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I. PROPOSED RULE AMENDMENTS RECOMMENDED

A. Proposed Amendment to R. 1:4-4 -- Affidavits

An attorney suggested a rule amendment to allow the filing of facsimiled affidavits. In some vicinages, facsimiled affidavits annexed to motion papers are not accepted for filing because of the absence of the affiant's original signature. The Committee agreed to recommend the amendment of R. 1:4-4 to allow the filing of facsimiled affidavits providing that the attorney presenting the affidavit represents that the original document will be provided upon the request of the court or a party.

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

1:4-4. Affidavits

(a) ... no change

(b) ... no change

(c) Facsimile Signature. If the affiant is not available to sign an affidavit or certification, it may be filed with a facsimile signature provided the attorney offering the document certifies that the affiant acknowledged the genuineness of the signature and that the document or a copy with an original signature affixed will be filed if requested by the court or a party.

Note: Source -- R.R. 1:27F, 4:10-4; paragraph (c) adopted to be effective .

B. Proposed Amendment to R. 1:4-9 -- Filed Papers

Two judges and an attorney presented to the Committee separate complaints concerning pleadings whose pages, though typed or computer-generated, were so overcrowded as to be unreadable. Each recommended rule changes articulating more stringent format requirements for papers filed with and submitted to the court. The Committee agreed that the rules should be amended to ensure the legibility not only of pleadings, motions and other filed papers but also of letter briefs and memoranda. It proposes placing in R. 1:4-9 the requirement that such papers be double spaced with a type size of pica or larger.

The Committee also proposes removing from the rule the now obsolete provision that prior to September 1, 1971 legal-size paper may be used.

The proposed amendment to R. 1:4-9 reads as follows:

1:4-9. Size [and], Weight and Format of Filed Papers

Except as otherwise provided by R. 2:6-10, [P]pleadings and other papers filed with [and] the court, including letter briefs and memoranda, [except as otherwise provided by R. 2:6-10,] shall be prepared on letter size (approximately 8 1/2 x 11 inches) paper of customary weight and quality[. Prior to September 1, 1971, however, either legal or letter size papers may be filed.] and shall be double spaced with a type size of pica or larger.

Note: Source -- R.R. 1:27C; amended to be effective .

C. Proposed Amendments to Rules 1:5-3, 4:4-7 and 4:59-1(d) -- Service Issues

These rules are proposed jointly by the Civil Practice Committee and the Special Civil Part Practice Committee on the initiative of the latter, which expressed great concern over defendant's rights with respect to service generally and wage executions specifically. The three rule proposals represent a compromised view acceptable to the two committees. In short, R. 1:5-3 is proposed to be amended to make clear that the return receipt card is not required to be filed on post-process service but that when such service is made by mail, the affidavit must be specific respecting the last known address of the person served. R. 4:4-7 is proposed to be amended to require filing of the return receipt card when original process has been served by mail. Finally, R. 4:59-1 is proposed to be amended to require filing of proof of service together with submission of the form of wage execution, to give the judgment debtor a 30-day period in which to respond, and to give the judgment debtor recourse if an objection is raised even after the wage execution has issued.

The proposed amendments to Rules 1:5-3, 4:4-7 and 4:59-1(d) read as follows:

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] certification of service appended to the paper to be filed and signed by the attorney for the party making service. If service has been made by mail the affidavit or certification shall state that the mailing was to the last known address of the person served. 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] filing of the return receipt card with the court shall not be required. Failure to make proof of service does not affect the validity of the service, and the court at any time may allow the proof to be amended or supplied unless an injustice would result.

Note: Source -- R.R. 4:5-2(b), 4:88-10 (fifth sentence); amended July 17, 1975 to be effective September 8, 1975; amended July 29, 1977 to be effective September 6, 1977; amended _____ to be effective _____.

4:4-7. Return

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

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

4:59-1. Execution

(a) ... no change

(b) ... no change

(c) ... no change

(d) Wage Executions; Notice, Order, Hearing. Proceedings for the issuance of an execution against the wages, debts, earnings, salary, income from trust funds or profits of a judgment debtor shall be on notice to [him] the debtor. The notice of wage execution shall state (1) that the application will be made for an order directing a wage execution to be served upon the defendant's named employer, (2) the limitations prescribed by 15 U.S.C.A. §1671-1677, inclusive and N.J.S. 2A:17-50 et seq. and N.J.S. 2A:17-57 et seq. on the amount of defendant's salary which may be levied upon, (3) that defendant may notify the county clerk and the plaintiff in writing within 10 days after service of the notice of [his] reasons why the order should not be entered; and (4) if defendant so notifies the clerk, the application will be set down for hearing of which the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course. The notice of wage execution shall be served on the judgment debtor in accordance with R. 1:5-2. A copy of the notice of application for wage execution, together with proof of service in accordance with R. 1:5-3, shall be filed

with the clerk at the time the form of order for wage execution is submitted. No order shall be entered unless the form of order was filed within 30 days of service of the notice or 30 days of the date of the hearing. If an objection from the judgment debtor is received by the clerk after a wage execution has issued, all moneys remitted by the employer shall be held until further order of the court and the matter shall be set down for a hearing within 7 days of receipt of the objection.

(e) ...no change

(f) ...no change

(g) ...no change

Note: Source -- R.R. 4:74-1, 4:74-2, 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended to be effective _____.

D. Proposed Amendments to Rules 1:5-6 and 4:5-1 -- Case Information Statement

In the Summer of 1988, the Supreme Court considered a proposal to implement the use of a Civil Case Information Statement (CIS) statewide. As the Civil Practice Committee was then on summer hiatus, the Court asked Judge Pressler to draft revisions to the appropriate rules to implement the mandatory filing of the CIS with all first pleadings. The language of the proposed rules was thereafter approved by the full Committee at its first meeting of the new term.

The proposed amendments to Rules 1:5-6 and 4:5-1, along with the proposed form of CIS, were published for comment in the August 25, 1988 issue of the Law Journal; comments were subsequently received. The Court has not yet acted on this proposal.

The proposed amendments to Rules 1:5-6 and 4:5-1 read as follows:

1:5-6. Filing

(a) ... no change

(b) ... no change

(c) Nonconforming Papers. The clerk shall file all papers presented [to him] for filing and may notify the person filing if such papers do not conform to these rules. If, however, a paper is presented for filing without the Case Information Statement required by R. 4:5-1 or without payment of the required filing fee, the clerk shall return the same stamped "Received but not Filed (date)" with notice that if the paper is retransmitted [to him] together with the Case Information Statement or filing fee, as appropriate, within ten days after the receipt date stamped thereon, filing will be deemed to have been made on said date.

(d) ... no change

Note: Source -- R.R. 1:7-11, 1:12-3(b), 2:10, 3:11-4(d), 4:5-5(a), 4:5-6(a) (first and second sentences), 4:5-7 (first sentence), 5:5-1(a). Paragraphs (b) and (c) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (c) amended to be effective .

4:5-1. [Pleadings Allowed; Notice of Other Actions]
General Requirements for Pleadings

(a) Pleadings Allowed. There shall be a complaint and an answer; an answer to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint pursuant to R. 4:8; a third-party answer, if a third-party complaint is served; and a reply, if an affirmative defense is set forth in an answer and the pleader wishes to allege any matter constituting an avoidance of the defense. No other pleading is allowed.

(b) Requirements for First Pleadings.

(1) Case Information Statement. A case information statement in the form prescribed by Appendix XII to these rules shall be annexed as a cover sheet to each party's first pleading.

(2) Notice of Other Actions. Each party shall include with the first pleading a certification as to whether the matter in controversy is the subject of any other action pending in any court or of a pending arbitration proceeding, or whether any other action or arbitration proceeding is contemplated; and, if so, the certification shall identify such actions and all parties thereto. Further, each party shall disclose in the certification the names of any other party who should be joined in the action. Each party shall have a continuing obligation during the course of the

litigation to file and serve on all other parties and with the court an amended certification if there is a change in the facts stated in the original certification. The court may compel the joinder of parties in appropriate circumstances, either upon its own motion or that of a party.

Note: Source -- R.R. 4:7-1; amended July 26, 1984 to be effective September 10, 1984; caption and text amended to be effective .

E. Proposed Amendment to R. 1:6-2 -- Form of Motion; Hearing

A trial judge recommended two revisions to R. 1:6-2. The first, to paragraph (c), would make it clear that it is counsel who must personally make the required good faith attempt to confer with the adversary prior to the filing of a calendar or discovery motion. The second revision suggested by the trial judge would modify paragraph (d) to clarify the process for obtaining oral argument. The Committee deferred consideration of these proposals until it reviewed the draft report of the Committee on Civil and Family Motion Practice to determine that the latter committee had not addressed these issues.

Rule 1:6-2(c) now requires that a discovery or calendar motion be accompanied by a certification stating that the moving party has conferred or has made a good faith effort to confer with the opposing party in an effort to resolve the issues raised by the motion. In actual practice, this certification is often signed by a secretary or paralegal in the office of the moving party's attorney, who merely spoke with (or attempted to speak with) his or her counterpart in the office of the adversary's attorney. Such a practice circumvents the intent of the rule, and the Committee agreed to recommend an amendment specifically requiring the attorney for the moving party personally to confer

orally (or to make a good faith attempt to confer) with the attorney for the opposing party.

As to R. 1:6-2(d), there is apparently considerable disparity as to how judges around the state apply the rule in permitting (or requiring) oral argument. At present, R. 1:6-2(c) calls for calendar or discovery motions to be disposed of on the papers, unless the court directs otherwise, on its own motion or at a party's request. All other civil motions are to receive oral argument unless it is waived [R. 1:6-2(d)]. In actual practice, however, interpretation and application of these rules varies widely.

In discussing how to address this issue, the Committee considered several proposals. One would have resulted in the automatic waiver of oral argument on any type of motion unless specifically requested by a party or directed by the court. Another would have resulted in the automatic scheduling of a motion -- any type of motion -- for oral argument if opposed. Ultimately, the Committee approved an amendment to R. 1:6-2(d) to make clear that oral argument is permitted as of right if a party requests it and the motion does not involve pretrial discovery or the calendar.

In discussing those calendar motions that, along with discovery motions, are to be disposed of on the papers, the Committee's view is that such motions

include those that affect the calendar directly, i.e., motions for adjournment or to place a case on the inactive list. In the Committee's view, calendar motions do not include those made under R. 4:8 (third-party practice) or R. 4:9 (amended and supplemental pleadings).

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

1:6-2. Form of Motion; Hearing

(a) ... no change

(b) ... no change

(c) Civil and Family Part Discovery and Calendar Motions. Every motion in a civil case or a case in the Chancery Division, Family Part, not governed by paragraph (b), involving any aspect of pretrial discovery or the calendar, shall be listed for disposition only if accompanied by a certification stating that the attorney for the moving party has [orally] personally conferred orally or has made a specifically described good faith attempt to [orally] confer orally with the attorney for the opposing party in order to resolve the issues raised by the motion by agreement or consent order and that such effort at resolution has been unsuccessful. The moving papers shall also set forth the date of pretrial conference, calendar call or trial date, or state that no such dates have been fixed. Discovery and calendar motions shall be disposed of on the papers unless, on at least two days notice, the court specifically directs oral argument on its own motion or, in its discretion, on a party's request. A movant's request for oral argument shall be made either in [his] the moving papers or reply; a respondent's request for oral argument shall be made in [his] the answering papers. [A request for oral argument shall state the reasons therefor.]

(d) Civil and Family Motions - [Waiver of] Oral Argument. [In respect of all motions in civil actions to which paragraphs (b) and (c) of this rule do not apply, the moving party may state in his notice of motion that he waives oral argument and consents to disposition on the papers. The motion shall be so disposed of unless the respondent in his answering papers or the movant in his reply papers requests oral argument or unless the court directs oral argument.] Except as otherwise provided by R. 5:5-4 (family actions), no motion shall be listed for oral argument unless a party requests oral argument in the moving papers or in timely-filed answering or reply papers, or unless the court directs. A party requesting oral argument may, however, condition the request on the motion being contested. If the motion involves pretrial discovery or is directly addressed to the calendar, the request shall be considered only if accompanied by a statement of reasons and shall be deemed denied unless the court otherwise advises counsel prior to the return day. As to all other motions, the request shall be granted as of right.

(e) ... no change

(f) ... no change

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

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

F. Proposed Amendment to R. 1:6-3 -- Time for Serving and Filing Motions, Cross Motions and Affidavits

In its 1988 report to the Court, the Criminal Practice Committee recommended that the return date for motions for bail reduction be shortened from the 14 days required under R. 1:6-3 to a lesser period. The Criminal Practice Committee proposed a new rule -- R. 3:26-8 -- that would deal specifically with bail reduction motions. Because this proposal affected R. 1:6 which, as a rule of general application, falls under the mandate of the Civil Practice Committee, the Court requested that the latter committee review the proposal.

The Civil Practice Committee supports the recommendation of the Criminal Practice Committee to exempt bail reduction motions from the procedures of R. 1:6 and instead make them subject of a separate Part III rule.

The proposed amendment to R. 1:6-3 reads as follows:

1:6-3. Time for Serving and Filing Motions, Cross Motions and Affidavits

Except as otherwise provided by R. 3:26-8 (application for bail reduction) and R. 4:46-1 (motion for summary judgment), a notice of motion, other than an ex parte motion, shall be served and filed not later than 14 days before the time specified for the return date unless otherwise provided by rule or court order. For cause shown, such an order may be made on ex parte application. If a motion is supported by affidavit, the affidavit shall be served and filed with the motion; and, except as provided by R. 4:49-1(b) (motion for new trial), any opposing affidavits and cross-motions or objections filed pursuant to R. 1:6-2 shall be served and filed not later than 8 days before the return date unless the court permits them to be served at a later time. Answers or responses to any opposing affidavits and cross-motions shall be served and filed not later than 4 days before the return date unless the court otherwise orders.

Note: Source--R.R. 3:11-1, 4:6-3(a); amended July 24, 1978 to be effective September 11, 1978; amended July 16, 1979 to be effective September 10, 1979; amended July 16, 1981 to be effective September 14, 1981; amended November 1, 1985 to be effective January 2, 1986; amended _____ to be effective _____.

G. Proposed Amendment to R. 1:8-4 -- Foreman

Two trial judges proposed that R. 1:8-4, which now states that "juror number one shall be the foreman", should be amended to deal with the situation of a juror's reluctance or unwillingness to serve as foreman. Although the Committee does not recommend any substantive changes to the rule (see Section II. D. of this report), it does propose that the word "foreman" be replaced by "foreperson."

The proposed amendment to R. 1:8-4 reads as follows:

1:8-4. [Foreman] Foreperson

Juror number one shall be the [foreman] foreperson; but if [he] that juror [shall be] is thereafter selected as an alternate juror or otherwise discharged, then the juror next drawn on the impanelling of a jury, who remains on the jury for the determination of the issues, shall be the [foreman] foreperson.

Note: Source -- R.R. 3:7-2(e), 4:48-2 (last phrase). Amended July 7, 1971 to be effective September 13, 1971, former rule deleted and new rule adopted June 29, 1973 to be effective September 10, 1973; amended _____ to be effective _____.

H. Proposed Amendment to R. 1:9-2 -- For Production of Documentary Evidence; Notice in Lieu of Subpoena

An attorney advised the Committee that there appears to be a lack of common knowledge of the proper manner for obtaining documentary evidence during the discovery period prior to trial. Although R. 4:14-7(c) sets out the procedure for and limitations on the use of subpoenas for purposes of pretrial discovery, many attorneys apparently are unfamiliar with that rule. Instead, they turn to R. 1:9-2, which is intended to deal with subpoenas for trial only. In order to ensure that attorneys are alerted to the relevant provisions of R. 4:14-7(c) when preparing to use subpoenas for pretrial discovery, the Committee recommends that R. 1:9-2 be amended to cross-reference that rule.

The proposed amendment to R. 1:9-2 reads as follows:

1:9-2. For Production of Documentary Evidence; Notice in Lieu of Subpoena

A subpoena or, in a civil action, a notice in lieu of subpoena as authorized by R. 1:9-1 may require production of books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena or notice if compliance would be unreasonable or oppressive and, in a civil action, may condition denial of the motion upon the advancement by the person in whose behalf the subpoena or notice is issued of the reasonable cost of producing the objects subpoenaed. The court may direct that the objects designated in the subpoena or notice be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them or portions of them to be inspected by the parties and their attorneys and, in matrimonial actions and juvenile proceedings, by a probation officer or other person designated by the court. Except for pretrial production directed by the court pursuant to this rule, subpoenas for pretrial production shall comply with the requirements of R. 4:14-7(c).

Note: Source -- R.R. 3:5-10(c), 4:46-2, 6:3-7(b), 7:4-3 (second paragraph), 8:4-9(c); amended November 27, 1974 to be effective April 1, 1975; amended _____ to be effective _____.

I. Proposed Amendment to R. 1:17-1 -- Persons Prohibited

Pickett v. Harris, 219 N.J. Super. 402 (Law Div. 1987), revised 219 N.J. Super. 252 (App. Div. 1987), arose in the context of a challenge to the newly elected Surrogate of Essex County to hold that office while at the same time holding the elected office of councilman for the City of Newark. Although this matter came before the Supreme Court, defendant Harris died before the Court could render a decision. In response to the issue raised in Harris, however, the Supreme Court requested that the Committee review the language of a proposed change to R. 1:17-1(g) that would require any person elected to the office of Surrogate to resign from any other public office. The Committee suggested minor revisions to the language proposed by the Court. The proposed amendment was then published for comment in a May 1989 issue of the Law Journal; comments were subsequently received. The Court has not yet acted on the proposed amendment.

The proposed amendment to R. 1:17-1(g) reads as follows:

1:17-1. Persons Prohibited

The following persons in or serving the judicial branch of government shall not hold any elective public office nor be a candidate therefor, nor engage in political activity, nor, without prior written approval of the Supreme Court, requested through the Administrative Director of the Courts, hold any other public office, position or employment:

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

(g) Surrogates, except such political activity as is directly related to seeking reelection. [The following shall apply only to surrogates who, prior to June 1, 1983, have filed (in a primary or otherwise) for election to another office or, prior to said date, have been elected to another office: (1) such surrogate may engage in political activity related to seeking such other office or serving in same; (2) such surrogate may not, while serving as surrogate, seek reelection to said other office nor, while serving in said other office, seek reelection as surrogate.] A person elected to the office of Surrogate shall, prior to taking the oath of office, resign from any other

public office, position, or employment, elected or appointed, held by such person.

(h) ... no change

(i) ... no change

Note: Source -- R.R. 1:25C(a); paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (g) amended June 15, 1983 to be effective immediately; paragraph (i) amended July 26, 1984 to be effective September 10, 1984; paragraph (g) amended _____ to be effective _____.

J. Proposed Amendment to R. 1:21-1(b) -- Appearance

A New Jersey attorney advised the Committee that there is some confusion and inconsistency in the treatment of out-of-state attorneys in depositions in this State taken under R. 4:11-4. That rule contemplates that depositions may be taken for use in an action in another jurisdiction. In such cases, the attorneys who will be taking the depositions are almost always attorneys from the other jurisdiction, who may not be admitted in New Jersey. Some trial judges have held that depositions taken pursuant to R. 4:11-4 may be taken only by New Jersey attorneys unless the out-of-state attorneys are admitted pro hac vice and make the required payment into the Clients' Security Fund.

In the Committee's view, this approach is unduly wasteful and expensive for all concerned -- it generates paperwork and expends the valuable time of attorneys and judges without advancing or protecting any real interest that this State or its attorneys may have. The Committee agreed that out-of-state attorneys should be permitted to handle the taking of depositions under R. 4:11-4 without the necessity for pro hac vice admission. Accordingly, the Committee recommends the amendment of R. 1:21-1(b) to make it clear that taking a deposition under R. 4:11-4 does not constitute an appearance.

The proposed amendment to R. 1:21-1(b) reads as follows:

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

(a) ... no change

(b) Appearance. All attorneys and pro se parties appearing in any action shall be under the control of the court in which they appear and subject to appropriate disciplinary action. An attorney admitted in another jurisdiction shall not be deemed to be making an appearance in this State by reason of taking a deposition pursuant to R. 4:11-4.

(c) ... no change

(d) ... no change

(e) ... no change

Note: Source -- R.R. 1:12-4(a)(b)(c)(d)(e)(f). Paragraph (c) amended by order of December 16, 1969 effective immediately; paragraph (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 _____ to be effective _____.

K. Proposed Amendments to R. 1:21-1(d) and RPC 7.5 -- Who May Practice; Appearance in Court

The proposed amendments to this rule conform with the requirements, limitations and conditions prescribed and suggested by the Supreme Court in In re 1115 Legal Service Care, 110 N.J. 344 (1988). The rule as amended authorizes the practice of law by noncommercial, staff-operated prepaid legal service plans that serve particular clientele groups. It was developed by a Civil Practice Committee subcommittee with special expertise in designing and managing legal service programs and was approved unanimously by the Committee as a whole.

Also attached is a proposed revision of RPC 7.5. Again, in accordance with the Court's direction in In re 1115 Legal Service Care, this modification would permit the entities covered by the proposed revision to R. 1:21-1(d) to use their organizational name for purposes of identification.

The proposed amendments to R. 1:21-1(d) and RPC 7.5 read as follows:

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

(a) ... no change

(b) ... no change

(c) ... no change

(d) [Charitable and] Legal Services [Corporations] Organizations. Nonprofit [corporations] organizations incorporated in this or any other [s]State for the purpose[, among others,] of providing legal services to the poor or functioning as a public interest law firm and qualified group legal services organizations or trusts, as defined by 26 U.S.C.A. 120(b) and 501(c)(20) and which provide legal services to a predefined and limited class of clients, may practice law in their own names through staff attorneys who are members of the bar of the State of New Jersey, provided that: [(i)] (1) [the matter in controversy directly involves the corporate] the legal work is directly related to the organizational purpose [(ii)] (2) the staff attorney responsible for the matter [is a member of the bar of New Jersey who shall] signs all papers bearing [above] the corporate name, and [(iii)] (3) the [professional] relationship between [the] staff attorney and client meets the attorney's professional responsibilities to the client and [shall] is not [be] subject to interference, control, or direction by the [corporation] organization's board or employees

except for a supervising attorney who is a member of the New Jersey bar.

(e) ... no change

Note: Source -- R.R. 1:12-4(a)(b)(c)(d)(e)(f). Paragraph (c) amended by order of December 16, 1969 effective immediately; paragraph (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 (d) amended to be effective .

RPC 7.5 FIRM NAMES AND LETTERHEADS

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates RPC 7.1. Except for [nonprofit legal aid or public interest law firms] organizations referred to in R. 1:21-1(d), the name under which a lawyer or law firm practices shall contain only the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.

(b) ... no change

(c) ... no change

(d) ... no change

(e) In any case where [a nonprofit legal aid or public interest law firm] an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

L. Proposed Amendment to R. 1:21-7(e) -- Contingent Fees

The Director of the Office of Attorney Ethics pointed out that R. 1:21-7(e) refers to a former disciplinary rule [DR 2-106(A)] that has been replaced by RPC 1.5(a). The Committee therefore recommends revising R. 1:21-7(e) accordingly.

The proposed amendment to R. 1:21-7(e) reads as follows:

1:21-7. Contingent Fees

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) Paragraph (c) of this rule is intended to fix maximum permissible fees and does not preclude an attorney from entering into a contingent fee arrangement providing for, or from charging or collecting a contingent fee below such limits. In all cases contingent fees charged or collected must conform to [DR 2-106(A)] RPC 1.5(a).

(f) ... no change

(g) ... no change

(h) ... no change

(i) ... no change

Note: Source -- R. 1:21-6(f), as adopted July 7, 1971 to be effective September 13, 1971 and deleted December 21, 1971 to be effective January 31, 1972. Adopted December 21, 1971 to be effective January 31, 1972. Amended June 29, 1973 to be effective September 10, 1973. Paragraphs (c) and (e) amended October 13, 1976, effective as to contingent fee arrangements entered into on November 1, 1976 and thereafter. Closing statements on all contingent fee arrangements filed as previously required between January 31, 1972 and January 31, 1973 shall be filed with the Administrative Office of the Courts whenever the case is closed; paragraph (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 24, 1978 to be effective September 11, 1978; paragraph (c) amended and new paragraphs (h) and (i) adopted January 16, 1984 to be effective immediately; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (e) amended to be effective .

M. Proposed Amendments to R. 1:22 -- Committee on the Unauthorized Practice of Law

A Subcommittee on the Unauthorized Practice of Law was established and charged with the task of reviewing proposed changes in R. 1:22, which governs the Supreme Court's Committee on the Unauthorized Practice of Law (UPL Committee). The basic purposes of the rule changes were to modernize the procedures of the UPL Committee and to conform them, where appropriate, to those followed by the district ethics committees.

The subcommittee spent most of its time considering the role of the New Jersey State Bar Association in the financing of the UPL Committee and in prosecuting certain cases on its behalf. The members of the subcommittee concluded, and the Committee as a whole agreed, that it would be more appropriate for the UPL Committee to be totally independent of the Bar Association, in order to avoid any appearance of conflict of interest. For this reason, the proposed rule changes are silent on the issue of funding, which, it is assumed, will be supplied by the Administrative Office of the Courts in the normal manner. The proposed rules give the UPL Committee the option of requesting the assistance of the Attorney General of New Jersey in seeking to enforce its decision. Such assistance could also be obtained from attorneys employed by the Office

RULE 1:22. COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

1:22-1. Appointment; [Organization] Membership; Administration

(a) Appointment. The Supreme Court shall appoint a committee on the unauthorized practice of law consisting of 21 attorneys of this State and four lay members. [The original appointment shall be of 7 members for a term of one year, 7 members for a term of 2 years, and 7 members for a term of 3 years. At the expiration of such terms all subsequent appointments shall be for a term of 3 years.] The members shall be appointed for staggered terms of three years and may be reappointed for such additional term or terms as the Supreme Court shall determine. Any vacancy shall be filled for the unexpired term. The Supreme Court shall annually designate [members of the committee to serve as chairman and vice-chairman, respectively] a chair and vice-chair, who shall be members of the committee. [The committee shall appoint a secretary and an assistant secretary, who need not be members of the committee but shall be members of the bar.]

[(b) Organization; Parts. The Supreme Court shall divide the committee into parts consisting of not less than 5 members each and assign to each part a designated area of the State. Each part shall elect a chairman

and a secretary. The secretary need not be a member of the committee but shall be a member of the bar].

(b) Staff. The Administrative Director of the Courts shall provide the committee with a secretary, who shall be responsible for day-to-day coordination of staff support to the committee. The secretary shall file with the Administrative Director a copy of (1) the minutes of every meeting; (2) every advisory opinion; and (3) every recommendation for the institution of litigation.

[(c) Quorum. A majority of the committee or of a part shall constitute a quorum but no action may be taken by the committee or a part unless approved by a majority of its members. On the request of the chairman, the court may appoint temporary members of the committee or a part. The committee and the parts thereof shall meet at the call of their respective chairmen.]

(c) Records; Confidentiality. All records of the committee shall be filed and maintained by the secretary at the principal office of the committee which shall be located at the Administrative Office of the Courts. All records, files, meetings and proceedings of the committee or of a part thereof shall be confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or by the Supreme Court.

[(d) Powers of Parts. The full jurisdiction and authority of the committee as provided in these rules may be exercised by a part thereof, except that (1) no advisory opinion shall be given, as provided in R. 1:22-2(a), without the approval of a majority of the whole committee; (2) no recommendation for the institution of litigation shall be made, as provided in R. 1:22-7(a) or R. 1:22-8, without the approval of a majority of the whole committee; and (3) the action of a part on any matter shall be subject to review and the approval or disapproval of the whole committee.

(e) Records; Confidentiality. The secretary of the committee and of each part thereof shall file promptly with the Administrative Director of the Courts a copy: (1) of the minutes of every meeting; (2) of every complaint, answer, investigation report, notice of dismissal and notice of hearing; (3) of every written agreement of settlement; (4) of every recommendation for the institution of litigation; and (5) of every advisory opinion. The Administrative Director shall keep the court advised as to the status of matters pending before the committee and of the actions taken by it. All records, files, meetings and proceedings of the committee or of a part shall be regarded as confidential and shall not be disclosed to or attended by anyone except as authorized by these rules or by the Supreme Court.]

Note: Source -- R.R. 1:12A-1(a)(b)(c)(d)(e)(f); caption to rule and text of paragraph (a) amended, paragraphs (b)(c)(d) and (e) deleted, and new paragraphs (b) and (c) with new captions adopted to be effective .

1:22-1A. Organization; Quorum

(a) Parts. The Supreme Court shall divide the committee into parts consisting of not less than five members each, one of whom shall be a lay member, and shall assign to each part a designated area of the State. The chair of the committee shall appoint an attorney member as chair of each part.

(b) Quorum. A majority of the committee, or of a part, shall constitute a quorum. No action may be taken by less than a majority of the committee or of a part except as expressly provided by this rule. At the request of the chair, the Supreme Court may appoint temporary members of the committee or a part. The committee and its parts shall meet at the call of their respective chairs.

(c) Action by Committee. The full jurisdiction and authority of the committee, as provided in these rules, may be exercised by a part thereof, except that (1) no advisory opinion shall be given, as provided in R. 1:22-3, without the approval of a majority of the committee; (2) no determination of the unauthorized practice of law by a respondent shall be made, as

provided in R. 1:22-6, without the approval of a majority of the committee; and (3) the action of a part on any matter shall be subject to review and the approval or disapproval of the committee.

Note: Adopted _____ to be effective _____.

1:22-2. Jurisdiction

(a) Advisory Opinions. On request of any person, or in connection with the consideration of any complaint or any investigation made on its own initiative, the committee may [give] render advisory opinions relating to the unauthorized practice of law and arrange for their publication.

[(b) Statement of Charges. The committee may on its own initiative and without any complaint being made to it investigate any condition or situation coming to its attention which it considers may involve the unauthorized practice of law. If the committee finds evidence of the unauthorized practice of law it may prepare a statement of charges which shall be regarded as a complaint and shall be proceeded on accordingly.]

(b) Complaints. The committee shall have jurisdiction over and shall inquire into and consider complaints alleging the unauthorized practice of law by any natural or other persons or entity.

[(c) Scope of Investigation. The committee shall have jurisdiction over and shall inquire into and consider complaints alleging the un-authorized practice of law by any person, including a business entity.]

(c) Investigation. The committee may, on its own initiative, and without any complaint being made to it, investigate any condition or situation of which it becomes aware that may involve the unauthorized practice of law.

Note: Source -- R.R. 1:12A-2(a)(b)(c); paragraph (a) amended, paragraphs (b) and (c) deleted, and new paragraphs (b) and (c) with new captions adopted to be effective .

1:22-3. Procedure[;]: Advisory Opinions

[(a) Rules. The committee may adopt such rules as it may deem desirable concerning the methods and procedures to be followed in considering requests and expressing opinions, such rules not to be effective until approved by the Supreme Court.]

(a) Receipt of Request. Upon receipt of a request for an advisory opinion, the secretary shall make a written acknowledgement thereof to the person or persons bringing the matter to the committee's attention. The secretary shall promptly forward a copy of the inquiry and other information to the chair of the committee and to the chair of the

part of the area of the State from which the inquiry originates. If the request for an advisory opinion originates outside of New Jersey, the matter may be referred to any part by the secretary.

(b) [Limitations on Opinions.] Pending Controversy. No opinion shall be rendered if, to the committee's knowledge, the subject matter either involves or might affect a case or controversy pending in any court. [All published opinions, insofar as practicable, shall not contain names of persons and shall not violate the confidence of the person or persons who made the request therefor.]

(c) Technical Requirements. In accordance with R. 1:22-2(a), an advisory opinion shall be issued by the committee in writing and shall be filed with the secretary, who shall transmit a copy to the person making the inquiry, or in the case of a complaint, to the complainant and respondent. Where the committee so instructs, the secretary shall make suitable arrangements for publication. Published opinions shall not, insofar as practicable, identify the party or parties making an inquiry, or the complainant or respondent.

(d) Form of Opinion. Upon the conclusion of a review by the committee or a part of a request for an advisory opinion, a report shall be made to the whole committee. The committee shall determine the

form in which the advisory opinion is to be promulgated, in accordance with R. 1:22-3.

(e) Rules and Procedures. The committee may adopt such additional rules, subject to approval by the Supreme Court, as it may deem appropriate for prescribing the methods and procedures to be followed in considering requests and expressing opinions.

Note: Source -- R.R. 1:12A-3(a)(b)(c); caption to rule amended, paragraph (a) deleted and new paragraph (a) with new caption adopted, caption and text of paragraph (b) amended, and paragraphs (c)(d) and (e) adopted to be effective .

1:22-4. [Procedure; Informal Conferences. Upon any matter within its jurisdiction coming to its attention, whether or not a complaint has been made, the committee may arrange an informal conference with the person or persons concerned in an attempt to arrive at an amicable disposition. If it appears that the conduct in question constitutes the unauthorized practice of law, the committee shall endeavor to have the person or persons concerned enter into a written agreement to refrain in the future from such conduct. Should such person or persons decline to enter into such an agreement, the committee shall proceed in accordance with R. 1:22-5. The disposition of matters informally, as provided in this rule, is to be encouraged.]

Complaints: Preliminary Investigation

(a) Receipt of Complaint. Upon receipt of a complaint or any other matter within the committee's jurisdiction, the secretary shall make written acknowledgement thereof to the person bringing the matter to the committee's attention.

(b) Referral to Part. The secretary shall promptly forward a copy of the complaint and other information to the chair of the committee and to the chair of the part in the area of the State in which the respondent's activities occur. If the person, persons or entity alleged to be engaged in such unauthorized practice is located outside of New Jersey, the matter may be referred to any part by the secretary.

(c) Investigation. The investigation or review shall be promptly instituted by the part or by a member thereof designated by the chair of the part. If a complaint has been filed, the investigating member shall interview the complainant and respondent and shall conduct such further investigation as is deemed appropriate. At the discretion of the committee, the respondent may be informed of the identity of the complainant.

(d) Report. Upon the conclusion of an investigation of a complaint, a report shall be made to the committee and recorded in the minutes. If, after

consideration of the report, the committee concludes that there has been no unauthorized practice of law, the complaint shall be dismissed and the secretary shall so notify the complainant and the respondent in writing and shall close the file in the matter. If the committee concludes that there has been unauthorized practice of law, the committee shall attempt to persuade the respondent to enter into a written agreement to refrain from such conduct in the future, in accordance with R. 1:22-5.

Note: Source -- R.R.1:12A-4(a)(b)(c); caption and text of rule deleted, and new caption and paragraphs (a)(b)(c) and (d) adopted to be effective .

1:22-5. [Procedure; Formal Complaints; Investigations; Hearings

(a) Form and Contents of Complaint. Every complaint shall be in writing, signed and sworn to, and filed with the secretary of the committee or subcommittee in triplicate. It shall state the name and address of the complainant, the facts constituting the alleged unlawful practice of law, and the name and address of the person complained against, hereafter referred to as the respondent. The secretary shall, where necessary, assist the complainant in preparing the complaint. The secretary shall maintain a separate file for each complaint with an appropriate index.

(b) Service of Complaint; Reference. Upon receipt of a complaint, the secretary shall make written acknowledgement thereof to the complainant and shall forthwith serve a copy on the respondent, either personally or by ordinary mail and request that within 10 days he file, in triplicate, a written answer to the complaint. Upon receipt of an answer the secretary shall mail one copy to the complainant and then, at the expiration of the 10-day period, refer the complaint and answer, if any, to one or more members of the committee designated by the chairman for investigation.

(c) Investigation. The investigation shall be promptly instituted and completed. The investigating committee member or members shall interview both the complainant and respondent and shall conduct such further investigation as is deemed appropriate. Upon its conclusion, a written report of the investigation shall be made to the committee. The committee shall consider the investigation report at its first meeting following its filing.

(d) Preliminary Disposition. If, after consideration of the investigation report, the committee concludes that there has been no unlawful practice of law, the complaint shall be dismissed and the secretary shall in writing so notify the complainant and the respondent and shall close the file in the matter. If the committee concludes, however, that there are

indications of conduct constituting the unlawful practice of law, the complaint shall be set down promptly for formal hearing. The secretary shall give at lease 10 days' written notice by ordinary mail to both the complainant and the respondent, stating: (1) the time and place of the hearing; (2) that each may be represented by counsel, if he so desires; (3) that subpoenas will be furnished them upon receipt by the secretary of the names and addresses of their proposed witnesses; and (4) that they may produce witnesses and such other proof before the committee as may be relevant.

(e) Conduct of Hearing. The hearing shall be conducted in private and in a formal manner. The chairman, or in his absence another member of the committee, shall preside over and conduct the proceedings. Any member of the committee is hereby authorized to administer oaths to such witnesses as may appear before the committee. The complainant and the respondent and their attorneys shall have the right to be present at all times during the hearing. They shall also have the right to examine and cross-examine witnesses, but examination and cross-examination on behalf of the complainant shall be conducted principally by his attorney or an attorney designated by the committee. The committee shall not be bound by strict rules of evidence.]

Complaints: Informal Disposition

(a) Informal Review; Conference. The committee may attempt to arrive at an amicable disposition of any matter within its jurisdiction with the person, persons or entity concerned. At any time during the pendency of a matter before it, the committee may conduct an informal conference with the person, persons or entity that is the subject of a committee inquiry or investigation. At the committee's discretion, an electronic recording or written transcription of the proceeding may be made. No oath shall be administered. A person or entity subject to an informal conference may be represented by counsel.

(b) Disposition. If it appears that the conduct in question involves the unauthorized practice of law, the committee shall endeavor to have the person, persons or entity enter into a written agreement to refrain in the future from such conduct. The informal disposition of matters as provided in this rule is to be encouraged. If, after a finding by the committee of the unauthorized practice of law, a person or entity declines to enter into a written agreement pursuant to this rule, the committee shall institute formal proceedings in accordance with R. 1:22-6.

Note: Source -- R.R. 1:12A-5(a)(b)(c)(d)(e)(f); caption and text of rule deleted, and new caption and paragraphs (a)(b)(c)(d) and (e) adopted to be effective .

1:22-6. [Subpoena

(a) Issuance of Subpoena. The chairman or secretary of the committee, upon determining that any person, other than the respondent or other person whose conduct is under investigation, is a material witness to a matter pending before the committee, for purposes of either investigation or hearing, may issue a subpoena in the name of the Clerk of the Superior Court requiring such person to appear and testify, either before the committee or a member or members thereof, at the time and place specified therein. The subpoena may also command such person to produce books, papers, documents, or other objects designated therein. Subpoenas shall be served in the manner prescribed by R. 1:9.

(b) Noncompliance. If any person, without adequate excuse, shall fail to obey a subpoena, the chairman or secretary of the committee may file with the Superior Court a verified statement setting forth the facts establishing such disobedience, and the court may then, in its discretion, institute contempt proceedings pursuant to R. 1:10-2. If he is found guilty of contempt, the court may compel him to pay the costs of the contempt proceedings to be taxed by the court.]

Complaint: Formal Proceedings

(a) Formal Complaint. When the committee concludes from its preliminary investigation or from the failure of an infomal conference as provided in

R. 1:22-5 that further proceedings are required to determine the existence of conduct constituting the unauthorized practice of law, it shall issue a formal complaint which shall be signed and sworn to by the secretary of the committee. The complaint shall state the name and address of the respondent, the name and address of the complainant, and the facts as then known to the committee that constitute the alleged unauthorized practice of law. The secretary shall prepare a summons and serve the summons and the complaint pursuant to R. 4:4.

(b) Service and Answer. Within 20 days after service of the formal complaint upon a respondent located in New Jersey, or within 35 days after service upon a respondent located outside of New Jersey, the respondent shall be required to file a written answer to the charges with the committee at its principal office. The committee may, for good cause, extend the time within which the respondent may file an answer.

(c) Discovery. Subsequent to the filing of an answer with the committee, the respondent may request disclosure of all factual information related to the complaint that is contained in the committee's file. Upon such request, the committee shall make such factual information available to the respondent, together with the names and addresses of witnesses. The committee may demand and obtain discovery of

relevant factual information and documents from the respondent.

(d) Formal Hearing. After receiving the respondent's answer or after the expiration of the time within which an answer is due, the committee shall schedule a formal hearing for receipt of testimony under oath and the production of any other relevant evidence. At the discretion of the committee chair, a formal hearing may be held before the full committee or a part thereof, pursuant to R. 1:22-1A(c). The secretary shall give at least 10 days written notice by ordinary mail to both the complainant and the respondent stating: (1) the time and place of the hearing; (2) that each may be represented by counsel, if so desired; (3) that subpoenas will be furnished to them upon receipt by the secretary of the names and addresses of their proposed witnesses; and (4) that they may produce witnesses and such other proof before the committee as may be relevant.

(e) Presiding Officer. The chair of the committee or other attorney member designated by the chair shall preside over and conduct the proceedings. When in the judgment of the committee it shall appear necessary or expedient to do so, the chair may designate the chair of a part to conduct the hearing.

(f) Oath. All testimony taken at a formal

hearing shall be under oath. Any attorney member of the committee may administer such oaths.

(g) Recordation. All formal hearings shall be recorded by a certified stenographer or by an electronic recording device, and a transcript shall be prepared and kept on file in the committee's principal office.

(h) Prosecution. The charges concerning the respondent shall be presented to the committee by a staff member of the Administrative Office of the Courts assigned to administer the work of the committee and to prosecute complaints pending before the committee. The respondent or respondent's attorney shall present any evidence in defense or explanation of the charges. Cross-examination of all witnesses shall be permitted. In conducting the hearing, the presentation of evidence shall conform to the Rules of Evidence, which the committee may however relax.

(i) Presence of Respondent. The respondent and the respondent's attorney shall have the right to be present at the hearing. The complainant and the complainant's attorney may be present when the respondent is testifying as to the allegations by that complainant.

(j) Amended Complaint. Upon the conclusion of

a formal hearing, the committee may order that the charges set forth in the formal complaint be amended to conform to the proofs presented at the hearing, provided that in the committee's determination, the respondent has had a fair opportunity to respond to the amended charges.

(k) Confidentiality. Any proceeding before the committee held subsequent to the filing of a formal complaint under this rule, and any record thereof, shall not be confidential.

Note: Source -- R.R. 1:12A-6(a)(b); caption and text of rule deleted, and new caption and paragraphs (a)(b)(c)(d)(e)(f)(g)(h)(i)(j) and (k) adopted to be effective .

1:22-7. Proceedings Following Hearing

[(a) Determination. The committee shall consider the case promptly at the conclusion of the formal hearing and reach a determination. If the committee determines that there has been no unlawful practice of law, the complaint shall be dismissed and the secretary shall in writing so notify the complainant and the respondent and shall mark the file "closed". If the committee determines that the respondent has engaged in the unauthorized practice of law, it shall endeavor to have the respondent enter into a written agreement to refrain in the future from such conduct. Should the respondent decline to enter into such an agreement, the

committee shall recommend to the New Jersey State Bar Association the institution of an appropriate action in the Superior Court, Chancery Division, to enjoin the respondent from the further unauthorized practice of law.]

(a) Committee Action. The committee, or part, shall consider the matter promptly at the conclusion of the formal hearing and reach a determination. If the formal hearing is held before a part, the part shall make a recommendation to the full committee, and the full committee will then review the record de novo and make a determination.

(1) If the committee determines that there has been no unauthorized practice of law, the complaint shall be dismissed and the secretary shall so notify the complainant and the respondent in writing and shall close the file.

