION PRACTICE COMMITTEE FOR 1990-1992

### I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

#### R. 1:18. Duty of Judges

##### Discussion:

The Committee discussed at length the issue of a judge's duty to report violations of law discovered during the course of judicial proceedings. This discussion was prompted by the recent decision in *Sheridan v. Sheridan*, 247 N.J. Super. 552 (Ch. Div. 1990), and the problems addressed therein. In *Sheridan*, the court observed at 563:

It is every citizen's duty to uphold the law and as part of that duty to report any knowledge she or he may have of a crime committed or to be committed. In order to preserve public confidence in the integrity of the judiciary, a judge must be the ultimate exemplar of that good citizenship. Sworn testimony before her or him that a crime has been committed -- as in this case -- requires the judge to make a prompt report to proper authority ... (footnote omitted).

The *Sheridan* court then proceeded to review a memorandum previously issued by the then Assignment Judge of Burlington and Ocean counties to the judges within his vicinage addressing the duty of a judge to report illegal conduct on the part of a litigant. The gravamen of that memorandum was that, as the result of a discussion that Assignment Judge Lenox had with Robert Cowen (now Third Circuit

Judge Cowen) of the Central Ethics Unit, there was a judicial obligation to report illegal conduct to law enforcement authorities or to the Central Ethics Unit. That memorandum specifically continued:

I specifically call your attention that Cowen mentioned that this includes evidence indicating the failure of a litigant to file an income tax return or to report income on a filed return. Such evidence is not uncommon in matrimonial litigation and occurs occasionally in civil litigation. Such evidence should be reported to Cowen, who in turn transmits it to the Internal Revenue Service....

*Sheridan*, 247 N.J. Super. at 563-64.

The Committee, after thoroughly reviewing this topic, concurs with the *Sheridan* opinion and the Lenox memorandum that courts are obligated to report evidence of potential crimes including the intentional failure of litigants to report income and the intentional failure of those litigants to file income tax returns. The Committee notes that prior to *Sheridan*, this obligation had not appeared in a reported decision. The Committee concludes that codification of this obligation within the Rules Governing the Courts of the State of New Jersey is appropriate and specifically recommends that where there is substantial evidence that a crime has been committed or substantial evidence of an intentional under-reporting of income or an intentional failure to

file income tax returns that the reporting obligation is triggered.

It is to be noted that the Committee specifically recommends that the Rule set forth below be a Rule of General Application appearing in Part I rather than Part V of the Court Rules. This recommendation is made because the Committee views the responsibility to report as not being solely confined to the Family Part, but instead to be the responsibility of all courts without our state. To do otherwise would, to paraphrase *Sheridan*, make a judge less than the ultimate exemplar of good citizenship.

#### Proposed Rule Change:

#### R. 1:18. Duty of Judges

(a) *Generally*. It shall be the duty of every judge to abide by and to enforce the provisions of the Disciplinary Rules of the Code of Professional Responsibility, the Code of Judicial Conduct and the provisions of Rule 1:15 and Rule 1:17.

(b) *Reporting of an Act Which May Constitute a Crime*. Where substantial evidence exists that an act which may constitute a crime may have been committed, it shall be the duty of a judge to make prompt report to the proper authority.

(c) *Reporting of an Act Which May Constitute an Income Tax Violation*. Where substantial evidence

exists that there may have been an intentional underreporting of income or the intentional failure to file an income tax return, it shall be the duty of a judge to make prompt report to the proper authority.

Note: Source--R.R.1:26-6, 8:13-7(a); amended July 29, 1977 to be effective September 6, 1977; amended \_\_\_ to be effective \_\_\_

R. 3:1-5. Indictable Offenses in the Superior Court; Transfer Discussion:

The Committee noted the adoption by the Legislature of Chapter 104 of the laws of 1990 and discussed the need for the Administrative Office of the Courts to generate a standard 'stamp' including required bi-lingual notice language for all custody and visitation orders. The Committee notes that the Administrative Office of the Courts did, in fact, promulgate recommended language for inclusion in such orders. The Committee commends the Administrative Office of the Courts for having done so.