(2) If the committee determines by clear and convincing evidence that the respondent has engaged in the unauthorized practice of law, it shall endeavor to persuade the respondent to enter into a written agreement to refrain in the future from such conduct. The agreement shall contain the committee's findings and determination, and shall be annexed to an order of the committee incorporating the agreement by reference. Should the respondent decline to enter into such an

agreement, the committee shall enter an order barring such conduct.

[(b) Superior Court Action. The action in the Superior Court shall be prosecuted in the name of the New Jersey State Bar Association by counsel provided by it and shall be tried de novo. Testimony taken before the committee may not be introduced in evidence at the trial.]

(b) Review. An aggrieved party may seek review of any final action of the committee by proceeding in accordance with R. 1:19-8.

[(c) Petitions for Review. An aggrieved party may seek review of any final action of the Committee on the Unauthorized Practice of Law by proceeding in accordance with R. 1:19-8.]

(c) Summary Action. In the event that an order is entered pursuant to R. 1:22-7(a), and the time for review under R. 1:22-7(b) has expired, and the aggrieved party has not sought review pursuant to paragraph (b) of this rule, the committee may in its discretion request that the Attorney General of the State of New Jersey commence an action in the Superior Court for enforcement of the order under R. 4:67.

Note: Source -- R.R. 1:12A-7(a)(b)(c)(d); new paragraph (c) adopted July 16, 1981 to be effective September 14, 1981; caption and text of paragraphs (a) (b) and (c) deleted, and new paragraphs (a)(b) and (c) with new captions adopted to be effective .

1:22-8. [Written Agreements; Failure to Comply

Should a written agreement be entered into between the committee and the respondent, and should the respondent subsequently fail to comply with its terms, the committee shall: (1) first attempt to obtain voluntary compliance; and (2) failing to obtain voluntary compliance, shall recommend to the New Jersey State Bar Association the institution of an appropriate action to compel compliance in the Superior Court, Chancery Division, to be tried and prosecuted pursuant to R. 1:22-7(b).]

Subpoena: Authority of Committee; Service

(a) Authority. In the conduct of any investigation, hearing or proceeding of any nature, the committee chair, the secretary of the committee or the chair of any part may issue subpoenas on behalf of any party for the attendance of the respondent and of witnesses, and for the production of papers, books, accounts, documents, or any other records or material that may be relevant to such investigation or proceeding.

(b) Service. The sheriff of the appropriate county or such person as may be designated by the committee shall, when necessary in the judgment of the committee, serve subpoenas or orders upon the persons to whom such subpoenas or orders may be directed.

(c) Failure to Obey. If any person shall fail

to obey a subpoena, the chair or the secretary of the committee may file with the Superior Court a verified petition setting forth the facts establishing such disobedience, and the court may then, in its discretion, institute contempt proceedings pursuant to R. 1:10-2. If such person is found guilty of contempt, the court may compel the payment of the costs of the contempt proceeding as taxed by the court.

Note: Source -- R.R. 1:12A-8; caption and text of rule deleted, and new caption and paragraphs (a) (b) and (c) adopted to be effective .

1:22-9. [Payment of Committee Expenses; Cost of Prosecution

The New Jersey State Bar Association shall pay all expenses incidental to the proper functioning of the committee and to the prosecution of any actions instituted on the recommendation of the committee. In any such action the payment of any fees provided for by Title 22A, Chapter 2, shall be waived.]

Prosecution of Disorderly Persons Offense

If the committee concludes that a person, persons or entity is engaged in the unauthorized practice of law and that the protection of the public requires relief in lieu of that provided by R. 1:22-4 through 1:22-7, the committee may authorize any attorney member or any other attorney to file in the

name of the committee a disorderly persons complaint, pursuant to N.J.S.A. 2A:170-78 through 2A:170-85, in the municipal court of the municipality where the unauthorized practice of law occurred.

Note: Source -- R.R. 1:12A-9; caption and text of rule deleted, and new caption and text adopted to be effective .

1:22-10. Legal Assistance

At any stage in its investigative or hearing proceedings, the committee may request the assistance of the Attorney General of the State of New Jersey. Matters may be referred to the Attorney General of the State of New Jersey for such action as the Attorney General may deem appropriate.

Note: Adopted to be effective .

1:22-11. Immunity from Suit

(a) The members and staff of the committee shall be absolutely immune from suit, whether legal or equitable in nature, for any conduct in the performance of their official duties.

(b) Witnesses and persons who bring allegations concerning any individual or entity to the committee shall be immune from suit, whether legal or equitable in nature, for all communications to the committee or

to its staff and for any testimony given at formal proceedings. This immunity shall not extend to any other publication or communication of such information.

Note: Adopted _____ to be effective _____.

N. Proposed Amendments to Rule 1:33 -- Administrative Responsibility

The Task Force on Women in the Courts, in its 1984 and 1986 reports, recommended revision of all court rules to excise gender-biased language. The Committee has been accomplishing this gradually, as rule revisions are proposed. However, at the request of the Administrative Director, the Committee has amended Rules 1:33 and 1:34 (see Section I. O. of this report) specifically to remove gender-biased references to Judiciary personnel.

The proposed amendments to R. 1:33 read as follows:

RULE 1:33. ADMINISTRATIVE RESPONSIBILITY

1:33-1. The Chief Justice of the Supreme Court; Acting Chief Justice

The Chief Justice of the Supreme Court shall be responsible for the administration of all courts in the State. To assist [him, he] in those duties the Chief Justice shall appoint an Administrative Director of the Courts [to] who shall serve at [his pleasure, who shall] the pleasure of and report directly to [him] the Chief Justice. A full-time judge of any court of this State may be designated to serve temporarily as Acting Administrative Director, in which event such judge shall continue to hold, and shall only be paid the salary of such judicial office. If there is a vacancy in the office of Chief Justice, the senior justice shall serve temporarily as Acting Chief Justice. Seniority shall be determined by order of taking of oath as a member of the court. If the Chief Justice is absent or unable to serve, the senior justice shall serve temporarily as Acting Chief Justice.

Note: Source -- R.R. 6:2-1A(b), 7:20-2(b), 8:13-3A, Const. of 1947, Art. VI, Sec. VII, par. 1; amended June 5, 1973, effective immediately; 5th, 6th and 7th sentences adopted October 30, 1973, to be effective immediately; amended January 16, 1975 to be effective April 1, 1975; amended June 20, 1979 to be effective July 1, 1979; amended October 26, 1983 to be effective immediately; amended _____ to be effective _____.

1:33-2. Court Managerial Structure

(a) The Chief Justice shall divide the State into such geographical divisions as [he shall deem] appropriate to facilitate the efficient administration of the courts. Such geographical divisions shall be known as "vicinages."

(b) For each vicinage, the Chief Justice shall designate a judge of the Superior Court to serve as Assignment Judge. Each such Assignment Judge shall serve at the pleasure of and report directly to the Chief Justice [and shall report directly to him].

(c) Within each vicinage, the Chief Justice shall organize the trial court system into four functional units to facilitate the management of the trial court system within that vicinage. These units shall be: Civil, Criminal, Family and Chancery.

(d) (1) Each functional unit shall be supervised by a Presiding Judge who shall be appointed by the Chief Justice, after consultation with the Assignment Judge, and who shall serve at [his] the pleasure of the Chief Justice. A Presiding Judge may supervise more than one functional unit. The Presiding Judge shall report directly and be responsible to the Assignment Judge.

(2) The Chief Justice may[, in his discretion,] appoint the Assignment Judge to serve as the Presiding

Judge for one or more functional units within [his] the vicinage.

(e) The Chief Justice shall designate a judge of the Tax Court as presiding judge, to serve at [his pleasure.] the pleasure of the Chief Justice.

Note: Former Rule redesignated R. 1:33-3 and new Rule adopted October 26, 1983 to be effective immediately; paragraphs (a) (b) (d) and (e) amended to be effective .

1:33-3. The Administrative Director of the Courts

The Administrative Director of the Courts shall be generally responsible for the enforcement of the rules, policies and directives of the Supreme Court and the Chief Justice relating to matters of administration. At the direction of the Chief Justice and the Supreme Court, [he] the Administrative Director shall promulgate a compilation of administrative rules and directives relating to case processing, records and management information services, personnel, budgeting and such other matters as the Chief Justice and Supreme Court shall direct. [He] The Administrative Director also shall perform such other functions and duties as may be assigned [him] by the Chief Justice or by rule of the Supreme Court.

Note: Former Rule redesignated as R. 1:33-4 October 26, 1983 to be effective immediately. Source (Current Rule) -- Formerly R. 1:33-2 redesignated as

R. 1:33-3 and amended October 26, 1983 to be effective immediately; amended _____ to be effective _____.

1:33-4. Assignment Judges; Presiding Judge for Administration of the Appellate Division

(a) The Assignment Judge shall be the chief judicial officer within the vicinage and shall have plenary responsibility for the administration of all courts therein, subject to the direction of the Chief Justice and [by] the rules of the Supreme Court. [He] The Assignment Judge shall be responsible for the implementation and enforcement of the rules, policies and directives of the Supreme Court, the Chief Justice and the Administrative Director.

(b) The Assignment Judge shall be the authorized representative of the Chief Justice for the efficient and economic management of all courts within the vicinage. [His responsibilities] The responsibilities of the Assignment Judge also shall include all such matters affecting county and municipal governments, including but not limited to budgets, personnel, and facilities.

(c) The Assignment Judge shall be responsible for the supervision and efficient management of all court matters filed in the vicinage and for the supervision, superintendence and allocation of all judges

and personnel having a judicial support function within the vicinage.

(d) The Assignment Judge shall have full responsibility for the administration of all court units within the vicinage, including those of the Surrogate and the Deputy Clerk of the Superior Court.

(e) Subject to uniform minimum standards and conditions promulgated by the Administrative Director, the Assignment Judge may appoint and discharge [such] judicial support personnel within the vicinage [as he shall deem necessary].

(f) The Assignment Judge shall perform such additional duties as shall be assigned [to him] by the Chief Justice or by rule of the Supreme Court.

(g) The Presiding Judge for Administration of the Appellate Division shall have responsibility for the administration of the Appellate Division subject to the direction of the Chief Justice and the rules of the Supreme Court. The Presiding Judge shall be responsible for the implementation and enforcement of the rules, policies and directives of the Supreme Court, the Chief Justice and the Administrative Director; the responsibilities of the Presiding Judge shall include all personnel and management matters as are assigned by the Chief Justice or by rule of the Supreme Court, and the Presiding Judge shall perform such additional duties as may be assigned.

Note: Former Rule redesignated R. 1:33-6 October 26, 1983, to be effective immediately. Source (Current Rule) -- R.R. 1:29-1, 1:29-1A, 1:29-2, 1:31-1, 3:11-5 (first sentence), 4:41-4(b) (first sentence); caption amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (a) (b) (e) and (f) amended to be effective .

1:33-5. Trial Court Administrators - Case Coordinators

(a) The Trial Court Administrator shall be the administrative arm of the courts within the vicinage, under the direction of the Assignment Judge and the Administrative Director. [He] The Trial Court Administrator shall be appointed by the Administrative Director, after consultation with the Assignment Judge, subject to the approval of the Chief Justice. [His responsibilities] The responsibilities of the Trial Court Administrator shall include the provision of technical and managerial support to the Assignment Judge and Administrative Director with respect to budget development and expenditures, the supervision of all judicial support personnel, program development and analysis, facilities and resource management, the provision of such assistance as shall be necessary to such advisory committees to the courts as shall be appointed, and such additional administrative duties as shall be designated by the Administrative Director.

(b) After consultation with the Assignment Judge, the Administrative Director may appoint such

Assistant Trial Court Administrators as [he shall deem] are deemed necessary. The Assistant Trial Court Administrators shall report to and be supervised by the Trial Court Administrator.

(c) For each vicinage there shall be a Case Coordinator who shall be responsible for the efficient movement of cases within the vicinage, subject to the direction of the Assignment Judge.

(d) The Trial Court Administrator shall serve as the Case Coordinator for the vicinage, provided, however, that the Administrative Director may designate, after consultation with the Assignment Judge, an Assistant Trial Court Administrator to serve as Case Coordinator.

Note: Former Rule redesignated as R. 1:33-9 and new Rule adopted October 26, 1983 to be effective immediately; paragraphs (a) and (b) amended to be effective .

1:33-6. Presiding Judges of Functional Units

(a) Except as provided by the Chief Justice or by the Supreme Court, the Assignment Judge may delegate to the Presiding Judge of each functional unit within the vicinage, judicial duties and responsibilities allocated to the Assignment Judge by these rules.

(b) In addition to [his] judicial duties, the Presiding Judge of each functional unit within the vicinage shall be responsible for the expeditious

processing to disposition of all matters filed within [his] that unit.

(c) The Presiding Judge annually shall submit to the Trial Court Administrator and Assignment Judge, budget and personnel needs and recommendations for [his] the unit at such times and in such format and in accordance with such procedures as shall be prescribed by the Administrative Director.

(d) The Presiding Judge shall perform such additional administrative duties as shall be assigned [to him] by the Assignment Judge and shall be responsible for the implementation and enforcement [in his unit] within the court of all administrative rules, policies and directives of the Supreme Court, the Chief Justice, the Administrative Director and the Assignment Judge.

Note: Source -- R.R. 1:31-1, 6:2-1A, 7:7-2, 7:7-8, 7:7-9, 7:19-2 (first sentence), 7:20-2(a), 8:7-1 (third and fourth sentences), 8:13-3A. Formerly R. 1:33-4, redesignated and amended October 26, 1983 to be effective immediately; new paragraph (a) adopted and paragraphs (a), (b), and (c) redesignated (b), (c), and (d), respectively November 1, 1985 to be effective January 2, 1986; paragraphs (b) (c) and (d) amended to be effective .

1:33-7. Case Managers

There shall be on the staff of the Trial Court Administrator a Case Manager for each court support unit within the vicinage who shall be appointed by the

Administrative Director after consultation with the Assignment Judge. [His] The Case 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 [his] the Case Manager's functional unit by the Assignment Judge and Trial Court Administrator.

Note: Adopted October 26, 1983, to be effective immediately; amended to be effective .

1:33-8. Probation Services

(a) For each vicinage, there shall be a Vicinage Chief Probation Officer who shall be appointed by the Administrative Director after consultation with the Assignment Judge, subject to the approval of the Chief Justice and who shall serve at the pleasure of the Administrative Director.

(b) The Vicinage Chief Probation Officer shall be the supervisor of probation services. [His responsibilities] The responsibilities of said officer shall include the supervision and management of the delivery of probation services as part of a statewide system as organized and directed as to programmatic and statewide policy matters by the authority of the Administrative Director. In the performance of [his]

professional duties over probation services, the Vicinage Chief Probation Officer shall report to the Assignment Judge. In the performance of [his] administrative duties, the Vicinage Chief Probation Officer shall report to the Trial Court Administrator.

(c) The Vicinage Chief Probation Officer annually shall submit to the Trial Court Administrator the budget and personnel needs of the Probation Department and [his] recommendations for probation services at such times, in such format and in accordance with such procedures as shall be prescribed by the Administrative Director.

(d) The Vicinage Chief Probation Officer shall assign to each functional unit such staff as may be required. The staff so assigned shall be directly responsible to the Presiding Judge with regard to their day-to-day functions.

(e) The Vicinage Chief Probation Officer shall perform such additional duties as shall be assigned [to him] by the Assignment Judge.

Note: Adopted October 26, 1983, to be effective immediately; paragraphs (b) (c) and (e) amended to be effective .

1:33-9. Review of Administrative Recommended Dispositions

... no change

O. Proposed Amendments to R. 1:34 -- Supporting Personnel of the Courts

See introductory comment to proposed amendments to R. 1:33 (Section I. N. of this report).

In addition to amendments for the purpose of eliminating gender-biased language, R. 1:34-2 is proposed to be revised to delete reference to former courts.

The proposed amendments to R. 1:34 read as follows:

RULE 1:34. SUPPORTING PERSONNEL OF THE COURTS

1:34-1. Standing Masters of the Supreme Court [Deleted]

... no change

1:34-2. Clerks of Court

The clerk of every court, except the Supreme Court, the Superior Court and the Tax Court, shall be responsible to and under the supervision of the judge or presiding judge of the court [of] which [he is] the clerk serves, the Assignment Judge of the county, and the Administrative Director of the Courts. The clerks of the Supreme and Superior Courts shall be responsible to and under the supervision of the Administrative Director of the Courts and the Chief Justice. The clerk of the Tax Court shall be responsible to and under the supervision of the presiding judge of the court and the Administrative Director of the Courts. The clerk of the county shall be the deputy clerk of the Superior Court with respect to Superior Court matters pending in [his] that county and may issue writs out of the Superior Court. [Deputy clerks in the juvenile and domestic relations courts and the county district courts and all other employees of such courts

shall be responsible to and under the supervision of the clerk of the court.]

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

1:34-3. Jury Comissioners

... no change

1:34-4. Probation Officers and Volunteers in Probation

... no change

1:34-5. Court Reporters

... no change

1:34-6. Office of Foreclosure

... no change

P. Proposed Amendment to R. 2:12-7 -- Form, Service and Filing of Petition for Certification

Under R. 2:12-3, the notice of petition for certification must be served and filed within 20 days after entry of a final judgement of the Appellate Division. Under R. 2:12-7, the petition itself must be served and filed within 10 days after filing of the notice of petition. Because of the interrelationship of these two rules, if the petitioner anticipates that the entire 30 days will be needed to prepare the petition, the notice of petition must be filed on the twentieth day--effectively requiring hand-delivery to Trenton. Accordingly, an attorney proposed and the Committee has recommended revising R. 2:12-7(b) to require that the petition be served and filed within 30 days of the final judgment of the Appellate Division. This proposed amendment does not expand the allowable time for filing the petition, but merely alters the starting point from which the time begins to run. Stephen W. Townsend, Clerk of the Supreme Court, was consulted, and is in agreement with the proposed amendment.

The proposed amendment to R. 2:12-7 reads as follows:

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

(a) ... no change

(b) Service, Filing and Time. Within [10 days after filing of the notice of petition for certification] 30 days after the entry of the final judgment, 2 copies of the petition shall be served on each opposing party and 9 copies thereof together with 9 copies of petitioner's Appellate Division brief and appendix shall be filed with the Clerk of the Supreme Court.

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

Q. Proposed Amendment to R. 4:3-2 -- Venue in the Superior Court

It was brought to the Committee's attention that discrepancies exist in the language of R. 4:3-2(a) between the West and Gann versions of the rules. The West version contains duplicative language omitted by Gann. In addition, Gann cites the specific Special Civil Part rule that is an exception to the general venue provisions, whereas West merely contains a blanket exception for Part VI of the rules. Although the discrepancies are purely formal and have no bearing on the substance of the rule, the Committee recommends that the two versions be reconciled and that the Gann version be adopted. Staff to the Special Civil Part Practice Committee agree that the Gann version is preferable.

The proposed amendment to the West version of R. 4:3-2 reads as follows:

4:3-2. Venue in the Superior Court

(a) Where Laid. Venue shall be laid by the plaintiff in Superior Court actions[, except those governed by Part VI,] as follows: (1) [in] actions affecting title to real property or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements, [venue shall be laid] in the county in which any affected property is situate; (2) [in] actions not affecting real property which are brought by or against municipal corporations, counties, public agencies or officials, in the county in which the cause of action arose; (3) except as otherwise provided by R. 4:53-2 (receivership actions), R. 4:60-2 (attachments), R 5:2-1 (family actions), [and] R. 4:98 (probate actions), and R. 6:1-3 (Special Civil Part actions), the venue in all other actions in the Superior Court shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served upon a nonresident defendant.

(b) ... no change

(c) ... no change

Note: Source -- R.R. 4:3-2; Paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (c) adopted January 9, 1984 to be effective immediately; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended to be effective .

R. Proposed Amendment to R. 4:3-3 -- Change of Venue in the Superior Court

An Assignment Judge proposed that R. 4:3-3(a) be changed to permit Civil Presiding Judges to sign orders for change of venue in the Law Division. At present, the language of the rule limits this authority to Assignment Judges, although in the Chancery Division General Equity judges and Family Part Presiding Judges may sign such orders. As most motions to change venue are routine and affect the trial calendar, the Committee agrees that Civil Presiding Judges, or any designee of the Assignment Judge, should be authorized to sign change of venue orders.

The proposed amendment to R. 4:3-3 reads as follows:

4:3-3. Change of Venue in the Superior Court

(a) By Whom Ordered; Grounds. In actions in the Superior Court a change of venue may be ordered by the Assignment Judge or the designee of the Assignment Judge of the county in which venue is laid or by a judge of such county sitting in the Chancery Division, General Equity, or the presiding judge of the Family Part, or the designee of the Assignment Judge for the Special Civil Part, (1) if the venue is not laid in accordance with R. 4:3-2; or (2) if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid; or (3) for the convenience of parties and witnesses in the interest of justice; or, (4) in Family Part post-judgment motions, if both parties reside outside the county of original venue and application is made to the court by either party to change venue to a county where one of the parties now resides.

(b) ... no change

(c) ... no change

Note: Source -- R.R. 4:3-3. Paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended and paragraph (c) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended to be effective .

S. Proposed Amendment to R. 4:4-2 -- Summons: Form

For some time the State Bar Association has requested an amendment to that provision of R. 4:4-2 that includes in the summons form the telephone number of the New Jersey State Bar Association as a source for lawyer referral. In deleting any reference to the State Bar from the rule, the Committee has attempted to fill the gap for those few counties not having a lawyer referral service by requiring the listing of lawyer referral services operating in an adjacent county. The Committee is advised, however, that there is available a legal services program covering every county.

It is the Committee's understanding that the Court may be acting on this proposed amendment on an emergent basis.

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

4:4-2. Summons: Form

Except as otherwise provided by R. 5:4-1(b) (summary proceedings in family actions), the summons shall be in the name of the State, signed in the name of the clerk and directed to the defendant. It shall contain the name of the court and the plaintiff and the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve his or her answer upon the plaintiff or his or her attorney, and shall notify the defendant that if he or she fails to answer judgment by default may be rendered [against him] for the relief demanded in the complaint. It shall also inform the defendant that he or she shall file [his] an answer and proof of service thereof with the clerk of the court in accordance with the rules of civil practice and procedure and, in Superior Court actions, that such filing be in duplicate. If the defendant is an individual resident in this state, the summons shall advise [him] that if he or she is unable to obtain an attorney, he or she may communicate with the [New Jersey State Bar Association or] Lawyer Referral Service of the county of his or her residence, or the county in which the action is pending, or, if there is none in either county, the Lawyer Referral Service of an adjacent county. The summons shall also advise defendant [and] that if he or she cannot afford

an attorney, he or she may communicate with the Legal Services Office of the county of his or her residence or the county in which the action is pending. If the defendant is an individual not resident in this [s] State, the summons shall similarly advise him or her, directing [him] the defendant, however, to the appropriate agency in the county in which the action is pending. The summons shall state explicitly the telephone number of each such agency or service.

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

T. Proposed Amendment to R. 4:6-1 -- Presentation of Defenses and Objections

The Committee was asked by an attorney to clarify the time-to-answer periods set forth in R. 4:6-1(a). The Committee's position is that the present rule is clear -- in-state personal service results in a 20-day answer period whereas all other types of service result in a 35-day answer period. However, because the question keeps recurring, primarily in the context of foreclosure actions, the Committee determined to reconsider the issue upon obtaining the views of Myron Weinstein, Esq., Chief of the Office of Foreclosure.

Mr. Weinstein agreed that R. 4:6-1(a) should be revised in order to eliminate any confusion between R. 4:4-4(a)(1), which defines three forms of personal service, and R. 4:6-1, which applies the 20-day answer period to defendants "personally served", intending, however, to include only one of the R. 4:4-4(a)(1) forms of personal service.

To allay confusion, therefore, the Committee recommends that R. 4:6-1(a) be amended to specify the modes of service that give rise to a 35-day answer period (the exception); all other types of service require an answer within 20 days (the rule).

The proposed amendment to R. 4:6-1(a) reads as follows:

4:6-1. When Presented

(a) Time; Presentation. Except as otherwise provided by R. 4:7-5(c) (crossclaims), [a defendant who is personally served with process within this state pursuant to R. 4:4-4(a)(1) shall serve his answer including therein any counterclaim within 20 days after service of the summons and complaint upon him. Every other defendant shall serve his answer including therein any counterclaim within 35 days after completion of service or publication or within such other time as the court orders.] the defendant shall serve an answer, including therein any counterclaim, within 20 days after service of the summons and complaint upon that defendant but said time shall be enlarged to 35 days (1) if service is made by mail, publication or posting or (2) if the defendant is served outside this State by any mode or (3) if service is made upon defendant by service upon a registered, statutory or court appointed agent. If service is made as provided by court order, pursuant to R. 4:4-4(i), the time for service of the answer may be specified therein. Service by mail shall be complete upon mailing of the ordinary mail. If no ordinary mailing is made, service shall be deemed complete upon the date of the acceptance of the registered or certified mail. A party served with a pleading stating a counterclaim or crossclaim against him or her shall serve an answer thereto within 20 days after the service upon

[him] that party. A reply to an answer, where permitted, shall be served with 20 days after service of the answer.

(b) ... no change

(c) ... no change

(d) ... no change

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

U. Proposed Amendments to Rules 4:7-1, 4:27-1, 4:28-1, 4:29-1, 4:30, and 4:30A -- Entire Controversy Doctrine

In Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989), the Supreme Court concluded that "the entire controversy doctrine appropriately encompasses the mandatory joinder of parties", and called for the rule on party-joinder (R. 4:28) to be amended consistent with the explication of the entire controversy doctrine as set forth in Cogdell. The Civil Practice Committee established a subcommittee to consider the implications of Cogdell and to recommend necessary rule changes in light of that decision.

The position of the subcommittee, which was reflected in the Committee as a whole, was that the entire controversy doctrine does not require joinder of claims or persons; rather, it imposes a particular consequence -- claim preclusion -- on failure to join claims or parties covered by the doctrine. In other words, a plaintiff may make a conscious decision to omit certain claims or persons and may nonetheless proceed with the suit, but the result of such omission shall to the extent required by the entire controversy doctrine be claim preclusion should plaintiff later decide joinder of the omitted claim or person is desirable or even necessary.

The Committee determined to deal with the issue by recommending a new rule -- R. 4:30A (entire

controversy doctrine) -- to alert practitioners to the consequences of failure to join claims or persons required to be joined by the entire controversy doctrine. In addition, the Committee proposes that reference to this new rule be added to current Rules 4:7-1 (mandatory or permissive counterclaims), 4:27-1 (joinder of claims), 4:28 (joinder of persons needed for just adjudication), and 4:29 (permissive joinder). The Committee also recommends the modification of R. 4:30 (misjoinder and non-joinder of parties) to make it clear that a claim may be expressly reserved, i.e., that the entire controversy doctrine does not mean that an action cannot proceed if all necessary claims are not joined.

The proposed amendments to Rules 4:7-1, 4:27-1, 4:28-1, 4:29-1, 4:30 and 4:30A read as follows:

4:7-1. Mandatory or Permissive Counterclaims

Except as otherwise provided by R. 4:67-4 (summary actions) and except in foreclosure actions (in which only germane counterclaims may be pleaded), a pleading may state as a counterclaim any claim against the opposing party whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. A defendant, however, either failing to comply with [R. 4:27-1(b) (mandatory joinder of claims)] R. 4:30A (entire controversy doctrine) or failing to set off a liquidated debt or demand or a debt or demand capable of being ascertained by calculation, shall thereafter be precluded from bringing any action for such claim or for such debt or demand which might have been so set off.

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

4:27-1. Joinder of Claims

[(a) Permissive Joinder.] Subject to R. 4:30A (entire controversy doctrine), t [T]he plaintiff in his or her complaint or in an answer to a counterclaim denominated as such and the defendant in an answer setting forth a counterclaim may join, either as independent or as alternate claims, as many claims, either legal or equitable or both, as he or she may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of R. 4:28 (joinder of parties), R. 4:29 (joinder of multiple parties), and R. 4:31 (interpleader) are satisfied. There may be a like joinder of crossclaims or third-party claims if the requirements of R. 4:7 (counterclaim and cross-claim) and R. 4:8 (third-party practice) respectively are satisfied.

[(b) Mandatory Joinder. Each party to an action shall assert therein all claims which he may have against any other party thereto insofar as may be required by application of the entire controversy doctrine.]

Note: Source -- R.R. 4:31-1. Paragraph designations and paragraph (b) adopted July 16, 1979 to be effective September 10, 1979; caption of paragraph (a) deleted, paragraph (a) amended, and paragraph (b) deleted to be effective _____.

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

(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party to the action if (1) in [his] the person's absence complete relief cannot be accorded among those already parties, or (2) [he] the person claims an interest in the subject of the action and is so situated that the disposition of the action in [his] the person's absence may either (i) as a practical matter impair or impede [his] the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of [his] the claimed interest. If [he] the person has not been so joined, the court shall order that [he] the person be made a party. If [he] the person should join as a plaintiff but refuses to do so, [he] the person may be made a defendant.

(b) ... no change

(c) ... no change

(d) ... no change

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

Note: Source -- R.R. 4:32-1, 4:32-2, 4:32-3, 4:32-4, 4:32-5; paragraphs (a) and (e) amended to be effective .

4:29-1. Permissive Joinder

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

(b) ...no change

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

R. 4:30. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by court order on motion by any party or its own motion. Any claim against a party may be reserved or severed and proceeded with separately by court order.

Note: Source -- R.R. 4:34; amended to be effective .

R. 4:30A. Entire Controversy Doctrine

Non-joinder of claims or parties required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine.

Note: Adopted _____ to be effective _____.

V. Proposed Amendment to R. 4:14-9 -- Videotaped Depositions

Current R. 4:14-9(e) permits a de bene esse deposition of an expert, taken in accordance with the provisions of the rule, to be introduced into evidence in lieu of live testimony whether or not the expert is available for trial. An Appellate Division judge brought to the Committee's attention a situation in which a trial judge rejected a party's application to produce for live testimony a witness whose de bene esse videotaped deposition had already been taken. The judge's rationale was that, by taking the videotaped deposition, the party had made a binding election that precluded subsequent production of the witness at trial.

In the Committee's view, the authorization of R. 4:14-9 to use an expert's videotaped deposition when he or she is available does not include the corollary principle that the party is subsequently precluded from electing to produce the witness at trial. Accordingly, the Committee recommends the amendment of R. 4:14-9(e) to clarify this issue.

The proposed amendment to R. 4:14-9 reads as follows:

4:14-9. Videotaped Depositions

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) Use. Videotaped depositions may be used at trial in accordance with R. 4:16-1. In addition, a videotaped deposition of a treating physician or expert witness, which has been taken in accordance with these rules, may be used at trial in lieu of testimony whether or not such witness is available to testify and provided further that the party who has taken the deposition has produced the witness for further videotaped deposition necessitated by discovery completed following the original videotaped deposition or for other good cause. Disputes among parties regarding the recall of a treating physician or expert witness shall be resolved by motion which shall be made as early as practicable before trial. The taking of a videotaped deposition of a treating physician or expert witness shall not preclude the party taking the deposition from producing the witness at trial.

(f) ... no change

(g) ... no change

(h) ... no change

Note: Adopted July 21, 1980 to be effective September 8, 1980; paragraph (e) amended to be effective .

W. Proposed Amendments to Rules 4:17-3 and 4:17-4 -- Interrogatories

Rule 4:17-3(a) now provides that the party serving interrogatories shall furnish the answering party with an original and two copies of the interrogatories plus as many additional copies as there are parties named in the case. Thus, if a plaintiff sued five defendants, a party must serve an original and eight copies of the interrogatories on the answering party. The apparent rationale behind this requirement is that the answering party will type in the answers on the original and all the copies, keep one copy and return the rest to the propounding party who, pursuant to R. 4:17-4(c), must then serve a copy of the interrogatories and answers upon each of the other parties. In actual practice, however, service of multiple copies is impractical and rarely occurs.

The Committee agreed that, in this day of the word processor and photocopier, the mechanics of Rules 4:17-3(a) and 4:17-4(c) are outdated. Accordingly, the Committee recommends that R. 4:17-3(a) be amended to require the propounding party to serve only an original and two copies of the interrogatories on the answering party. It also recommends that R. 4:17-4(c) be amended to require that the answering party serve only the original and one copy of the answered interrogatories upon the propounding party.

See Section II. O. of this report for proposed revisions to these rules that the Committee considered and rejected.

The proposed amendments to Rules 4:17-3(a) and 4:17-4(c) read as follows:

4:17-3. Number of Copies Served; Form of Interrogatories

(a) Number of Copies Served. The party serving the interrogatories shall furnish the answering party with an original and 2 copies of the interrogatories [and as many additional copies thereof as there are parties named in the action. In determining the number of copies, parties against whom a default has been entered need not be counted and parties represented by the same attorney may be counted as one].

(b) ...no change

(c) ...no change

Note: Source -- R.R. 4:23-3(a)(b). Amended July 14, 1972 to be effective September 5, 1972 (paragraph (a) formerly in R. 4:17-1); paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended _____ to be effective _____.

4:17-4. Form, Service and Time of Answers

(a) ... no change

(b) ... no change

(c) Copies; Service by Propounding Party. The original and one copy of [T] the answers shall be served[, together with the original and all but one copy of the respective interrogatories to which the answers apply,] upon the propounding party, who shall then serve a copy of the interrogatories and answers upon each of the other parties. Parties against whom default has been entered need not, however, be served, and parties represented by the same attorney need be served with one copy. [If copies of papers are annexed to answers, they need to be annexed to only one set for each party.]

(d) ... no change

(e) ... no change

Note: Source -- R.R. 4:23-4, 4:23-5, 4:23-6(a) (b) (c) (d). Paragraph (a) amended and paragraph (d) adopted July 14, 1972 to be effective September 5, 1972; paragraph (a) amended September 13, 1976 to be effective September 13, 1976; paragraph (a) amended and paragraph (e) adopted July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended to be effective .

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

The Committee observed that the final sentence of R. 4:17-7 refers to R. 4:21-6, which has been deleted in its entirety. The Committee therefore recommends amending R. 4:17-7 to remove this obsolete reference.

The proposed amendment to R. 4:17-7 reads as follows:

4:17-7. Amendment of Answers

Except as otherwise provided by R.4:17-4(e), if a party who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the first date fixed for trial. Thereafter amendments may be allowed only for extraordinary or compelling reasons and to prevent manifest injustice, and upon such terms as the court directs. In no case shall amendments be allowed [1)] at trial where it appears that the evidence sought to be introduced was known to the party seeking such leave, more than 10 days prior to trial [, or 2) for the purpose of naming a new expert witness after a medical malpractice panel has issued a unanimous disposition as provided by R.4:21-6(e)].

Note: Source -- R.R. 4:23-12; amended July 29, 1977 to be effective September 6, 1977; amended September 9, 1982 to be effective September 14, 1982; amended July 22, 1983 to be effective September 12, 1983; amended _____ to be effective _____.

Y. Proposed Amendment to R. 4:21A-8 -- Administration of Arbitration Programs

This amendment was suggested by the Arbitration Advisory Committee (AAC) and approved unanimously by the Civil Practice Committee. The proposed amendment was the result of the AAC's consideration of the delegability of the powers of the Assignment Judge in administering the statutory arbitration programs and in determining legal questions arising in the context of these programs. This issue was raised but not decided in Helstoski v.Hyckey, 225 N.J. Super. 142 (App. Div. 1988), the question there being the delegability of the Assignment Judge's power under R. 4:21A-6(c)(5) to decide an application for costs following a trial de novo of an arbitrated case. The position of the AAC, which was endorsed by the Civil Practice Committee, is that the Assignment Judge's power to supervise and resolve all issues arising from the arbitration programs is delegable, given the history and purpose of these programs. The recommended revisions to R. 4:21A-8 would make this clear.

The proposed amendments to R. 4:21A-8 read as follows:

4:21A-8. Administration

(a) Assignment Judge. The Assignment Judge or other judge designated by order of the Supreme Court shall be responsible for the supervision of the arbitration programs in [his or her] the vicinage [and] including the resolution of all issues arising therefrom. The Assignment Judge may delegate all or any of [his or her supervisory] these powers to any Superior Court judge in the vicinage.

(b) Administrative Director of the Courts. The Administrative Director of the Courts shall promulgate such guidelines and forms as required for the implementation of the programs.

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

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

Z. Proposed Amendment to R. 4:23-5 -- Failure to Serve Answers to Interrogatories

Pursuant to the direction of the Supreme Court in Aujero v. Cirelli, 110 N.J. 566 (1988), the Civil Practice Committee has reconsidered the problem of delinquent answers to interrogatories and the remedies therefor, and proposes as well as a solution to the difficulties created by reinstatement motions made many months, if not years, after a dismissal.

The scheme proposed, supported by near-unanimous vote of the Committee, would eliminate the present ex parte dismissal practice and establish a two-tier motion practice, that is, an initial motion for an order of dismissal without prejudice for failure to answer interrogatories and, where the delinquent party does not move successfully to vacate, a second motion, brought either by the party entitled to answers or by the court 90 days after the initial order, to dismiss or suppress with prejudice. The judge hearing the initial motion would have the discretion to grant alternative relief, such as compelling answers to interrogatories within a specific time period, only on good cause shown. The first, "without prejudice" dismissal or suppression order may be vacated within 90 days upon motion supported by affidavit stating that fully responsive answers to the interrogatories have been served and the sliding scale penalty, discussed

below, is paid. It is the contemplation of the Committee, however, that only the most extraordinary circumstances would relieve a party of the dispositive consequences of the "with prejudice" dismissal order.

The Committee is of the view that the main objective is to compel the answers rather than to dismiss the case, and believes that this two-tier, 90-day practice will have a salutary effect because of a key stipulation of the proposal, namely, that an attorney who is served with a notice of motion to dismiss with prejudice must send a letter to the client so advising. The proposed form of the required letter is contained in Appendix A of this report; the Committee recommends that this letter, if approved by the Court, appear as an Appendix to the Rules. The Committee is of the view that responsible practitioners will seek to avoid the necessity of having to send such a letter by seeing to it that answers are forthcoming within the 90-day period. Another advantage of this practice is that it protects the attorney who is unable to locate a client and has no other recourse but to allow to terminate litigation in which the client itself may have lost interest. Thus, the alternative to sending the letter to the client and so certifying to the court is a certification by the lawyer that he or she cannot locate the client after diligent inquiry.

Other proposed changes worthy of mention include an increase of the monetary sanction, presently fixed at $50 for late answers, to $100 if the interrogatories are answered and the dismissal-without-prejudice order vacated during the first 30 days of the 90-day period and $300 thereafter. Furthermore, with the adoption by the Supreme Court last year of the amendment to R. 4:17-4(a) authorizing an agent or other representative (particularly an insurance company) to answer the interrogatories and thereby bind the party, the Committee is again proposing that any motion to dismiss or suppress for failure to answer interrogatories must be accompanied by a certification that the moving party is not in default.

The proposed amendments to R. 4:23-5 read as follows:

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

(a) Dismissal [or Suppression].

(1) Without Prejudice. If timely answers to interrogatories are not served and no [formal] motion for an extension has been made pursuant to R. 4:17-4(b), [the complaint, counterclaim or answer of the delinquent party shall be dismissed or stricken by the court upon the filing by] the party entitled to the answers [of an affidavit stating such failure within 60 days from the date on which said answers became due] may move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. [Thereafter such relief may be granted only by motion. The affidavit shall have annexed thereto a form of order of dismissal or suppression. A copy of all such orders with affidavits annexed shall be served upon the delinquent party within 7 days after the date thereof.] The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and further stating that the moving party is not in default in answering, pursuant to R. 4:17-4(a), the interrogatories served by the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. [On formal motion made by t]The delinquent party may move for vacation of the dismissal or suppression order, [within 30 days after service upon him of the order, the court may vacate it,] provided the motion is supported by affidavit stating that fully responsive

answers [to the propounded interrogatories are presented] have been served and provided further the delinquent party pays costs in the amount of [$50.00] $100.00 to the Clerk of the Superior Court if the motion is made within 30 days after entry of the order of dismissal without prejudice and $300.00 if the motion is made thereafter.

(2) With Prejudice. If an order of dismissal or suppression without prejudice has been entered and not thereafter vacated, the party entitled to the answers or the court on its own motion may, after the expiration of 90 days from the date of the order, move, on notice, for an order of dismissal or suppression with prejudice. The motion shall be granted unless exceptional circumstances are demonstrated. The attorney for the delinquent party shall, not later than 5 days prior to the return date of the motion, file and serve an affidavit stating that the client has been notified of the pendency of the motion or that the attorney is unable, despite diligent inquiry, to determine the client's whereabouts. The notification to the client shall be in the form appearing as Appendix to these rules, and the attorney's appearance on the return date of the motion shall be mandatory.

(3) General Requirements. All motions made pursuant to this rule shall be accompanied by an appropriate form of order, and all affidavits in support of relief shall include a certification of prior consultation with opposing counsel

as required by R. 1:6-2(c). An order of dismissal or suppression shall be entered only in favor of the moving party.

(b) ... no change

Note: Source-- R.R. 4:23-6(c) (f), 4:25-2 (fourth sentence); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended to be effective .

AA. Proposed Amendment to R. 4:28-4 -- Notice to Attorney General and Attorneys for Other Governmental Bodies

A government attorney suggested that, in cases where the validity of a governmental regulation is questioned in an action to which the State is not a party, notice nonetheless should be given to the State. Before acting on this proposal, the Committee sought the position of the Attorney General, who agrees with the soundness of the suggestion and supports it, as does the Committee.

The proposed amendment to R. 4:28-4 reads as follows:

4:28-4. Notice to Attorney General and Attorneys for Other Governmental Bodies

(a) Actions Involving Validity of Statute, Ordinance, etc; Unknown Owners. If the validity of a [statute, executive order, franchise or constitutional provision] State constitutional provision or of a statute, rule, regulation, executive order or franchise of this State is questioned in any action to which the State or an agency or officer thereof is not a party, the party raising the question shall give notice of the pendency of the action to the Attorney General. If the validity of an ordinance, regulation or franchise of a governmental subdivision of this State affecting the public interest is questioned in any action to which the subdivision or an agency or officer thereof is not a party, the party raising the question shall given notice of the pendency of the action to the attorney or chief legal officer of the governmental subdivision. The plaintiff in any action brought against unknown owners of or claimants to real property shall give notice of the pendency of the action to the Attorney General if the State is not already a party thereto.

(b) ... no change

(c) ... no change

(d) ... no change

Note: Source -- R.R. 4:37-2, 4:117-6. Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended to be effective .

BB. Proposed Amendment to R. 4:38-1 -- Consolidation

A trial judge suggested that R. 4:38-1 be amended to specify how consolidated cases are to be handled, e.g., in what order the cases should be listed and how future papers filed in any of the consolidated cases should be captioned and docketed. An amendment clarifying these procedures would go far to eliminate the confusion that now arises when, for example, motions are filed in apparently separate cases that, unbeknownst to the judges hearing the motions, had been consolidated.

The Committee agreed to recommend an amendment to R. 4:38-1 to provide that after the order of consolidation is entered, all papers filed in any of the consolidated cases shall bear the docket number and captions of all the consolidated cases, in chronological order, and shall also state clearly the pleading or motion to which the paper is responsive. The Committee further agreed that the rule should continue to require that the order of consolidation designate the venue in which the consolidated action shall proceed.