The Committee also discussed those provisions of Chapter 104 which made certain violations crimes of the second or third degree. The Committee focused in detail upon when and if such issues should be heard in the Criminal Part and/or the Family Part. The Committee noted that the Criminal Part may be

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Criminal Division and others, the Committee considered whether the form should be all-inclusive and, if so, the best way to preserve the integrity of the form to prevent false statements while, simultaneously, protecting the rights of a defendant from utilization of information on the form in subsequent proceedings. The Committee's report (at page 56) sets out the pros and cons. Our Committee report concluded, at page 57:

By a vote of 12 for, 6 against and 3 abstentions, the Committee voted to recommend adoption by the Supreme Court of Defendant Reporting System Forms package without an accompanying rule on confidentiality, but without the objectionable questions relating to drug/alcohol use and physical/mental health on the UDIR form. These questions have been added to the form collecting information for PTI which is now subject to a confidentiality requirement. The PTI application form is prepared after consultation with counsel. In this way issues can arise in the adjudicatory context relating to collection of the additional information for bail and intake purposes. There is, however, a strong view by some members of the Committee that the UDIR form should contain the additional questions and that either a rule concerning confidentiality be adopted and/or issues concerning its receipt and collection be litigated in the adversary context.

We have been advised that, after submission of our report, the Supreme Court approved promulgation of the Uniform Defendant Reporting System UDIR form, and instructed that the form contain all questions which the Committee had deleted. We were further advised that the Court directed the Committee to expeditiously draft a rule to provide confidentiality with respect to form utilization.

No issue has presented more divergent opinion among members of the Criminal Practice Committee than utilization of this form and whether use of information contained thereon should be deemed confidential. On the one hand, prosecutors generally believe that, while some confidentiality must be honored, there must also be an exception permitting them to at least be able to use information contained on the form as a basis for cross examination of the defendant who signs same under certification when the information is inconsistent with something he or she testifies to at trial. Prosecutor Alan Rockoff's letter of August 20, 1990 on behalf of

the Prosecutor's Association and the Division of Criminal Justice, taking that position, is attached hereto. On the other hand, representatives of the Public Defender's Office want the information, and anything derived therefrom, to be immunized from future use absent defendant's consent. Assistant Public Defender Dale Jones' letter of October 18, 1990, adopting the views of John Cannel, Esq., as stated in his letter of June 18, 1990, is also attached. Their view proposes that the information collected on the intake form for purposes of bail not be utilized with respect to subsequent court proceedings, such as the presentence report, without defendant's consent. We are advised that the Presiding Judges of the Criminal Division have endorsed a rule which would prohibit the use of the information against the defendant in a criminal or civil trial. See Jack McCarthy's attached memorandum of May 19, 1987. (This memorandum was before the Committee again during its 1990 deliberations). Their proposal would not, however, prohibit use of the information collected for subsequent court events other than trial, such as sentencing, even though defendant was not represented at the time the intake form was prepared.

The Committee debated these positions and a consensus could not be reached. In fact, none of the three proposals presented to the Committee could muster a majority. Given this fact the Committee decided to present the Court with the three options from which the Court could choose. No memorandum on constitutional values has been presented by any Committee member.

We assume that the Court will adhere to its prior decision that the initial intake form contain all relevant information and that a confidentiality rule be adopted. Accordingly, I do not address those issues herein. Joe Barraco and I will be glad to put whatever option the Court selects into final rule form, as the drafts embodied on the enclosed proposals need refinement.

Very truly yours,

Edwin H. Stern

EHS:ek  
Enclosures

cc: Steven D. Bonville, Esq.  
John P. McCarthy, Esq.  
Joseph J. Barraco, Esq.