The proposed amendments to R. 4:38-1 read as follows:

4:38-1 . Consolidation

(a) ... no change

(b) ... no change

(c) Order; Further Proceedings. [Where actions in different venues or courts are consolidated, the order of consolidation shall state the venue in which the consolidated action or actions are to be tried and shall be filed in triplicate with the Clerk of the Superior Court. Where consolidation is provided for in this rule all actions shall be consolidated into one action unless the court otherwise orders. Unless otherwise ordered by the court, the action first instituted shall determine which party shall have the privilege to open and close and in other respects shall govern the conduct of subsequent proceedings. Upon a consolidation the court may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.] Unless the court otherwise directs in the order of consolidation, all papers thereafter filed in the consolidated action shall (1) include the caption and docket number of each separate action, that of the earliest instituted action to be listed first and (2) state with specificity the pleading or motion to which the paper is responsive. If actions pending in different venues are consolidated, the order shall specify the venue in which the consolidated action shall proceed and the party having the responsibility to file a copy

of the order with the clerk of each county from which an action is being transferred. The order of consolidation may also include such terms as the court may prescribe to expedite further proceedings. In addition to the filing required by R. 1:6-4(b)(6), a copy of the order of consolidation shall be included in the county clerk's file of each separate action.

Note: Source -- R.R. 4:43-1(a)(b)(c)(d)(e); paragraph (b) amended, paragraphs (c) and (d) deleted and former paragraph (e) redesignated as paragraph (c) July 26, 1984 effective September 10, 1984; paragraph (c) amended to be effective .

CC. Proposed Amendment to R. 4:42-9(a)(4) -- Counsel Fees

An Assignment Judge recommended revising R. 4:42-9(a)(4) to resolve any confusion resulting from two conflicting General Equity decisions on the subject of the amount of permissible fees in a foreclosure action. The rule sets out a fee schedule for calculating allowances in foreclosure cases. However, the final clauses of the rule state that "...in no case shall the allowance exceed $7,500, except upon application supported by affidavit of services." (emphasis added)

In Farmers & Merchants National Bank of Bridgeton v. Cotler, 225 N.J. Super. 160 (Ch. Div. 1988), the court read the rule as permitting an allowance of fees in excess of $7,500 whenever the work involved in the litigation supported such a fee. Levine v. Levine, 210 N.J. Super. 585 (Ch. Div. 1986), however, held that a fee in excess of $7,500 should be permitted only if the application of the percentages set forth in the rule produce a higher figure.

After determining that neither case was on appeal, the Committee agreed that the intent of the rule was to permit fees in excess of $7,500 only if the application of the schedule set forth in the rule results in a higher figure (the Levine approach). This reading of the rule does not prevent attorneys from being

compensated for excess work; it simply means they cannot pass on the cost of the excess on to the defendant.

The proposed amendment to R. 4:42-9(a)(4) reads as follows:

4:42-9. Counsel Fees

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

(1) ... no change

(2) ... no change

(3) ... no change

(4) In an action for the foreclosure of a mortgage, the allowance shall be calculated as follows: on all sums adjudged to be paid the plaintiff amounting to $5,000 or less, at the rate of 3.5% provided, however, that in any action a minimum fee of $75 shall be allowed; upon the excess over $5,000 and up to $10,000 at a rate of 1.5% and upon the excess of $10,000 at a rate of 1%, provided that [in no case shall] the allowance shall not exceed $7,500[, except]. If, however, application of the formula prescribed by this rule results in a sum in excess of $7,500, the court may award an additional fee not greater than the amount of such excess upon application supported by affidavit of services. In no case shall the fee allowance exceed the limitations of this rule.

(5) ... no change

(6) ... no change

(7) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

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

DD. Proposed Amendment to R. 4:42-9(a)(6) -- Counsel Fees

In the 1987-88 rules cycle, an attorney had suggested that the Committee consider amending R. 4:42-9(a)(6) to provide for the allowance of counsel fees where an insured seeks recompense from its own carrier when that carrier fails to pay a first-party claim. The Committee had considered this issue in 1983, and at that time recommended an amendment to permit counsel fees to be awarded to a successful claimant in an action on any insurance policy. The Court did not adopt such an amendment; however, it did appoint the Committee on Award of Counsel Fees on Insurance to study the question. That committee, which was chaired by Judge King, issued its report in September 1985 (published in the January 9, 1986 issue of the Law Journal), recommending that the scope of the rule should not be amended and that the Legislature may be the appropriate forum to consider the matter. Given this history, the Civil Practice Committee determined not to propose an amendment to R. 4:42-9(a)(6) in its 1988 report, but agreed to re-examine the entire issue more fully in the 1988-90 rules cycle.

After considerable discussion, the Committee voted strongly (20 to 7) in favor of amending the rule to permit counsel fees. The reasons offered in support of such an amendment were many: an insurance contract is typically one of adhesion; the carrier creates an aura

of protection for which it should be held accountable; a quasi-fiduciary relationship exists between insurer and insured; and consumer expectations fostered by the carrier. In short, the situation to be corrected is that of an insurer reneging on its contract and being forced to meet its obligation. As insurers operate for profit under contracts of adhesion, the majority of the Committee were of the view that a special exception to the American rule is justified. Because the Committee was not unanimous on this issue, however, majority and minority reports were prepared, which are included as Appendix B to this report.

The language of the proposed amendment is intended to be broad enough to permit recovery on a first-party claim under any type of insurance contract, including an indemnity agreement. It is not intended to permit a fee in an action on a surety bond.

The proposed amendment to R. 4:42-9(a)(6) reads as follows:

4:42-9. Counsel Fees

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

(1) ... no change

(2) ... no change

(3) ... no change

(4) ... no change

(5) ... no change

(6) In an action upon a [liability or indemnity] policy of insurance brought against the issuer, in favor of a successful claimant.

(7) ... no change

(8) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

Note: Source -- R.R. 4:55-7(a)(b)(c)(d)(e)(f), 4:55-8, 4:98-4(c). Paragraph (a) and (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)(1) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a)(1) and (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended January 19, 1989 to be effective February 1, 1989; paragraph (a)(6) amended to be effective .

EE. Proposed Amendments to Rules 4:63-3 and 4:63-4 -- Dower or Curtesy

In the previous rules cycle, the Court approved the replacement of the capitalization and life expectancy tables contained in Appendix I to the rules, in order to provide more current, accurate and readily usable data. In light of this change, the Committee now proposes amending Rules 4:63-3 and 4:63-4 to provide the trial judge, in making calculations relating to dower and curtesy, with the option of applying an interest rate other than the 5-1/2% now allowed in these rules, which rate was geared to the former tables. The Committee recommends language allowing the court to apply the 5-1/2% rate or another rate that is reasonable and appropriate. Such an amendment would give the judge flexibility while avoiding the need for expert testimony in every case.

The proposed amendments to Rules 4:63-3 and 4:63-4 read as follows:

4:63-3. Calculation of Gross Sum in Lieu of Dower or Curtesy

The gross sum to be allowed in lieu of dower or curtesy or an estate for life or years devised in lieu of dower or curtesy shall be fixed by the court at such an amount as, in its opinion and under the circumstances of the case, will provide a reasonable satisfaction for the dower or other interest. In fixing that amount, the court shall proceed after the sale as follows:

(a) ... no change

(b) ... no change

(c) If the interest on the net proceeds of sale at 5 1/2% or at such other interest rate as the court determines on good cause shown is appropriate, exceeds the clear yearly income, the amount fixed by the court shall, except in unusual circumstances, be determined by adding to the amount arrived at under paragraph (b), in cases of dower or curtesy, 1/2 -- or in other cases, 1/4 -- of the difference between the amount arrived at under paragraph (a) and the amount arrived at under paragraph (b).

(d) ... no change

Note: Source -- R.R. 4:81-5; paragraph (c) amended February 24, 1978 to be effective immediately as to all matters wherein final judicial review has not been exhausted; paragraph (c) amended to be effective .

4:63-4. Calculation of Investment in Lieu of Dower or Curtesy

If an income from an investment is allowed in lieu of dower, curtesy or other estate referred to in R.4:63-3, the amount of the investment shall be fixed by the court so that the income therefrom will, in its opinion and under the circumstances of the case, provide a reasonable satisfaction for the dower or other interest. In fixing that amount, the court shall proceed after the sale as follows:

(a) ... no change

(b) The court shall also determine the clear yearly income from the premises as provided by R.4:63-3 and then calculate the amount of the investment, basing it upon this income capitalized at 5 1/2% or at such other rate of interest as the court for good cause shown determines is appropriate.

(c) ...no change

Note: Source -- R.R. 4:81-6; paragraph (b) amended February 24, 1978 to be effective immediately as to all matters wherein final judicial review has not been exhausted; paragraph (b) amended to be effective .

FF. Proposed Amendment to R. 4:64-7 -- In Rem Tax Foreclosure

There has been considerable concern among many segments of the bar and municipal government respecting the validity of in rem tax sales certificate foreclosures both as a prospective and a retroactive matter since the United States Supreme Court decision in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), which in effect held that all persons whose interest is ascertainable from the record must be noticed. Until Mennonite raised the issue, the standard practice in in rem foreclosures was to give notice only to the owner and to such other persons who, under the authorization and opportunity of N.J.S.A. 54:5-104.48, requested notice.

Although the issue has not yet been decided by an appellate court in New Jersey*, the Civil Practice Committee, after having considered various alternative methods of complying with Mennonite, has concluded that the matter must be addressed as promptly as possible by rule amendment. The Committee was advised that the City of Newark, which was most concerned about the viability

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* In Bridgeton Housing Development Corp. v. City of Bridgeton, A-122-88T5, decided July 6, 1989, the State appealed a judgment declaring N.J.S.A. 54:5-104.48 unconstitutional. The appellate panel found it unnecessary to reach the merits of this issue, however, and remanded the matter to the Law Division for further proceedings to join as parties the encumbrancers who had not been given actual notice of the tax foreclosure action.

of a future in rem program, has now, in effect, capitulated and is doing both 60-year searches and judgment searches. The proposed amendment would so require but is intended to exclude searches of the probate record. The Committee has for several years worked on this issue with Myron Weinstein, Chief of Foreclosure, who has been enormously helpful and concurs with both the concept and the formulation of the proposed rule.

The proposed amendment to R. 4:64-7 reads as follows:

4:64-7. In Rem Tax Foreclosure

(a) ... no change

(b) ... no change

(c) Service. The plaintiff shall, within 7 days after the date of publication of the notice of foreclosure, serve a copy thereof in the manner hereinafter provided on each person whose name appears as an owner in the tax foreclosure list at his or her last known address as it appears on the last municipal tax duplicate. The plaintiff shall also make such service upon all other persons having an ownership or lien interest recorded in the office of the Superior Court Clerk or the county recording officer on the date of the filing of the complaint and upon all other persons who, pursuant to N.J.S.A. 54:5-104.48, as amended, have filed a notice with the tax collector specifying a title, lien, claim or interest in any of the lands sought to be affected by said complaint. Such service shall be made in the manner provided by R. 4:4-4(a) or by simultaneously mailing to the last known address by registered or certified mail, return receipt requested, and by ordinary mail. In addition to the foregoing, the plaintiff shall mail a copy of the notice of foreclosure, by ordinary mail, to the Attorney General.

(d) ... no change

(e) ... no change

(f) ... no change

(g) ... no change

Note: Source -- R.R. 4:82-7(a)(b)(c)(d)(e)(f)(g)(h)(i); paragraph (c), (e) and (g) amended July 29, 1977 to be effective September 6, 1977; paragraph (c) amended July 16, 1981 to be effective September 14, 1981; paragraph (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended to be effective .

GG. Proposed Amendment to R. 4:65-3 -- Advertisement of Diagram or Statement in Lieu

An attorney noted a discrepancy between the foreclosure sale procedures set forth in R. 4:65-3 and those of the foreclosure statute, N.J.S.A. 2A:61-1. The latter requires the notice of sale to include a diagram of the premises or a concise description of the property. The former, however, requires the foreclosing mortgagee to move before the court to be permitted to use a diagram or concise description. The Committee sought the views of Myron Weinstein, Esq., Chief of the Office of Foreclosure, who advised that in actual practice no motion is necessary and who agreed that the rule should be amended to conform to the statute.

The proposed amendment to R. 4:65-3 reads as follows:

4:65-3. Advertisement of Diagram or Statement in Lieu

If real estate is to be sold at public sale, [the court on motion may order] the sheriff, receiver or other person [,to] shall publish with the notice of the sale [, in lieu of the actual description, either] the actual description, or a diagram of the premises or a concise statement indicating the municipality in which, and the street or road upon which the premises are located, and specifying the tax lot and block, the number of feet to the nearest cross street, the dimensions of the premises, and the street number, if any. If the notice does not contain the full legal description, it shall state that the diagram or concise statement does not constitute a full description and shall also state where the full legal description can be found. An immaterial error in the diagram or statement shall not constitute ground for relieving the purchaser and ordering a new sale.

Note: Source -- R.R. 4:83-3; amended to be effective .

HH. Proposed Amendment to R. 4:67-6 -- Summary Proceedings to Enforce Agency Orders

In 1987, an Assignment Judge brought to the Committee's attention the fact that R. 4:67-6 apparently requires an action to enforce the order of an administrative agency to be brought by the agency itself rather than by the person or entity in whose favor the order was issued. Unfortunately, the forum agency may not have an interest in enforcing the order, in which case the individual who obtained the award will have no recourse.

Reference to earlier Committee minutes and reports revealed, however, that when the Committee originally recommended adoption of the current rule in 1983, it intentionally excluded enforcement actions by individuals benefited by agency orders, in order to provide a speedy and exclusive remedy should the administrative agency wish to vindicate its judgment.

Upon reconsideration of this issue, however, the consensus of the Committee was that the individual party should have the same means of rapid relief as the agency. Accordingly, the Committee recommended in its 1988 report to the Court an amendment to R. 4:67-6 to permit summary actions to enforce agency orders to be brought by individuals, noting that in such instances notice must be provided to the agency to give it the option of joining in the enforcement action.

The Supreme Court deferred action on this recommendation, however, requesting that the Committee seek the formal written positions of both the Attorney General and the Office of Administrative Law (OAL) on the proposed amendments to R. 4:67-6 and on whether the enforcement of an agency's order should be contingent upon the agency's consent.

The formal written positions of the Attorney General and the OAL are attached as Appendix C to this report. Both offices expressed the view that the agency's consent should be a necessary precondition to enforcement, otherwise the agency's discretion as to whether and when to enforce an order would be compromised.

After considerable discussion, the Committee determined that to require agency consent in all instances of party enforcement would be burdensome and would also effectively render agency orders non-final. The Committee also rejected the suggestion of the OAL that the court could decide, in a party enforcement action, whether an agency's consent had been unreasonably withheld.

The Committee ultimately agreed that applicability of the proposed amendment should be limited to parties to the administrative proceeding in whose favor specific relief was ordered. This provision, plus the requirement that notice of a party's action to enforce be

given to the agency, were deemed sufficient to quell the OAL's and the Attorney General's concerns. Indeed, the latter's representative sits on the Committee and agreed to this compromise.

The proposed amendments to R. 4:67-6 read as follows:

4:67-6. Summary Proceedings to Enforce Agency Orders

(a) Applicability of Rule. This rule is applicable to (1) all actions by a state administrative agency as defined by N.J.S.A. 52:14B2(a) brought to enforce a written order or determination entered by it, whether final or interlocutory, and whether the order to be enforced requires the payment of money or imposes a non-monetary requirement or includes a combination of monetary and non-monetary remedies[.]; and (2) all such enforcement actions brought by a party to the administrative proceeding in whose favor a written order or determination was entered affording that party specific relief.

(b) Form of Action; Where Brought[.]; Notice.

(1) ... no change

(2) Interlocutory Orders. An interlocutory order of an administrative agency to which R. 1:9-6 applies shall be enforced [by the agency] pursuant to the provisions of that rule in either trial division of the Superior Court. All other interlocutory orders shall be enforced as provided by subparagraph (b)(1) hereof.

(3) Notice to Agency; Intervention. Unless the action is brought by an agency seeking to enforce its own judgment or order, the plaintiff shall serve a copy of the complaint and order to show cause on the agency whose judgment or order is the subject of the action. The agency shall be permitted to intervene in

the action on application made on or prior to the return date of the order to show cause.

(c) ... no change

Note: Adopted July 22, 1983 to be effective September 12, 1983; paragraph (a), paragraph (b) caption, and paragraph (b)(2) amended, and paragraph (b)(3) adopted to be effective .

II. Proposed Amendment to R. 4:70-5 -- Judgment; Commitment

A trial judge pointed out that R. 4:70-5 currently contains a reference to a judgment rendered "in a county court." In an effort to cleanse the rules of references to former courts, the Committee recommends that the rule be revised to reflect current practice. Specifically, mention of the county court should be replaced by a reference to the Civil Judgement and Order Docket.

The proposed amendment to R. 4:70-5 reads as follows:

4:70-5. Judgment; Commitment

(a) ... no change

(b) ... no change

(c) Money Judgment; Execution, Property and Persons Subject to. If a money judgment is rendered against a defendant, execution may issue, in the form prescribed by the Administrative Director of the Courts, against the goods and chattels of the defendant[, and]; against [his] defendant's real estate if the judgment is [rendered in a county court] entered in the Civil Judgment and Order Docket[,]; and against the body of [such] an individual defendant [if he is an individual and if] provided the court in which the judgment is rendered shall by special order so direct and shall designate in said order the maximum number of days during which the defendant may be detained in custody under such body execution.

(d) ... no change

Note: Source -- R.R. 7:13-10, 7:13-11, 7:13-12, 7:13-13, 7:13-14, 7:13-16; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraph (c) amended to be effective .

JJ. Proposed Amendment to R. 4:73-6 -- Appeal From Report of Commissioners

At present, the application of R. 4:73-6 varies from vicinage to vicinage. Some judges read the rule as requiring that an appeal from the report of condemnation commissioners be given a new Law Division docket number, whereas others permit such an appeal to be processed under the same docket number as the original condemnation complaint. At a Fall 1989 meeting of the Chief Justice with the Assignment Judges, it was agreed that an appeal of the award of condemnation commissioners, in an action in which the original complaint covers but a single parcel of land, should not be given a new docket number. Rather, the case should be reopened under the original docket number. The Civil Practice Committee was asked to recommend an amendment to R. 4:73-6 to make this procedure clear.

In preparing the proposed amendment, the Committee sought the views of the Attorney General's office, which handles condemnation actions for the State. The Attorney General's representative, who sits on the Committee, noted that ownership is the controlling issue -- i.e., that no new docket number need be assigned if the original complaint covers a single tract owned by a single owner. The proposed amendment is drafted accordingly.

The proposed amendment to R. 4:73-6 reads as follows:

4:73-6. Appeal from Report of Commissioners

(a) Notice of Appeal; Service, Contents; Docket Number. An appeal from the report of the commissioners shall be taken by an appellant by filing a notice of appeal with the Clerk of The Superior Court within 20 days after the date of service upon him or her, by mail or otherwise, of a copy of the report; but the court for good cause shown may extend the time for a period not exceeding 30 days. The notice of appeal shall be served only on persons in possession and parties appearing before the commissioners who have an interest in the property. The appellant in the notice of appeal may demand trial by jury, or any other party may make such a demand within 10 days after service of the notice of appeal. The notice of appeal shall also include notice of an application for an order fixing the date of trial. Unless the court otherwise orders, if the original action involves a taking or takings from a tract of land under single ownership, the appeal shall be docketed under the number assigned to the original action and shall continue in that action.

(b) Severance. Except as provided in paragraph (a), [T]the appeal as to takings from each separate tract [or parcel] shall be severed from the action for purpose of trial and shall be docketed as a separate action cross-indexed to the original action. All

appeals relating to the same [parcel] tract shall be docketed under the number assigned to the original notice of appeal as to that [parcel] tract.

Note: Source -- R.R. 4:92-6(a)(b)(c); paragraphs (a) and (b) amended to be effective .

KK. Proposed Amendment to R. 4:74-7 -- Civil Commitment

In the previous rules cycle (1987-88), the Mental Commitments Subcommittee prepared a comprehensive revision to R. 4:74-7 to conform the provisions of the rule with those of recently enacted legislation. The subcommittee was also asked to consider whether the rule should require a hearing for patients who seek to change their commitment status from involuntary to voluntary. In its April 1988 report to the Civil Practice Committee, the subcommittee did not recommend a court rule establishing such review, primarily because of the polarized positions on this issue of the Public Advocate and the Attorney General, both of whom were represented on the subcommittee.

The subcommittee was asked to consider the issue of judicial review for voluntary patients further, in the 1988-90 term. The membership of the subcommittee was expanded to include two trial judges and a private practitioner, all with substantial experience in the area of civil commitments. In its efforts to determine whether judicial review of voluntary patients is needed and what the practical effects of such a procedure would be, six individuals representing varied perspectives on the commitment process were invited to address the subcommittee at two fact-gathering meetings.

As a result of its deliberations, including its consideration of the information obtained at the

fact-gathering meetings, the subcommittee concluded that duress, false promises, misinformation and misunderstanding are too often factors in conversion from involuntary to voluntary status. Accordingly, the subcommittee recommended in its November 1989 report to the Committee that R. 4:74-7(g) be amended to provide for mandatory judicial review of conversions to voluntary status. The Attorney General's representative on the subcommittee agreed with the substance of the recommendation, but took the position that such a rule is outside the authority of the Court under Winberry v. Salisbury, 5 N.J. 240 (1950). The report of the subcommittee, setting forth its recommendations and the various positions of its members, is reprinted in its entirety as Appendix D to this report.

After considerable discussion, the Committee unanimously agreed with the recommendation of the subcommittee to revise R. 4:74-7(g) to afford mandatory judicial review to all patients converting from involuntary to voluntary status as well as to those who are admitted voluntarily through a screening service. (See Section V. E. of this report for a discussion of the Committee's position on the subcommittee's recommendation to require periodic judicial review for all voluntary patients.)

The proposed amendment to R. 4:74-7(g) reads as follows:

4:74-7. Civil Commitment

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

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

(1) Where a patient has been involuntarily committed to a short-term care facility, a psychiatric facility or a special psychiatric hospital, as defined in N.J.S.A. 30:4-27.2, and thereafter seeks to convert to voluntary status, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to convert to voluntary status and whether the decision was made knowingly and voluntarily. Counsel previously appointed shall represent the patient at this hearing.

(2) Where a patient has been evaluated by a screening service and thereafter admitted to a short-term care facility or a psychiatric facility as a voluntary patient and where no court order of temporary commitment has been entered, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to be admitted voluntarily and whether the decision

was made knowingly and voluntarily. Counsel shall be appointed to represent the patient at this hearing.

(h) ... no change from present (g)

(i) ... no change from present (h)

(j) ... no change from present (i)

(k) ... no change from present (j)

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

LL. Proposed Amendments to Probate Rules Generally

The Civil Practice Committee has unanimously approved the attached rule changes affecting probate practice. There are two sections. The first - consisting of amendments to R. 1:34-2, R. 1:5-6(b), R. 1:6-4(a) and R. 4:3-1(a) - designates the Surrogate of each county as the Deputy Clerk of the Superior Court, Chancery Division, Probate Part for the purpose of filing and record keeping of all probate matters requiring disposition by the Superior Court. This is in accordance with Article XI, § 6 of the Constitution adopted in 1978 at the time that county courts were abolished. As drafted, those Rules anticipate that direct filing of probate matters will be in place.

The second section represents a complete revision of Chapter IX of Part IV of the Rules - those rules which set the practice for probate matters. The revision makes no substantive changes in probate practice. What it accomplishes are the following:

1) making a clear distinction between the functions of a Surrogate by virtue of that constitutional office and those which the Surrogate has as a deputy clerk of the court,

2) eliminating a present perception among members of the bar that there is concurrent jurisdiction over probate litigation in both the Chancery Division, Probate Part (filing with the Clerk of the Superior

Court) and the Law Division, Probate Part (filings with the county Surrogate), exercisable at the whim of the complainant,

3) restructuring of the probate rules so that their order and structure is more rational and compact,

4) eliminating of outdated references to county courts and gender-biased language, and

5) updating to conform to revised language of the Probate Reform Act (N.J.S.A. 3B:1-1 et seq.).

The intent of the framers of the 1947 Constitution was to place the trial of all causes in one court, the Superior Court of New Jersey. Depending on the nature of the action, the cause would proceed in the Law Division (generally with the right of trial by jury) or the Chancery Division (non-jury trials). The maze of the prior court structure was to be abolished. Insofar as probate matters were concerned, the Prerogative Court and the Orphans Court were to be abolished and the Chancery Division was to succeed to their jurisdiction - among others. The Surrogate was to continue as a constitutional officer and would continue to fulfill the statutory responsibilities of the Surrogate's Court.

That plan, notable for its simplicity, was partially frustrated by the need for compromise leading to retention of the county courts in the Constitution as adopted. That led to the irrational parallelism between the county courts and the Superior Court and

resulting choices in filing matters in either Court. Civil complaints were filed in either court; indictments were returned in the Superior Court and filed by the local County Clerk for trial in the county court, law division, criminal part. General assignment orders were issued each year cross-assigning all judges, no matter the court of their appointment, to sit in all other courts.

With regard to probate matters requiring court resolution, parallel paths likewise arose. The county court had a probate division, with the Surrogate acting as clerk; the Superior Court, Chancery Division had full probate jurisdiction as well. The Surrogate continued, as before, to probate wills in common form and to appoint administrators of estates and guardians for minors. It was against that background that Chapter IX of Part IV of the Rules was drafted.

Prior to 1948, probate of a will by the Surrogate was initiated by the filing of an Application for Probate. In case of intestacy, administration was sought by the filing of a Petition for Administration. Guardianship for a minor began with an Application for Appointment of a Guardian. For some reason, with the adoption of the new court system and the Rules of Court, the terminology was changed to "Complaint" instead of Application or Petition. Perhaps this stemmed from the insistence in the Rules that "There

shall be one form of action in civil practice to be known as a 'civil action'" and that "A civil action is commenced by filing a complaint with the court."[1] Another factor was the legislative terminology of Surrogate's Court. The use of "complaint" is a misnomer in the context of applying to the Surrogate for probate of a will or for administration or for appointment of a guardian for a minor since there is no "action" in the sense of a "civil action" involved. Nonetheless "complaint" was used and caused confusion because there are true complaints in probate matters which are filed not with the Surrogate's Court but with the Surrogate as clerk, in cases requiring judicial decision wherein the Surrogate may not act.

The resulting hodgepodge is best illustrated by reading, for example, present Rules 4:80, 4:81, 4:82, 4:84, 4:98 and 4:99.

County courts were abolished by constitutional amendment effective November 7, 1978 (Article XI, § 6). Subdivision (c) thereof provides in pertinent part:

> Until otherwise provided by law, ... all surrogates shall become clerks of the Chancery Division (Probate Part) of the Superior Court formerly respective counties and shall perform such duties and maintain such files and records on behalf of the Clerk of the Superior Court as may be required by law and rule of court, and

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1 See present Rules 4:2-1 and 2.

> all fees payable to the ... surrogates prior to the effective date of this amendment shall continue to be so payable and be received for the use of their respective counties until otherwise provided by law.

The constitutional amendment did not affect the probate jurisdiction of the Superior Court, Chancery Division, which continued as before. R. 4:3-1(a).

With regard to probate matters then pending before the county court, probate part, subdivision (a) of the constitutional amendment provided in pertinent part:

> All the jurisdiction, functions, powers and duties of the County Court of each county, the judicial officers, clerks, employees thereof, and the causes pending therein, and their files, shall be transferred to the Superior Court....

The Supreme Court responded to that constitutional transfer of pending causes by the adoption of Rule 1:1A, effective December 7, 1978. R. 1:1A-2(b), as amended in 1979, provided:

> Probate Division. Causes pending in the probate division of the county court shall be deemed pending in the Superior Court, Law Division, Probate Part. The venue in each cause shall be deemed to be laid in the county wherein it is pending, and the file shall be retained for the Law Division, Probate Part by the surrogate of county as Deputy Clerk of the Superior Court for that county. (Emphasis supplied).

That Rule, deleted on November 12, 1983, was intended as a stopgap to cover probate cases pending as of November 7, 1978.

As of November 12, 1983 any probate complaint requiring Superior Court adjudication should have been captioned in the Superior Court, Chancery Division (R. 4:3-1(a)) and filed with the Surrogate of the county as deputy clerk of the Superior Court, Chancery Division, Probate Part (Article XI, § 6(c)). Since at that time direct filing had not yet been initiated, the Surrogate would have been responsible to forward the originals of all pleadings to the Superior Court Clerk for central filing and docketing.

The practice did not develop in that fashion. The probate bar continued of the view that complaints in probate matters could be filed either with the Surrogate as Deputy Clerk of the Superior Court, Law Division, Probate Part or with the Superior Court Clerk in the Superior Court, Chancery Division. Most chose to do so with the Surrogate as a matter of custom and convenience. A few (as before the county courts were abolished) filed in the Chancery Division. Surrogates continued to accept new filings in the Superior Court, Law Division, Probate Part, and do so up to the present. The Surrogate also continued to function as the filing official as they previously had for the county court, probate part. By means of these proposed rule amendments, the Surrogate will be designated as deputy clerk of the Superior court, Chancery Division, Probate Part, and all probate complaints will be

locally filed with that office. Thus direct filing which has been de facto since 1983 will simply be continued, since it has, apparently, caused no problems. The Clerk of the Superior Court will be relieved of duplicate filings in Trenton, as in all other cases of direct filing.

With regard to fees the Legislature has already acted. Fee schedules were amended both as to the Clerk of the Superior Court (N.J.S.A. 22A:2-15) and the Surrogate (N.J.S.A. 22A:2-30). Filing fees for complaints and other pleadings in Superior Court actions are Superior Court generated funds and not payable to the respective counties. Fees paid to the Surrogate's Court are, as before, county funds. The auditing of accounts in all cases will be done by the Surrogates under this proposal. They now do the bulk of that work by virtue of the filings in the Superior Court, Law Division, Probate Part. With the proposed change, however, they will pick up some audits now being done in the Superior Court Clerk's Office for Chancery Division actions. To that extent the Superior Court will lose income to the counties. The counties, on the other hand, are picking up the added costs of filing and docketing of pleadings and will actually be, through the Surrogate, running the audits. In 1983 the then Clerk of the Superior Court, W. Lewis Bambrick, advised the Committee that a five-year average amount

for auditing fees was $190,000. We do not have an updated figure but believe that it has not significantly changed. In any event, there should be a compensating offset by reduction in the Clerk's auditing staff.

I. RULE AMENDMENTS

R. 1:34-2 (Clerks of Court) is amended in two ways. The first eliminates references to the now-abolished juvenile and domestic relations court and county district court and replaces them with the new Superior Court designations - Chancery Division, Family Part, and Law Division, Special Civil Part. The second (pertinent to the revisions proposed) adds the sentence, "The Surrogate of the county shall be the deputy clerk of the Superior Court, Chancery Division, Probate Part, with respect to probate matters pending in that county". It is, essentially, the constitutional language of Article XI, § 6(c).

R. 1:5-6(b) (What Constitutes Filing with the Court) is amended by adding "In probate actions the original of the paper shall be filed with the Surrogate of the appropriate county as deputy clerk of the Superior Court, Chancery Division, Probate Part."

R. 1:6-4(a) (Superior Court; Place for Filing Motions, etc.) is amended by changing the Superior Court

reference from Law Division to Chancery Division. The Surrogate is continued as the designated official for filing.

R. 4:3-1(a) (Divisions of Court) is amended to provide as subsection (2) that all probate actions requiring judicial determination shall be instituted in the Chancery Division, Probate Part.

II. SIGNIFICANT CHAPTER IX CHANGES

The significant changes appear in proposed Rules 4:80 through 4:85. Those designated R. 4:86 to R. 4:99 are the same as those covering the same subjects in the existing Rules but for editorial, gender and statutory-reference corrections, which have been made throughout the proposed Probate Rules.

Within the group from R. 4:80 to R. 4:85 a clear dichotomy is established between the functions of Surrogate as constitutional officer (the Surrogate's Court) and Surrogate as deputy clerk of the Superior Court, Chancery Division, Probate Part. R. 4:80 and R. 4:81 cover the routine Surrogate's Court duties: probate of will, grant of letters of administration or of guardianships of minors. R. 4:83 through R. 4:85 cover functions of the Surrogate as the deputy clerk of the Superior Court. R. 4:82 provides the clear break between the two. To add emphasis to the distinction

the term "Surrogate's Court" is preserved when referring to the traditional non-adversarial, administrative functions of the office. When acting in the capacity of deputy clerk the reference is simply to the "Surrogate".

The use of the word "Complaint" to describe a non-adversarial application to the Surrogate has been changed in favor of "Application" in R. 4:80 and R. 4:81. "Complaint" has been reserved for the initial pleading in those matters which must be adjudicated by a Superior Court Judge (R. 4:83 et seq.).

References to probate "in common form" or "in solemn form" are eliminated. A will is probated either in the Surrogate's Court (the vast majority of cases), or by order of the Superior Court (will contest, cases of doubt and the like).

R. 4:80-6 (Notice of Probate of a Will) and R. 4:80-8 (Notice to Creditors) have been expanded to require mailing to interested persons and creditors as can be determined by reasonable inquiry in order to obviate any suggestion that our present procedure does not accord due process under Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed. 2d 565 (1988), and Mennonite Board of Missions v. Adams, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed. 2d 180 (1983).

Insofar as court actions are concerned, R. 4:83 prescribes the standard procedure of initiation by the filing of a verified complaint and the use of an order to show cause as initial process in accordance with R. 4:67.

R. 4:86 (Guardianships of Incompetents, etc.) is the same as present R. 4:83 but with an expanded statement in R. 4:86-4(b).

R. 4:87 (Settlement of Accounts) is simply a combination of present Rules 4:86 and 4:87. The existing opportunity in R. 4:87-3 for settling accounts on "notice" has been eliminated. There is no present statutory authorization for it and N.J.S.A. 3B:2-4 points to the order to show cause procedure. Proceeding on "notice" is constitutionally suspect under Tulsa Professional Collection Services, supra. The order to show cause procedure is obviously preferable.

R. 4:88 (Commissions and Fees) tracks present R. 4:88.

R. 4:89 (Distribution) is the same as present R. 4:89.

R. 4:90 (Sale of Realty where Personalty Insufficient) follows present R. 4:90.

R. 4:91 (Insolvent Estates) likewise is the same as present R. 4:91.

R. 4:92 (Proceedings to Apply Foreclosure or Partition Funds to Decedent's Debt) tracks present R. 4:85.

R. 4:93 (Declaration of Death) follows present R. 4:92.

R. 4:94 (Sale or Mortgage of Infants and Incompetents Lands) is the same as present R. 4:66. R. 4:66 is presently located in the general civil rules. If there is to be a revision, it was believed more logical to include it in the Probate Rules.

R. 4:95 (Miscellaneous Actions) is essentially the same as present R. 4:96-2 and R. 4:96-5.

R. 4:96 (Miscellaneous Provisions) is essentially the same as present R. 4:97-2 and 3, R. 4:99-4 and 5, and R. 4:84-2.

1:5-6. Filing

(a) ... no change

(b) What Constitutes Filing with the Court: Copies. Except as otherwise stated in this rule or in R. 6:12-2 (filing in the Special Civil Part), a paper is filed with the trial court if the original is filed with the clerk of the court. In civil actions in the Superior Court a clear copy of each paper shall also be filed with the Clerk of the Superior Court, who shall forthwith forward the copy to the Clerk of the appropriate county. In probate actions the original of the paper shall be filed with the Surrogate of the appropriate county as deputy clerk of the Superior Court, Chancery Division, Probate Part. In all criminal actions, except those in a municipal court or in the Special Civil Part, papers shall be filed with the county clerk as deputy clerk of the Superior Court. Motion papers, orders to show cause, and orders in the trial divisions of the Superior Court shall be filed as prescribed by R. 1:6-4. In any case the judge or, at the judge's chambers, a member of his or her staff may accept papers for filing if they show filing date and the initials of the judge's name and office. The filed papers shall be forthwith forwarded to the clerk.

(c) ... no change

(d) ... no change

Note: Source -- R.R. 1:7-11, 1:12-3(b), 2:10, 3:11-4(d), 4:5-5(a), 4:5-6(a) (first and second sentences), 4:5-7 (first sentence), 5:5-1(a). Paragraphs (b) and (c) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended _____ to be effective _____.

1:6-4. Superior Court; Place for Filing Motions, Cross Motions, Affidavits and Orders

(a) In General. Except as otherwise provided herein and by paragraph (b) of this rule, the original of all motions, orders to show cause, and orders in civil actions in the Superior Court shall be filed with the clerk of the county in which the matter is to be or was [held] heard. In actions pending in the Chancery Division or specially assigned to a specific judge of the Law Division, a copy of all motion papers shall also be filed with the judge. In actions pending in the Superior Court, [Law] Chancery Division, Probate Part, the original of all papers shall be filed with the Surrogate of the county rather than the clerk of the county. Opposing papers including cross motions shall be filed in the same manner.

(b) ... no change

Note: Source -- R.R. 3:11-1, 4:5-5(b) (first sentence), 4:5-6(b); amended July 16, 1981 to be effective September 14, 1981; caption amended and paragraphs (a) and (b) adopted November 7, 1988 to be effective January 2, 1989; paragraph (a) amended to be effective .

1:34-2. Clerks of Court

The clerk of every court, except the Supreme Court, the Superior Court and the Tax Court, shall be responsible to and under the supervision of the judge or presiding judge of the court [of] which [he is] the clerk serves, the Assignment Judge of the county, and the Administrative Director of the Courts. The clerks of the Supreme and Superior Courts shall be responsible to and under the supervision of the Administrative Director of the Courts and the Chief Justice. The clerk of the Tax Court shall be responsible to and under the supervision of the presiding judge of the court and the Administrative Director of the Courts. The clerk of the county shall be the deputy clerk of the Superior Court with respect to Superior Court matters pending in [his] that county and may issue writs out of the Superior Court. The Surrogate of the county shall be the deputy clerk of the Superior Court, Chancery Division, Probate Part, with respect to probate matters pending in that county. Deputy clerks in the [juvenile and domestic relations courts] Superior Court, Chancery Division, Family Part and the [county district courts] Superior Court, Law Division, Special Civil Part and all other employees of such courts shall be responsible to and under the supervision of the clerk of the court.

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

4:3-1. Divisions of Court; Commencement and Transfer of Actions

(a) Where Instituted.

(1) Chancery Division - General Equity. Actions in which the plaintiff's primary right or the principal relief sought is equitable [or probate] in nature, except as provided by subparagraphs (2) and (3), shall be brought in the Chancery Division, General Equity, even though legal relief is demanded in addition or alternative to equitable [or probate] relief.

(2) Chancery Division - Probate Part. All actions brought pursuant to R. 4:83 et seq.

[(2)] (3) Chancery Division - Family Part. All civil actions in which the principal claim is unique to and arises out of a family or family-type relationship shall be brought in the Chancery Division, Family Part. Civil family actions cognizable in the Family Part shall include all actions and proceedings provided for in Part V of these rules; all civil actions and proceedings formerly cognizable in the juvenile and domestic relations court; and all other actions and proceedings unique to and arising out of a family or family-type relationship.

[(3)] (4) Law Division. All actions in the Superior Court except those encompassed by subparagraphs (1) [and], (2) and (3) hereof shall be brought

in the Law Division or Law Division, Special Civil Part.

(b) ... no change

Note: Source -- R.R. 4:41-2, 4:41-3, 5:1-2. Paragraphs (a) and (b) amended and caption amended July 22, 1983 to be effective September 12, 1983; new paragraph (a) adopted and paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (b) amended November 7, 1988 to be effective January 2, 1989; subparagraph (a)(1) amended, subparagraph (a)(2) recaptioned and adopted, former subparagraphs (a)(2) and (a)(3) redesignated (a)(3) and (a)(4) respectively, and subparagraph (a)(4) amended to be effective _____.

CHAPTER IX. PROBATE [ACTIONS] MATTERS

RULE 4:80. [ACTION] APPLICATION TO SURROGATE'S COURT FOR PROBATE OR ADMINISTRATION

4:80-1. [Complaint] Application

(a) Contents [of Complaint]. [Actions] Unless a complaint for probate is filed with the Superior Court pursuant to R. 4:83, an application for the probate of a will, for letters testamentary, letters of administration, letters of administration with the will annexed, letters of administration ad prosequendum, letters of substitutionary administration and letters of substitutionary administration with the will annexed shall be [commenced by filing a complaint in a] filed with the [s]Surrogate's [c]Court [or the Superior Court], stating: (1) the [plaintiff's] applicant's residence; (2) the name and date of death of the decedent, his or her domicile at [his] date of death and date of [his] the last will, if any, of decedent; (3) the names and addresses of [his] the spouse, heirs, next of kin, and other persons, if any, entitled to letters, and their relationships to [him] decedent, and, to the best of the [plaintiff's] applicant's knowledge and belief, identifying any of them whose names are unknown and stating further that there are no other heirs and next of kin, or as the case may be; (4) the ages of any minor heirs or minor next of kin;

and in an [action] application for probate of a will, whether the testator had issue living when the will was made, and whether he or she left any child born or adopted thereafter or any issue of such after-born or adopted child, [and whether he left any child adopted thereafter or any issue of such adopted child,] and the names of after-born or adopted children [and children adopted] since the date of the will, or their issue, if any. The applicant shall verify under oath that the statements are true to the best of the applicant's knowledge and belief.

(b) Certificates, Affidavits Accompanying the [Complaint] Application. Except in an [action] application for substitutionary letters, the [complaint] application shall be accompanied by a certificate of the death or other competent proof thereof, unless for good cause dispensed with; and in all [actions] applications where a bond is required of the person applying for letters, the [complaint] application shall be accompanied by an affidavit of the value of the personal estate. [In an action in the Superior Court only, whether or not a caveat has been filed with the court, the complaint shall be accompanied by a surrogate's certificate as provided by R. 4:84-1(a).]

(c) [Recording] Filing. [The complaint shall be recorded by the clerk.] The application for the probate of a will or for letters of administration shall

be filed with the Surrogate's Court of the county in which the decedent was domiciled at death, or if at that time the decedent was not domiciled in this State, then with the Surrogate's Court of any county in which the decedent left any property or into which any property belonging to the decedent's estate may have come.

[(c)] (d) Recording. The [complaint] application shall be recorded by the [clerk] Surrogate's Court.

Note: Source -- R.R. 4:99-1, 5:3-2; caption of rule, and text of paragraphs (a) and (b) amended, new paragraph (c) adopted, and former paragraph (c) redesignated as paragraph (d) and amended to be effective .

4:80-2. Proof of Will: Nonresident or Deceased Witnesses

(a) Depositions of Nonresident Witnesses. If any subscribing witness to a will of any person[s] resident or nonresident in this State at [his] death resides or is out of the State, [and the will is proved in common form in] the [s]Surrogate's [c]Court[, it] may issue a commission with a photocopy of the will attached authorizing the taking of the deposition of the witness in the form of a witness-proof[;]. [t]The commission may be directed to any person before whom depositions may be taken under R. 4:12-2 and 4:12-3, or to the [s]Surrogate or [d]Deputy [s]Surrogate of any county of this State, who shall take the [deposition] proofs under oath and certify to the taking of the same. [If the will is proved in solemn form in the Superior Court, proceedings for discovery shall be taken pursuant to R. 4:10, 4:12 to 4:19, inclusive, 4:21 and 4:23. If the will is proved in common form in the Superior Court it may, in its discretion, require only a witness-proof or deposition taken pursuant to the issuance of a commission. In any case a surrogate or the Superior Court shall require a photocopy of the will annexed to the commission or, if the deposition is taken pursuant to R. 4:10-1 to 4:16-4, inclusive, to be marked by the person taking the deposition.]

(b) Deceased Witnesses. If [both] all witnesses are deceased, the signature of each such witness may be proved by one person, and the same person may prove [both] all signatures. Proof of death of the attesting witness may be made by affidavit without producing certified copies of death certificates.

Note: Source -- R.R. 4:99-2, 5:4-2. Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended _____ to be effective _____.

4:80-3. [Transcript]

[If a will is probated in solemn form, the court in its discretion may order the testimony of the attesting witnesses, or any part of such testimony, to be transcribed.]

[4:80-4.] Renunciation by or Notice to Next of Kin and Others

If the application for the letters specified in R. 4:80-1(a) (except letters testamentary) is made to the [s]Surrogate's [c]Court [or the Superior Court] by the person first entitled thereto, no renunciation or notice shall be required; but if the application is made by any other person, [he] the applicant shall file:

(a) the renunciation, [made in accordance with R. 4:97-3,] acknowledged before an officer qualified to take acknowledgements of deeds, of all competent adult persons whose right to the letters is prior or equal to that of the applicant, containing a request that the letters issue according to the application; or

(b) [P]proof that at least 10 days' notice of the application has been given to all such persons residing in this State who have not renounced, and that 60 days'

notice, or such notice (not less than 10 days in length), as the [court] Surrogate [may] by order [direct] may have directed, has been given to all of them who reside outside this State. If in an [action] application for letters of administration with the will annexed, it appears that the decedent left a will naming an executor who has not renounced, proof shall be submitted showing that like notice has been given to him or her. In any case the [court] Surrogate may require [plaintiff] applicant to give notice to interested persons other than those entitled to letters. Such notice may be served either as prescribed by R. 4:4-4 or by registered or certified mail return receipt requested to [his] the person's last known address. If the name[s or] and address[es] of any such person[s] entitled to notice [are] is not known, then an affidavit of inquiry as to such name[s] or address[es], made as prescribed by R. 4:4-5(c), shall be filed in lieu of proof of notice.

(c) In addition to the proofs required in paragraphs (a) and (b) of this rule, if the [complaint] application for letters of administration shows that there are no known next of kin or knowledge thereof, the applicant shall file proof that at least 20 days' notice of the application has been given to the Attorney General of this State.

(d) All renunciations shall be recorded by the Surrogate.

Note: Source -- R.R. 4:99-3. Amended July 26, 1984 to be effective September 10, 1984; former caption and text of R. 4:80-3 deleted, introductory text and paragraphs (a), (b) and (c) of former R. 4:80-4 amended, paragraph (d) adopted, and rule redesignated to be effective .

4:80-4. Qualifications

Qualifications of executors and administrators shall be taken as provided in R. 4:96-1.

Note: New caption and text adopted to be effective .

4:80-5. Residents Preferred Over Nonresidents

As between persons equally entitled, the [Superior] Surrogate's Court in granting letters shall give preference to residents of this State over nonresidents, unless the best interest of the estate will not thereby be served.

Note: Source -- R.R. 4:99-4. Amended July 26, 1984 to be effective September 10, 1984; amended to be effective _____.

N.B. Current R. 4:80-6 redesignated as R. 4:85-4.

[4:80-8.] 4:80-6. Notice of Probate of Will

Within 60 days after the date of the probate of a will, the executor or administrator with the will annexed shall cause to be mailed to all beneficiaries under the will and to all persons designated by R. 4:80-1(a)(3), at their last-known [post office] addresses, a copy of the will and a notice in writing that the will has been probated, and the place and date of probate. If the names or addresses of any of those persons are not known or cannot by reasonable inquiry be determined, then a notice of probate of the will shall be published in a newspaper of general circulation in the county naming or identifying those persons as having a possible interest in the probate estate. If by the terms of the will property is devoted to a present or future charitable use or purpose, like notice and a copy of the will shall be mailed to the Attorney General.

Note: Source -- R.R. 4:99-7; former R. 4:80-8 amended and rule redesignated to be effective .

4:80-7. [Review of Ex Parte Probate Actions]

[(a) Order to Show Cause; Time. If a will has been probated in common form, any person aggrieved by the judgment may, without notice, move for an order requiring the plaintiff to show cause why the judgment should not be set aside or modified; provided, however, the motion for the order to show cause is presented to the court or clerk within 3 months after entry of the judgment, or within 6 months thereafter if the moving party resided outside this State at the time of the entry of the judgment. If probate was granted by the surrogate's court of any county, the order to show cause shall issue from the county court, and if granted by the Superior Court, the order shall issue from that court. The order to show cause shall be served as provided by R. 4:67-3, but without serving the complaint or other papers in the action. Persons in interest may on their own motion intervene in the action. The hearing shall be de novo and the court may either set aside, modify or confirm the judgment.

(b) Relief Under R. 4:50 or From Fraud. Any person interested in a judgment of the surrogate's court of any county or Superior Court granting probate of a will in common form, who seeks relief therefrom under R. 4:50 or because of fraud upon the court may, without notice, move before the county court of the county or the Superior Court, as the case may be, for an order

requiring the other persons in interest to show cause why the relief sought by him should not be granted; or in special circumstances, the court may grant the relief without issuing an order to show cause. Where relief is sought under R. 4:50-1 because of mistake, inadvertence, surprise, or excusable neglect or because of newly discovered evidence or because of fraud, misrepresentation, or misconduct, other than fraud upon the court, the application for an order to show cause or for the relief shall be made within 3 months after entry of the judgment, or within 6 months thereafter if the moving party resided outside this State at the time of the entry of the judgment.

(c) Procedure. All proceedings under this rule shall be instituted on motion, without complaint or petition, supported by affidavit stating the grounds for relief. The issues raised by an order to show cause under paragraph (a) of this rule shall be tried de novo.

(d) Enlargement of Time. The time periods prescribed by paragraphs (a) and (b) of this rule may be extended for a period not exceeding 30 days by order of the Superior Court or county court, as the case may be, upon a showing of good cause and the absence of prejudice, provided the motion for the order to show cause is presented to the court or clerk within the time as extended.]

Note: Source -- R.R. 1:27B(d), 4:99-6(a)(b), 5:3-4(a)(b), 5:3-5(a). Paragraph (a) amended September 5, 1969 effective September 8, 1969; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; caption and text deleted to be effective .

[4:80-11.] Use of Photostatic Copy Where Will Is Probated in Another State

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

Note: Source -- R.R. 4:99-10; former R. 4:80-11 amended and rule redesignated to be effective .

[4:96-1.] 4:80-8. Notice to Creditors to Present Claims

If an order is entered under N.J.S.A. 3B:22-4, a notice stating the entry, the date thereof, on whose application, and what directions are thereby given, shall be mailed by the personal representative to each creditor of the estate of which the personal representative is aware or should, upon reasonable inquiry, be deemed aware, by ordinary mail directed to the creditor's last known address, and shall be [advertised] published once in such one or more newspapers of this State as may be directed in the order, the [advertisement] publication to be made within 20 days after the date of the order. Such further notice shall be given as the [court] Surrogate's Court directs.

Note: Source -- R.R. 4:114-1 (first and second sentence). Amended July 7, 1971 to be effective September 13, 1971; amended July 22, 1983 to be effective September 12, 1983; former R. 4:96-1 amended and rule redesignated to be effective _____.

N.B. Current R. 4:80-9 redesignated as R. 4:84-5.

[4:81-1.] 4:80-9. Testamentary Trustees

If a trustee is named in or pursuant to a will duly admitted to probate [by a surrogate's court or the Superior Court] or a substituted trustee under a will has been appointed [by the court], [he] the trustee shall, before exercising the authority vested [in him] by the will or the appointment, accept the trusteeship as provided by [R. 4:97-2] R. 4:96-1. The acceptance shall recite the names and addresses of the trustees and [parties] persons interested in the trust and shall identify their interests. Upon the filing of the acceptance and the power of attorney required by N.J.S. [3A:12-14] 3B:14-47, letters of trusteeship shall be issued by the [surrogate or clerk of the Superior Court] Surrogate's Court. No [complaint] application, judgment or order for the issuance of letters shall be required.

Note: Source -- R.R. 4:100-1. Amended July 7, 1971 to be effective September 13, 1971; amended July 26, 1984 to be effective September 10, 1984; former R. 4:81-1 amended and rule redesignated to be effective .

[4:80-10. Consolidation When One Will Is Offered for Probate Before a Surrogate's Court and Another Is Offered in Superior Court

If an action for the probate of a will is pending in a surrogate's court of any county and an action for the probate of an earlier or later will of the same testator is pending in the Superior Court, the actions shall be consolidated by order of the Superior Court and proceeded with in that court as if originally commenced there. Upon the filing of a certified copy of the order of consolidation with the surrogate, he shall forthwith transmit to the Clerk of the Superior Court the record of the proceedings before him.]

Note: Source -- R.R. 4:99-9. Amended July 26, 1984 to be effective September 10, 1984; deleted to be effective .

[RULE 4:81.] [LETTERS OF TRUSTEESHIP AND APPOINTMENT OF TRUSTEES]

N.B. Current R. 4:81-1 redesignated as R. 4:80-9.

[RULE 4:82.] Rule 4:81. [ACTION] APPLICATION TO SURROGATE'S COURT FOR GUARDIANSHIP OF [INFANT] MINOR

[4:82-1.] 4:81-1. [Complaint.] Application.

(a) Contents[of Complaint]. [Every action] Unless a complaint is filed with the Superior Court pursuant to R. 4:83, an application for letters of guardianship of [an infant] a minor shall be [commenced by filing a complaint in a surrogate's or county court or the Superior Court] filed with the Surrogate's Court, stating the [infant's] minor's age and residence, and the names and [residences] addresses of [his] the minor's nearest of kin and of all persons who stand in loco parentis and [also] of the persons with whom [he] the minor resides.

(b) Affidavits[, Certificates Accompanying the Complaint]. The [complaint] application shall have annexed to it an affidavit made by a person with personal knowledge stating the value of the [infant's] minor's personal estate and the amount of income from

any real or personal estate belonging to [him] the minor. [, and in an action in the Superior Court only, whether or not a caveat has been filed with the court, the complaint shall be accompanied by a surrogate's certificate as provided by R. 4:84-1(a).]

(c) [Recording. The complaint shall be recorded by the clerk.] Filing. The application shall be filed in the county where the minor is domiciled at the time or, if at that time the minor has no domicile in this State, then in any county in which the minor has any property.

Note: Source -- R.R. 4:101-1; caption and paragraphs (a) and (b) of former R. 4:82-1 amended, new caption and text of paragraph (c) adopted, and rule redesignated to be effective .

4:81-2. [Trustees of Inter Vivos Trusts]

[When a trustee is appointed by court order or by deed or otherwise as to any trust not created by will, the Superior Court, on the filing of a complaint to which shall be annexed a copy of the instrument, if any, under which the trustee is acting, and his acceptance of the trusteeship, may either by judgment without notice or in a summary manner pursuant to R. 4:67, direct the issuance of letters of trusteeship.]

Note: Source -- R.R. 4:100-2. Amended July 26, 1984 to be effective September 10, 1984; caption and text deleted to be effective .

N.B. See proposed R. 4:84-4.

[4:82-2.] Renunciation or Notice

If application [for letters of guardianship of an orphan under the age of 14 or of guardianship of the estate of an infant whose father is living] is made [to a surrogate's court or the Superior Court] by the person[s] first entitled [to the letters,] thereto for letters of guardianship of the estate of a minor who has a living parent, no renunciation or notice shall be required; but if made by any other person, [he] there shall be filed either:

(a) [The] a renunciation, made in accordance with [R. 4:97-3] R. 4:96-2, by (1) [of] all [competent] adult persons whose right to the letters is prior or

equal to that of the applicant, [and the renunciation of] (2) the person or persons, if any, [standing] in loco parentis to the minor and (3) the persons with whom [he] the minor resides.[, which] All such renunciations shall contain a request for the issuance of letters according to the application; or

(b) [P]proof of notice of the application or affidavit of inquiry [in lieu thereof] as prescribed by [R. 4:80-4(b)] R. 4:80-3(b). Such notice shall be given to the persons whose renunciations are required by paragraph (a) and such additional persons as the [court] Surrogate may specify.

Note: Source -- R.R. 4:101-2. Amended July 26, 1984 to be effective September 10, 1984; introductory text and paragraphs (a) and (b) of former R. 4:82-2 amended and rule redesignated to be effective .

4:81-3. [Appointment of Trustee in Summary Manner]

[Actions to appoint or substitute trustees may be brought in Superior Court pursuant to R. 4:67. The complaint shall set forth the terms of the trust sufficiently to show the persons interested in the trust as cestuis que trust, vested or contingent, and as trustees, and the order to show cause shall be directed to such persons, except as otherwise provided by R. 4:26-3 (virtual representation).]

Note: Source -- R.R. 4:100-3. Amended July 26, 1984 to be effective September 10, 1984; caption text deleted to be effective .

N.B. See proposed R. 4:84-4.

[4:82-3.] Signature to [Complaint] Application

If an [action] application is [brought] made for letters of guardianship [of an orphan of the age of 14 years or more, or of an infant of that age] for a minor of the age of 14 years or more whose [father] parent has absconded or [absented himself] has been absent from this State [for 2 years] leaving the [infant] minor without sufficient provision for maintenance and education, or [of] for any [infant] minor desiring the appointment of a special guardian in order to enlist in the armed forces of the United

States, the [complaint] application shall be signed [a judge of the court or] any [s]Surrogate or by the [orphan or infant] minor in the presence of [d]Deputy [s]Surrogate. If the [orphan or infant] minor is outside this State, the [complaint] application shall be signed by [him] the minor and acknowledged in the manner provided for deeds, either in the presence of a judge of a court of record or, in a foreign country, in the presence of an officer authorized by the law of that country to take acknowledgements [pursuant to law]. The requirement that the minor sign the application shall not apply when the person filing the application certifies in the application that the minor is unable to appreciate the legal significance of the application.

Note: Source -- R.R. 4:101-3; caption and text of former R. 4:82-3 amended and rule redesignated to be effective .

[4:82-4.] 4:81-4. Residents Preferred Over Nonresidents

As between persons equally entitled, the [Superior] Surrogate's Court in granting letters shall give preference to the residents of this State, unless the best interests of the [infant] minor will not thereby be served.

Note: Source -- R.R. 4:101-4. Amended July 26, 1984 to be effective September 10, 1984; former R. 4:82-4 amended and rule redesignated to be effective .

[4:82-5.] 4:81-5. Acceptance

Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with [R. 4:97-2] R. 4:96-1.

Note: Source -- R.R. 4:103-3 (second sentence); former R. 4:82-5 amended and rule redesignated to be effective .

[4:82-6. Appointment of Guardian for Orphan Over 14 for Whom a Guardian Has Been Appointed While Under 14

If a guardian has been appointed for an orphan under 14 years of age or for any infant under that age whose father, before the appointment, absconded or absented himself from this State for 2 years leaving the infant without sufficient provision for maintenance and education, the orphan or infant may, if he so desires on reaching the age of 14 years or more, bring an action for the appointment of another guardian. If the guardian has been appointed by a surrogate's court the action shall be there brought, and if appointed by the Superior Court, the action shall be brought in that court. The complaint shall be signed by the orphan or infant as provided by R. 4:82-3. Notice of the application as prescribed by R. 4:82-2 shall be given to the guardian theretofore appointed, the nearest of kin, persons standing in loco parentis and persons with whom such minor may reside or other person entitled to letters. On the application, the court shall inquire into the circumstances and take such action in respect to the appointment of a guardian for the orphan or infant as appears to be in his best interest.]

Note: Source -- R.R. 4:101-5. Amended July 26, 1984 to be effective September 10, 1984; deleted to be effective .

RULE 4:82. [ACTION FOR GUARDIANSHIP OF INFANT] [4:84-1(d).] MATTERS IN WHICH THE SURROGATE'S COURT MAY NOT ACT

Unless specifically authorized by order or judgment of the [county court] Superior Court, and then only in accordance with such order or judgment, the [s]Surrogate's [c]Court [of the county] shall not act in any matter in which (1) a caveat has been filed with it before the entry of its judgment; (2) a doubt arises on the face of a will or a will has been lost or destroyed; (3) a will of a person not resident in this State at [his] death is [propounded] offered for probate without having been submitted to probate in the jurisdiction in which [he] the decedent then resided; (4) the application is to appoint an administrator pendente lite or other limited administrator; [(4)] (5) a dispute arises in the [s]Surrogate's [c]Court as to any matter; or [(5)] (6) the [s]Surrogate certifies the case to be of doubt or difficulty.

Note: Former R. 4:82 redesignated as R. 4:81, and former R. 4:84-1(d) amended and redesignated as R. 4:82 to be effective .

RULE 4:83. [ACTION FOR GUARDIANSHIP OF INCOMPETENT OR FOR THE APPOINTMENT OF A CONSERVATOR] PROBATE ACTIONS IN THE SUPERIOR COURT, CHANCERY DIVISION, PROBATE PART: GENERAL PROVISIONS

N.B. Current Rules 4:83-1 through 4:83-12 now redesignated as Rules 4:86-1 through 4:86-12.

4:83-1. Method of Proceeding

Unless otherwise specified, all actions in the Superior Court, Chancery Division, Probate Part, shall be brought in a summary manner by the filing of a complaint and issuance of an order to show cause pursuant to R. 4:67 and shall proceed thereafter in accordance with that rule.

Note: Adopted to be effective .

N.B. See former R. 4:99-1.

4:83-2. Filing of Papers

In all matters relating to estates of decedents, trusts and guardianships, other than those set forth in R. 4:80 and R. 4:81, all papers shall be filed with the the Surrogate of the county of venue as the deputy clerk of clerk of the Superior Court, Chancery Division, Probate Part, pursuant to R. 1:5-6.

Note: Adopted _____ to be effective _____.

N.B. See former R. 4:99-2.

[4:99-3.] 4:83-3. Title of Action [on Probate Papers]

In all actions for the probate of a will, for letters of administration or guardianship of [an infant] a minor or incompetent and [all] other actions brought [on order to show cause under R. 4:67 or on notice with relation to the estate, guardianship or any trust created by the will] pursuant to these rules, every paper shall be entitled "In the Matter of the Estate of _____, Deceased"[,] or "In the Matter of _____, [an Infant,"] a Minor," or the like.

Note: Source -- R.R. 4:117-4; caption and text of former R. 4:99-3 amended and rule redesignated to be effective _____.

4:83-4. Venue

(a) Where the Surrogate's Court May Not Act. In an action brought because the Surrogate's Court is barred from acting by R. 4:82, venue shall be laid in that county.

(b) Guardianship and Conservatorship Actions. In an action for the appointment of a guardian for an alleged incompetent or of a conservator pursuant to R. 4:86, venue shall be laid in the county in which the alleged incompetent or conservatee is domiciled at the commencement of the action, or if at that time the person has no domicile in this State, then in any county in which the person has any property.

(c) Actions By or Against a Fiduciary. In an action brought by or against a fiduciary who received letters of appointment in this State to (1) account for the estate, real or personal for which the fiduciary is chargeable, or (2) for the construction of the will or other instrument by which the fiduciary was appointed, or (3) for directions by the court as to the fiduciary's authority or duties, venue shall be laid in the county in which the fiduciary received the letters of appointment.

(d) To Appoint Inter Vivos or Substituted Trustee. In an action for the appointment of a trustee or substituted trustee of any trust not created by will, venue shall be laid in the county in which

there is any property of the trust estate at the commencement of the action or in the county in which a trustee is domiciled at the time the action is commenced.

(e) Other Actions. In all other probate actions, venue shall be laid in accordance with R. 4:3-2(a).

Note: Adopted _____ to be effective _____.

N.B. See former R. 4:98.

[4:97-1.] 4:83-5. [Complaints and Accounts] Verification

[Except as] Unless otherwise provided by these rules, all complaints [in actions relating to estates of decedents, trusts and guardianships, other than plenary actions brought on summons and summary actions brought on order to show cause pursuant to R. 4:67,] shall be verified by the plaintiff upon [his] oath that the allegations thereof are true to the best of [his] the plaintiff's knowledge and belief. Every account shall be verified by the accountant upon [his] oath that the account and the statements required to be annexed thereto are just and true to the best of [his] the accountant's knowledge and belief.

Note: Source -- R.R. 4:115-1; caption and text of former R. 4:97-1 amended and rule redesignated to be effective .

RULE 4:84. [PROCEDURE COMMON TO ACTIONS FOR PROBATE, ADMINISTRATION, TRUSTEESHIP AND GUARDIANSHIP OF INFANTS] COMPLAINTS IN CASES IN WHICH SURROGATE'S COURT MAY NOT ACT

4:84-1. [Superior Court Procedures; Limitations on Surrogate's Court]

[(a) Certificate as to Caveat or Dispute. In any action in the Superior Court for the probate of a will or the issuance of letters of administration or of guardianship of an infant the court shall not grant the probate or letters sought unless the plaintiff files a certificate of the surrogate of the county in which the testator or intestate resided at the time of death or the infant resides, dated not more than 5 days prior to the filing of the complaint, stating either that no caveat against the grant has been filed in his office or dispute with respect thereto has arisen therein, or reciting the names of the caveators or disputants. The surrogate shall note on his docket the issuance of any such certificate.

(b) Solemn Probate in Superior Court. The Superior Court for good cause or if a caveat is filed or a dispute arises, may issue an order to show cause why the probate or letters sought should not be granted. The order to show cause and the complaint may be served

as provided by R. 4:67-3 but without serving other papers in the action. If a caveat is filed with the Superior Court before the entry of judgment, the clerk shall not enter judgment unless the court otherwise orders.

(c) Parties Where Caveat Filed or Dispute Arises. In any action where a caveat has been filed or a dispute arises, the plaintiff and the caveator or disputant shall be the only indispensable parties to the action; or if a doubt arises as to any provision of a will offered for probate, the plaintiff and persons affected by the provision shall be the only indispensable parties to the action. In any action persons in interest may, on motion, intervene.

(d) Matters in Which the Surrogate's Court May Not Act. Unless specifically authorized by order or judgment of the county court, and then only in accordance with such order or judgment, the surrogate's court of the county shall not act in any matter where (1) a caveat is filed with it before the entry of its judgment; (2) a doubt arises on the face of a will or a will is lost or destroyed; (3) a will of a person not resident in this State at his death is propounded without having been submitted to probate in the jurisdiction in which he then resided; (4) a dispute arises in the surrogate's court as to any matter; or (5) the surrogate certifies the case to be of doubt or difficulty.

(e) Order to Show Cause by County Court. If the surrogate's court may not act by reason of any provision of paragraph (d), any person in interest may, without notice, apply to the county court of the county for an order requiring the other persons in interest to show cause why the relief sought by him should not be granted.]

Note: Source -- R.R. 4:103-1(a)(b)(c), 5:3-3(a)(b), 5:3-5(b). Paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a), (b) (c) and (e) deleted, paragraph (d) amended and redesignated as R. 4:82 to be effective .

4:84-1. In General

In any case in which, under R. 4:82, the Surrogate's Court may not act, any person in interest may file a complaint and apply for an order directed to other interested parties to show cause why the relief sought should not be granted. Service shall be as provided by R. 4:67-3.

Note: New caption and text adopted _____ to be effective _____.

N.B. See former R. 4:84-1(e).

N.B. Current R. 4:84-2 redesignated as R. 4:96-5.

4:84-2. Probate in the Superior Court

If a will is sought to be proved in the Superior Court, proceedings for discovery shall be available pursuant to R. 4:10, 4:12 to 4:19 inclusive, 4:21 and 4:23. If a deposition is taken pursuant to R. 4:10-1 to 4:16-4 inclusive, a photocopy of the will shall be marked for identification by the person before whom the deposition is taken. If the will is admitted to probate, the judgment of the Superior Court shall direct that the will be filed with and recorded by the Surrogate's Court.

Note: New caption and text adopted to be effective .

4:84-3. [Filing Transcripts of Will and Letters in Surrogate's Office]

[If a will is admitted to probate or letters of administration or guardianship are granted by the Superior Court, the clerk shall, at the expense of the estate, file in the office of the surrogate of the county in which the testator or intestate resided at his death or in which the ward resides, a certified transcript of the probated will, the proofs thereof, the judgment for probate and the letters issued, which transcripts shall be certified by the Superior Court Clerk and recorded by the surrogate in his office.]

Note: Source -- R.R. 4:103-4; deleted to be effective .

Contested Administration

Where administration of an estate has been contested, the judgment of the Superior Court granting administration shall direct issuance and recording of letters of administration by the Surrogate's Court.

Note: New caption and text adopted to be effective .

4:84-4. Appointment of Inter Vivos or Substitute Trustees

An action for the appointment of a trustee of an inter vivos trust or for the appointment of a substitute trustee not otherwise provided for by will shall be brought pursuant to R. 4:83. The complaint shall have attached a copy of the trust instrument and the acceptance by the person or persons seeking the appointment. The order to show cause shall be served upon all persons having an interest in the trust, vested or contingent, except as otherwise provided by R. 4:26-3 (virtual representation), and upon any trustees then serving. The judgment shall direct the issuance by the Surrogate's Court of letters of trusteeship.

Note: Adopted _____ to be effective _____.

N.B. See former R. 4:81-2.

4:84-5. Appointment of Administrator Pendente Lite or Other Limited Administrator [; Notice]

No order appointing an administrator pendente lite or other limited administrator shall be [granted] entered by the Superior Court without either notice to the persons in interest[,] or [without] their written consent, unless it clearly appears from specific facts shown by affidavit or by the verified [petition or] complaint that immediate and irreparable damage will result [to the applicant] before notice can be served and a hearing had thereon. [Such] If an order is granted without notice, it shall give any person in interest leave to move for the discharge of the administrator on no more than 2 days' notice. This rule shall not apply to the administrator ad prosequendum in an action for wrongful death [wrongfully caused].

Note: Source -- R.R. 4:99-8. Amended July 26, 1984 to be effective September 10, 1984; caption and text of former R. 4:80-9 amended and rule redesignated to be effective .

RULE 4:85. [PROCEEDINGS TO APPLY TOWARD DECEDENT'S DEBTS MONEYS RECEIVED ON FORECLOSURE AND PARTITION SALE]

REVIEW BY SUPERIOR COURT OF ACTIONS BY SURROGATE'S COURT: GENERAL PROVISIONS

N.B. Current Rules 4:85-1 through 4:85-3 now redesignated as Rules 4:92-1 through 4:92-3.

4:85-1. Complaint; Time for Filing

If a will has been probated by the Surrogate's Court or letters testamentary or of administration, guardianship or trusteeship have been issued, any person aggrieved by that action may, upon the filing of a complaint setting forth the basis for the relief sought, obtain an order requiring the personal representative and any persons interested therein to show cause why the probate should not be set aside or modified or the letters of appointment vacated, provided, however, the complaint is filed within three months after notice of probate pursuant to R. 4:80-6 or of the appointment, as the case may be, or if the aggrieved person resided outside this State at the time of the granting of probate or issuance of letters within six months thereafter. The complaint

and order to show cause shall be served as provided by R. 4:67-3. Other persons in interest may, on their own motion, apply to intervene in the action.

Note: New caption and text adopted to be effective .

4:85-2. Complaint Based on R. 4:50 or Fraud

If the ground for relief is based on R. 4:50 or because of fraud on the court, the procedure shall be as set forth in R. 4:85-1 but there shall be filed with the complaint an affidavit stating with particularity the grounds for the relief sought.

Note: New caption and text adopted to be effective .

N.B. See former R. 4:80-7(b).

4:85-3. Enlargement of Time

The time periods prescribed by R. 4:85-1 may be extended for a period not exceeding 30 days by order of the court upon a showing of good cause and the absence of prejudice.

Note: New caption and text adopted to be effective .

[4:80-6.] 4:85-4. Where Will Is Discovered After Grant of Administration [Grant of] or Probate of Prior Will

Where administration has been granted and subsequently a will is offered for probate, or where probate of a will has been granted and subsequently a later will is offered for probate, the [plaintiff] person offering such will may, upon the filing of a complaint, move[,] without notice[,] for an order requiring all interested persons [interested] to show cause why probate of such will should not be granted. [If the original administration or probate was granted by a county or surrogate's court, the complaint shall be filed in the surrogate's court, and the order to show cause shall be issued by and returnable to the county court of that county; if the original administration or probate was granted by the Superior Court, the action shall be instituted in that court.] The complaint shall be filed in the county where the original administration or probate was granted. If, on the return date [of the order to show cause] or thereafter, new probate is granted, the court shall require the administrator or prior executor to make final settlement of his or her account[,] and shall make such order respecting [his] commissions as [are] is appropriate.

Note: Source -- R.R. 4:99-5; caption and text of former R. 4:80-6 amended and rule redesignated to be effective .

RULE 4:86. [ACTIONS FOR THE SETTLEMENT OF ACCOUNTS]

[RULE 4:83.] ACTION FOR GUARDIANSHIP OF AN INCOMPETENT OR FOR THE APPOINTMENT OF A CONSERVATOR

4:86-1. [Court Entertaining Action]

[The accounts of executors and trustees under wills probated in a surrogate's or county court of any county and of administrators and guardians appointed therein, shall be settled in the county court, except that in special circumstances they may be settled in the Superior Court. The accounts of executors and trustees under wills probated in the Superior Court and of administrators and guardians appointed by that court shall be settled in that court. The accounts of assignees for the benefit of creditors shall be settled in the county court or the Superior Court.]

Note: Source -- R.R. 4:105-1, 5:3-6(a) (first independent clause). Amended July 14, 1972 to be effective September 5, 1972; caption and text deleted to be effective .

N.B. See proposed R. 4:87-1.

[4:83-1.] Complaint

Every action for the determination of mental incompetency [resulting from idiocy, insanity, lunacy, unsoundness of mind or habitual drunkenness] of a person and for the appointment of a guardian for that person or [his] the person's estate or both, other than an action with respect to a veteran under N.J.S.A. 3B:13-1 et seq., shall be brought [in a county court or the Superior Court] pursuant to [R. 4:83-1 to 4:83-8, inclusive] R. 4:86-1 through 4:86-8 of this rule. The complaint shall state the name, age, domicile and address of the plaintiff, [his relationship to the alleged incompetent, his interest in the action; the name, age, domicile and address] of the alleged incompetent[; the name, domicile and address] and of [his] the alleged incompetent's spouse, if any; the plaintiff's relationship to the alleged incompetent; the plaintiff's interest in the action; the names, [and] addresses, and ages of [his] the alleged incompetent's children, [parents and nearest of kin, with the ages of the children], if any, and the names and addresses of the alleged incompetent's parents and nearest of kin; the name and address of the person or institution having the care or custody of the alleged incompetent; and if [he] the alleged incompetent has lived in an institution, the period or periods of time [he] the alleged incompetent has lived therein, the date of the

commitment or confinement, and by what authority committed or confined.

Note: Source -- R.R. 4:102-1. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:83-1 amended and rule redesignated to be effective .

4:86-2. [On Notice or Order to Show Cause]

[Accounts of all fiduciaries referred to in R. 4:86-1, of non-testamentary trustees and of assignees for the benefit of creditors, shall be settled on notice pursuant to R. 4:87 or, if the court so directs, in a summary manner pursuant to R. 4:67. A non-testamentary trustee shall annex to the first account a copy of the written instrument creating the trust and stating its terms. The order to show cause issuing under R. 4:67-2 shall state the amount of commissions and attorney's fees, if any, which will be applied for.]

Note: Source -- R.R. 4:105-2, 5:3-6(a) (second independent clause), 5:3-6(c) (first sentence), 5:3-6(d); caption and text deleted to be effective .

N.B. See proposed R. 4:87-1.

[4:83-2.] Accompanying Affidavits

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

(a) an affidavit stating the nature, location, and fair market value (1) of all real estate in which the alleged incompetent has or may have a present or future interest, stating the interest, describing the real estate fully or by metes[,] and bounds and stating the assessed valuation thereof[,]; and (2) of all the personal estate which he or she is, will or may in all

probability become entitled to, including the nature and total or annual amount of any compensation, pension, insurance, or income which may be payable to [him] the alleged incompetent. If the plaintiff cannot secure such information, [he] the complaint shall so state [in the complaint] and give the reasons therefor, and the affidavit submitted shall in that case contain as much information as can be secured in the exercise of reasonable diligence[.];

(b) [A]affidavits of 2 reputable physicians, having the qualifications set forth in [R.S.] N.J.S.A. 30:4-29. If an alleged incompetent has been committed to a public institution and is confined therein, one of the affidavits shall be that of the chief executive officer, [or] the medical director, or the chief of service providing [he] that person is also the physician with overall responsibility for the professional program of care and treatment in the administrative unit of the institution. However, where an alleged incompetent is domiciled within this State but resident elsewhere, the affidavits may be those of physicians who are residents of the state or jurisdiction of the alleged incompetent's residence. To support the complaint, each affiant shall state that in his or her opinion the alleged incompetent is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the

circumstances and conduct of the alleged incompetent upon which this opinion is based, including a history of [his] the alleged incompetent's condition. Each affiant shall have made a personal examination of the alleged incompetent not more than 20 days prior to the filing of the complaint, and [his] the affidavit shall set forth the date of the examination and include a physical description sufficient to identify the alleged incompetent.

(c) In lieu of the affidavits provided for in paragraph (b), an affidavit of one reputable physician, having the qualifications as required by paragraph (b), [to the effect] stating that he or she has endeavored to make a personal examination of the alleged incompetent not more than 20 days prior to the filing of the complaint but that the alleged incompetent or those in charge of him or her have refused or are unwilling to have the affiant make such an examination.

Note: Source -- R.R. 4:102-2; former R. 4:83-2 amended and rule redesignated to be effective .

4:86-3. [Actions to Compel Account and Filing of Inventory]

[Any fiduciary referred to in R. 4:86-1 may be compelled by a summary action brought pursuant to R. 4:67 in the court to which he is accountable, to settle his account, and in appropriate circumstances, to file an inventory and appraisement.]

Note: Source -- R.R. 4:105-4(a)(b), 5:3-6(b); caption and text deleted to be effective .

N.B. See proposed R. 4:87-1(b).

[4:83-3.] Disqualification of Physician

No affidavit shall be submitted by a physician who is related, either through blood or marriage, to the alleged incompetent or to a proprietor, director or chief executive officer of any institution (except state, county or federal institutions) for the care and treatment of the [insane] mentally ill [(except state, county or federal institutions)] in which the alleged incompetent is living or in which it is proposed to place him or her, or who is professionally employed by the management thereof as a resident physician, or who is financially interested therein.

Note: Source -- R.R. 4:102-3; former R. 4:83-3 amended and rule redesignated to be effective .

4:86-4. [Dispensing With Accounting by Agreement]

[If all parties interested in any separable part of an account, such as income, are of full age and competent, and so agree in writing, there need be no accounting as to the same.]

Note: Source -- R.R. 4:106-4 (second paragraph); redesignated as R. 4:87-9 to be effective .

[4:83-4.] [Notice; Attorney; Order for Examination]

Order for Hearing

(a) [Notice of Hearing] Contents of Order. If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings should be taken thereon, it shall [require] enter an order fixing a date for hearing and requiring that at least 20 days' notice [of the hearing] thereof [to] be given to the alleged incompetent, his or her spouse, children 18 years of age or over, parents, the person having [the care or] custody of the alleged incompetent, the attorney appointed pursuant to R. 4:86-4(b), and such other [person or] persons as the court directs. [A] Notice shall be effected by service of a copy of the [notice] order, complaint and supporting affidavits [shall be served] upon the alleged incompetent personally and upon each of the other persons in such manner as the court directs. The court,

in [its] the order, may, for good cause [shown], allow shorter notice or dispense with notice, but in such case the order shall recite the grounds therefor, and proof shall be submitted at the hearing that the ground for [dispensing with the notice] such dispensation continues to exist. [The notice to the alleged incompetent shall contain a statement] A separate notice shall, in addition, be served on the alleged incompetent stating that if he or she desires to oppose the action he or she may appear [therein] either in person or by attorney[, and if he desires a trial by jury, he may demand the same] and may demand a trial by jury. [The order fixing the hearing date shall include the appointment of counsel for the alleged incompetent. If the alleged incompetent thereafter obtains other counsel, notice of that action must be given to the court and to the appointed counsel at least five days prior to the hearing date. The compensation of any appointed counsel may be fixed by the court to be paid out of the estate of the incompetent or in such other manner as the court shall direct.]

(b) Appointment of Counsel. The order shall include the appointment by the court of counsel for the alleged incompetent. Counsel shall be responsible to meet with the alleged incompetent; to make inquiry of persons having knowledge of the alleged incompetent's circumstances, his or her physical and mental state,

and his or her estate; and to file a written report of findings and recommendations to the court at least 2 days prior to the hearing. A copy of the report shall be sent to the plaintiff's attorney and other parties who may have formally appeared. If the alleged incompetent thereafter obtains other counsel, such counsel shall notify the court and appointed counsel at least 5 days prior to the hearing. The compensation of appointed counsel may be fixed by the court to be paid out of the estate of the incompetent or in such other manner as the court shall direct.

[(b)] (c) Examination. If the affidavit supporting the complaint is made pursuant to R. 4:86-2(c), the court may, on motion and upon notice to all persons entitled to notice of the hearing under paragraph (a), order the alleged incompetent to submit to an examination[, on motion after notice to all persons entitled to notice of the hearing under paragraph (a)]. The motion shall set forth the names and addresses of the physicians who will conduct the examination, and the order shall specify the time, place and conditions of the examination. Upon request, the report thereof shall be furnished to either the examined party or his or her attorney.

Note: Source -- R.R. 4:102-4(a)(b). Paragraph (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 16,

1981 to be effective September 14, 1981; caption of former R. 4:83-4 amended, caption and text of paragraph (b) adopted, paragraph (b) redesignated as paragraph (c) and amended, and rule redesignated to be effective.

[4:83-5.] 4:86-5. Proof of [Notice] Service; Appearance of Incompetent at Hearing; Answer

Prior to the hearing, [T]the plaintiff shall file [before the hearing] proof of service of the notice, order for hearing, complaint and affidavits and proof by affidavit that the alleged incompetent has been afforded [every] the opportunity to appear personally or by attorney, [at the hearing] and that he or she has been given or offered assistance to communicate [fully] with [his] friends, relatives, or attorneys. The plaintiff or appointed counsel may produce the alleged incompetent at the hearing or the court may direct [him] the plaintiff to do so, unless the court finds that it would be prejudicial to the health of the alleged incompetent or unsafe for [him] the incompetent or others [so] to do so. If the alleged incompetent or any person receiving notice of the hearing [is] intends to appear [through] by an attorney, [he] such person shall, not later than 5 days before the hearing, serve and file an answer to the complaint.

Note: Source -- R.R. 4:102-5; caption and text of former R. 4:83-5 amended and rule redesignated to be effective .

[4:83-6.] 4:86-6. Hearing; Judgment

(a) Trial. Unless a trial by jury is demanded by or on behalf of the alleged incompetent [or someone in his behalf], or is ordered by the court, the court without a jury shall, after taking testimony in open court, determine the issue of mental incompetency. If there is no jury, the court, with the consent of counsel for the alleged incompetent, may take the testimony of [the] a physician by telephone or may dispense with [a] the physician's oral testimony and rely on the affidavits submitted pursuant to [R. 4:83-2(b)] R. 4:86-2(b). Telephone testimony shall be recorded verbatim.

(b) Motion for New Trial. A motion for a new trial shall be served not later than 30 days after the entry of the judgment.

(c) Appointment of Guardian. [In any case where] If a guardian is to be appointed, letters shall be granted to the spouse or next of kin, or if none of them will accept the letters or it is proven to the court that no appointment from among them will be to the best interest of the incompetent or his or her estate, then to such other proper person as will accept [the same] them. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with [R. 4:97-2] R. 4:96-1. The judgment appointing the guardian shall fix the amount of [his] the bond.

Note: Source -- R.R. 4:102-6(a)(b)(c), 4:103-3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (c) of former R. 4:83-6 amended and rule redesignated to be effective .

[4:83-7.] 4:86-7. Return to Competency

Upon the filing either of a motion in the original cause or of a complaint in a separate action by an incompetent or [some] an interested person on his or her behalf, verified by affidavit and setting forth facts evidencing [his] a return to competency, the court shall set a date for hearing, take oral testimony in open court with or without a jury and may render judgment that [he] the person has returned to competency and that his or her estate be restored to [him] his or her control.

Note: Source -- R.R. 4:102-7; former R. 4:83-7 amended and rule redesignated to be effective .

[4:83-8.] 4:86-8. Appointment of Guardian for Nonresident Incompetent

An action for the appointment of a guardian for a nonresident who has been or shall be found to be a mental incompetent under the laws of the state or jurisdiction in which [he] the incompetent resides shall be brought in the Superior Court pursuant to R. 4:67. The plaintiff shall exhibit and file with the court an exemplified copy of the proceedings or other evidence establishing the finding. [Where] If the plaintiff is the duly appointed guardian, trustee or committee of the mental incompetent in the state or jurisdiction in which the finding was made [is the plaintiff in the action], and applies to be appointed guardian in this State, the court may forthwith appoint [him guardian] that person without issuing an order to show cause.

Note: Source -- R.R. 4:102-8. Amended July 26, 1984 to be effective September 10, 1984; former R. 4:83-8 amended and rule redesignated to be effective .

[4:83-9.] 4:86-9. Guardians for Incompetents Under Uniform Veterans Guardianship Law

(a) [Action]Complaint for Appointment. An action for the appointment of a guardian under N.J.S.A. 3B:13-1 et seq. [as to] for a ward alleged to be a mental incompetent shall be brought in the Superior Court by any person entitled to priority of appointment. If there is no person so entitled or if the person so entitled fails or refuses to commence the action within 30 days after the mailing of notice by a federal agency to [his] the last known address of such person entitled to priority of appointment, indicating the necessity for the appointment, the action may be brought by any person residing in this State, acting on the ward's behalf.

(b) Complaint. The complaint shall state (1) the name, age and place of residence of the ward; (2) the name and place of residence of the nearest relative, if known; (3) the name and address of the person or institution, if any, having custody of the ward; (4) that such ward is entitled to receive moneys payable by or through a federal agency; (5) the amount of money due and the amount of probable future payments; and (6) that the ward has been rated incompetent on examination by a federal agency in accordance with the laws regulating the same.

(c) Proof of Necessity for Guardian of Mental Incompetent. [In such action, a] A certificate [of] by the chief officer, or his or her representative, stating the fact that the ward has been rated incompetent by a federal agency on examination in accordance with the laws and regulations governing such agency[,] and that appointment is a condition precedent to the payment of moneys due the ward by such agency[,] shall be prima facie evidence of the necessity for making an appointment under this rule.

(d) Determination of Mental Incompetency. Mental incompetency may be determined on the certificates, without other evidence, of 2 medical officers of the military service[,] or of a federal agency, certifying that by reason of the mental incompetency [of] the ward [he] is incapable of managing his or her property[;], or certifying to such other facts as shall satisfy the court as to such incompetency.

(e) Appointment of Guardian; Bond. Upon proof of notice duly given and a determination of mental incompetency, the court may appoint a [fit and] proper person to be the guardian and fix the amount of [his] the bond. The bond shall be in an amount not less than that which will be due or become payable to [him] the ward in the ensuing year. The court may from time to time require additional security. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with [R. 4:97-2] R. 4:96-1.

(f) Termination of Guardianship When Ward Becomes Mentally [(In)]Competent. If the court has appointed a guardian for the estate of a [beneficiary] ward, it may subsequently, on due notice, declare the beneficiary] ward to be competent on proof of a finding and determination to that effect by the medical authorities of the military service or federal agency or based on such other facts as shall satisfy the court as to the competency of the [beneficiary] ward. The court may thereupon discharge the guardian without further proceedings[,] subject to the settlement of his or her account.

(g) Complaint in Action to Have Guardian Receive Additional Personalty. The complaint in an action to authorize the guardian, pursuant to law, to receive personal property from any source other than the United States Government shall set forth the amount of such property and the name and address of the person or institution having actual custody of the ward.

(h) Definitions. [The] [d]Definitions contained in N.J.S. [3A:27-2] 3B:13-2 shall apply to the terms of this rule.

Note: Source -- R.R. 4:102-9(a)(b)(c)(d)(e)(f)(g)(h), 4:103-3 (second sentence). Paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) through (h) of former R. 4:83-9 amended and rule redesignated to be effective .

[4:83-10.] 4:86-10. Appointment of Guardian for Person Receiving Services from the Division of Developmental Disabilities

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

(a) The complaint may be brought by the Commissioner of Human Services or a parent, spouse, relative or other party interested in the welfare of such person.

(b) In lieu of the affidavits prescribed by [R. 4:83-2] R. 4:86-2 the verified complaint shall have annexed thereto [two] 2 affidavits setting forth with particularity why the person is in need of a guardian. One affidavit shall be submitted by the chief executive officer, medical director or other officer having administrative control over a Division of Developmental Disabilities program servicing the alleged incompetent and the other shall be submitted by a physician licensed to practice in New Jersey or a psychologist licensed pursuant to N.J.S.A. 45:14B-1[,] et seq.

(c) The attorney for the alleged incompetent as required by [R. 4:83-4(a)] R. 4:86-4(a) shall be the Public Advocate, or, if unavailable, the court shall appoint an attorney, to be paid by the State, to repre-

sent the alleged incompetent. The attorney for the alleged incompetent, [in his discretion,] at the expense of the State, may retain an independent expert to render an opinion respecting the incompetency of the alleged incompetent.

(d) The hearing shall be held pursuant to [R. 4:83-6] R. 4:86-6 except that a guardian may be summarily appointed if the attorney of the alleged incompetent, by affidavit [disputes neither], does not dispute either the need for the guardianship [nor] or the fitness of the proposed guardian and if a plenary hearing is not requested either by the alleged incompetent or on his or her behalf.

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

[4:83-11.] 4:86-11. Appointment of Conservator

(a) Commencement of Action; Complaint. An action pursuant to N.J.S.A. 3B:13A-1[,] et seq.[,] for the appointment of a conservator [may] shall be brought pursuant to [R. 4:67] R. 4:86 by a conservatee or other person on his or her behalf on notice as provided by N.J.S.A. 3B:13A-5 and 6. The complaint shall be filed in the Superior Court and shall state (1) the conservatee's age and residence, (2) the names and addresses of the conservatee's heirs and all other persons entitled to notice pursuant to N.J.S.A. 3B:13A-6, and (3) the nature, location and fair market value of all real and personal estate, including statutory entitlements, in which the conservatee has a present or future interest.

(b) Hearing. The court, without a jury, shall take testimony in open court to determine whether the conservatee, by reason of advanced age, illness or physical infirmity, is unable to care for or manage [his] or her property or has become unable to provide for himself or herself or others dependent upon him or her for support. The court may appoint counsel for the conservatee if it concludes that counsel is necessary to [adequately] protect his or her interests. If the conservatee is unable to attend the hearing by reason of physical or other disability, the court shall appoint a guardian ad litem to conduct an investigation

to determine whether the conservatee objects to the conservatorship. If counsel for the conservatee has, however, been appointed, [he] such counsel shall conduct the investigation and no separate guardian ad litem shall be appointed. In no case shall a conservator be appointed if the court finds that the conservatee objects thereto.

(c) Acceptance of Appointment. An acceptance of appointment as conservator may be taken before any person authorized by the laws of this [s]State to administer an oath.

(d) Settlement of Conservator's Account. Where the court, for good cause shown, orders a full accounting by the conservator, the account shall be settled in the Superior Court in accordance with R. 4:87, insofar as applicable.

Note: Adopted July 26, 1984 to be effective September 10, 1984; paragraphs (a), (b) and (c) of former R. 4:83-11 amended and rule redesignated to be effective .

[4:83-12.] 4:86-12. Special Medical Guardian

(a) Standards. On the application of a hospital, nursing home, treating physician, relative or other appropriate person under the circumstances, the court may appoint a special guardian of the person of a patient to make decisions respecting medical treatment if the court finds that the patient is incompetent, unconscious, underage or otherwise unable to consent to medical treatment[,]; if no general or natural guardian is immediately available who will consent to the rendering of medical treatment[,]; and if the prompt rendering of medical treatment is necessary in order to deal with a substantial threat to the patient's life or health.

(b) Venue. The application shall be made to the Superior Court judge assigned to general equity in the vicinage in which the patient is physically located when the application is made and, in the event of [his] that judge's unavailability, to the Assignment Judge of the vicinage[,] or the judge designated [by him] as the emergent duty judge, or if neither is available, any judge in the vicinage.

(c) Procedure. The procedure on the application shall conform as nearly as practicable to the requirements of [R. 4:83-1 to R. 4:83-6] R. 4:86-1 to R. 4:86-6, but the judge may, if the circumstances require, accept an oral complaint and oral testimony

either by telephone, in court, or at any other suitable location. [Where] If the circumstances do not permit the making of a verbatim record, the judge shall make detailed notes of the allegations of the complaint and the supporting testimony. Whenever possible an attorney shall be appointed to represent the patient.

(d) Order. The order granting the application, if orally rendered, shall be reduced to writing as promptly as possible and shall recite the findings on which it is based.

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

RULE 4:87. [PRACTICE ON] ACTIONS FOR THE SETTLEMENT OF ACCOUNTS

4:87-1. Procedure

(a) Actions to settle the accounts of executors, administrators, testamentary trustees, non-testamentary trustees, guardians and assignees for the benefit of creditors shall be brought in the county where such fiduciaries received their appointment. The action shall be commenced by the filing of a complaint in the Superior Court, Chancery Division, and upon issuance of an order to show cause pursuant to R. 4:83. A non-testamentary trustee shall annex to the complaint a copy of the written instrument creating the trust and stating its terms. The order to show cause shall state the amount of commissions and attorney's fee, if any, which are applied for.

(b) An action may be commenced by an interested person to compel a fiduciary referred to by paragraph (a) of this rule to settle his or her account, and, in appropriate circumstances, to file an inventory and appraisement.

Note: Adopted _____ to be effective _____.

N.B. See former Rules 4:86-1, 4:86-2, and 4:86-3.

[4:87-1.] 4:87-2. Complaint

The complaint in an action for the settlement of an account

(a) [S]shall contain the names and addresses of all persons interested in the account, specifying which of them, if any, are [infants] minors or incompetent persons, the names and addresses of their guardians, or if there is no guardian then the names and addresses of the parents or persons standing in loco parentis to the [infants] minors[.];

(b) [S]shall specify the period of time covered by the account and contain a summary of the account. The summary shall state, all as shown by the account: (1) in the case of a first accounting, the amount for which the accountant was chargeable as of the date [his] the trust or obligation devolved upon him or her, or where an inventory is on file, the amount of the inventory; or in the case of a second or later accounting, the balance remaining in [his] the hands of the accountant as shown in the last previous account; (2) the amount for which [he] the accountant became chargeable in addition thereto; (3) the total of the first 2 items; (4) the amount of allowances claimed in the account; and (5) the balance in the accountant's hands. Charges and allowances sought on account of corpus and income shall be stated separately both in the summary and in the account[.];

(c) [S]shall have annexed thereto the account which shall be dated[.];

(d) [S]shall ask for the allowance of the account, and also for the allowance of commissions and a fee for [his] the accountant's attorney, if the accountant intends to apply therefor[.];

(e) [S]shall be filed 20 days prior to the day on which the account is to be settled.

Note: Source -- R.R. 4:106-1. Paragraph (e) adopted June 29, 1973 to be effective September 10, 1973; former R. 4:87-1 amended and rule redesignated to be effective .

[4:87-2.] 4:87-3. Form of Account; Statement of Assets to be Annexed to Account

(a) Form of Account. The charges and allowances as to principal and income and the statements required to be annexed to the account may be typed or in the form of computer or machine printouts; and, where appropriate, the accountant may use a single schedule for the presentation of portions of the account, but charges and allowances as to corpus and income shall be stated separately.

(b) Statement to Be Annexed to Account. To all accounts shall be annexed:

(1) [A] a full statement or list of the investments and assets composing the balance of the estate in accountant's hands, setting forth the inventory value or the value when [he] the accountant acquired them and the value as of the day the account is drawn, and also stating with particularity where the investments and assets are deposited or kept and in what name;

(2) [A] a statement of all changes made in the investments and assets since they were acquired or since the day of the last account, together with the date the changes were made;

(3) [A] a statement as to items apportioned between principal and income, showing the apportionments made;

(4) [A] a statement as to apportionments made with respect to transfer and inheritance or estate taxes;

(5) [A] a statement of allocation [where] if counsel fees, commissions and other administration expenses have been paid out [for] of corpus, but the benefits of the deductions from corpus have been allocated in part or in whole to income beneficiaries for tax purposes;

(6) [A] a statement showing how the commissions requested, with respect to corpus, are computed, and in summary form the assets or property, if any, not appearing in the account on which such commissions are in part based.

Note: Source -- R.R. 4:106-2. Paragraph (a) adopted and paragraphs (b) (c) (d) (e) and (f) redesignated June 29, 1973 to be effective September 10, 1973; former R. 4:87-2 amended and rule redesignated to be effective .

[4:87-3. Notice of Settlement

In an action on notice pursuant to R. 4:86-2:

(a) Except as otherwise provided by R. 4:26-3 (virtual representation) 20 days' notice of the time and place of the settlement of the account and of the amount of commissions and attorney's fee, if any, which will be applied for, shall be given by registered or certified mail, return receipt requested, to all persons interested therein who reside within the State; 30 days' notice, similarly given, to all such persons who reside outside this State but within a state of the United States or the District of Columbia; and 60 days' notice similarly given to all other persons interested. If any person interested is an infant or incompetent, the notice shall be given to the person or persons upon whom a summons is to be served under R. 4:4-4(b). A surety on the bond of a fiduciary shall be deemed a person interested.

(b) Notice of the time and place of the settlement shall be published once at least 30 days preceding the settlement in a newspaper published in the county in which the action is brought or the venue is laid, or if there is none, in a newspaper published in this State and circulating in such county.

(c) Proof of the mailing and publication shall be filed before the account is allowed. Where the names or addresses of any persons interested in the account

are unknown, there shall be filed an affidavit of inquiry as to such names and addresses made in accordance with R. 4:4-5(c).]

Note: Source -- R.R. 4:106-3. Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; caption and text deleted to be effective .

4:87-4. Service

(a) Process shall be by order to show cause. The order to show cause, certified by plaintiff's attorney to be a true copy, together with a copy of the complaint and of the account, similarly certified, shall be mailed by registered or certified mail, return receipt requested, to all persons interested therein who reside in this State at least 20 days before the return date; to all such persons who reside outside this State but within a state of the United States or the District of Columbia, at least 30 days before the return date; and at least 60 days to all other interested persons. If any person interested is a minor or incompetent and except as otherwise provided by R. 4:26-3 (virtual representation), service shall be made on the person or persons upon whom a summons would have to be served pursuant to R. 4:4-4(b) unless a guardian ad litem is required under R. 4:26-2. A surety on the fiduciary's bond shall be deemed an interested person.

(b) Where the names or addresses of any persons interested in the account are unknown, there shall be filed an affidavit of inquiry as to such names and addresses made in accordance with R. 4:4-5(c)(2). The court may then enter such order for service of process as it deems proper including publication of a notice of the proceedings in accordance with R. 4:4-5(c) at least 30 days before the return date.

(c) Proof of mailing, and of publication where ordered, shall be filed before the account is allowed.

Note: Adopted _____ to be effective _____.

[4:87-4.] 4:87-5. Vouchers

Vouchers in support of allowances claimed [on] in an account shall be made available for inspection by any interested person during business hours at the office in this State of the accountant or [his] of the accountant's attorney [but]. They shall be presented to the court only if requested by the court or an interested person, or, as to particular allowances by [the clerk of the court or] the [s]Surrogate auditing the account. Vouchers presented to the court or the [clerk or s]Surrogate shall be returned to the accountant or [his] the accountant's attorney after the settlement of the account.

Note: Source -- R.R. 4:106-4 (first paragraph). Amended July 7, 1971 to be effective September 13, 1971; former rule deleted and new rule adopted June 29, 1973 to be effective September 10, 1973; former R. 4:87-4 amended and rule redesignated to be effective .

[4:87-5.] 4:87-6. Audit and Report on Accounts

The Surrogate as deputy clerk of the court shall audit the accounts of all fiduciaries [(]unless otherwise ordered by the court pursuant to R. 4:53-7(b)[)] and], shall place the same on file at least 20 days prior to its presentation to the court, and shall make a report to the court upon the audit not later than the day on which the account is settled. The report shall specify the derelictions, if any, and other matters that in the [clerk's] Surrogate's opinion should be brought to the court's attention.

Note: Source -- R.R. 4:106-5; amended July 15, 1982 to be effective September 13, 1982; former R. 4:87-5 amended and rule redesignated to be effective .

[4:87-6.] 4:87-7. Report of Guardian Ad Litem

A guardian ad litem for [an infant] a minor or incompetent shall [at least 7 days prior to the day on which the account is settled] file [with the court] a written report with the court at least 7 days prior to the day on which the account is settled. If [he] the guardian applies for the allowance of a fee in excess of $200.00[,] the report shall include, or be accompanied by, an affidavit of [his] services. Notice of all applications for allowances shall be given as provided by R. 4:26-2(c).

Note: Source -- R.R. 4:106-5A; former R. 4:87-6 amended and rule redesignated to be effective .

[4:87-7.] 4:87-8. Exceptions

In all actions for the settlement of accounts, other than plenary actions, any interested person may, at least 5 days before the return of the [notice or] order to show cause[,] or within such time as the court allows, serve the accountant with written exceptions, signed by [him] that person or his or her attorney, to any item in or omission from the account, including any exceptions to the commissions or attorney's fees requested. The exceptions shall state particularly the item or omission excepted to, the modification sought in the account and the reasons for the modification. An exception may be stricken [on motion] because of its insufficiency in law.

Note: Source -- R.R. 4:106-6. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:87-7 amended and rule redesignated to be effective .

[4:86-4.] 4:87-9. Dispensing with Accounting by Agreement

If all parties interested in any separable part of an account, such as income, are of full age and competent, and so agree in writing, there need be no accounting as to the same.

Note: Source -- R.R. 4:106-4 (second paragraph); former R. 4:86-4 redesignated to be effective .

RULE 4:88. COMMISSIONS AND ATTORNEYS' FEES

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

On every application for commissions on corpus, if the gross corpus receipts have exceeded [$100,000] $200,000, the applicant shall file with the court at least 20 days prior to the day on which the account is settled an affidavit stating in detail the nature of the services rendered in administering the estate and specifying the amount of the commissions requested.

Note: Source -- R.R. 4:107-1; amended to be effective .

4:88-2. Commission Payments Before Settlement

Whether or not annual commissions are taken without court allowance under N.J.S.A. [3B:18-14 or] 3B:18-17, a fiduciary may apply to the court to which he or she is accountable for an ex parte order supported by appropriate affidavits for payment to [himself] the fiduciary on account of commissions on corpus for [his] services to date. Such order shall not be binding on the beneficiaries, and the payment so ordered shall be subject to approval and allowance or to disallowance by the court upon the settlement of the fiduciary's account.

Note: Amended June 29, 1973 to be effective September 10, 1973; amended July 22, 1983 to be effective September 12, 1983; amended to be effective .

4:88-3. Notice as to Apportionment of Commissions

The court shall not apportion commissions among co-fiduciaries unless proof is made that 5 days' notice of the application for apportionment has been given to those of them who do not appear.

Note: Source -- R.R. 4:107-2.

4:88-4. Affidavit of Attorney's Services

On every application for attorney's fees, the attorney shall file with the court at least 20 days prior to the day on which the account is settled an affidavit stating, in addition to the information required by R. 4:42-9(b), whether any part of the requested fee is to be paid to or shared with an attorney or firm of attorneys of another state or jurisdiction[;] and if so, the amount to be paid or the manner in which the fee is to be shared shall be set forth and shall be supported by an accompanying affidavit of the foreign attorney or attorneys stating in detail the nature of the services rendered. The allowance shall be payable to the New Jersey attorney, and shall state what part, if any, of said allowance is to be paid to or shared with the foreign attorney or attorneys.

Note: Source -- R.R. 4:107-3; amended to be effective .

RULE 4:89. DISTRIBUTION

4:89-1. Where an Account Is About to Be Settled

If an account is to be settled [by action brought on notice or order to show cause], the plaintiff in [his] the complaint may apply to the court for directions as to the distribution of the estate. If such an application is made, notice thereof shall be given either in the [notice of] order to show cause for the settlement of the account or as the court orders.

Note: Source -- R.R. 4:108-1; amended to be effective .

4:89-2. Complaint

In actions for distribution [brought on notice or order to show cause,] the complaint shall state: (a) when letters, if any, were granted to a fiduciary; (b) the names and addresses of all persons interested, specifying which of them are [infant] minors or incompetent persons; and in actions for the distribution of an intestate's estate, the manner and degree in which [his] the next of kin severally stand related to him; (c) the balance in the fiduciary's hands for distribution, so far as the same may be known; and (d) shall have annexed to the complaint a copy of the will or other instrument, if any, pursuant to which distribution is to be made.

Note: Source - R.R. 4:108-2; amended to be effective .

4:89-3. Inquiry for Unknown Distributees

If in an action for the distribution of personal property [whereof] of a decedent [dies] who died intestate, proceedings are taken under N.J.S.A. 3B:23-19 to bar [from all right, title or claim to the estate,] persons whose names or addresses are unknown from all right, title or claim to the estate, the court shall require an inquiry and affidavit to be made pursuant to R. 4:4-5(c).

Note: Source -- R.R. 4:108-3. Amended July 22, 1983 to be effective September 12, 1983; amended to be effective .

4:89-4. Unclaimed Assets Deposited in Court

Upon payment of moneys into court pursuant to N.J.S.A. 3B:23-21 or 2A:19-42, the fiduciary shall file therewith an affidavit that [he has made] diligent inquiry has been made for the residence and post office address of the person entitled to the moneys and that the fiduciary has not been able to ascertain the same; or that having ascertained the same [he] the fiduciary has personally or by letter duly mailed, registered or certified mail, return receipt requested, to such residence and post office address, given notice to such person to appear and receive the same. The notice shall have been given at least 20 days before payment of such moneys into court. The receipt issued by the clerk of the court on the payment of the moneys into court shall be recorded [in his office] in the manner in which releases for legacies and distributive shares are recorded. Withdrawals shall be made pursuant to R. 4:57.

Note: Source -- R.R. 4:108-4. Amended July 22, 1983 to be effective September 12, 1983; amended to be effective .

RULE 4:90. SALE OF REAL ESTATE FOR DEBTS WHERE PERSONALTY INSUFFICIENT

4:90-1. Complaint in Action by Executor or Administrator to Sell

The complaint [of an executor or administrator] in an action to sell real estate to pay debts where [he] the executor or administrator discovers or believes that the personal estate of [his] the decedent is insufficient [therefore] therefor shall state the description of all the real estate whereof the decedent dies seized, its location, its character, condition and value, as near as may be, and a true account of such of the personal estate and debts as [he] can [discover] be discovered.

Note: Source -- R.R. 4:109-1; amended to be effective .

4:90-2. Complaint in Action by Creditor to Sell

The complaint of a creditor or [his] the creditor's legal representative in an action to sell real estate to pay debts, shall state that

(a) the creditor has reduced [his] the claim against the executor or administrator to judgment;

(b) the judgment remains partly or wholly unsatisfied for want of personal assets;

(c) there is real estate, specifying its description, location, character, condition and value, as near as may be; and

(d) the executor or administrator, notwithstanding that demand has been made upon him or her more than one month previously, has failed to commence an action for the sale of the real estate.

Note: Source -- R.R. 4:109-2; amended to be effective .

4:90-3. Order to Show Cause

Upon [presentation] filing of the complaint, and[,] if the complaint is made by a creditor or [his] the creditor's legal representative[,] upon notice to the executor or administrator, the court may make an order requiring all persons interested in the decedent's real estate to show cause on a specified date not less than 2 months after the date of the order why so much of the real estate should not be sold as will be sufficient to pay the decedent's debts[,] or the residue thereof. The order to show cause shall, one month prior to the date fixed in the order for the hearing, be published once in a newspaper of this State, as the court directs.

Note: Source -- R.R. 4:109-4. Amended July 7, 1971 to be effective September 13, 1971; amended to be effective .

4:90-4. Objections to Claim

An objection to any claim set forth in the complaint may be made in writing by the executor or administrator, the person interested in the real estate or any other person in interest; and the claimant shall be given 10 days' notice, in such manner as the court directs, that the objection will be brought on for hearing on the return day of the order to show cause.

Note: Source -- R.R. 4:109-5.

4:90-5. Judgment for Sale[; Bond]

If only part of the real estate of which the decedent dies seized is to be sold, the judgment for sale shall specify the part to be sold.

Note: Source -- R.R. 4:109-6, 4:109-7. Amended July 22, 1983 to be effective September 12, 1983; caption amended to be effective .

4:90-6. Sale of Decedent's Land Liable for Debts Where Land Is Subject to Escheat

If land may be subject to escheat to the State, the court may order such land to be sold to pay debts in the same manner and to the same extent provided for other cases. A copy of the order to show cause why such real estate should not be sold, together with a copy of the complaint filed in the action, shall be sent by registered or certified mail to the State Treasurer, and no further proceedings shall be taken in the action unless a certificate, signed by the Attorney General and the State Treasurer certifying that the State will interpose no objection to the making of an order authorizing the sale of such real estate, has been exhibited to the court.

Note: Source -- R.R. 4:109-8; amended to be effective .

4:90-7. Notice of Application for Prosecution of Bonds of Heirs and Devisees

If the heirs of an intestate[,] or the heirs or devisees of a testator[,] shall have given bond to the executor or administrator, with the approval of the court, upon the return of an order to show cause for the sale of lands for the payment of debts, and an application is made for an order to prosecute the bond or to sell the lands, notice of the application shall be given to such heirs or devisees and their sureties, if they are still living, or, if dead, to their executors or administrators. The notice may be given [to them] by ordinary mail, whether they reside within or outside this State.

Note: Source -- R.R. 4:109-9; amended to be effective .

RULE 4:91. INSOLVENT ESTATES

4:91-1. Proceedings as to Insolvency on or After Obtaining Order to Limit Creditors

(a) Time; Complaint. The executor or administrator may, at the time of obtaining an order to limit creditors under N.J.S.A. 3B:22-4 or at any time thereafter, commence an action to have the estate adjudged insolvent by filing a complaint stating that to the best of his or her knowledge and belief the real and personal estate of the decedent is insufficient to pay debts.

(b) Report of Claims; Account of Personal Estate and Inventory of Real Estate. The executor or administrator shall file his or her report of claims, inventory and account under oath with the court at least one month before the hearing in the action. The report shall state such claims as were duly presented [to him], particularly specifying the demand and the amount thereof at the time of the report, and whether it is based on judgment, bond, note, book account or otherwise. The account shall state the personal estate of the decedent which has come to [his] the knowledge or possession of the executor or administrator, and the inventory shall state the real estate of the decedent

of which [he] the executor or administrator has knowledge, and the value thereof, as near as may be.

(c) Judgment. The court may, on the report of claims and the presentation of the inventory and account, adjudge the estate to be insolvent.

Note: Source -- R.R. 4:110-1, 4:110-2(a)(b). Paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a) and (b) amended to be effective .

4:91-2. Notice to Creditors of Insolvent Estates

After the time [under] specified by the order barring creditors has expired and after the account, inventory and report of claims have been filed, the executor or administrator shall give to all creditors who have presented claims and, except as otherwise provided by R. 4:26-3 (virtual representation), to all other interested persons, notice of the filing of the account, inventory and report and of the time and place of the hearing in the action. The notice shall be given not less than one month before the hearing in the action and may be sent by registered or certified mail, return receipt requested, to the last known address of each such creditor or person, whether residing within or outside this State. The notice shall state that such creditors and persons shall file their exceptions to the account, inventory and report before the time of the hearing or within such time as the court may allow.

Note: Source -- R.R. 4:110-3 (first, second and third sentences); amended to be effective .

4:91-3. Exceptions to Account, Inventory and Claims; Determination

A creditor or other interested person may take exceptions to the account of the executor or administrator in respect of the personal estate and the inventory of the real estate. The executor or administrator, or any other interested person, may take exceptions to any creditor's claim or part thereof. Such exceptions shall be served on or before the hearing in the action[,] or within such time as the court on application allows. Any account and inventory not excepted to shall be allowed as true, and a claim not excepted to shall be deemed justly due. The court shall hear proofs on the exceptions and shall make such determination and final judgment with respect thereto as is just and lawful.

Note: Source -- R.R. 4:110-4; amended to be effective .

4:91-4. Excepted Claims; Plenary Action; Recovery

If a creditor to whose claim exception is made elects to proceed in a plenary civil action in preference to a determination by the court on the exception, he or she shall so proceed immediately. If an executor or administrator desires to have a claim determined in a plenary [civil] action, he or she shall, before filing [his] the report, so notify the creditor who shall thereupon proceed to sue immediately. Such sum as the creditor recovers in such plenary action shall be the amount upon which a ratable portion shall be paid. The court in which the action is brought shall dispose thereof as quickly as possible.

Note: Source -- R.R. 4:110-5; amended to be effective .

4:91-5. Actions Pending May Proceed to Judgment

If an action is pending against the executor or administrator on the date of the order limiting creditors, or is thereafter brought, the plaintiff in such action may proceed to final judgment therein, but no execution shall issue in any case after the filing of the complaint. The amount of the judgment, when recovered, shall be the sum on which the creditor shall receive [his] a ratable proportion.

Note: Source -- R.R. 4:110-6; amended to be effective .

[RULE 4:85.] RULE 4:92. PROCEEDINGS TO APPLY TOWARD DECEDENT'S DEBTS MONEYS RECEIVED ON FORECLOSURE AND PARTITION SALES

N.B. Current R. 4:92 (Declaration of Death) redesignated as R. 4:93.

[4:85-1.] 4:92-1. [Petition] Motion

[A petition by] A notice of motion supported by affidavit of an executor or administrator [in the Superior Court] made for leave to apply to the payment of [his] the decedent's debts the surplus moneys on a foreclosure sale, or the moneys received on the sale of real estate sold in an action for partition shall be [prosecuted in a summary manner] captioned [pursuant to R. 4:67, except that the petition shall be entitled] in the action in which the moneys arose. The [petition shall be verified in accordance with R. 1:4-7 and] motion supporting affidavit shall state:

(a) the date of the decedent's death;

(b) the date of the sale under which the moneys were or will be received;

(c) whether any of the heirs or devisees have [aliened] alienated or encumbered their estate in the lands sold, in whole or in part, or their interest in the proceeds of the sale thereof; and when, and what

part and to whom; and

(d) whether any spouse has a right or estate of dower or curtesy in the moneys, or any part thereof.

Note: Source -- R.R. 4:104-1; caption and text of former R. 4:85-1 amended and rule redesignated to be effective .

[4:85-2.] 4:92-2. [Order to Show Cause;] Statement of Assets and Liabilities

Except as otherwise provided by R. 4:26-3 (virtual representation), the [order to show cause required by R. 4:67-2] notice of motion shall be directed to all persons who may be entitled to the moneys, or any part thereof, if the moneys are not required for the payment of debts. With the [order to show cause and petition,] motion and supporting affidavit there shall be served an account of the personal estate that has come into the hands or the knowledge of the [petitioner,] personal representative; the debts, expenses and other items paid or for which allowance is claimed[,]; the amount on hand[,]; the debts claimed to be due from the decedent[,]; and the debts disputed.

Note: Source -- R.R. 4:104-2; caption and text of former R. 4:85-2 amended and rule redesignated to be effective .

[4:85-3.] 4:92-3. Bond

No moneys shall be paid over pursuant to the order of the court until the party instituting the action shall have filed [in the court] a bond as prescribed by [R. 4:90-5] the court.

Note: Source -- R.R. 4:104-3; former R. 4:85-3 amended and rule redesignated to be effective .

[RULE 4:92.] 4:93. DECLARATION OF DEATH

[4:92-1.] 4:931. Complaint

An action under N.J.S.A. 3B:27-6 to declare dead an absentee, whether a resident or nonresident of this State, may be brought by a spouse, any next of kin, creditor, executor, administrator, beneficiary under an insurance policy on the absentee's life, or any other person interested in the estate. The complaint shall specify the facts as to the plaintiff's interest.

Note: Source -- R.R. 4:111-1. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:92-1 redesignated to be to be effective .

[4:92-2.] 4:93-2. Declaration of Death

The action may be brought in a summary manner in accordance with [R. 4:67] R. 4:83 on an order to show cause returnable not less than 30 days nor more than 3 months from the date of the order why judgment should not be entered declaring such person to be dead. Notice of the order shall be published once in a newspaper of general circulation in the county where [he] the absentee was last domiciled and shall be served by mail or otherwise as the court directs.

Note: Source -- R.R. 4:111-2. Amended July 7, 1971 to be effective September 13, 1971; former R. 4:92-2 amended and rule redesignated to be effective .

[4:92-3.] 4:93-3. Parties Defendant

The order to show cause shall be directed to all persons in interest, including (a) the persons who would have an interest, as executor or beneficiary under a will of the absentee, or as heir, next of kin or spouse of the absentee or otherwise, in any real or personal property by reason of the death of the absentee, testate or intestate; (b) the carrier and beneficiaries of any insurance known to the plaintiff which is payable on the death of the absentee; (c) those persons entitled, in a fiduciary or beneficial capacity, to any interest known to the plaintiff, which interest expires or is contingent upon the death of the absentee; and (d) such other persons as the court directs.

Note: Source -- R.R. 4:111-3; former R. 4:92-3 redesignated to be effective .

[4:92-4.] 4:93-4. Hearing

Whether or not an answer or an answering affidavit is filed, the court shall hear the matter on oral testimony and shall not enter judgment declaring the absentee dead unless it is satisfied that the plaintiff has made reasonable effort to ascertain the facts necessary to maintain the action.

Note: Source -- R.R. 4:111-4; former R. 4:92-4 redesignated to be effective .

[4:92-5.] 4:93-5. Letters Issued

After entry of the judgment, an [action] application may be brought for the issuance of letters of administration upon the estate of the absentee as in the case of a deceased person, or for the probate of [his] the will, or for the appointment of a testamentary guardian.

Note: Source -- R.R. 4:111-5; former R. 4:92-5 amended and rule redesignated to be effective .

[RULE 4:66.] RULE 4:94. SALE OR MORTGAGE OF [INFANT'S] MINOR'S AND INCOMPETENT'S LANDS

[4:66-1.] 4:94-1. Action for Sale

[The] A general guardian of the person or property of [an infant] a minor or incompetent person or, if the general guardian shall fail to act or [his interest is adverse] have an adverse interest or other good cause exists, a guardian ad litem appointed [for him] by the court after notice to the general guardian, or any person having a vested interest in lands in which [an infant] a minor, incompetent, or person not in being has an interest, may bring an action in the Superior Court for the sale or other disposition of the property of the [infant] minor, incompetent or person not in being. Nothing in these rules shall be deemed to authorize the sale or other disposition of any property contrary to the provisions of any will or conveyance by which the same were bequeathed, devised or granted to or for the benefit of the [infant] minor or incompetent.

Note: Source -- R.R. 4:84-1 (first sentence), 4:84-2 (fifth sentence). Amended July 7, 1971 to be effective September 13, 1971; amended July 22, 1983 to be effective September 12, 1983; former R. 4:66-1 amended and rule redesignated to be effective .

[4:66-2.] 4:94-2. Complaint; Supporting Affidavits; Notice

The complaint shall state the age and residence of the ward, a description of the property proposed to be sold or otherwise disposed of, a statement of the encumbrances, if any, thereon, and the reasons why the sale or other disposition would be in the ward's best interest. The complaint shall be verified by affidavit made pursuant to R. 1:6-6 and have annexed thereto affidavits of at least 2 persons, stating the situation, assessed value, if any, and fair market value of the property proposed to be sold or otherwise disposed of, and if real estate, of each separate lot or parcel. If, however, the [infant] minor or incompetent owns a fractional portion of real estate having a value not in excess of $1,200.00 as shown by one affidavit, the court may dispense with the requirement of a second affidavit as to value. Unless the court otherwise orders, no notice of the action need be given to the ward.

Note: Source -- R.R. 4:84-1 (second and third sentences); former R. 4:66-2 amended and rule redesignated to be effective .

[4:66-3.] 4:94-3. Order to Sell

Upon presentation of the complaint and affidavit to the court, it may in its discretion require proof by way of oral testimony or additional affidavits in support of the statements therein. If from the complaint, affidavits and oral proofs, if any, the court is satisfied that the best interest of the ward would thereby be substantially promoted and the rights of other persons interested in the property would not be harmed, it may order the guardian or guardian ad litem to sell or otherwise dispose of the property, or such part thereof, as it deems proper. The order may fix the terms and conditions of the sale or other disposition, and may establish a price below which the property shall not be sold.

Note: Source -- R.R. 4:84-2 (first, second, third sentences). Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 22, 1983 to be effective September 12, 1983; former R. 4:66-3 amended and rule redesignated to be effective .

[4:66-4.] 4:94-4. Bond

If a sale or other disposition is made by a guardian ad litem, the proceeds thereof shall not be paid to him or her, but to [a] the guardian who has filed a bond in an adequate amount. The court on directing the sale or other disposition of property shall examine into the sufficiency of the bond previously given by the general guardian[,] or the special guardian for real or personal property within this State of the nonresident minor or incompetent, and if in the court's judgment the same is insufficient, or if no bond has been previously given, the court shall require [him] the guardian or special guardian to give an additional bond approved by [the court appointing him,] it before the confirmation of the sale, or as [may be directed by the court] it directs. If [he] the guardian or special guardian was appointed by a court other than the Superior Court of New Jersey, then before the confirmation there shall be presented a certificate of such appointing court, certifying that a good and sufficient bond, of a stated amount, has been filed with it.

Note: Source -- R.R. 4:84-2 (fourth sentence), 4:84-3; former R. 4:66-4 amended and rule redesignated to be effective .

[4:66-5.] 4:94-5. Confirmation of Sale; Conveyance

The report, notice and order for the confirmation of a sale or other disposition of property shall be in accordance with R. 4:65-6 dealing with real estate, except that the order to sell may dispense with a confirmation of the sale in case of a private sale. If the report is filed within 6 months after the hearing or application under [R. 4:66-3] R. 4:94-3, it need not have annexed to it affidavits as to the value of the property sold. The conveyance to be made pursuant to the order confirming sale, when duly executed and delivered, shall vest in the purchaser as good an estate in the property as the [infant] minor or incompetent person could have conveyed if at the time of the conveyance [he] such person were of full age and sound mind.

Note: Source -- R.R. 4:84-4; former R. 4:66-5 amended and rule redesignated to be effective .

[4:66-6.] 4:94-6. Mortgage of Lands

Actions in the Superior Court under any statute providing for the borrowing of money on the security of, or the exchange of, any real estate of [an infant] a minor, incompetent or other person, shall be commenced by filing a verified complaint of the guardian or other person authorized to proceed under the statute, and shall conform with the provisions of [R. 4:66] R. 4:94 insofar as they are applicable. If the action is to mortgage land, the court shall also ascertain the manner in which it is proposed to meet the interest to accrue upon the mortgage. If it appears that the best interest of the [infant] minor, incompetent or other person would be [prompted] promoted by selling the real estate rather than by mortgaging it, the court in its discretion may direct the guardian or other designated person to take such proceedings to sell the whole or any part of the same.

Note: Source -- R.R. 4:84-5; amended July 26, 1984 to be effective September 10, 1984; former R. 4:66-6 amended and rule redesignated to be effective .

[4:66-7.] 4:94-7. Costs and Expenses of Proceedings

The costs and expenses of proceedings under [R. 4:66] R. 4:94 shall be taxed and paid out of the proceeds of the sale or mortgage.

Note: Source -- R.R. 4:84-6; former R. 4:66-7 amended and redesignated and amended to be effective .

[RULE 4:96.] RULE 4:95. MISCELLANEOUS [PROBATE PROCEEDINGS] ACTIONS

N.B. Current R. 4:96-1 redesignated as R. 4:80-8.

[4:96-2.] 4:95-1. Order to Compel Production of Purported Will

A summary action pursuant to [R. 4:67] R. 4:83 for the discovery or production of any paper purporting to be the will of any decedent, which has not been offered for probate, may be instituted by any person in interest by filing a complaint [in the Superior Court] alleging [that he believes] a belief that any person has the paper in his or her possession or has knowledge of its existence or whereabouts. Upon the return of the order to show cause, the court may order such person to appear before it and make discovery as to his or her possession or knowledge of the same, by the examination of such person and other witnesses, and may order any such person [having in his possession] possessing any such paper, to lodge the same with the court for probate.

Note: Source -- R.R. 4:114-2. Amended July 26, 1984 to be effective September 10, 1984; former R. 4:96-2 amended and rule redesignated to be effective .

[4:96-3.] 4:95-2. Instructions as to Investment of Funds

Executors, administrators, guardians or trustees applying to the court for instructions as to the investment of funds shall bring a summary action for such instructions pursuant to [R. 4:67] R. 4:83.

Note: Source -- R.R. 4:114-3. Caption and text amended July 22, 1983 to be effective September 12, 1983; former R. 4:96-3 amended and rule redesignated to be effective .

[4:96-4.] 4:95-3. Approval of Compromise

The complaint of the fiduciary in an action for the approval of a compromise of a claim shall state the nature of the claim and the circumstances justifying the compromise, and shall have annexed to it a copy of the writing setting forth the terms and conditions of the compromise. If, pending the action, the fiduciary applies to the court for approval either of a modification of the compromise, or of another compromise, agreed upon in writing, the court shall, if satisfied that it is in the interests of all persons interested, approve it, provided due notice of the application has been given to such persons.

Note: Source -- R.R. 4:114-4; former R. 4:96-4 amended and rule redesignated to be effective .

[4:96-5.] 4:95-4. Certificate as to Further Security; Death Act, etc.

When a payment is to be made to an administrator for damages due under N.J.S. 2A:31-1 to 6, inclusive ([relating to] death by wrongful act) or for damages sustained by the decedent prior to death, the administrator shall, prior to receiving payment, furnish to the person liable a certificate of the [s]Surrogate [or judge of the Superior Court] setting forth the amount of the payment and certifying that the administrator has furnished adequate security in accordance with the statute.

Note: Source -- R.R. 4:114-5; former R. 4:96-5 amended and rule redesignated to be effective .

[RULE 4:97.] Rule 4:96. [OATHS AND ACKNOWLEDGMENTS]
MISCELLANEOUS

N.B. Current R. 4:97-1 redesignated as R. 4:83-5.

[4:97-2.] 4:96-1. Qualifications; Acceptances

Qualifications of executors and administrators and acceptances of trusteeship and guardianship may be taken outside this State under oath by any person before whom depositions may be taken under R. 4:12-2 and R. 4:12-3, and when the qualification of an executor or an administrator with the will annexed is taken outside this State, the will need not be annexed to the qualification. Such qualifications and acceptances may be taken within this State before any person authorized by the laws of this State to administer oaths.

Note: Source -- R.R. 4:115-2; former R. 4:97-2 redesignated to be effective .

[4:97-3.] 4:96-2. Renunciations

[All] A renunciation[s] by any person named as a fiduciary in any will or other instrument or entitled to letters testamentary, of administration, guardianship or trusteeship, shall be acknowledged before an officer qualified to take acknowledgements of deeds, and shall be recorded by the Surrogate as the deputy clerk of the court.

Note: Source -- R.R. 4:115-3; former R. 4:97-3 amended and rule redesignated to be effective .

[4:99-4.] 4:96-3. Money Judgments [Rendered] in the [Law] Chancery Division, Probate Part

When a money judgment is rendered by the [court in a matter in the] Superior Court, [Law] Chancery Division, Probate Part, the [s]Surrogate shall forthwith transmit the original of the judgment to the Clerk of the Superior Court for entry in the Civil Judgment and Order Docket pursuant to [Rule 4:47] R. 4:101.

Note: Adopted July 11, 1979 to be effective September 10, 1979; caption and text of former R. 4:99-4 amended and rule redesignated to be effective .

[4:99-5.] 4:96-4. Notice to Surety

In any proceeding brought to review the conduct or performance of the duties of a bonded fiduciary, the party bringing the action shall give the surety notice of said [action] motion or proceeding as in the case of an interested party.

Note: Adopted July 22, 1983 to be effective September 12, 1983; former R. 4:99-5 amended and rule redesignated to be effective .

[4:84-2.] 4:96-5. Bond from Corporate Fiduciary

No corporation appointed as fiduciary shall be required to give bond without surety or otherwise, except as provided by law.

Note: Source -- R.R. 4:103-2; former R. 4:84-2 redesignated to be effective .

[RULE 4:98. VENUE IN PROBATE ACTIONS]

[4:98-1. Probate; Administration; Testamentary Trusts

The venue in an action in the Superior Court for the probate of a will or letters of administration and in all actions brought on order to show cause under R. 4:67 or on notice with relation to the estate or any trust created by the will, shall be laid by the plaintiff in the county in this State in which the decedent had his domicile at his death; or if at that time he had no domicile in this State, then in any county in which he left any property or into which any property belonging to his estate may have come.]

Note: Source -- R.R. 4:116-1; deleted to be effective .

[4:98-2. Guardianship of Infants and Incompetents; Conservatorships

The venue in an action in the Superior Court for the appointment of a guardian for an infant or an incompetent or for the appointment of a conservator and in all subsequent actions brought on order to show cause under R. 4:67 or on notice with relation to the guardianship or conservatorship, shall be laid by the plaintiff in the county in the State in which the infant or incompetent or conservatee has his domicile at the commencement of the action; or if at that time he has no domicile in this State, then in any county in which there is then any property of his.]

Note: Source -- R.R. 4:116-2. Caption and text amended July 26, 1984 to be effective September 10, 1984; deleted to be effective _____.

N.B. See proposed R. 4:83-4(b).

[4:98-3. Inter Vivos Trusts

In any action in the Superior Court under R. 4:81-2 for the issuance of letters of trusteeship as to any trust not created by will, the venue shall be laid in the county in which there is any property of the trust estate at the commencement of the action or in the county in which the trustee is domiciled at the time the action is commenced.]

Note: Source -- R.R. 4:116-3; deleted to be effective .

N.B. See proposed R. 4:83(d).

[4:98-4. Certain Plenary Actions

Where a plenary action is brought in the Superior Court by or against a fiduciary to account for the estate, real or personal, for which he is chargeable, or for the construction of the will or other instrument by which he was appointed, or for the directions of the court as to his authority or duties, and where letters have been issued to the fiduciary by a court of this State, the venue in the action shall be laid by the plaintiff in the county in which the venue was laid in the proceeding for the issuance of letters or if letters were issued by a surrogate, then in the county in which he received his letters.]

Note: Source -- R.R. 4:116-4. Amended July 26, 1984 to be effective September 10, 1984; deleted to be effective .

N.B. See proposed R. 4:83(c).

[4:98-5. Other Actions

The venue in all actions in the Superior Court with relation to estates of decedents, trusts and guardianships, other than those referred to in R. 4:98-1 to 4:98-4, shall be laid by the plaintiff in accordance with R. 4:3-2(a).]

Note: Source -- R.R. 4:116-5; deleted to be effective .

N.B. See proposed R. 4:83-4(e).

[RULE 4:99. PROBATE ACTIONS; IN GENERAL]

[4:99-1. Summary Actions

(a) Probate Part of the Law Division of the Superior Court. Except as otherwise provided by these rules, all actions in the Probate Part of the Law Division of the Superior Court shall be brought in a summary manner on order to show cause pursuant to R. 4:67.

(b) Chancery Division of the Superior Court. Actions in the Chancery Division of the Superior Court relating to estates of decedents, trusts and guardianships may be brought in summary manner, if the court so orders. Actions on notice, including actions for the settlement of accounts or the distribution of estates, may be tried and, except where these rules otherwise direct, proceedings may be taken as in an action brought in a summary manner under R. 4:67 insofar as applicable. Nothing contained in R. 4:80 to R. 4:99 shall affect the right of the Superior Court to proceed in a plenary manner in any action.]

Note: Source -- R.R. 4:105-3, 4:117-1 (first and second sentences); paragraphs (a) and (b) amended July 11, 1979 to be effective September 10, 1979; deleted to be effective .

[4:99-2. Filing of Papers

(a) Chancery Division of the Superior Court. In all actions in the Chancery Division of the Superior Court relating to estates of decedents, trusts and guardianships, papers shall be filed with the court pursuant to R. 1:5-6, except that a duplicate copy of the bond and power of attorney furnished by any fiduciary shall not be required.

(b) Probate Part of the Law Division of the Superior Court. In all actions relating to estates of decedents and guardianships, except those filed pursuant to paragraph (a), papers shall be filed with the surrogate in the county of venue.]

Note: Source -- R.R. 4:117-2. Former rule amended and redesignated paragraph (a) and paragraph (b) adopted July 11, 1979 to be effective September 10, 1979; deleted _____ to be effective _____.

N.B. See proposed R. 4:83-2.

MM. Proposed Amendment to R. 4:101-4 -- Docketing of Judgments

This rule currently contains a reference to the county district court, which court no longer exists. Accordingly, the Committee recommends that such reference be deleted and replaced by reference to the Special Civil Part.

The proposed amendment to R. 4:101-4 reads as follows:

4:101-4. Docketing of Judgments; Recording of Transcript and Other Documents

The clerk shall docket final judgments recovered or docketed in [a county district court] the Special Civil Part and certificates or liens filed by State or county officers and agencies, required by law to be docketed in [his] the clerk's office, by entry in accordance with R. 4:101-1 on the [c]Civil [j]Judgment and [o]Order [d]Docket or by binding the transcript or statement of such certificates or judgments in books kept for that purpose and indexing the name of the judgment debtor in the index to the Civil Judgment and Order Docket.

Note: Source -- R.R. 4:120-5. Amended July 7, 1971 to be effective September 13, 1971; amended July 22, 1983 to be effective September 12, 1983; amended to be effective .

II. PROPOSED RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendment to 1:5-6 -- Filing of Nonconforming Papers

An attorney requested that the Committee consider amending the rules to prevent the Clerk of the Superior Court from accepting for filing an answer unaccompanied by a R. 4:6-1(d) certificate of service after default has been entered. Another attorney proposed that the Clerk should be required to reject nonconforming papers generally.

Rule 1:5-6(c) was amended in 1969 to require the Clerk to file all papers presented if accompanied by a fee, even if nonconforming or out-of-time. As the Comment to the rule explains, the Clerk, with respect to filing, should act ministerially; it is up to the adversary to challenge the adequacy of the papers filed. Accordingly, the Committee declined to recommend the proposed rule changes.

B. Proposed Amendment to R 1:6-3 -- Time for Serving and Filing Motions

An Assignment Judge suggested that a rule specifying the procedures for filing short-notice motions would be of assistance to the bench and bar alike. The consensus of the Committee, however, was that no such rule is needed. Short-notice motions may be brought on leave of court only, as R. 1:6-3 now provides.

C. Proposed Amendment to R. 1:6-4 -- Filing Responses to Motions

A trial judge proposed a rule amendment to require that a copy of all answering papers to motions be filed directly with the motion judge.

The Committee voted not to recommend such an amendment at this time. In most counties, attorneys are unaware, eight days before the return date, when answers are due, of the identity of the judge who will hear their motions, and so the motions clerk would be harassed biweekly with calls from hundreds of attorneys seeking to learn to whom to send the answering papers.

D. Proposed Amendment to R. 1:8-4 -- Foreman

In Section I. G. of this report, the Committee proposes amending R. 1:8-4 to remove gender-biased language. However, it voted against any substantive amendment to the rule, as suggested by two trial judges, to provide for the situation in which a juror is unwilling to serve as foreperson. The Committee noted that any juror may lead the discussion in the deliberation room; the foreperson is required only to read the verdict in court. The Committee determined not to formalize by rule the rare situation of a juror's refusal to act as foreperson.

E. Proposed Amendment to R. 1:17-1(g) -- Surrogates

An attorney proposed that the Committee amend R. 1:17-1(g) to require that Surrogates be attorneys. The attorney was advised that his request was beyond the Committee's authority, being a constitutional matter.

F. Proposed Amendment to 2:6-11 -- Time for Serving and Filing Briefs

In appellate practice, an attorney may file a brief on the due date along with a motion for leave to file an overlength brief. An attorney suggested that R. 2:6-11 be amended to include a tolling provision, i.e., tolling the time for the other party to file a responsive brief while the motion is outstanding.

The Committee's position is that no rule change is needed. If a nonconforming (i.e., overlong) brief is submitted for filing, the time to reply does not commence until the motion is granted or, if denied, a conforming brief is submitted.

G. Proposed Amendment to R. 4:4-3 -- Service of Process

Some time ago, Philip Geron, President of Guaranteed Subpoena Service, Inc., had written to many judges, the Administrative Director and the Committee proposing a rule change to permit private service of process as an option for attorneys and litigants. (At present, although there is no legislative prohibition against private service, the rules permit such service only with a court order.)

Several members noted that private service might be cheaper and more efficient than Sheriff's service and that healthy competition might improve Sheriff's service. However, the Committee had no hard information on how long Sheriff's service now takes in the various counties and had no sense that the bar believed such service to be inefficient. Other members observed that Sheriffs are on the public payroll and thus may be more accountable to provide efficient service than a private company. Also to be considered is the theory that the defendant will be more likely to be impressed with the gravity of the event if service is made by a uniformed officer.

Other points of view were expressed: the Judiciary's relationship with the Sheriffs may be disrupted if the service status quo is changed;

permitting private service may undermine the Sheriffs' role and make them less efficient; no change in present service procedures should be taken until more information is obtained, perhaps through a survey, on Sheriffs' time-to-service.

After considerable discussion, the Committee voted against any present change in the rules to permit the option of private service of process.

H. Proposed Amendment to R. 4:4-4 -- Summons; Personal Service; In Personam Jurisdiction

An attorney recommended that the Committee consider amending the service rules to reconcile an apparent conflict among Rules 4:4-4(a)(2), 4:4-2 and 4:6-1. Specifically, he suggested that the rules be revised to state expressly that if service is by mail, the defendant has 60 days to answer and no default judgment can be rendered without personal service unless otherwise ordered by the court.

The Committee declined to support this recommendation and is of the view that no conflict among the above-cited rules exists.

I. Proposed Amendment to R. 4:5-3 -- Answer; Defenses; Form of Denials

An attorney suggested that the Committee review the fact that the filing of an answer that does not contest any claim contained in the complaint nevertheless results in the plaintiff being unable to proceed to judgment without first filing a summary judgment motion. The Committee agreed that in such a situation, i.e., where a defendant does not contest liability, summary judgment motions could likely be avoided by settlement or consent judgment. The Committee, therefore, determined that a rule change is unnecessary.

J. Proposed Amendment to R. 4:5-4 -- Affirmative Defenses

An attorney suggested that R. 4:5-4 be amended to include the single controversy doctrine among the affirmative defenses listed in that rule. The Committee determined not to recommend such an amendment, as the list of affirmative defenses contained in the rule is for illustrative purposes only and is not intended to be exhaustive. (See also Section I. U. of this report for a discussion of the Committee's views on the entire controversy doctrine.)

K. Proposed Amendment to R. 4:6-1(c) -- Extension of Time by Consent

A trial judge brought to the Committee's attention the fact that R. 4:6-1(c) requires enlargements of time to answer by consent, beyond 30 days, to be on notice by court order, on good cause shown. The good cause requirement, however, is apparently widely disregarded. Typically, consent orders extending time to answer beyond 30 days are submitted without any certification attempting to demonstrate good cause. To enforce the requirement by returning all proposed consent orders unaccompanied by the appropriate certification, however, is impractical.

The Committee discussed extending the permissible enlargement of time, by written consent of the parties, from 30 days to 60 or 90 days. It voted overwhelmingly against such an extension as contrary to the court's interest in receiving timely answers.

The Committee also voted against removing from the rule the required showing of good cause. Where a consent order is submitted without the certification, the judge may now waive the requirement, or enforce it by directing that the good cause certification be provided.

L. Proposed Amendments to Rules 4:8, 4:9, and 4:26-4 -- Newly Joined Parties

An attorney proposed amendments to the above rules to ensure that parties brought into an action after the service of the original complaint will receive copies of all papers previously filed or exchanged in the matter. Both judges and attorneys on the Committee agreed that the difficulty a late-entering party encounters in obtaining pertinent documents is a real problem. Some handle it through a notice to produce; other examine the court's file. The Committee agreed, however, that no blanket, automatic requirement to provide late-entering parties with all documents in the case should be embodied in the rules. First, this would be overkill -- frequently, the late-entering party is simply not interested in and has no need to see the reams of pleadings and other documents that have been previously filed or exchanged. Second, the problem is really one of a failure of professional courtesy -- the attorney for a late-entering party should be able to obtain the necessary documents through a simple telephone call to opposing counsel.

Several members suggested that a list of documents be provided to the late-entering party, from which counsel could determine those that he

or she needed. Another member, a judge, stated that the problem should be handled on a case-by-case basis, noting that he sometimes includes in the order permitting the addition of another party a direction that certain documents be supplied.

The Committee determined not to recommend any rule changes to address this issue.

M. Proposed Amendment to R. 4:9-1 -- Amended and Supplemental Pleadings

A trial judge recommended a revision to R. 4:9-1 requiring that a copy of the proposed amended pleading be annexed to the consent order permitting the amended pleading to be filed. The current rule, however, does not require court approval when all parties agree to the filing of the amended or supplemental pleading. Although the practice in some vicinages may be for the attorneys to submit a consent order, the rule does not require such an order; therefore, in the Committee's view, such an amendment would be inappropriate.

N. Proposed Amendment to R. 4:14 -- Depositions Upon Oral Examination

An attorney had proposed an amendment to R. 4:14 to permit the party noticing the deposition to tape-record the proceedings in lieu of reporting and transcription by a certified shorthand reporter. Although such a proposal might reduce deposition transcript costs, the Committee was not in favor of the suggested amendment. In the Committee's view, maintenance of the integrity of the transcript and of a good working relationship with the certified shorthand reporters are two concerns that would override the potential cost savings.

O. Proposed Amendment to R. 4:17-4 -- Interrogatories

In Section I. W. of this report, the Committee recommends revisions to Rule 4:17-3 and 4:17-4 to require a party propounding interrogatories to serve the original and only two copies, and the answering party to serve the original and one copy. The Committee also considered a suggestion to further amend R. 4:17-4(c) to require the answering party to serve the answers upon all other parties to the action. The rule now places this responsibility upon the propounding party, who all too often fails to follow through and serve the answered interrogatories as required. After considerable discussion, however, the Committee voted overwhelmingly in favor of leaving to the propounding party the responsibility of serving the answered interrogatories upon all other parties.

P. Proposed Deletion of R. 4:37-2(b)--Involuntary Dismissal

An attorney and Committee member posited that Rules 4:40-1 and 4:37-2(b) serve the same purpose -- dismissal at the close of plaintiff's case -- and apply the same standard -- denial of defendant's motion to dismiss if plaintiff has made a prima facie case. Accordingly, he proposed that R. 4:37-2(b) be deleted. Several members of the Committee observed, however, that there are practical and philosophical differences between the two rules. A motion for judgment at trial under R. 4:40-1 can be made, at the earliest, only at the close of plaintiff's case, i.e., after proof of damages is in. A motion under R. 4:37-2(b) for involuntary dismissal at trial, however, can be made after plaintiff has presented evidence on all matters other than damages. Also, a R. 4:37-2(b) motion may be granted without prejudice, unlike a R. 4:40-1 motion. In short, R. 4:37-2(b) does not deal with affirmative relief -- the plaintiff is in effect non-suited, unable even to make a prima facie case -- and thus it is conceptually different from R. 4:40-1.

The Committee determined to retain both rules as presently worded.

Q. Proposed Amendment to R. 4:42-1 -- Form of Judgment or Order

An attorney suggested that R. 4:42-1(c) be revised to eliminate the required submission of a stamped, self-addressed envelope with all forms of orders or judgments. Based upon the experience of Committee members, the situation described in the attorney's letter (i.e., 100 unused, stamped envelopes in one court file) was considered not at all representative of the practice throughout the state. The Committee is satisfied that the required submission of stamped envelope is appropriate, and that a rule revision is unnecessary.

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

A trial judge suggested that R. 4:43-2(b) be amended to allow the entry of default judgments in deficiency matters upon affidavit in lieu of appearance by the plaintiff in court. The Committee had considered this issue in the 1986-87 term, and recommended that the rule be revised to require the appearance of plaintiff in court, on an application for a deficiency judgment. The Court declined to adopt the recommended amendment, being of the view that whether the plaintiff appears at the hearing or submits proofs by affidavit is within the discretion of the court.

It was also suggested, again by a trial judge, that R. 4:43-2(b) be amended either to require evidence of liability at the proof hearing of a case involving the issue of comparative negligence, or to require notice to the defendant even if the application for default judgment is brought within six months of the entry of default. The Committee, however, determined that the rule should not be changed, as the issue of the adequacy of proofs supporting a judgment is one of substantive law.

S. Proposed Amendment to R. 4:67 -- Summary Actions

Ronald Sturtz, Esq., chairman of the Equity Jurisprudence Committee of the Essex County Bar Association and principal drafter of the New Jersey Alternative Procedure for Dispute Resolution Act (N.J.S.A. 2A:23A-1 et seq.), had proposed various amendments to R. 4:67 to accommodate the provisions of the act.

After discussion, the Committee agreed that no amendments to R. 4:67 are necessary. That rule now provides adequately for the many summary procedures authorized by statute; to single out one particular statutory scheme and amend the rule to provide for it alone could generate confusion.

T. Proposed Amendment to R. 4:69 -- Prerogative Writs

An attorney suggested that R. 4:69 be amended to incorporate the requirements of Rules 2:5-3 and 2:5-4(b), in order to clarify the respective obligations of the parties as to whether a transcript of the agency decision should be ordered, who should order it, and what other matters should be included in the record. The Committee determined that the problematic situation described by the attorney, i.e., delay in prerogative writ actions due to confusion over ordering transcripts, should not arise when only a few judges within a vicinage handle such matters. The nature of the problem was determined to be within courthouse management and not within the language of R. 4:69.

U. Proposed Amendment Imposing Sanctions for Frivolous Litigation

Legislation permitting the recovery of attorney's fees in a civil suit when the legal position of the losing party was not justified (L. 1988, c. 46) became effective on December 25, 1988. The Committee discussed whether it should draft and propose court rules in accordance with this legislation.

In the Committee's view, the legislation may be unconstitutional in light of Winberry v. Salisbury. It determined, therefore, that any drafting of implementing court rules must await judicial construction of the legislation and a determination of its constitutionality.

V. Proposed Amendment to Prohibit Ex Parte Orders Against the AOC for Payment of Fees

In a recent drunk driving case, the trial judge, on remand, ordered that the AOC pay the costs of defendants' experts, in a challenge to the admissibility of breathalyzer evidence. At its October 1989 Administrative Conference, the Supreme Court authorized the AOC to pay the experts' fees and costs, but expressed concern that the AOC, which was not a party to the proceeding, had an ex parte order entered against it. To ensure that there is no repetition of this situation, the Court suggested that a rule be drafted prohibiting the ex parte assessment of fees against the AOC.

The Committee unanimously agreed that a court rule would not be the most effective or appropriate way to handle this type of situation. It was the Committee's thought that when a case is remanded for the factual testing of a substantial public question, the remand order itself should designate who should bear the expense or specify that a post-judgment hearing be held for that purpose. The Committee chair has drafted a letter to the Administrative Director articulating the Committee's position.

III. OTHER RECOMMENDATIONS

A. Administrative Directives Affecting Practice

An attorney had recommended that all Notices to the Bar and Administrative Directives affecting practice, other than those of a temporary nature, should be codified into the Rules of Court or otherwise collected in a form readily accessible to lawyers. The Committee was advised that a compilation of Administrative Directives is being prepared by the Administrative Office of the Courts and is currently being reviewed by the Assignment Judges.

With respect to Administrative Directives, the prevailing position of the Committee is that any directive affecting the practice of law, lawyer conduct, or any other subject within the Court's constitutional rule-making power should be promulgated only by formal rule amendment. Another view is that such directives as are adopted be given a limited effective period and, if it is subsequently determined that a directive should be continued, it would then be incorporated into the rules. Still another approach might be that all directives be codified and distributed through a loose-leaf service similar to the New Jersey Administrative Code. This approach would

necessarily impose a discipline of periodic update and review.

Although the Committee is not unanimous as to the approach that should be taken, its members are uniformly concerned that, as an integrated State court system, we are losing the uniformity of practice that makes a multi-county practice, the norm for most of the bar, both possible and workable. The Committee is also concerned that the "rules of the game" are not equally accessible to all practitioners. Accordingly, it strongly recommends that an administrative policy be developed to address these problems and stands ready to offer any assistance possible in such an undertaking.

V. MATTERS HELD FOR CONSIDERATION

A. Filing and Service by Fax

A subcommittee was established to study fax usage in the courts of other jurisdictions and its possible application in New Jersey. Based on the subcommittee's findings, the Committee notes that there are numerous advantages and disadvantages to fax usage. The primary advantages, of course, are convenience and speed. The main disadvantages stem from some limitations of the technology and the fact that the burdens of service now properly upon the generating party come to be shared by the recipient when fax is used.

In the view of the Fax Subcommittee, the day has not yet come to permit filing or original service by fax. Interlocutory service by fax, however, may be feasible. The Committee as a whole expressed reservations about recommending that fax service be permitted. Harold Sherman, a committee member who is also president of the Civil Trial Bar Section of the State Bar, noted that the Bar is interested in exploring the possibility of fax service, and that this issue will be on the agenda for the Section's consideration in early 1990. Accordingly, the Committee determined to defer any recommendation on fax service until the Bar's position is articulated.

B. Subcommittee on Appointment of Attorney-Trustees

In the 1988 term, a subcommittee was established to consider the effectiveness of R. 1:20-12 in a "catastrophic" situation, i.e., when an attorney-trustee appointed under the rule is faced with managing a large number of very complex and/or disorganized files of a suspended, disbarred or deceased attorney. The subcommittee, which included three State Bar representatives, studied the problem and sought the views of the Clients' Security Fund (CSF), the Office of Attorney Ethics (OAE), and the Administrative Office of the Courts (AOC) as to how the difficulties encountered by an attorney-trustee might be be handled.

The subcommittee continues to study the issue. The major problem to be resolved is that of cost -- who will pay for out-of-pocket expenses of attorney-trustees, how should attorney-trustees be compensated for their time and effort, and, in a situation where an attorney with a substantial practice leaves it in disarray, who will underwrite the costs of the team of persons -- clerical staff and paralegals, as well as the appointed attorney-trustee -- needed to unravel the files and deal with clients?

It is hoped that these cost issues can be resolved in the near future through a meeting of the subcommittee chair with the heads of the interested judicial offices (e.g., CSF, OAE, AOC).

C. Subcommittee on Renotice Requirements of Adjourned Sheriff's Sale

In the previous term, the Committee established a subcommittee to consider what rule or legislative amendments, if any, are appropriate in light of the decision in First Mutual Corporation v. Samojeden, 214 N.J. Super. 122 (App. Div. 1986). That opinion holds that Rules 4:65-2 and 4:65-4 implicitly entitle interested parties to actual knowledge of the adjourned date upon which a sheriff's sale occurs. The opinion notes that statutes of both Pennsylvania and New York provide for formal renotice of the postponed date of the sheriff's sale.

The subcommittee has considered the problem and will prepare proposed rule amendments for the Committee's consideration in the next term.

D. Judiciary Style Manual Subcommittee

A subcommittee, under the chairmanship of Judge Skillman, is continuing its work on revising and updating the Judiciary Style Manual.

E. Mental Commitments Subcommittee

Section I. KK. of this report discusses the Committee's endorsement of the Mental Commitments Subcommittee's proposal to amend R. 4:74-7 in order to provide judicial review to those patients who seek to change their status from involuntary to voluntary, as well as to those who are admitted voluntarily through a screening service. (See the report of the Mental Commitments Subcommittee, which appears as Appendix D to this report.)

The Committee, however, expressed concern about the subcommittee's recommendation to require periodic judicial review for all voluntary patients, which concern centered on the issues of privacy rights of voluntarily admitted patients and the obligation of hospitals and institutions to keep patient information confidential.

The Committee referred the question of periodic judicial review of voluntary patients back to the subcommittee for further study in the next term. The subcommittee will also look into the issue of commitment of juveniles, as recent legislative changes have removed all statutory underpinning for this procedure.

F. Proposed Amendment to R. 1:21-1(a) -- Bona Fide Office

An attorney proposed that R. 1:21-1(a) be amended to specify what constitutes a "bona fide office" staffed by a "responsible person." Committee members agreed that questionable bona fide office situations do arise fairly frequently, but suggested that the Office of Attorney Ethics or the Advisory Committee on Professional Ethics may be a more suitable forum to handle such problems. Harold Sherman, a Committee member who is also the current president of the State Bar's Civil Trial Bar Section, will take this matter up with the Bar and report back to the Committee in the next term.

VI. MISCELLANEOUS MATTERS

A. Proposed Amendment to R. 1:6-2 -- Form of Motion; Hearing

An appellate judge suggested amending R. 1:6-2 to require parties to list each pleading, document or discovery item (e.g., interrogatories, depositions, etc.) relied upon in their moving or opposing papers.

The Committee referred this issue to the Committee on Civil and Family Motion Practice.

B. Proposed Amendment to R. 1:11-3 -- Termination of Responsibility in the Trial Court; Responsibility on Appeal

In response to a recommendation by the Office of the Public Defender, the Criminal Practice Committee drafted a new subsection to R. 1:11-3, delineating the responsibility of trial counsel to appellate counsel. The proposed amendment would require the trial attorney to provide the appellate attorney with all information and documents necessary to perfect the appeal.

The Committee as a whole was of the view that new counsel taking an appeal is entitled to the file. RPC 1.16(d) states this principle as an ethical obligation. Accordingly, the Committee determined that there is no need to amend R. 1:11-3 as proposed. This view was transmitted to the chair of the Criminal Practice Committee.

C. Proposed Amendment to 1:21-1(e) -- Appearances Before Office of Administrative Law

The Office of Administrative Law (OAL) had requested that R. 1:21-1(e) be amended specifically to authorize representation, without fee, by non-lawyer education specialists in special education hearings before the OAL. The OAL believes such an amendment is necessary in light of the decision in Arons v. New Jersey Board of Education, 842 F.2d 58 (3rd Cir. 1988), which renders representational services by education specialists impermissible under R. 1:21-1(e) as it is currently written.

This proposal was presented to the Committee as a supplemental agenda item at its final meeting of the term. Members felt that the issue raised is extremely important, but that time constraints prevented the thoughtful consideration it deserved. Rather than defer in-depth review of OAL's request to the next term, which would necessarily delay response to an issue requiring prompt review, the Committee has presented the matter directly to the Supreme Court.

D. Proposed Amendment to R. 2:6-1(b)

An attorney proposed an amendment to R. 2:6-1(b) for the purpose of simplifying the language of the second sentence of the rule. The Committee referred this proposal to the Appellate Division Rules Committee, which did not support the suggested change.

E. Proposed Amendment to R. 4:42-8 -- Costs

An attorney proposed amending R. 4:42-8(c) to require that when an expert seeks fees for aid and assistance in a case by means of a certification and does not testify in court, a copy of that expert's license or other proof of professional accreditation be submitted. As this issue tends to arise most commonly in a family law context, the Committee agreed to refer it to the Family Practice Committee.

F. Proposed Amendment to R. 4:46-1 -- Summary Judgment

An attorney had suggested that R. 4:46-1 be amended to cure the apparent inconsistency of allowing a cross-motion for summary judgment to be filed only eight days prior to the return date (leaving only four days to file a reply), while requiring that twenty-eight days' notice be given with respect to the initial motion.

The Committee agreed to refer this issue to the Committee on Civil and Family Motion Practice.

G. Proposed Amendment to N.J.S.A. 39:6A-25 -- PIP Claims

An Assignment Judge recommended language changes to N.J.S.A. 39:6A-25 to indicate clearly that contractual actions falling within the ambit of PIP claims would not be subject to mandatory arbitration.

The Committee referred this suggestion to the AOC's Legislative Analysis Unit for review and recommendation.

H. Report of Committee on Civil and Family Motion Practice

The Committee on Civil and Family Motion Practice submitted to the Civil Practice Committee a draft of its final report, for review and comment. After extensive discussion of the report at two meetings, the Committee endorsed the majority of the recommendations presented. The Committee also supported the exercise of judicial discretion and flexibility in dealing with the needs of particular motions, and expressed the view that the entire subject of judicial management of motions should be offered as a course at the Judicial College or at the new judges' orientation program. The major areas of the Committee's disagreement with the report were the proposal for differentiated motion management and the Motion Committee's endorsement of the procedural approach followed by Federal Judge Lechner.

The Committee's views were relayed to the Committee on Civil and Family Motion Practice.

I. Report of the Committee on Masters and Hearing Officers

The Committee reviewed the report of the Committee on Masters and Hearing Officers and specifically its two-pronged recommendation: the first, to relax R. 4:41 (References) to permit the appointment of masters without prior approval by the Chief Justice; and the second, to establish on a pilot basis a judicial commissioner program.

The Committee discussed these recommendations at length, over the course of several meetings. With respect to the proposal to relax R. 4:41, the Committee endorsed the expanded use of masters where all parties consent, but expressed reservations about the appointment of a master over the objections of a party. The Committee's views on this proposal were transmitted by letter to the staff of the Committee on Masters and Hearing Officers in December 1988.

With respect to proposal to institute a judicial commissioners pilot program, the concerns and questions of the Committee as a whole and of individual members were transmitted by letter to Masters Committee staff in April 1989.

J. Review of Pre-proposed Office of Administrative Law Rule

The Committee was asked to review a pre-proposal of an OAL rule that was drafted in response to the 1989 revision of R. 2:5-3. That revision set out new procedures governing the production and filing of transcripts of court proceedings. The OAL sought to conform its requirements to those of the court rule.

The Committee delegated the task of responding to the OAL to a small group of its members who are Appellate Division judges. Comments were prepared and transmitted to the OAL in July 1989.

Respectfully submitted,

Hon. Sylvia B. Pressler, Chair
Morris M. Schnitzer, Esq., Vice-Chair
Hon. Leonard N. Arnold
Hon. Murry D. Brochin
Hon. Philip S. Carchman
Professor Robert Carter
Thomas T. Chappell, Esq.
Gail Chester, Esq.
Hon. James D. Clyne
Hon. William M. D'Annunzio
Hon. Donald W. deCordova
Hon. William A. Dreier
Kevin P. Duffy, Esq.
Joseph A. Ginarte, Esq.
Douglas T. Hague, Esq.
Hon. Martin L. Haines
Hon. J. Norris Harding
Hon. John E. Keefe
Hon. Howard H. Kestin
Linda Lashbrook, Esq.
Kenneth S. Levy, Esq.
Hon. Paul G. Levy
Edwin McCreedy, Esq.
Hon. Patrick J. McGann, Jr.
John P. McGee, Esq.
Hon. Harry A. Margolis
Alan Y. Medvin, Esq.
Melville D. Miller, Esq.
Lorraine C. Parker, Esq.
Hon. James J. Petrella
Deanne Wilson Plank, Esq.
Bruce M. Schragger, Esq.
Hon. Edward J. Seaman
Harold A. Sherman, Esq.
Hon. Stephen Skillman
Hon. Alfred Slocum
William A. Thomas, Jr., Esq.
Michael J. Waldman, Esq.
Alexander P. Waugh, Jr., Esq.
Hon. Barbara Byrd Wecker
Hon. Lawrence Weiss
Jane F. Castner, Esq., AOC Staff
John J. Baxter, Esq., AOC Staff

January 16, 1990

APPENDIX A

NOTICE TO CLIENT PURSUANT TO R. 4:23-5

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

_____ dismiss your complaint

_____ suppress your answer

_____ dismiss your counterclaim

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

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

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

Very truly yours,

_____

Attorney for _____

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STAFF ATTORNEY
JUDITH MCKAY

ADDRESS YOUR REPLY TO
Perth Amboy Office

January 19, 1989

Mr. John J. Baxter
Administrative Office of the Courts
CN-981
Trenton, New Jersey 08625

Re: Civil Practice Committee

Dear Mr. Baxter:

I was delegated to draft the statement of reasons for the Committee's vote at the December meeting to propose an amendment to R. 4:42-9(a)(6), enlarging the circumstances under which insurance companies would be obligated to compensate policy-holders for legal fees.

Here it is. Since I will not be able to attend the January meeting, I leave revisions to the Committee's pleasure. I have already solicited input from several members who voted with the majority.

Very truly yours,

Gail Chester, Esq.

GC:mso
Enclosure
cc: Honorable Sylvia B. Pressler, Chair, with enclosure

The Committee received a complaint from an attorney who had been forced to sue an insurance company to recover a $1000 claim under automobile comprehensive coverage, and felt it unfair that under R. 4:42-9(a)(6) his client had to bear the cost of the litigation. The company never gave a reason for its refusal to pay and then moved to vacate the judgment after it lost. Members of the Committee reported numerous similar cases. The present Rule provides fees only to successful claimants upon a liability or indemnity policy. The Committee debated whether the Rule should be amended to provide for payment of attorneys fees to policyholders who successfully pursue first-party claims against their insurance companies. By a large majority, the Committee concluded that it should be.

The Committee recognizes that under the "American Rule" each litigant bears its own legal costs unless otherwise provided by contract or law, but the majority felt that suits by policyholders against insurance companies should be treated differently. In most consumer transactions, the creditor drafts the contract and provides for payment of its legal fees in case of default by the debtor, but insurance policies are drafted by a prospective debtor, the insurer, while the consumer, the prospective creditor, has no opportunity to insert protective clauses. The committee also recognizes that insurance companies are particularly practiced in the use of the legal system and have an economic advantage over most policyholders. Insurance companies have been held to a special, fiduciary relationship vis-a-vis their policyholders. On a substantive level, the consumer is buying a certain amount of protection and it seems fair that he or she get that amount in case of a loss, undiminished by litigation costs. This is especially important when the claim is small; otherwise the company's refusal to pay will force the policyholder to abandon it.

The Committee considered whether the enactment of NJSA 2A:15-59.1, providing sanctions for frivolous litigation, would resolve the problem and concluded that it will not. It is expected that courts will reserve the application of that law for the most extreme cases, and be reluctant to order relief for policyholders if the insurance company can offer any legal or factual support for its position, however slim. Rule 4:42-9, on the other hand, does not require a finding of bad faith by the company, Kistler v. N.J. Mfrs. Ins. Co., 172 N.J. Super. 324 (App. Div. 1980). The court may consider all attendant circumstances, a more flexible standard.

The Committee considered the argument that awards of fees to litigants who have to sue for coverage would be passed on to other consumers through higher premiums, but the Committee considers that spreading risks is a legitimate aspect of insurance. The alternative, having only policyholders who are forced to sue bear all of the costs,

seems less equitable. If fee awards did result in higher premiums, companies with better claim processing procedures would gain a competitive advantage over those that routinely deny meritorious claims just to gain time or discourage claimants. The Committee further hopes that the necessity of paying consumers' fees would deter companies from denying claims arbitrarily, and either keep such cases out of the courts entirely or cause them to settle at an earlier stage.

SUPREME COURT OF NEW JERSEY

CIVIL PRACTICE COMMITTEE

R. 4:42-9(a)(6) Minority Report*

In 1985, the Supreme Court Committee on the Award of Counsel Fees on Insurance Claims ("King Committee")[1] issued its report recommending that R. 4:42-9(a)(6)[2] not be amended to permit insureds to recover counsel fees in successful litigation against insurance carriers on claims under policies other than liability and indemnity policies.[3] The King Committee reported, inter alia, that "no real ground swell in favor of expanding

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*Because of the time lag between the initial circulation of this minority report among the members of the Civil Practice Committee and the ultimate submission of the minority report to the Supreme Court at the end of the two-year rules cycle, the original minority report fails to reflect case law and statutory developments, as well as the Committee's drafting history of the proposed R. 4:42-9(a)(6), during the interim period. For the benefit of the Supreme Court, the reporter for the minority report has updated the minority report to reflect current developments. Alterations to the original minority report are shown in bold print. As revised, the minority report is current through L.1989, c.193, 117 N.J. 239, and 236 N.J. Super. 504.

[1]The King Committee was chaired by the Hon. Michael Patrick King, P.J.A.D., and had as its members Delia V. Edoga, Esq., Arthur S. Goldstein, Esq., Leonard Meyerson, Esq., and Francis H. Wolff, Esq.

[2]R. 4:42-9(a)(6) provides that counsel fees may be taxed as costs "[i]n an action upon a liability or indemnity policy of insurance, in favor of a successful claimant".

[3]Report of the Supreme Court Committee on the Award of Counsel Fees on Insurance Claims, Sept. 17, 1985 (hereinafter "King Committee Report"), reprinted without appendices in 117 N.J.L.J. 33 (Jan. 9, 1986), and appended hereto as Exhibit A.

counsel fee awards" existed.[4] The Supreme Court, in accordance with that recommendation, did not amend R. 4:42-9(a)(6).[5]

In the four years that have passed since the King Committee Report was issued, there still has been no ground swell of support in favor of the proposed amendment to R. 4:42-9(a)(6). What has prompted this proposal is a complaint from an attorney whose client was denied counsel fees after successfully

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[4]King Committee Report, p. 3.

[5]Guarantee Ins. Co. v. Saltman, 217 N.J. Super. 604, 612 n.2 (App. Div. 1987); Enright v. Lubow, 215 N.J. Super. 306, 312-13 (App. Div.), certif. den., 108 N.J. 193 (1987); No Expansion of Counsel Fees in First-Party Claims, [Supreme] Court Says, 117 N.J.L.J. 783 (June 12, 1986). In 1983, the Civil Practice Committee, after soliciting public comment (111 N.J.L.J. 134 (Feb. 10, 1983)), recommended to the Supreme Court that R. 4:42-9(a)(6) be amended to permit counsel fees to successful claimants in first-party insurance actions. Report of the Civil Practice Committee, June 16, 1983, reprinted in 111 N.J.L.J. 670 (June 16, 1983), and in relevant part appended hereto as Exhibit B. The recommended amendment was not adopted by the Supreme Court.

This issue has been before the Supreme Court, in the context of actual litigation, on at least four occasions during the last six years. In June 1983, an equally-divided Court affirmed the Appellate Division's ruling that counsel fees are not recoverable in first-party actions. Vesley v. Cambridge Mutual Fire Ins. Co., 93 N.J. 323 (1983), aff'g, 189 N.J. Super. 521 (App. Div. 1981). In May 1986 and June 1987, the Court declined to review the issue. Enright v. Lubow, 202 N.J. Super. 58, 83-84 (App. Div. 1985) (following Vesley), certif. den., 104 N.J. 376 (1986), adhered to on reconsideration, 215 N.J. Super. 306 (App. Div.), certif. den., 108 N.J. 193 (1987). The issue is presently before the Court. Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 222 N.J. Super. 363, 376-77 (App. Div.) (following Enright), certif. granted, 110 N.J. 513 (1988); 122 N.J.L.J. 668 (Sept. 15, 1988) (listing as an issue on appeal in Walker Rogge: "Was plaintiff entitled to recover counsel fees?"). **Because the Supreme Court subsequently reversed the judgment in favor of the insured in Walker Rogge, the Court did not address the R. 4:42-9(a)(6) issue. Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 116 N.J. 517 (1989).**

prosecuting a first-party action.[6] The attorney candidly recognized that the trial court, in denying the request for counsel fees, had properly relied upon Kistler v. New Jersey Manufacturers Ins. Co., 172 N.J. Super. 324 (App. Div. 1980), an opinion that was extant in 1983 and 1985 when the Supreme Court declined to amend R. 4:42-9(a)(6).[7]

It is respectfully submitted that no adequate reason has been put forth to justify a proposed amendment that has twice been passed over by the Supreme Court, that the reasons advanced in the majority report are seriously flawed, and that, if anything, developments over the past four years further support retaining the status quo.

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[6]When public comments were solicited in 1983, one attorney questioned whether "there are any statistics dealing with the frequency and outcome of first-party suits against insurance companies." As was the case in 1983, the proponents of the proposed amendment to R. 4:42-9(a)(6) have not come forward with any such statistics. **See Cohen v. Allstate Ins. Co., 231 N.J. Super. 97, 102 (App. Div.) ("We cannot properly base a determination of unconscionability on unsubstantiated impressions and personal intuition. Evaluation and adjustment of the competing public and private interests are best left to the legislative and administrative processes."), certif. den., 117 N.J. 87 (1989).** Indeed, the only statistics in the record were submitted in 1983 by an insurer. The insurer noted that of the 2.3 million claims filed by its 4.6 million New Jersey-insured residents in 1982, only 63 claims (0.003%) resulted in lawsuits. None of these claims were ever tried, all having been settled or dismissed. These statistics hardly suggest that there is a need to amend R. 4:42-9(a)(6).

[7]See Ellmex Const. Co. v. Republic Ins. Co., 202 N.J. Super. 195, 214 (App. Div. 1985) ("The language of R. 4:42-9(a)(6) is unambiguous and needs no interpretation. A pronouncement of legal principle by our Supreme Court on a question such as this, whether by rule or decision, is final and binding. The denial of counsel fees to plaintiff is affirmed."), certif. den., 103 N.J. 453 (1986).

I.

The majority report, at ¶2, appropriately recognizes that New Jersey follows the "American Rule". As the Supreme Court recently observed in Coleman v. Fiore Bros., 113 N.J. 594, 596 (1989):

> In New Jersey, we accept, as do most other courts, the premise of the American Rule that ordinarily society is best served when the parties to litigation each bear their own legal expenses.[8]

Nonetheless, the majority report identifies several overlapping factors that the majority deem sufficient to warrant the availability of counsel fees in all insurance litigation and only against the insurer and not the insured.

First, the majority report, at ¶2, states:

> In most consumer transactions, the creditor drafts the contract and provides for payment of its legal fees in case of default by the debtor, but insurance policies are drafted by a prospective debtor, the insurer, while the consumer, the prospective creditor, has no opportunity to insert protective clauses.

The distinction drawn in the majority report is one without substance. The issue is not one of debtor versus creditor but is one of relative bargaining power. In consumer transactions, it is the creditor who dictates the terms of the

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[8]See also Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975) ("having considered [the] origin and development [of the American Rule], we are convinced that it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents").

agreement, with essentially minimal oversight by the Legislature[9] or the Judiciary.[10] In consumer insurance transactions, it is the insurer who dictates the terms of the policy, but with extensive oversight exercised by the Legislature,[11] the Department of Insurance,[12] and, to a lesser extent, by the

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[9]Certain State legislation provides a degree of protection against overreaching in consumer transactions. See, e.g., N.J.S.A. 12A:2-302 (unconscionability standard of the U.C.C.); N.J.S.A. 12A:1-203 (good faith standard of the U.C.C.); N.J.S.A. 56:8-1 et seq. (Consumer Fraud Act); N.J.S.A. 56:12-1 et seq. (Plain Language Law).

[10]See, e.g., Shell Oil Co. v. Marinello, 63 N.J. 402, 408 (1973) ("Where there is grossly disproportionate bargaining power, the principle of freedom of contract is non-existent and unilateral terms result. In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual provisions which clearly tend to the injury of the public in some way."), cert. den., 415 U.S. 920 (1974); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 404 (1960); Kugler v. Romain, 58 N.J. 522, 543-44 (1971). See generally Calamari & Perillo, The Law of Contracts, §§9-37 to 10-5 (3d ed. 1987).

[11]For example, the Legislature had dictated that insurance policies be written in a manner and contain numerous provisions that protect the consuming public. See, e.g., N.J.S.A. 17:28-1.1 to -2; N.J.S.A. 17:28-5; N.J.S.A. 17:29C-1; N.J.S.A. 17:35-13; N.J.S.A. 17:35-27; N.J.S.A. 17:35-29; N.J.S.A. 17:35C-2: N.J.S.A. 17:36-5.20; N.J.S.A. 17:45-5 to -6; N.J.S.A. 17:46C-6; N.J.S.A. 17:48-6 to -6d; N.J.S.A. 17:48A-5 to -7b; N.J.S.A. 17:48C-8; N.J.S.A. 17B:17-21; N.J.S.A. 17B:25-2 to -14; N.J.S.A. 17B:25-19 to -20; N.J.S.A. 17B:26-2 to -27; N.J.S.A. 17B:26-45; N.J.S.A. 17B:26A-2; N.J.S.A. 17B:27-10 to -23; N.J.S.A. 17B:27-33 to -46.1c; N.J.S.A. 17B:27-51.12; N.J.S.A. 34:15-83 to -86; N.J.S.A. 39:6-48; N.J.S.A. 39:6A-3 to -4; N.J.S.A. 39:6B-1; and N.J.S.A. 56:12-2 & -10.

[12]Consumer insurance contracts must be submitted to the Commissioner of Insurance before being initially issued to the public and the Commissioner has the statutory obligation to disapprove any contract that "contains provisions which are unjust, unfair, inequitable, misleading, contrary to law or to the public policy of this State". N.J.S.A. 17B:25-18(h). Accord N.J.S.A. 17B:26-1(h); N.J.S.A. 17B:27-25(g); N.J.S.A.

(continued...)

Judiciary.[13] Thus, the consumer purchasing insurance has far superior protection than does the consumer in other non-commercial transactions.

II.

A second reason put forth in the majority report, at ¶2, in support of the proposed rule singling out insurers is that:

> On a substantive level, the consumer is buying a certain amount of protection and it seems fair that he or she get that amount in case of a loss, undiminished by litigation costs. This is especially important when the claim is small; otherwise the company's refusal to pay will force the policyholder to abandon it.

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[12](...continued)
17B:27-49(g); N.J.S.A. 17:36-5.15; N.J.S.A. 17:35-26; N.J.S.A. 17B:28-5(a)(i); N.J.S.A. 17B:28A-4; N.J.S.A. 17B:29-7(e); N.J.S.A. 17:46A-8; N.J.S.A. 17:46C-6(a)(3); N.J.S.A. 17:48-1.7; N.J.S.A. 17:48A-9; N.J.S.A. 17:48C-14; N.J.S.A. 17:48D-9; N.J.S.A. 17:28-1.1(a); N.J.S.A. 17:28-1; N.J.S.A. 39:6A-3; N.J.S.A. 39:6A-4; N.J.S.A. 39:6B-1; and N.J.S.A. 39:6A-20.

[13]See, e.g., Sparks v. St. Paul Ins. Co., 100 N.J. 325, 335-36 (1985) ("The doctrine that courts do not lightly interfere with freedom of contract must be applied cautiously and realistically with regard to complex contracts of insurance, since such contracts are highly technical, extremely difficult to understand, and not subject to bargaining over the terms. They are contracts of adhesion, prepared unilaterally by the insurer, and have always been subjected to careful judicial scrutiny to avoid injury to the public. * * * The recognition that insurance policies are not readily understood has impelled courts to resolve ambiguities in such contracts against the insurance companies. * * * This recognition has also led courts to enforce unambiguous insurance contracts in accordance with the reasonable expectations of the insured."); Dancy v. Popp, 114 N.J. 570 (1989) (claim for reformation of insurance policy not precluded by insured's failure to read policy where there was evidence that agent was aware of insured's inability to read and declaration provision was in fine print and inconspicuous).

This argument fails, however, because it is applicable to all consumer transactions and tort actions, not just insurance transactions. As one commentator has observed, the "inequity" of the American Rule extends to all litigants who are not made whole because part of their recovery must be paid to their attorneys:

> So long as the prevailing party is not allowed to recover his attorney's fees from the defaulting or negligent party, he will remain to that extent uncompensated for the detrimental consequences of an injury caused through no fault of his own, and the term "compensatory damages" will remain a misnomer under any possible viewpoint.[14]

And as Professor Mueller has commented:

> Two factors combine to bring about the modern consumer's lack of effective legal power when be [sic] buys a product which is faulty but does not cause physical injury. Both of them stem from the fact that he is a little man in the scheme of things. First, there is an all-pervasive difficulty: our machinery of justice is simply not designed for easy use by the average citizen with a minor claim of any kind. If anything, it is designed to discourage him. He is not apt to know a lawyer and he does not particularly want to know one. And if he does muster up his courage and finds a lawyer, he will almost surely discover that his small claim is of no interest to that lawyer unless he is prepared to guarantee what to him will seem a

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[14] 1 Speiser, Attorneys' Fees, §12:8, p. 481 (1973), quoting Stirling, Attorney's Fees: Who Should Bear The Burden?, 41 Cal. State Bar J. 874, 875 (1966). In commenting on the fact that counsel fees are not awarded under Article Two of the Uniform Commercial Code, Professors White and Summers observed that "[a]ny economist or accountant readily recognizes that the attorneys' fees a seller incurs when recovering his basic damage award are an incidental expense that ought to be recoverable." 1 White & Summers, Uniform Commercial Code, §7-16, p. 382 (3d pract. ed. 1988). Thus, counsel fees are not deemed a part of the make-whole remedial purpose of the Uniform Commercial Code. N.J.S.A. 12A:1-106.

> preposterous sum. Even in those localities where small claims courts are supposed to be readily available, the use of the law remains a mysterious and a frightening prospect for the average citizen. It is especially frightening for the below-average citizen, for "the poor man looks upon the law as an enemy, not as a friend. For him the law is always taking something away."[15]

III.

A third reason set forth in the majority report, at ¶2, is that "insurance companies are particularly practiced in the use of the legal system and have an economic advantage over most policyholders." The short response to this argument is that most large corporations, insurance and otherwise, are, by necessity, well practiced in the legal system.[16] Yet these non-insurance corporations are not being singled out for special treatment by the Civil Practice Committee.

IV.

A fourth reason proffered in the majority report, at ¶2, in support of the proposed amendment is that "[i]nsurance companies have been held to a special, fiduciary relationship vis-a-vis their policyholders." While it is true that insurers

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[15]Mueller, Contracts of Frustration, 78 Yale L.J. 578-79 (1969) (footnotes omitted).

[16]It should be noted that even small businesses have a need to develop expertise in the legal system. For example, the owner of a modest-sized apartment complex must be well practiced in the procedural and substantive nuances of the Anti-Eviction Act, N.J.S.A. 2A:18-61.1 et seq. See, e.g., A.P. Development Corp. v. Band, 113 N.J. 485 (1988) (examining the impact of course of dealings between landlord and tenant on the right of the former to evict the latter).

owe a fiduciary duty to their insured in certain circumstances,[17] it is equally true that insurers do not owe their insureds a fiduciary duty when resolving coverage and quantum-of-benefits issues in first-party actions.[18]

V.

The majority report, at ¶3, also rejects the contention that the recently-enacted New Jersey "Rule 11", N.J.S.A. 2A:15-59.1 (L.1988, c.46),[19] would protect insureds from insurers who refuse to pay clearly meritorious claims:

> It is expected that courts will reserve the application of [N.J.S.A. 2A:15-59.1] for the most extreme cases, and be reluctant to order

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[17]See, e.g., Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 492-96 (1974); **American Home Assurance Co. v. Hermann's Warehouse Corp., 117 N.J. 1, 6-10 (1989).**

[18]Pierzga v. Ohio Casualty Group, 208 N.J. Super. 40, 44 (App. Div.), certif. den., 104 N.J. 399 (1986); Kubiak v. Allstate Ins. Co., 198 N.J. Super. 115, 118 (App. Div. 1984), certif. den., 101 N.J. 290 (1985); Milcarek v. Nationwide Ins. Co., 190 N.J. Super. 358, 363-65 (App. Div. 1983); Ellmex Const. Co. v. Republic Ins. Co., 202 N.J. Super. 195, 206 (App. Div. 1985), certif. den., 103 N.J. 453 (1986). See King Committee Report, p. 4 at ¶6.

[19]The full text of N.J.S.A. 2A:15-59.1 is set forth in Exhibit C.

There are only two reported decisions involving the application of N.J.S.A. 2A:15-59.1. In Evans v. Prudential Property & Cas. Ins. Co., 233 N.J. Super. 652 (Law Div. 1989), the court held that a claim for counsel fees and costs under N.J.S.A. 2A:15-59.1 cannot be asserted by way of a counterclaim, but rather should be raised by a timely motion; and that, under the circumstances presented, the defendants were not liable to the plaintiffs for counsel fees under N.J.S.A. 2A:15-59.1 as a result of defendants having filed an improper counterclaim. In Iannone v. McHale, 236 N.J. Super. 227 (Law Div. 1989), an election contest brought pursuant to N.J.S.A. 19:29-1 et seq., the court awarded two defendants a total of $8,400 for counsel fees and $2,280 for expenses.

> relief for policyholders if the insurance company can offer any legal or factual support for its position, however slim. Rule 4:42-9, on the other hand, does not require a finding of bad faith by the company....

The majority report provides no support, legislative or otherwise, for this interpretation of N.J.S.A. 2A:15-59.1. Indeed, the language of N.J.S.A. 2A:15-59.1 refutes that interpretation. N.J.S.A. 2A:15-59.1 does not require a showing of bad faith in order to recover sanctions, though such a showing would entitle the movant to sanctions. Rather, even in the absence of bad faith, if the non-movant's pleading was without reasonable basis, an objective standard, the movant would be entitled to sanctions.[20]

Moreover, nothing in the legislative history of N.J.S.A. 2A:15-59.1 suggests that it is to be applied in the rarest of circumstances. Rather, the language and purpose of N.J.S.A. 2A:15-59.1 suggest that the statute parallels Federal

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[20] **See Iannone v. McHale, 236 N.J. Super. 227, 231 (Law Div. 1989) (awarding counsel fees and litigation expenses pursuant to N.J.S.A. 2A:15-59.1 against plaintiffs who instituted suit "'without any reasonable basis in law or equity'").**

It should be noted that the "reasonable basis" standard of N.J.S.A. 2A:15-59.1 is not foreign to New Jersey insurance law. See, e.g., Hermann v. Rutgers Casualty Ins. Co., 221 N.J. Super. 162, 165, 169 (App. Div. 1987) (affirming the denial of counsel fees in an action for personal injury protection benefits where the insurer had "'a reasonable basis for refusing coverage' and had 'engaged in good faith [in defending this] litigation'"); Clay v. N.J. Special Joint Underwriting Assoc., 160 N.J. Super. 188, 192 (App. Div. 1978) (same).

Rule of Civil Procedure 11's substantive standard.[21] Decisions under Rule 11 reflect the fact that Rule 11 has not been rarely invoked by the courts and also refute the majority report's assertion that N.J.S.A. 2A:15-59.1 will not permit the court to consider attendant circumstances.[22]

Several members of the majority questioned whether N.J.S.A. 2A:15-59.1 is constitutional. Until the constitutionality of the statute is definitely decided, its constitutionality should not be a factor weighed by the Civil Practice Committee in deciding whether R. 4:42-9(a)(6) should be amended.[23]

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[21]Askin, New Jersey's "Rule 11": A Threat to Innovative Litigation, NJSBA Civil Trial Bar Section Newsletter, p. 6 (May 1989) ("[i]n its essential features, Chapter 46 parallels Rule 11"); Kadish & Cohen, New Jersey's "Rule 11": The Impact of Sanctions for Frivolous Claims and Defenses, NJSBA Civil Trial Bar Section Newsletter, p. 8 (May 1989) (the objective standard of Chapter 46 "relies in large measure" upon the language of Rule 11); **Loigman v. Massachusetts Bay Ins. Co., 235 N.J. Super. 67, 74 n.2 (App. Div. 1989) (Chapter 46 "embodies essentially the same policies" as Rule 11).**

[22]See ABA Section of Litigation, Sanctions: Rule 11 and Other Powers, pp. 4-5 (2d ed. 1988); Lieb v. Topstone Industries, Inc., 788 F.2d 151, 157 (3d Cir. 1986) (also noting that there is no room for a "pure heart, empty head" defense under Rule 11). See generally American Judicature Society, Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (May 1989).

[23]See Jordan v. Horsemen's Benevolent & Protective Assoc., 90 N.J. 422, 433 (1982) ("a statute is presumed to be constitutional and...a court should exercise sparingly the power to declare a statute unconstitutional"); State v. Barnes, 84 N.J. 362, 367 (1980) ("[t]he better practice for a municipal court is 'to assume that an act is constitutional until it has been passed upon by the Appellate Court'").

(continued...)

VI.

The majority report, at ¶4, also concludes that imposing counsel fees against insurers who unjustifiably deny coverage or benefits is warranted by the fact that "spreading risks is a legitimate aspect of insurance". It is undisputed that "spreading risks" is a legitimate aspect of insurance; indeed, it is the primary economic function of insurance.[24] The risks being insured against and thus spread, however, are the misfortunes (e.g., house fire) of the insured, to the extent those misfortunes are covered by the policy. Counsel fees imposed against an insurance company that arbitrarily denies coverage or benefits are not the misfortunate being insured against by the policyholder.[25]

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[23](...continued)
As to the constitutionality of N.J.S.A. 2A:15-59.1, see Nissenbaum & Lem, Stop, Look & Listen: Selected Defenses to the New Jersey Frivolous Lawsuit Statute, Seton Hall L. R., Vol. 20, No. 1 (1989); Nissenbaum & Lem, Challenges Ahead for Frivolous Lawsuit Statute, 124 N.J.L.J. 837 (1989); Lynch, The New Jersey Supreme Court and the Counsel Fees Rule: Procedure or Substance and Remedy?, 4 Seton Hall L. R. 19 (1972)(Part I) and 4 Seton Hall L. R. 421 (1973)(Part II); cf. Parker v. M&T Chemicals, Inc., 236 N.J. Super. 451 (App. Div. 1989)(holding that the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq., does not unconstitutionally impinge on the Supreme Court's plenary and exclusive power to regulate the conduct of lawyers; collecting relevant case law); see also Du-Wel Products, Inc. v. United States Fire Ins. Co., 236 N.J. Super. 349 (App. Div. 1989) (counsel fees are part of the procedural law, not substantive law, of New Jersey); King Committee Report, p. 2 at ¶1 (quoted in text, infra at n.34).

[24]See Samuelson, Economics, pp. 424-26 (9th ed. 1973).

[25]If the goal sought to be achieved by the majority is the spreading of legal fees, the appropriate solution, under the American Rule, is for a litigant to either (a) obtain legal
(continued...)

Moreover, assuming arguendo the legitimacy of the aforesaid "spreading risks" theory, that theory would apply equally to all defendant-businesses, insurance or otherwise. Counsel fees imposed against such defendants could be spread out among all of the consumers of their products, as is the case presently with respect to said defendants' own litigation costs.[26]

VII.

The final reason put forth in the majority report, at ¶4, is the

> hope[ ] that the necessity of paying consumers' fees [will] deter companies from denying claims arbitrarily, and either keep such cases out of the courts entirely or cause them to settle at an earlier stage.

This rationale, however, applies to all litigants -- plaintiffs and defendants -- and not just to insurance companies. Moreover, the majority report overlooks the fact that the Legislature has already created a detailed mechanism for ensuring that insurance companies do not engage in unfair claim settlement practices, including the arbitrary denial of claims.[27] The majority report

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[25](...continued)
services insurance, which the Legislature specifically authorized in 1981 (N.J.S.A. 17:46C-1 et seq.), or (b) become a member of a prepaid legal services program.

[26]See Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 205-06 (1982) (discussing the "risk spreading" theory of products liability law).

[27]N.J.S.A. 17B:30-13.1 and N.J.S.A. 17:29B-4(9)(a)-(n) set forth 14 unfair claim settlement practices. (N.J.S.A. 17B:30-13.1 is quoted in full in Exhibit D. The language of
(continued...)

fails to point to any objective evidence that the statutory procedure is ineffectual or any efforts to advise the Legislature that its statutory provisions are inadequate.[28]

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[27](...continued)
N.J.S.A. 17:29B-4(9)(a)-(n) is identical.) These 14 specified unfair claim settlement practices are not exclusive. N.J.S.A. 17B:30-15; N.J.S.A. 17:29B-4(11). Violations of the "Unfair Claim Settlement Practices Act" may result in penalties of up to $5,000 per violation and the issuance of cease and desist orders. N.J.S.A. 17B:30-17(b); N.J.S.A. 17:29B-7. Failures to comply with cease and desist orders may result in fines of up to $5,000 per infraction and revocation or suspension of the offender's license. N.J.S.A. 17B:30-20; N.J.S.A. 17:29B-11. See also King Committee Report, p. 4 at ¶5; Bowler v. Fidelity & Casualty Co. of N.Y., 53 N.J. 313, 327-28 (1969) ("In all insurance contracts, particularly where the language expressing the extent of the coverage may be deceptive to the ordinary layman, there is an implied covenant of good faith and fair dealing that the insurer will not do anything to injure the right of its policyholder to receive the benefits of his contract. * * * In situations where a layman might give the controlling language of the policy a more restrictive interpretation than the insurer knows the courts have given it and as a result the uninformed insured might be inclined to be quiescent about the disregard or non-payment of his claim and not to press it in a timely fashion, the company cannot ignore its obligation. It cannot hide behind the insured's ignorance of the law; it cannot conceal its liability."); **Insinga v. Hegedus, 231 N.J. Super. 562, 567 (App. Div. 1989) ("Our insurance law is predicated upon our insistence that the insurance industry deal with its insured scrupulously, fairly and in good faith.").**

[28]As the Court in Milcarek v. Nationwide Ins. Co., 190 N.J. Super. 358, 368 (App. Div. 1983), observed:

> [T]he New Jersey Legislature has adopted a method for deterring unfair insurance practices under N.J.S.A. 17:29B-1 et seq. N.J.S.A. 17:29B-4(9) declares the general business practice of an insurance company of "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information" to be an unfair claim-settlement practice. Of course, such alleged violations are resolved before the Commissioner of Insurance and the monetary penalty provided would not go to the parties

(continued...)

VIII.

Another concern overlooked in the majority report is the special role the Legislature plays in the regulation of insurance in this State. As the King Committee reported in 1985, "[t]he insurance industry is already very strictly regulated by statute and the executive branch."[29] Titles 17 and 17B of the New Jersey Statutes and volume 11 of the New Jersey Administrative Code support that conclusion.

Since at least 1983, the Legislature has been diligently working on various measures aimed at controlling the ever-increasing cost of insurance in New Jersey.[30] Over the past

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[28](...continued)
aggrieved by the insurer's actions. * * * Nevertheless, this act punishes insurance companies for unreasonably denying claims, thereby also serving as a deterrent.

See Surace v. Pappachristou, 236 N.J. Super. 81, 87 (Law Div. 1989) ("The court is not in a position to second guess or make a better world for plaintiff than the one in which it finds itself as created by the Legislature. If remediation is necessary to relieve plaintiff of the harsh result ordered in this case, that is for another sphere of government, not the Judiciary.").

[29]King Committee Report, p. 3 at ¶4.

[30]The debate on cost containment and insurance reform has been vigorous and, on occasion, taken directly to the public. See e.g., Karcher, Radical Remedy: Overhauling The Auto Insurance Rattletrap, 17 New Jersey Reporter 14 (Feb. 1988); Hardwick, Hardwick Assails Karcher Plan, 17 New Jersey Reporter 5 (Apr. 1988) (Letter to Editor); Lane, The Industry Strikes Back: Karcher Plan Fuels Criticism, 17 New Jersey Reporter 26 (Apr. 1988); **Florio, Needed: A Fair, Honest Car Insurance System We Can Be Proud Of, NJSBA Civil Trial Bar Section Newsletter, p.1 (Oct. 1989); Courter, Auto Insurance: Sweeping Market-Oriented Reforms Are Needed, NJSBA Civil Trial Bar Section Newsletter, p. 1 (Oct. 1989); Karcher, Pay at the Pump: Establish a State Auto**

(continued...)

seven [six] years, numerous pieces of legislation that directly and indirectly address this issue have been passed.[31]

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[30](...continued)
Liability Insurance Plan, NJSBA Civil Trial Bar Section Newsletter, p. 2 (Oct. 1989).

[31]See, e.g., L.1983, c.362 (Automobile Insurance Freedom of Choice and Cost Containment Act), as amended by L. 1988, c.119, as amended by L.1988, c.156; L.1983, c.357 (financial disclosure and excess profits law, codified at N.J.S.A. 17:29A-5.2 et seq.), repealed and replaced by L.1988, c.118 (codified at N.J.S.A. 17:29A-5.6 et seq.); L.1983, c.358 (automobile accident arbitration law, codified at N.J.S.A. 39:6A-24 et seq.); L.1983, c.320 (Insurance Fraud Prevention Act, codified at N.J.S.A. 17:33A-1 et seq.); L.1983, c.128 (child automobile seat belt law, codified at N.J.S.A. 39:3-76.2a et seq.), supplemented by L.1984, c.179 (Passenger Automobile Seat Belt Usage Act, codified at N.J.S.A. 39:3-76.2e et seq.), supplemented by L.1986, c.133 (automobile seat belt study law, codified at N.J.S.A. 17:29A-36.1); **L.1983, c.57 (liquified petroleum or natural gas Good Samaritan immunity law, codified at N.J.S.A. 2A:62A-5); L.1986, c.13, as amended by L.1988, c.87 (little league liability law, codified at N.J.S.A. 2A:62A-6 and public policy underlying said law explained in Byrne v. Fords-Clara Barton Boys Baseball League, 236 N.J. Super. 185 (App. Div. 1989)); L.1986, c.30 (hazardous discharge Good Samaritan immunity law, codified at N.J.S.A. 2A:62A-7 to -9); L.1986, c.189 (medical personnel and facilities involved in obtaining bodily substance specimens immunity law, codified at N.J.S.A. 2A:62A-10 to -11); L.1987, c.87, as amended by L.1988, c.87 (nonprofit organization volunteers and officers immunity law, codified at N.J.S.A. 2A:53A-7.1); L.1987, c.239 (sports officials immunity law, codified at N.J.S.A. 2A:62A-6.1); L.1987, c. 296 (first aid squad amendment to the Good Samaritan Act, N.J.S.A. 2A:62A-1);** L.1987, c.152 (Licensed Alcoholic Beverage Server Fair Liability Act, codified at N.J.S.A. 2A:22A-1 et seq.); L.1987, c.197 (products liability law, codified at N.J.S.A. 2A:58C-1 et seq.); L.1987, c.324 (amending Tort Claims Act to eliminate joint and several liability, codified at N.J.S.A. 59:9-3 et seq.); L.1987, c.325 (amending Comparative Negligence Act to limit joint and several liability, codified at N.J.S.A. 2A:15-5.2 et seq.); L.1987, c.326 (collateral source rule law, codified at N.J.S.A. 2A:15-97); L.1987, c.329 (personal injury arbitration law, codified at N.J.S.A. 2A:23A-20 et seq.); L.1987, c.404 (social host alcoholic beverage server fair liability law, codified at N.J.S.A. 2A:15-5.5 et seq.); L.1987, c.406 (property and casualty insurance examination act, codified at N.J.S.A. 17:37B-1 et seq.); [and] L.1988, c.46 (N.J.'s "Rule 11", codified at N.J.S.A.

(continued...)

Given the Legislature's awareness of the various judicial opinions refusing to award punitive damages and counsel fees in first-party actions and the Legislature's comprehensive role in insurance reform and cost containment,[32] it is quite evident that the Legislature has concluded that punitive damages and counsel fees should not be available in all first-party actions.[33]

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[31](...continued)
2A:15-59.1); **L.1988, c.87 (nonprofit sports teams sponsors immunity law, codified at N.J.S.A. 2A:62A-6.2); L.1988, c.179 (nonprofit blood bank volunteers and trustees immunity law, codified at N.J.S.A. 2A:53A-7.2); L.1989, c.9 (common interest communities owners' associations immunity law, to be codified at N.J.S.A. 2A:62A-12 to -14); L.1989, c.65 (theft or salvage of motor vehicles reporting law, to be codified at N.J.S.A. 17:23-19); L.1989, c.171 (public library trustees immunity law, to be codified at N.J.S.A. 2A:53A-7.3); and L.1989, c.172 (public access premises immunity law, to be codified at N.J.S.A. 2A:42A-8).**

[32]As noted in the King Committee Report, p. 2 at ¶2:

> The certain result of expanding the award of counsel fees to all or most first-party insurance claims will be to effect an increase in premiums. Our State already is known for high insurance premiums, perhaps the highest in the country by recent estimates. An extension of the award of counsel fees may well also contribute to making our State an even less attractive market for the insurance industry.

[33]See Kubiak v. Allstate Ins. Co., 198 N.J. Super. 115, 120 (App. Div. 1984) (observing that the Legislature, despite ample time to do so, has not overruled prior case law prohibiting the award of punitive damages in insurance actions), certif. den., 101 N.J. 290 (1985); Boyle v. Breme, 93 N.J. 569, 570 (1983) (declining to adopt the dual capacity doctrine in view of the fact that the Legislature had made a comprehensive review of the Workers' Compensation Act and declined to overrule extant Appellate Division case law on point).

IX.

The majority report similarly fails to account for the fact that the Legislature and Congress have been very active in the area of counsel fees, particularly the shifting of such fees to the losing party. As the King Committee observed:

> [T]he award of counsel fees essentially as a component of money damages may well be a legislative or substantive matter and that the Court should not subsume a substantive role under the rule-making power, especially where the Legislature has acted extensively on the subject of counsel fees in other types of actions.[34]

Indeed, the Legislature has passed several fee-shifting statutes that are applicable to proceedings involving insurers.[35] For example, N.J.S.A. 17B:33-8 provides that an insured shall recover counsel fees in cases where an unauthorized foreign or alien insurer has unjustifiably refused to make payment under the terms of an insurance policy. N.J.S.A. 34:15-28.1 provides that an insurer who unreasonably or negligently delays or refuses to

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[34]King Committee Report, p. 2 at ¶1. The King Committee reported that there were approximately 75 fee statutes in New Jersey in 1985. Id. A recent review of the State statutes revealed at least [161] **159** such statutes, enumerated in Exhibit E. On the federal level, there are approximately 135 counsel fee statutes. See Newberg, Attorney Fee Awards, ch. 28 (1986) (listing 135 statutes); 86 Federal Litigator 40-41 (Nov. 1985) (listing 124 statutes); Derfner & Wolf, Court Awarded Attorney Fees, chs. 29-45 (1989) (discussing at least 131 statutes).

[35]See, e.g., N.J.S.A. 17:23A-20(c); N.J.S.A. 17:33A-5(a) and -7(a), (d); N.J.S.A. 17B:31-2 **(repealed by L.1989, c.58, §1)**; N.J.S.A. 17B:33-8; N.J.S.A. 34:15-28.1; N.J.S.A. 34:15-40(b)-(e); N.J.S.A. 39:6-67; N.J.S.A. 39:6A-4.3(c) (repealed by L.1988, c.119, §38); N.J.S.A. 39:6A-5(c); N.J.S.A. 43:21-51; N.J.S.A. 52:27E-19(b); and N.J.S.A. 56:12-3, -4, and -12.

pay temporary disability compensation benefits shall be liable for the counsel fees of the injured employee. And N.J.S.A. 43:21-51 provides that an insurer directed to pay temporary disability benefits may be required to pay a reasonable counsel fee to the employee's attorney.

The failure of the Legislature to enact a fee-shifting provision applicable to all first-party insurance litigation is further evidence that the Legislature has as a matter of public policy deemed it unnecessary to shift fees in all such litigation.

X.

Finally, the policy reasons set forth in the majority report are no different from any of the policy arguments made in 1983 and again in 1985 by proponents of similar amendments to R. 4:42-9(a)(6). As noted above, the Supreme Court declined to amend the rule. To ask the Supreme Court now to reconsider its prior determinations not to amend R. 4:42-9(a)(6) deprecates the efforts of both the Civil Practice Committee in 1983 and the King Committee in 1985.

* * *

It is respectfully submitted that the majority report fails to set forth sufficient justification for the Supreme Court to reconsider its prior determinations not to amend R.

4:42-9(a)(6).[36]

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[36]In the event the Supreme Court is inclined to amend R. 4:42-9(a)(6), it must be noted that the proposed amendment is both overbroad and underinclusive. As proposed, the amendment would apply to all first-party insurers. Some of the policy rationales set forth in the majority report do not justify the shifting of counsel fees in situations involving moderate and large-sized corporate insureds or the reinsurance market. [And, as noted in the King Committee Report, p. 4 at ¶7:

> The Committee is absolutely convinced beyond any doubt that if the counsel fee rule is expanded by the Court, surety contracts should not be included. Any fault in surety situations is attributable to the always defaulting and frequently bankrupt principal.]

(Note: Subsequent to the circulation of the majority and minority reports, the Civil Practice Committee continued to debate the precise language of R. 4:42-9(a)(6). At its October 3, 1989 and November 1, 1989 meetings, the Committee agreed not to extend R. 4:42-9(a)(6) to surety bonds, including performance and indemnity bonds. See 10 Appleman & Appleman, Insurance Law and Practice, §5771 (1981 rev.); Fengya v. Fengya, 156 N.J. Super. 340 (App. Div. 1978).)

Additionally, an insurance company should not be liable for counsel fees in situations where two individuals lay claim to the proceeds of an insurance policy and the insurer deposits the proceeds with the court.

As to underinclusiveness, the proposed amendment to R. 4:42-9(a)(6) fails to provide recompense to insurers who are confronted with arbitrary or frivolous claims. Principles of equity and the elimination of arbitrary litigation postures -- justifications set forth in the majority report -- would similarly be furthered if R. 4:42-9(a)(6) were available to insurers. See Enright v. Lubow, 215 N.J. Super. 306, 315 (App. Div.) ("it does not seem fair to assume, as does the rule [R.4:42-11(b)], that only defendants or their insurers are responsible for unreasonable failures of litigants to arrive at pretrial settlements", quoting Busik v. Levine, 63 N.J. 351, 383-84 (1973) (Conford, P.J.A.D., t/a, dissenting)), certif. den., 108 N.J. 193 (1987). As observed in the King Committee Report, p. 4 at ¶8:

> There is substantial sentiment on the Committee to make any expansion of the scope

(continued...)

[36](...continued)
of counsel fees mutual, if there must be an expansion. If the insurance company wins it may recover counsel fees, which recovery if effected in fact will be incorporated into the future rate structure for the benefit of all rate-paying insureds supporting the premium base.

Moreover, the availability of R. 4:42-9(a)(6) to insurers would enable insurers to litigate smaller, unjustifiable claims which, in the past, would have been settled for nuisance value. Eliminations of such settlements, coupled with the recovery of counsel fees, would protect the premium-paying public.

Finally, any amendment to R. 4:42-9(a)(6) should provide that the rule does not apply in circumstances where the insurer is entitled to recover under R. 4:58-3 (Consequences of Non-acceptance of Offer [of Judgment] of Party Not a Claimant).

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

MICHAEL PATRICK KING
JUDGE

9 TANNER STREET
HADDONFIELD, NEW JERSEY 08033

September 17, 1985

Chief Justice Robert N. Wilentz
313 State Street
Perth Amboy, New Jersey 08861

Re: Committee Dealing with
the Award of Counsel Fees
on Insurance Claims

Dear Chief Justice:

We have been asked to evaluate the advisability of extending the right of an insured to recover counsel fees in successful litigation against insurance carriers on claims under policies other than liability and indemnity policies. Counsel fees are available to the insured in claims under liability and indemnity insurance policies under existing court rule R. 4:42-9(a); counsel fees are recoverable under Personal Injury Protection (PIP) coverage by case law. See Cirelli v. The Ohio Casualty Ins. Co., 72 N.J. 380 (1977). The issue is basically whether the rule should be amended to permit recovery of counsel fees on all "first-party" claims against insurance carriers.

We have reached these conclusions:

1. This is an area where the Legislature has been reasonably active. A number of extant New Jersey state statutes, about 75, permit the recovery of counsel fees for successful claimants. See Appendix A. In view of this legislative activity we cannot conclude that this is a subject traditionally reserved to the courts. On the federal level, statutes also permit the recovery of counsel fees. E.g., 42 U.S.C.A. §1988; Pulliam v. Allen, 80 L.Ed. 2d 565 (1984); Singer v. State, 95 N.J. 487 (1984). One of the committee's sentiments is that the award of counsel fees essentially as a component of money damages may well be a legislative or substantive matter and that the Court should not subsume a substantive role under the rule-making power, especially where the Legislature has acted extensively on the subject of counsel fees in other types of actions. Our research discloses that many states handle counsel fees on insurance claims by statute. See Appendix B.

2. The certain result of expanding the award of counsel fees to all or most first-party insurance claims will be to effect an increase in premiums. Our State already is known for high insurance premiums, perhaps the highest in the country by recent estimates. An extension of the award of counsel fees may well also contribute to making our State an even less attractive market for the insurance industry. We also suspect that an expansion of the award of counsel fees may generate more litigation in what many already believe is an over-litigious society. Claims which now settle short of suit may be more likely to go into suit with the prospect of enhanced recovery.

3. We recognize that this subject is very colored with partisan bias. The claimants' bar, to a man and a woman, want to recover counsel fees; the defense bar and the insurance industry are to the contrary, naturally. There is really no middle ground. But we can honestly report no real ground swell in favor of expanding counsel fee awards. Perhaps this is a candid recognition that companies generally are handling coverage claims in a legitimate matter and do not need to be "encouraged" or pushed into a more generous decisional posture on these matters by the threat of counsel fee awards. Many claims against companies for first-party benefits are also a question of "how much," rather than whether or not coverage exists, e.g., fire, water damage, business interruptions, theft of personal property, medical bills, etc. These tend to be negotiated and settled like any other commercial claims and it often would be difficult to decide if claimants were "successful" prevailing litigants and truly entitled to counsel fees. Just because some recovery is made should not automatically entitle a claimant to recover legal fees.

4. The insurance industry is already very strictly regulated by statute and the executive branch. More public attention is focused on this industry than on any other save perhaps the energy industry. There seems to be no sentiment on the committee that any more strict regulations are necessary from the judiciary. Nor does there appear to be a need for expansion of counsel fees to encourage insureds and their lawyers to pursue legitimate claims. The legal industry seems to be most adroit at

pursuing claims in the present environment and probably needs no more encouragement in that respect.

5. Insurance carriers are presently responsible under N.J.S.A. 17:29B-4, the Unfair Claims Practices Act, which imposes penalties for failure to fulfill policy obligations. Persistent violations can lead to loss of license to do business. See Appendix C.

6. Most frequently there really is no fiduciary relationship between an insurer and an insured, especially on first-party claims. The relationship may well be totally adversarial from the outset, as in any commercial claims atmosphere.

7. The Committee is absolutely convinced beyond any doubt that if the counsel fee rule is expanded by the Court, surety contracts should not be included. Any fault in surety situations is attributable to the always defaulting and frequently bankrupt principal. There is certainly no fiduciary context here, either with the defaulting debtor or contractor or the totally adversarial claimant.

8. There is substantial sentiment on the Committee to make any expansion of the scope of counsel fees mutual, if there must be an expansion. If the insurance company wins it may recover counsel fees, which recovery if effected in fact will be incorporated into the future rate structure for the benefit of all rate-paying insureds supporting the premium base.

9. Expanding counsel fees for insurance claims may well generate forum shopping in our State and federal courts. Commercial claims usually advanced in other forums may drift our way

from nearby commercial centers such as Philadelphia, Wilmington, New York, Baltimore and Connecticut.

10. One member of the Committee thought that the discretionary award of counsel fees in all cases could be left to the judge. Other members thought that a rule of discretion alone would be too subject to arbitrary exercise by a judge, i.e., forcing a party to settle by threat of an award, and would be an erratic and uncertain tool at best. It would probably take years to develop a sound body of case law under a discretionary rule. Generally, recovery would probably depend "on the length of the Chancellor's foot" or even more subjective criteria.

11. We also wish to point up that liability and indemnity policies include a promise to defend as well as to pay. Frequently the promise to defend is more valuable than the promise to pay, especially if the claim is not meritorious. There is more basis for justifying counsel fees incurred in enforcing the promise to defend than there is in a routine contract claim, where the insurer has not undertaken the fiduciary duty to defend as well as to pay and does not owe the utmost faith to its insured in deciding to either discharge that duty to defend or to decline it. See Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 492-496 (1974).

The majority sentiment of the Committee is that R. 4:42-9(a)(6) not be expanded. Most states handle this situation through legislation, not court rule. Where there may be a substantial cost increase to the public, the Legislature may well

be the appropriate forum to consider this area. One member of the Committee recommends a rule of discretion in all cases except surety situations.

Respectfully submitted,

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Chairman, Committee on
Counsel Fees
Delia V. Edoga, Esquire
Arthur S. Goldstein, Esquire
Leonard Meyerson, Esquire
Francis H. Wolff, Esquire

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New Jersey Statutes Permitting Counsel Fees

1. Affidavit of selling officer at judicial or statutory sale of real estate, 2A:61-9
2. Campaign contributions and expenditures, governor candidates, legal expenses, 19:44A-35
3. Casino conservatorship, 5:12-130.3
4. Child custody jurisdiction, 2A:34-36, 2A:34-43
5. Civil rights, 10:5-27.1
6. Consumer contracts, 56:12-3, 56:12-4, 56:12-12
   Warranty and notice violations, 56:12-17
7. Consumer credit transactions, billing errors, 56:11-7
8. Consumer fraud, damages, 56:8-19
9. Costs, generally, ante
10. County improvement authorities, bond defaults, 40:37A-64
11. County park police, defense expenses, 40:37-11.5
12. Credit unions, collection of loans, 17:13-27
13. Crew leaders, seasonal farm workers, retaliatory actions, 34:8A-10.1
14. Criminal injuries compensation, 52:4B-8
15. Discrimination, 10:5-27.1
    Mortgage loans, 17:16F-7
16. Discrimination in place of public accommodation, etc., 10:1-7
17. Documents of title, lost, stolen or destroyed, bailee, 12A:7-601
18. Domestic violence actions, 2C:25-13
19. Door-to-Door Home Repair Sales Act of 1968, 17:16C-101
20. Elections, governor candidates, campaign contributions and expenditures, 19:44A-35

21. Electronic surveillance, actions to recover damages for, 2A:156A-24

22. Emergency fuel oil delivery, landlords, penalty enforcement proceedings, 26:3-31.8

23. Eminent domain, 20:3-26

24. Environmental protection actions, award to prevailing party, 2A:35A-10

26. Escheat
    Attorney who prosecutes, 2A:37-21
    Unclaimed bank deposits, 17:9-26

27. Forcible entry and detainer, recovery, 2A:39-8

28. Franchise Practices Act, 56:10-10

29. Fraudulent eviction of tenant, action for damages, 2A:18-61.6

30. Governor candidates, legal expenses, campaign contributions and expenditures, 19:44A-35

31. Home repair and improvement financing, default in contract, 17:16C-71

32. Imposition against parties, 2A:37-23

33. Land sales full disclosure, 45:15-16.23

34. Landlord and tenant,
    Emergency fuel oil delivery, penalty enforcement proceedings, 26:3-31-8
    Fraudulent eviction, actions for damages, 2A:18-61.6

35. Lien, 2A:13-5

36. Mechanics liens, discharge of notice of intentions, 2A:44-116

37. Medical assistance and health services, actions against third parties, 30:4D-7.1

38. Monopolies and unfair trade, 56:9-10

39. Mortgages
    Cancellation, 46:18-11.4
    Discrimination, 17:16F-7

40. Motor vehicle franchise location hearings, 56:10-24

41. Murder prosecution, compensation of counsel assigned in, 2A:163-1

42. Nursing homes or hospitals, residential actions against home for rights violations, 30:13-8

43. Planned real estate development, 45:22A-37

44. Port Authority of New York and New Jersey, condemnation, 32:1-35.15

45. Prerogative writs, proceedings in lieu of, records, inspection, 47:1A-4

46. Public guardians, veterans, 3B:13-31

47. Recovery, 2A:13-6

48. Residential facilities violations of residents rights, 55:13B-21

49. Retail installment sales,
Actions and proceedings, 17:16C-61.7
Default, 17:16C-42

50. Retirement community full disclosure actions, 45:22A-16

51. School officers and employees,
Actions against,
Damages, indemnity, 18A:60-4, 18A:60-5
Criminal actions, 18A:16-6.1
Indemnity, 18A:16-6

52. Secondary mortgage loan, 17:11A-46
Collection of note, 17:11A-53

53. Secured transactions, collateral,
Disposition after default, 12A:9-504
Redeemed after default, 12A:9-506

54. Security deposits, landlord and tenant, actions to return, 46:8-21.1

55. Security for payment, stock shareholder or voting trust certificate holder, action, 14A:3-6

56. Service of bill upon client prerequisite to action, 2A:13-6

57. Soliciting suits on contingent fee basis, unlicensed persons, 2A:170-83

58. Supreme court appointment, constitutionality challenge of acts, laws or statutes, 2A:1-11

59. Tax lien foreclosures, 54:5-97.1

60. Temporary disability benefit law, review of refusal of claim, 43:21-51

61. Unsatisfied claim and judgment law, fees in defending actions or claims under law, 39:6-67

62. Wage discrimination by reason of sex, recovery in action for, 34:11-56.8

63. Wage rates on public works, 34:11-56.40

64. Wiretapping or electronic surveillance, actions to recover damages for, 2A:156A-24

65. Council on armed forces and veterans affairs, 53:27H-51

66. Electronic Funds transfer, damages, 17:16K-6

67. Hackensack meadowlands food distribution center, collections, 13:17A-33

68. Insurance fraud, 17:33A-5

69. Insurance fraud prevention statute violations, 17:33A-7

70. Labor and employment, hazardous substances statute, rule, or regulation violations, 34:5A-23

71. Motor vehicle insurance, no-fault insurance, computation of contingent fees, 39:6A-4.3

72. Motor vehicles,
    Arbitration, tort claims, 39:6A-28
    Trial de novo, arbitrated tort claims, 39:6A-34

73. Nonprofit corporations and associations, members actions, 15A:3-5

74. Paternity proceedings, 9:17-54

STATUTES PROVIDING FOR RECOVERY OF ATTORNEY'S FEES

N.J.S.A. 2A:34-43 - violation of out-of-state custody decrees.

N.J.S.A. 2A:39-8 - Attorney fees recoverable in an action by unlawful entry and detainer pursuant to the 1971 Amendment.

N.J.S.A. 2A:44-116 - attorneys fees are available when there is a failure to discharge upon request after payment of mechanics notice of intention.

N.J.S.A. 10:5-27.1 - prevailing party may get attorney fees in an action brought under the law against discrimination.

N.J.S.A. 11:16-2 - attorney fees recoverable in the amount of 5% in an action brought by taxpayers to recover unauthorized payments by governmental officials.

N.J.S.A. 11:22-22 - attorney fees may be recoverable in action against government official for wrongful disbursement of public funds of 5% of the amount recovered.

N.J.S.A. 12A:9-504 - under the UCC a secured party has a right to attorney fees incurred on disposing of secured property.

N.J.S.A. 12A:9-506 - under the UCC a debtor must pay reasonable attorney fees upon redeeming of collateral.

N.J.S.A. 14A:3-6 - provides for attorney fees for defendants in share holder action.

N.J.S.A. 17:16C-42 - fees are allowed in a suit under delinquent installment account (20% of first $500; 10% after that amount).

N.J.S.A. 16C-71 - reasonable attorney fees allowed where recovered on a delinquent home-repair contract.

N.J.S.A. 16F-7 - under a 1977 act a violation of discrimination in mortgage lending permits recovery of reasonable attorney fees.

N.J.S.A. 22A:2-42 - provides for the recovery of attorney fees in the District Court, now the Special Part.

N.J.S.A. 26:3-31.8 - as of 1980 a landlord is liable for attorney fees incurred by entities seeking relief under the Emergency Fuel Oil Delivery Act.

N.J.S.A. 30:13-8 - attorney fees recoverable in a suit for violation of the Nursing Home Bill of Rights of 1976.

N.J.S.A. 34:8A-10.1 - attorney fees recoverable for seasonal farm workers in action against crew leaders for wrongful retaliatory conduct, adopted in 1975.

N.J.S.A. 34:11-56.8 - fees recoverable in an action for violation of discriminatory wage legislation.

N.J.S.A. 34:11-56.40 - fees recoverable in an action for violation of prevail wage laws.

N.J.S.A. 34:11-56A.25 - fees recoverable for violation of minimum wage laws.

N.J.S.A. 34:15-64 - fees recoverable in workers' compensation action.

N.J.S.A. 40:14A-21 - fees recoverable in action for unpaid sewer charges.

N.J.S.A. 40:14B-46 - fees recoverable in action by Municipal Utilities Authority for unpaid charges.

N.J.S.A. 40:66A-18 - fees recoverable in action by Incinerator Authority for unpaid charges.

N.J.S.A. 40:66A-51(E) - fees recoverable for unpaid service charges due under the Solid Waste Management Authority.

N.J.S.A. 40:68A-18 - fees recoverable in action by a Port Authority for unpaid service fee.

N.J.S.A. 40:154-1(17) - fees recoverable on action for collection of Sewer District charges.

N.J.S.A. 43:21-51 - attorney fees may be awarded up to 20% of an award made under the Unemployment Compensation Act.

N.J.S.A. 45:15-16.23(a) - attorney fees recoverable in an action under the Land Sales Full Disclosure Act of 1975.

N.J.S.A. 45:22A-16(b) - recovery of fees in action under the Retirement Community Full Disclosure Act of 1969.

N.J.S.A 45:22A-37 - prevailing party gets attorney fees under the Planned Real Real Estate Development Full Disclosure Act of 1977.

N.J.S.A. 46:8-21.1 - attorney fees recoverable in a suit for return of security deposit.

N.J.S.A. 46:8B-21 - attorney fees recoverable where a Condominium Association sues for fees or assessments owed by member of the Association under the Condominium Act of 1969.

N.J.S.A. 46:8C-3 - owner of mobile home may recover attorney fees in action to protect seller and owner of mobile homes under the Mobile Homes Park Act of 1974.

N.J.S.A. 46:18-11.4 - mortgagor may recover attorney fees for wrongful procedures in cancellation under an act passed in 1975.

N.J.S.A. 48:13A-10 - attorney fees recoverable in an action for illegal monopoly as described by the Solid Waste Utility Control Act of 1970.

N.J.S.A. 49:5-15 - attorney fees recoverable under the Corporation Takeover Bid Disclosure Law of 1977.

N.J.S.A. 55:13B-21 - right to recover attorney fees in successful action under the Rooming and Boarding House Act of 1979.

N.J.S.A. 56:6-25 - recovery of attorney fees permitted for violation of Unfair Motor Fuels Practices Act of 1953.

N.J.S.A. 56:7-32 - attorney fees recoverable under the Unfair Cigarette Sales Act of 1952.

N.J.S.A. 56:8-19 - attorney fees recoverable under the Consumer Fraud Act of 1967.

N.J.S.A. 56:9-10 - plaintiff may recover attorney fees if a permanent injunction is issued under the Anti-Trust Act of 1970.

N.J.S.A. 56:9-12 - recovery of attorney fees if damages recovered for violation of Anti-Trust Act of 1970.

N.J.S.A. 56:10-10 - attorney fees recoverable to franchisee under the Franchise Practices Act of 1971.

N.J.S.A. 56:12-3 - a consumer may recover attorney fees from a seller or insurer for failure to comply with the Consumer Contract Plan Language Act.

N.J.S.A. 58:10-23.11N- attorney fees recoverable under the Spill Compensation and Control Act where a party liable for discharge unsuccessful upon judicial review.

N.J.S.A. 59:9-5(c) - the Tort Claims Act permits award of attorney fees where a claimant is successful in suit where damages not awarded for pain and suffering.

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February 15, 1985

Honorable Michael Patrick King
Judge of the Superior Court of
New Jersey, Appellate Division
9 Tanner Street
Haddonfield, New Jersey 08033

Re: Committee Dealing with the Award of Counsel Fees

Dear Judge King:

As you had requested, I have reviewed the state of the law in several jurisdictions other than New Jersey regarding circumstances under which attorney's fees may be awarded to insureds in actions against their insurers. Some states compel an award where the refusal of the insurer to pay is "unreasonable" or in "bad faith." Others require a showing that the insured has been "successful" in recovering from the insurer, although there has been much debate about what meaning should be given to the term "successful." Some states even permit awarding counsel fees to an insurer where the claim is fraudulent or unreasonable. A review of some specific state statutory provisions on the matter is instructive.

Pennsylvania provides for a reasonable attorney's fee where an overdue no-fault benefit is paid to a claimant after the claimant has notified the insurer that the claimant has retained counsel. If a claimant sues his insurer for no-fault benefits and the court determines that there was no reasonable foundation for refusing to pay such claim, then the claimant is entitled to a reasonable attorney's fee. Where the claimant sues the insurer

and the court determines that the claim was either fraudulent or lacking a reasonable foundation, then the insurer is awarded a reasonable attorney's fee. 40 P.S. § 1009.107.

In New York, attorney's fees may be awarded against unauthorized foreign or alien insurers where there has been a vexatious refusal to make payment. Consol. Laws of New York § 59a(4).

California law provides that claims under fire insurance policies must be paid within 30 days of agreement as to the amount, and the insurer is responsible for the counsel fees of its insured in an action to recover such amount. West's Ann. Cal. Ins. Code § 2057.

In Michigan, the isurer will be charged with attorney's fees where the insurer has unreasonably refused to pay the claim or unreasonably delayed in making proper payment. The insurer is entitled to such a fee if the claim was in some respect fraudulent or so excessive as to have no reasonable foundation. Mich. Stat. Ann. § 24.13148.

Illinois permits counsel fees where there is an action by or against an insurer on the issue of the insurer's liability or the amount due thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that the action or the delay is "vexatious and unreasonable." The amount awarded is limited to the lesser of: (1) 25% of the amount which the court or jury finds such party is entitled to recover against the insurer (exclusive of all costs); (2) $5,000; (3) the excess of the amount the party is found to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement prior to the action. S.H.A. ch. 73, § 767.

In Massachusetts, courts will assess attorney's fees where it is found on motion that all or substantially all of the claims, defenses, set-offs or counterclaims are wholly insubstantial, frivolous and not advanced in good faith. Mass. Stat. Ann. ch. 175, § 1130.

Delaware allows attorney's fees pursuant to a property insurance claim. Del. Code Ann. § 4102.

In Texas, attorney's fees are awarded with respect to claims under life, accident and health insurance policies. Vernon's Ann. Civ. St., art. 3.62.

Maine provides for a reasonable attorney's fees for advising and representing a claimant on an overdue claim or action for an overdue claim if the overdue benefits are recovered in an action against the insurer or if such benefits are paid after receipt of notice of the attorney's representation. 24A M.R.S.A. § 2436.

Arkansas awards attorney's fees with respect to life, fire, health, accident and liability insurance. Ark. Stat. Ann. § 66-3239.

Florida law awards attorney's fees to the "prevailing party" in civil actions where there was no reasonable claim by the losing party. Fla. Stat. Ann. § 627.428.

In Georgia, a bad faith refusal to pay a claim within 60 days after demand has been made will result in attorney's fees liability for the insurer. The amount of the fee is fixed by a jury trial. Ga. Code Ann. 33-4-6.

Idaho provides for attorney's fees to be awarded against any insurer issuing any policy, certificate or contract of insurance, surety, guaranty or indemnity. An award will be made where the insurer fails to pay a claim within 30 days of proof of loss and the amount is subsequently determined to be due by a court. No fee may be awarded if, before the action, the insurer tenders to its insured the full amount justly due and deposits that amount in court. Certain restrictions apply in surety situations. I.C. § 41-1839.

In Louisiana, attorney's fees may be assessed as a penalty if an insurer does not pay a claimant benefits owed within 30 days of receipt of proof of a claim with respect to health and accident insurance, or within 60 days with respect to fire, theft and automobile insurance. LSA-R.S. 22:658.

Significantly, none of the states whose laws were reviewed specifically provide for an award of counsel fees against the surety. It would appear that the rationale which

supports the imposition of such liability in an action by an insured against its insurer is not applicable in the surety situation inasmuch as there is no fiduciary relationship created by reason of the issuance of a bond. Generally, the surety is called upon to perform and/or make payments to third-party claimants as a result of a default by the principal.

Providing for the award of counsel fees in this context against a surety would in my view result in forum shopping by bond claimants who would now seek to litigate in New Jersey. The companies who would be most susceptible to such litigation are the smaller New Jersey surety companies who are least able to accept the additional financial burden which would be created by reason of the proposed rule change.

I have enclosed Schedule A which lists the citations of the statutes referred to above. I have also enclosed a Schedule B which lists the statutes in New Jersey which provide for the award of counsel fees; I believe this list encompasses most, if not all, such statutes. Last but not least, I am enclosing herewith my responses to the questionnaire which you previously submitted to me.

I apologize for being unable to attend Thursday's meeting. I would be happy to provide whatever further information or assistance you deem appropriate regarding the work of the Committee.

Respectfully submitted,

ARTHUR S. GOLDSTEIN

ASG/job
Enclosures

SCHEDULE A

1.	Arkansas	Ark. Stat. Ann. § 66-3239
2.	California	West's Ann. Cal. Ins. Code § 2057
3.	Delaware	Del. Code Ann. 18 § 4102
4.	Florda	Fla. Stat. Ann. § 627.428
5.	Georgia	Ga. Code Ann. 33-4-6
6.	Idaho	I.C. § 41-1839
7.	Illinois	S.H.A. ch. 73, § 767
8.	Louisiana	LSA-R.S. 22:658
9.	Maine	24A M.R.S.A. § 2436
10.	Massachusetts	Mass. Stat. Ann. ch. 175, §1130
11.	Michigan	Mich. Stat. Ann. § 24.13148
12.	New York	Consol. Laws of New York § 59a(4)
13.	Pennsylvania	40 P.S. § 1009.107
14.	Texas	Vernon's Ann. Civ. St. art. 3.62

STATE OF NEW JERSEY
DEPARTMENT OF INSURANCE
W. MORGAN SHUMAKE
EXECUTIVE DIRECTOR
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March 19, 1984

The Honorable Michael Patrick King, J.A.D.
Superior Court of New Jersey
Appellate Division
9 Tanner Street
Haddonfield, New Jersey 08033

Dear Judge King:

In response to your inquiry, I am forwarding herewith copies of our Unfair Claims Settlement Practices regulation as adopted October 22, 1982.

Due to budgetary constraints, this regulation is presently enforced on a complaint basis. We do not have the staff to conduct a "market conduct review" which would entail an on-sight examination of New Jersey claims offices to evaluate their compliance.

I hope the attached information is helpful. I may be reached by telephone at (609) 984-2425. I had the pleasure of working closely with Bob Clifford as Deputy Commissioner for two years and I value his friendship.

Very truly yours,

W. Morgan Shumake

W. Morgan Shumake

mff

att.

[NOTE: The enclosure has been omitted. The full text of the Unfair Claims Settlement Practices Regulations is reprinted in N.J.A.C. 11:2-17.1 et seq.]

Report Of The Supreme Court's Committee On Civil Practice

(Continued from previous page)

182 N.J. Super. 328 (Law Div. 1981). A subcommittee was appointed to study this question and its report is attached at Appendix "C".

The committee concluded that a fee cannot be calculated in a matter involving a structured settlement unless the "value" of the structured settlement is known. The committee, therefore, recommends a rule which defines "value" as any cash payment made upon consummation of settlement plus the actual cost, to the party making the settlement, of the deferred payment (whether it be by annuity, or other similar vehicle), or the cost assigned to the deferred payment, if it is not actually purchased by the party making the settlement (as may be the case with an insurance carrier). The rule requires disclosure of these factors.

The recommended rule, containing amendments to the contingent fee percentage scale and including a structured settlement provision, is as follows:

1:21-7. Contingent Fees

(a) . . . no change

(b) . . . no change

(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

(1) [50%] 33 1/3 % on the first [$1,000] $250,000 recovered;

(2) [40%] 25% on the next [$2,000] $250,000 recovered; and

(3) 33 1/3% on the next $47,000 recovered;

(4) 25% on the next $50,000 recovered;

(5) 20% on the next $150,000 recovered;

(6) 10% on any amount recovered over $250,000; and

(7) where the amount recovered is for the benefit of a client who was an infant or incompetent when the contingent fee arrangement was made [and the matter is settled without trial], the foregoing limits shall apply, except that the fee on any amount recovered [up to $50,000] by settlement without trial shall not exceed 25%.

(d) . . . no change

(e) . . . no change

(f) . . . no change

(g) . . . no change

(h) Calculation of Fee in Structured Settlements. As used herein the term "structured settlement" refers to the payment of any settlement between the parties or judgment entered pursuant to a proceeding approved by the Court, the terms of which provide for the payment of the funds to be received by the plaintiff on an installment basis. For purposes of paragraph (c), the basis for calculation of a contingent fee shall be the present value of the structured settlement as herein defined. Present value shall consist of any cash payment made upon consummation of the settlement plus the actual cost to the party making the settlement of the deferred payment aspects thereof. In the event that the party paying the settlement does not purchase the deferred payment component, the actual cost thereof shall be the actual cost assigned by that party to that component. For further purposes of this rule the party making the settlement shall disclose to the party receiving the settlement its actual purchase cost and, if it does not purchase the deferred payment aspect of the settlement, the factors and assumptions used by it in assigning actual cost.

6. R. 2:6-1 (Appellant's Appendix)

The committee discussed a rule amendment recommended by the Criminal Practice Committee, which would require docket entries in the proceeding below to be included in the appendix on appeal. The committee agrees in principal with the recommendation and has no objection to the proposed rule, if limited to criminal cases. However, it feels that in civil matters the burden for supplying the docket entry listing should not necessarily fall on the attorneys. It may instead be accomplished on request from the Appellate Clerk of the Appellate Division to the Superior Court Clerk. The committee respectfully suggests that adoption of any rule amendment impacting on civil matters be deferred pending further considerations of 1) the burden such rule would place on lawyers 2) the delay in processing appeals such rule might cause and 3) the utility of the suggestion that supplying docket entries are of any use in civil proceedings.

Therefore, the committee recommends that if any rule is to be adopted it be limited to criminal proceedings as follows:

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

(a) Contents of Appendix. The appendix prepared by the appellant or jointly by the appellant and the respondent shall contain (1) in civil actions, the complete pretrial order, if any, and the pleadings; (2) in criminal, quasi-criminal or juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below; (3) the judgment, order or determination appealed from or sought to be reviewed or enforced; (4) the trial judge's charge to the jury, if at issue, and any opinion or statement of findings and conclusions; (5) the statement of proceedings in lieu of record made pursuant to R. 2:5-3(e); (6) the notice or notices of appeal; and (7) such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised.

(b) . . . no change

(c) . . . no change

(d) . . . no change

7. R. 2:12-5 (Deposit for Costs)

The committee reviewed and approved a suggestion made by the clerk of the Supreme Court that R. 2:12-5 be amended to raise the required deposit for costs for a petition for certification from $250 to $300. This increase will bring the figure in line with the deposit required by the Appellate Division. The recommended rule is as follows:

2:12-5. Deposit for Costs

In all civil actions, unless the petitioner has filed a supersedeas bond or made a deposit in lieu thereof pursuant to R. 2:5-2, he shall, within 30 days of the filing of the notice of petition for certification, deposit [$250] $300 with the clerk of the Supreme Court, to answer the costs on the petition, if denied, and the cost of the appeal if granted, but no deposit shall be required if the petitioner is a party exempted from making deposit by R. 2:5-2. Notice of deposit and dismissal for failure to make timely deposit shall be in accordance with R. 2:5-2.

8. Out-of State and Foreign Depositions

The committee recommends a proposed rule based on a suggestion from a member of the bar, which would set forth procedures for taking depositions outside New Jersey for use in an action here. Present rules do not adequately cover the subject. The committee concluded that the central questions which needed to be addressed were 1) the method by which attendance could be insured and 2) the method by which payment of expenses are to be set. The proposed rule clarifies present practice in that it permits out-of-state depositions on notice, by stipulation, or upon issuance of a commission or letters rogatory. A deposition on notice would insure attendance in a state having a rule or statute similar to New Jersey's which authorizes a court to issue a subpoena requiring appearance at depositions in aid of a foreign action. Further, a deposition on notice would be subject to judicial review where, as may frequently be the case, a protective order is sought. Where a commission or letter rogatory is obtained, process is available if the document is addressed to an out-of-state authority having subpoena power. The committee declined to specifically include in the rule any mechanism or formula for fixing the financial burden of taking the deposition. The payment of expenses shall be set according to "just terms". The committee, therefore, submits a proposed R. 4:11-5, as follows:

4:11-5. Depositions Outside the State

A deposition for use in an action in this state, either pending, not yet commenced, or pending appeal, may be taken outside this state either (a) on notice pursuant to R. 4:14-2, or, in the case of a foreign country, pursuant to R. 4:12-3; (b) in accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice; or (c) in any manner stipulated by the parties. Depositions within the United States taken on notice shall be taken before a person designated by R. 4:12-2. Commissions and letters rogatory shall be issued in accordance with R. 4:12-3. If the deposition is to be taken by stipulation, the person designated by the stipulation shall have the power by virtue of the designation to administer any necessary oath.

The committee further decided to amend R. 4:12-3, pertaining to depositions in foreign countries, to delete the requirement that a commission or letter rogatory be issued "only when necessary or convenient." The proposed rule is as follows:

4:12-3. In Foreign Countries

In a foreign country depositions shall be taken (a) on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or (b) before such person or officer as may be appointed by commission or under letters rogatory. A commission or letters rogatory shall be issued [only when necessary or convenient,] on application and notice, and on such terms and with such directions as are appropriate. Officers may be designated in notices or commissions either by name or descriptive title and letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)".

9. R. 4:42-9(a)(6) (Counsel fee — insurance or indemnity policy)

The committee recommends an amendment to the rule which would permit a counsel fee to be awarded to a successful claimant in an action on any insurance policy. The present rule expressly applies only to liability and indemnity policies. The recommended amendment would extend the rule to permit an award of counsel fees in an action brought by the insured or other claimant to obtain the direct benefits under any insurance policy including casualty, life, health, and indeed every kind of coverage. It would also apply to actions brought by principals and beneficiaries of surety bonds.

A notice to the bar was published in the Law Journal which set forth the proposed rule amendment. Numerous responses were received and reviewed by the committee. The chief concerns expressed by opponents of the proposed amendment are that it 1) unnecessarily expanded the rule, 2) was vague in not defining the term "successful" and 3) singled out the insurance industry for special treatment. At length, the committee debated the objections raised to the proposed amendment. It was decided that the rule was not overly broad and that a definition of the term "successful" should not be included in the rule. The committee concluded that since the award of counsel fees is discretionary these questions should be left to judicial determination on a case by case basis. The contention that the amendment unfairly singled out the insurance industry was rejected. It was felt that the industry constitutes a reasonable special category since the relationship between an insured and a carrier is fiduciary in nature. An insured relies upon his carrier to protect his interests and should be permitted to be reimbursed for fees expended to obtain the benefits provided by the policy.

The recommended rule is as follows:

4:42-9. Counsel Fees

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

(1) . . . no change

(2) . . . no change

(3) . . . no change

(4) . . . no change

(5) . . . no change

(6) In an action upon a [liability or indemnity] policy of insurance, or surety, in favor of a successful [claimant] insured, beneficiary, indemnitee.

(7) . . . no change

(8) . . . no change

(b) . . . no change

(c) . . . no change

(d) . . . no change

10. R. 4:46-6 (Counsel Fees — Sham Pleadings)

As it had the previous term, the committee considered if a rule was necessary to help prevent the filing of sham or harassing pleadings. Although a specific rule proposal was rejected by the committee last term, the matter was carried and a subcommittee appointed to study the problem. The subcomittee proposed a rule which would permit an award of counsel fees following trial if a summary judgment motion is made and defeated due to a bad faith assertion of sham factual contentions. The subcommittee report noted that there was reluctance to offer a broader rule proposal which would permit counsel fee awards in all cases of frivolous pleadings and motions. Some members spoke in favor of a broad rule, patterned after the English rule of awarding counsel fees. However, concern was expressed that a broad counsel fee rule may not be uniformly applied and may result in selective discrimination. Other members expressed a fear that misuse of a rule permitting counsel fees would have the effect of discouraging meritorious litigation. The consensus view was that the accessibility of the courts to all litigants must be maintained but that certain abuses should not be permitted. It was ultimately determined, therefore, that the subcommittee recommendation be adopted.

The recommended rule is as follows:

4:46-6. Attorneys' Fees

In an action tried to conclusion in which the prevailing party had made a pretrial motion for summary judgment or partial summary judgment which was denied, the court may, on motion, award counsel fees to the prevailing party if it finds that the denial of the motion was based on a factual contention raised in bad faith by the party opposing the motion with knowledge that it was a palpable sham or predicated on facts known or which should have been known by him to be false. The motion shall be made to the trial judge and shall be decided on the basis of the record made in the summary judgment motion and the trial of the cause. The award of counsel fees shall be limited to those legal services rendered on the motion for summary judgment and for such subsequent services as were compelled by its denial.

11. R. 4:59-1(d)/R. 1:6-2 (Wage Execution)

The committee discussed an inquiry from a member of the bar concerning the use of R. 1:6-2 motion procedure in obtaining wage executions pursuant to R. 4:59-1(d). The committee decided, following consultation with the District Court Committee, that applications for wage execution should not be treated as other motions and that R. 1:6-2 was inapplicable. It was concluded that an application for a wage execution was a distinct type of proceeding not in the nature of a motion. The use of R. 1:6-2, while an expeditious way to handle applications, was criticized as not affording a debtor either his absolute right to be heard or the other protections available under R. 4:59-1. The consensus view of the committee was that applications for wage execution should be sought only by way of R. 4:59-1. A suggestion to amend paragraph (d)(4) of the rule to reflect the current practice was, however, approved. The recommended rule would require that all parties receive notice to the hearing, as follows:

4:59-1. Execution

(a) . . . no change

(b) . . . no change

(c) . . . no change

(d) Wage Excutions; Notice, Order, Hearing. Proceedings for the issuance of an execution against the wages, debts, earnings, salary, income from trust funds or profits of a judgment debtor shall be on notice to him. The notice of wage execution shall state (1) that the application will be made for an order directing a wage execution to be served upon the defendant's named employer, (2) the limitations prescribed by 15 U.S.C.A. §1671-1677, inclusive and N.J.S. 2A:17-50 et seq. and N.J.S. 2A:17-57 et seq. on the amount of defendant's salary which may be levied upon, (3) that defendant may notify the county clerk and the plaintiff in writing within 10 days after service of the notice of his reasons why the order should not be entered; and (4) if defendant so notifies the clerk, the application will be set down for hearing of which [defendant] the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course.

(e) . . . no change

(f) . . . no change

(Continued on next page)

EXHIBIT C

N.J.S.A. 2A:15-59.1.

a. A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defense of the nonprevailing person was frivolous.

b. In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:

(1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or

(2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

c. A party seeking an award under this section shall make application to the court which heard the matter. The application shall be supported by an affidavit stating in detail:

(1) The nature of the services rendered, the responsibility assumed, the results obtained, the amount of time spent by the attorney, any particular novelty or difficulty, the time spent and services rendered by secretaries and staff, other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, an itemization of the disbursements for which reimbursement is sought, and any other factors relevant in evaluating fees and costs; and

(2) How much has been paid to the attorney and what provision, if any, has been made for the payment of these fees in the future.

EXHIBIT D

N.J.S.A. 17B:30-13.1. Unfair claim settlement practices.

No person shall engage in unfair claim settlement practices in this State. Unfair claim settlement practices which shall be unfair practices as defined in N.J.S. 17B:30-2, shall include the following practices:

Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;

c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;

d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;

e. Failing to affirm or deny coverage of claims within a reasonable time after proof of loss statements have been completed;

f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear;

g. Compelling insureds to institute litigation to recover amounts due under an insurance policy by offering substantially less than the amounts ultimately recovered in actions brought by such insureds;

h. Attempting to settle a claim for less than the amount to which a reasonable man would have believed he was entitled by reference to written or printed advertising material accompanying or made part of an application;

i. Attempting to settle claims on the basis of an application which was altered without notice to, or knowledge or consent of the insured;

j. Making claims payments to insureds or beneficiaries not accompanied by statement setting forth the coverage under which the payments are being made;

k. Making known to insureds or claimants a policy of appealing from arbitration awards in favor of insureds or claimants for the purpose of compelling them to accept settlements or compromises less than the amount awarded in arbitration;

l. Delaying the investigation or payment of claims by requiring an insured, claimant or the physician of either to submit a preliminary claim report and then requiring the subsequent submission of formal proof of loss forms, both of which submissions contain substantially the same information;

m. Failing to promptly settle claims, where liability has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage;

n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

EXHIBIT E

NEW JERSEY STATUTES PERMITTING THE AWARD OF COUNSEL FEES TO A PREVAILING PARTY OR FROM A FUND

NOTE: References herein are to the New Jersey Statutes Annotated. Those statutes that were referred to in Appendix A to the King Committee Report are marked with asterisks.

1. 1:7-7 (applications for judicial annulment of laws or joint resolutions)

*2. 2A:1-11 (actions involving the constitutionality or validity of certain statutes)

3. 2A:15-53 (actions for injunctions in labor disputes)

4. 2A:15-59.1 (New Jersey's "Rule 11")

[4A. 2A:15-85 (actions to recover unclaimed deposits)][1]

5. 2A:17-56.12 (actions involving employees discharged because of wage executions authorized by the Support Enforcement Act)

6. 2A:18-61.1e (actions for violations of the Anti-Eviction Act)

*7. 2A:18-61.6(a)-(d) (actions for violations of the Anti-Eviction Act)

8. 2A:23A-7(a)-(b) (actions involving summary reviews under the ADR Act)

9. 2A:23A-23 (offers of judgments under the personal injury arbitration law)

10. 2A:23A-29 (trials de novo under the personal injury arbitration law)

11. 2A:34-23 (pendente lite and final awards of counsel fees in matrimonial actions)

12. 2A:34-35(g) (actions instituted in inconvenient forums, under the Uniform Child Custody Jurisdiction Act)

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[1] **Repealed by L.1989, c.58, §1.**

*13. 2A:34-36(c) (actions under the Uniform Child Custody Jurisdiction Act)

*14. 2A:34-43(b) (actions under the Uniform Child Custody Jurisdiction Act)

*15. 2A:35A-10(a) (actions under the Environmental Rights Act)

[*16. 2A:37-21 (proceedings under the Escheat Act)][2]

[*17. 2A:37-23 (proceedings under the Escheat Act)][3]

18. 2A:38A-3 (actions under the computer security law)

*19. 2A:39-8 (actions arising from unlawful entry and detainer)

20. 2A:43A-1 (actions under the library theft law)

*21. 2A:44-116 (actions for the discharge of a mechanic's notice of intention)

22. 2A:73B-3(b) (actions under the grand jury secrecy law)

23. 2A:84A-21.8 (actions involving subpoenas served on newspersons)

24. 2A:84A-21.11(d) (actions arising from illegal searches and seizures of the news media)

*25. 2A:156A-24(c) (actions for violations of the Wiretapping and Electronic Surveillance Control Act)

25A. 2C:20-8(k) (restitution to vendors by persons guilty of theft of services)[4]

26. 2C:20-20(a) (actions arising from criminal fencing)

*27. 2C:25-13(b)(6) (actions under the Prevention of Domestic Violence Act)

28. 2C:41-4(c) (actions under New Jersey's "RICO" law)

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[2]Repealed by L.1989, c.58, §1.

[3]Repealed by L.1989, c.58, §1.

[4]Added by L.1989, c.112, §1.

*29. 3B:13-31 (proceedings involving public guardians of incompetent veterans)

30. 3B:18-6 (proceedings involving absentees)

31. 4:8-30 (actions under the apple and peach tree trueness law)

32. 4:13-26.1 (actions under the agricultural cooperative marketing associations law)

33. 4:20-8 (actions pertaining to partition fences)

34. 5:12-127(c) (actions under the Casino Control Act)

*35. 5:12-130.3 (proceedings involving conservatorships under the Casino Control Act)

*36. 9:17-54 (actions under the Parentage Act)

*37. 10:1-7 (actions under the places of public accommodation discrimination law)

*38. 10:5-27.1 (actions under the Law Against Discrimination)

39. 11A:2-22 (actions under the Civil Service Act)

40. 11A:10-5 (actions under the Civil Service Act to recover unauthorized payments)

*41. 12A:7-601(1) (actions under the U.C.C. pertaining to lost or missing documents of title)

42. 13:1E-71 (proceedings involving conservatorships under the Major Hazardous Waste Facilities Siting Act)

43. 13:17A-21(d) (actions by trustees under the Hackensack Meadowlands Food Distribution Center Commission Law)

*44. 13:17A-33 (actions by the commission under the Hackensack Meadowlands Food Distribution Center Commission Law)

*45. 14A:3-6(2)-(3) (shareholders' derivative suits)

46. 14A:11-10 (actions concerning the rights of dissenting shareholders)

47. 14A:12-7(8)(d) (actions concerning the oppression of minority shareholders)

48. 14A:12-7(10) (actions concerning the involuntary dissolution of corporations)

49. 14A:14-20 (proceedings involving corporate receiverships)

*50. 15A:3-5(b)-(c) (shareholders' derivative suits, nonprofit corporations)

51. 15A:12-12(i) (actions concerning the involuntary dissolution of nonprofit corporations)

52. 15A:14-20 (proceedings involving corporate (nonprofit) receiverships)

53. 17:3B-14 (actions involving revolving credit plans under the Market Rate Consumer Loan Act)

54. 17:3B-24 (actions involving closed end credit agreements under the Market Rate Consumer Loan Act)

55. 17:9A-167 (actions concerning the reorganization of banks under the Banking Act)

56. 17:9A-368 (actions concerning the rights of dissenting stockholders of banks)

57. 17:13-104(b) (actions involving credit union loans under the Credit Union Act)

58. 17:13-119 (proceedings involving conservatorships under the Credit Union Act)

59. 17:16C-50 (actions by settlers and finance companies under the Retail Installment Sales Act)

*60. 17:16C-61.7 (actions by buyers under the Retail Installment Sales Act)

61. 17:16C-70 (actions by home repair contractors under the Home Repair Financing Act)

*62. 17:16C-101 (actions by owners under the Door-to-Door Home Repair Sales Act)

*63. 17:16F-7 (actions under the discrimination in mortgage lending law)

*64. 17:16K-6 (actions under the Electronic Fund Transfer Privacy Act)

65. 17:23A-20(c) (actions against insurance institutions, agents, or insurance-support groups under the information practices law)

*66. 17:33A-5(a) (actions by the Commissioner of Insurance against violators of the Insurance Fraud Prevention Act)

*67. 17:33A-7(a), (d) (actions by insurers and the Commissioner of Insurance, if the Commissioner intervenes, against violators of the Insurance Fund Prevention Act)

[68. 17B:31-2 (escheat proceedings involving insurers)][5]

69. 17B:33-8 (actions under the Unauthorized Insurers' Process Act by insureds against unauthorized foreign or alien insurers who have refused to make payments in accordance with the terms of contracts and have not presented a colorable defense)

*70. 19:44A-35(a)(6) (counsel fees incurred in complying with the Campaign Contributions and Expenditures Reporting Act)

*71. 20:3-26(b)-(c) (actions under the Eminent Domain Act)

72. 20:4-4.2 (actions under the Relocation Assistance Act to recover relocation costs)

*73. 22A:2-42 (actions in the Special Civil Part of the Superior Court, Law Division)

74. 22A:2-43 (actions in municipal courts)

*75. 26:3-31.8 (actions pursuant to the Emergency Fuel Oil Delivery Act)

76. 26:4-122 (actions commenced by port health officers or local boards of health)

*77. 30:4D-7.1 to -7.2 (actions under the Medical Assistance and Health Services Act)

78. 30:4D-17.3(f) (actions under the Medical Assistance and Health Services Act)

*79. 30:13-8 (actions under the nursing home bill of rights law)

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[5]**Repealed by L.1989, c.58, §1.**

*80. 32:1-35.15(q) (condemnation proceedings abandoned by the Port Authority of N.Y. & N.J.)

*81. 34:5A-23 (actions under the Worker & Community Right to Know Act)

*82. 34:8A-10.1 (actions under the farm labor crew leader regulation law)

*83. 34:11-56a25 (actions under the Wage & Hour Law)

*84. 34:11-56.8 (actions under the sex discrimination in wages law)

*85. 34:11-56.40 (actions under the Prevailing Wage Act)

86. 34:15-28.1 (actions under the Workers' Compensation Act for unreasonable or negligent delays or refusals to pay claims for temporary disability benefits)

87. 34:15-40(b)-(e) (reductions of compensation liens by counsel fees paid by employees to their counsel in third-party actions)

*88. 34:15-64 (Workers' Compensation proceedings)

89. 34:19-5(e) (actions under the Conscientious Employee Protection Act, in favor of the employee)

90. 34:19-6 (actions under the Conscientious Employee Protection Act, in favor of the employer)

91. 38:23B-22.1(g) (proceedings under the Veterans' Loan Act)

*92. 39:6-67 (actions defended pursuant to the Unsatisfied Claim & Judgment Fund Law)

93. 39:6A-5(c) (arbitration proceedings concerning claims for personal injury protection benefits)

*94. 39:6A-28 (actions under the automobile accident arbitration law)

*95. 39:6A-34 (actions under the automobile accident arbitration law, on de novo review)

96. 40:14A-17(e) (proceedings commenced by trustees appointed pursuant to the Sewerage Authorities Law)

*97. 40:14A-21(f) (actions commenced by sewerage authorities under the Sewerage Authorities Law)

98. 40:14B-31(d) (proceedings commenced by trustees appointed pursuant to the Municipal Utilities Authorities Law)

*99. 40:14B-46 (actions commenced by municipal authorities under the Municipal Utilities Authorities Law)

100. 40:35B-32(d) (proceedings commenced by trustees appointed pursuant to the County Transportation Authorities Act)

*101. 40:37A-64(4) (proceedings commenced by trustees appointed pursuant to the County Improvement Authorities Law)

102. 40:37B-27(d) (proceedings commenced by trustees appointed pursuant to the First Class County Recreation Authority Law)

103. 40:55D-10(g) (actions under the Municipal Land Use Law)

104. 40:55D-44 (proceedings under the Municipal Land Use Law)

105. 40:56-20 (actions concerning the abandonment by municipalities of proposed improvement, etc.)

106. 40:62-115 (actions concerning the abandonment by municipalities of condemnation proceedings pertaining to waterworks)

107. 40:66A-15(c) (proceedings commenced by trustees appointed pursuant to the Incinerator Authorities Law)

*108. 40:66A-18(e) (actions commenced by incinerator authorities pursuant to the Incinerator Authorities Law)

109. 40:66A-48(c) (proceedings commenced by trustees appointed pursuant to the Solid Waste Management Authorities Law)

*110. 40:66A-51(e) (actions commenced by solid waste management authorities pursuant to the Solid Waste Management Authorities Law)

111. 40:68A-15(c) (proceedings commenced by trustees appointed pursuant to the Port Authorities Law)

*112. 40:68A-18 (actions commenced by port authorities pursuant to the Port Authorities Law)

113. 40:68A-49(d) (proceedings commenced by trustees appointed pursuant to the Municipal Port Authorities Law)

114. 42:2A-65 (limited partners' derivative suits)

115. 42:2A-66 (limited partners' derivative suits)

*116. 43:21-51 (actions under the Temporary Disability Benefits Law)

117. 45:14B-42 (actions under the disclosure of patient information by psychologists law)

118. 45:14D-24 (actions under the Public Movers & Warehousemen Licensing Act)

*119. 45:15-16.23(a) (actions under the Land Sales Full Disclosure Act)

120. 45:15-37 (actions under the real estate guaranty fund law)

*121. 45:22A-16(b) (actions under the Retirement Community Full Disclosure Act)

*122. 45:22A-37(a)-(b) (actions under the Planned Real Estate Development Full Disclosure Act)

*123. 46:8-21.1 (actions under the security deposits law)

124. 46:8C-2(f) (actions under the mobile home bill of rights law)

*125. 46:8C-3(a), (c) (actions under the mobile home bill of rights law)

*126. 46:18-11.4 (actions under the mortgage cancellation law)

126A. 46:30B-101 to -102 (actions under the Uniform Unclaimed Property Act)[6]

*127. 47:1A-4 (actions under the examination of public records law)

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[6]**Added by L.1989, c.58, §1.**

128. 48:5A-63(a)(3) (actions under the Cable Subscriber Privacy Protection Act)

*129. 48:13A-10(b) (actions under the Solid Waste Utility Control Act)

*130. 49:5-15(b)(1) (actions under the Corporation Takeover Bid Disclosure Law)

*131. 52:4B-8 (proceedings pursuant to the Criminal Injuries Compensation Act)

132. 52:4B-32 (New Jersey's "Son of Sam" law)

133. 52:13C-36(e) (actions under the Legislative Activities Disclosure Act)

134. 52:18A-67(e) (proceedings commenced by trustees appointed pursuant to the State Building Authority Act)

135. 52:27D-347(a) (actions under the Continuing Care Retirement Community Regulation & Financial Disclosure Act)

136. 52:27E-19(a)-(b) (proceedings involving the Division of Rate Counsel)

*137. 54:5-97.1 (proceedings involving tax lien foreclosures)

*138. 55:13B-21 (actions under the Rooming & Boarding House Act)

139. 55:14K-22(d) (proceedings commenced by trustees appointed pursuant to the Housing & Mortgage Finance Agency Law)

140. 56:3-13.16(d), (g), (i)(2) (actions under the trademark law)

*141. 56:6-25(a) (actions under the Unfair Motor Fuels Practices Act)

*142. 56:7-32(a) (actions under the Unfair Cigarette Sales Act)

*143. 56:8-19 (actions under the Consumer Fraud Act)

*144. 56:9-10(b) (actions for injunctive relief under the Antitrust Act)

*145. 56:9-12(a) (actions for damages under the Antitrust Act)

*146. 56:10-10 (actions under the Franchise Practices Act)

147. 56:10-29 (actions under the law prohibiting motor vehicle franchisors from engaging in the business of new car sales)

*148. 56:11-7(b)(2), (c) (actions under the consumer credit billing errors law)

*149. 56:12-3 (individual actions for damages under the Plain Language Law)

*150. 56:12-4 (class actions for damages under the Plain Language Law)

*151. 56:12-12 (actions for injunctive relief under the Plain Language Act)

*152. 56:12-17 (actions under the Truth-in-Consumer Contract, Warranty and Notice Act)

153. 56:12-36(d)(4) (informal dispute settlement proceedings under New Jersey's revised "Lemon Law")

154. 56:12-37(d) (appellate proceedings under the revised "Lemon Law")

155. 56:12-42 (actions commenced by consumers under the revised "Lemon Law")

156. 58:5-49(4) (proceedings commenced by trustees appointed pursuant to the Water Transmission Facilities Act)

*157. 58:10-23.11n(h) (actions under the Spill Compensation and Control Act)

158. 58:14-34.18(e) (proceedings commenced by trustees appointed pursuant to the Passaic Valley Sewerage Commission law)

159. 58:26-12(b) (proceedings under the Water Supply Privatization Act, wherein the Division of Rate Counsel has intervened)

160. 58:27-12(b) (proceedings under the Wastewater Treatment Privatization Act, wherein the Division of Rate Counsel has intervened)

*161. 59:9-5 (actions under the Tort Claims Act)

Numerous statutes listed in Appendix A to the King Committee Report have not been listed in this present compilation because the present compilation has a narrower scope. Thus, for example, statutory provisions concerning the payment of counsel fees by a litigant to that litigant's own counsel have been omitted (e.g., 2A:13-5; 2A:13-6; 52:27H-51), as have provisions permitting the award or payment of counsel fees where the parties have by agreement so provided (e.g., 12A:9-504(1)(a); 12A:9-506; 17:11A-46(g); 17:11A-53; 17:16C-42(b); 17:16C-71(b); 46:8B-21). Other statutes listed in Appendix A to the King Committee Report have been omitted from the present compilation because they have been repealed (e.g., **2A:37-21; 2A:37-23;** 11:16-2; 11:22-22; 17:13-27; 39:6A-4.3(c); 40:154-1). Other omitted statutes include: 2A:163-1 (compensation of assigned counsel in murder cases); 18A:16-6 to -6.1 (indemnification of agents of boards of education); 18A:60-4 to -5 (indemnification of agents of certain educational institutions); 32:1-35.15(m) (disallowance of awards of counsel fees to owners whose properties have been condemned by the Port Authority of N.Y. & N.J.); 40:37-11.5 (indemnification of agents of county park police systems); 56:10-24 (disallowance of awards of counsel fees in motor vehicle franchise administrative proceedings).

Note that there are additional statutory provisions pertaining to counsel fees that are outside the scope of this compilation and were not included in Appendix A to the King Committee Report. See, e.g., 2A:23A-17 (permitting award of

counsel fees where the agreement for alternative dispute resolution so provides); 2A:37-44 (allowance of counsel fees in certain escheat proceedings), **repealed by L.1989, c.58, §1;** 2A:42-81 (disallowance of counsel fees in proceedings involving substandard multiple dwellings receiverships); 2A:158A-25 (reimbursement by parents of costs of legal services provided by the Public Advocate to minors); 14A:3-5 (indemnification of corporate agents by corporations); 15A:3-4(c) (indemnification of corporate agents by nonprofit corporations); 17:9A-250(B) (indemnification of corporate agents by banking corporations); 17:12B-73 (indemnification of agents of savings and loan associations); 18A:12-20 (indemnification of board of education members); 27:1A-5.2 (indemnification by the Department of Transportation); 30:4-24.2(d)(2) & 30:6D-5(a) (compensation of counsel appointed to represent indigent institutionalized patients); 30:4-165.13 to -165.14 (compensation for counsel (but not the Public Advocate) appointed to represent indigent, alleged mental incompetents); 34:15-95 (disallowance of awards of counsel fees against the Second Injury Fund); 40:6A-1 (recovery of counsel fees incurred in the defense of an indigent person); 40A:14-28 (indemnification of agents of municipal fire departments); 40A:14-155 (indemnification of agents of municipal police departments); 42:2A-67 (indemnification of general partners); 52:27E-26 (eligibility for services of the Division of Mental Health Advocacy); 54:8-14 (disallowance of awards of counsel fees in proceedings to enforce tax liens where the

records thereof have been lost or destroyed); 56:10-14 (indemnification of motor vehicle franchisees); 58:10-23.11f(a) (indemnification of contractors by the Department of Environmental Protection); 59:10-1 to -2 (indemnification of state employees); **59:10-2.1 (indemnification of state officers);**[7] 59:10-4 (indemnification of local public entity employees).

Finally, statutes that refer to the recovery of "costs", "legal costs", "expenses and costs", or "expenses", without specific reference to counsel fees, have been omitted. See, e.g., 2A:29-1; 2A:123-10; 2A:123-20; 4:3-11.19; 4:8B-8; 4:20-16; 9:2-11; 13:1F-16(c); 13:9B-21(c)(2); 14A:2-2.1(7)(c); 14A:4-3(4); 14A:4-5(3); 14A:13-11; 15A:2-3(g)(3); 15A:4-3(d); 15A:13-11(c); 17:9-25(e), (g)-(h), **repealed by L.1989, c.58, §1;** 17:9-26, **repealed by L.1989, c.58, §1;** 17:9A-256(D); 17:9A-268; 17:12B-178; 17:14A-74; 17:16A-20; 17:16F-10; 17:33-2; 17:52-23(B); 18A:68-5; **19:29-14;** 19:34-56; 24:4-9; 34:15-95; 40:48-2.5(f)(1); 42:2A-6.1(g)(3); 42:2A-60(e); 45:1-25; 45:14D-16; 46:10A-5; 49:3-71(a); 52:17B-5.14; 54:10A-20; 54:10B-19; 54:10D-13; 54:14-6; 54:49-12.1; 56:8-11; 56:8-14.1; 58:26-12(b); App. A:9-35(b). See In re Caruso, 18 N.J. 26, 39 (1955) ("'Costs' in strict, technical usage do not cover counsel fees; and, while the statutory expression 'costs and expenses' has been held to include counsel fees,...in statutory usage the term is not always understood as including counsel fees."); Cola

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[7] **Added by L.1989, c.77, §1.**

v. Terzano, 129 N.J. Super. 47, 60 (Law. Div. 1974) (awarding counsel fees under the Uniform Securities Law, which, under N.J.S.A. 49:3-71(a), permits an award of "costs"), aff'd, 156 N.J. Super. 77 (App. Div. 1978); Iannone v. McHale, 236 N.J. Super. 227, 231 (Law Div. 1989) ("Counsel fees are deemed analogous to costs", quoting Justice, then Judge, Haneman's opinion in In re Katz' Estate, 40 N.J. Super. 103, 107 (Ch. Div. 1956)).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

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Jaynee LaVecchia
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April 25, 1989

Honorable Sylvia B. Pressler, J.A.D.
Court Plaza North
25 Main Street, 5th Floor
Hackensack, New Jersey 07601

Dear Judge Pressler:

I have been advised by Ken Levy, Director of the Division of Law, that the Civil Practice Committee and the Supreme Court have asked for the views of the Office of Administrative Law on the proposed Court Rule amendment concerning summary proceedings to enforce agency orders. It is with pleasure that I do so.

Regarding the proposed amendment to R.4:67-6, the Office of Administrative Law agrees with the Supreme Court suggestion that a person seeking enforcement of an administrative agency order should first be required to obtain the consent of the agency. The draft amendment which was shared with this Office gives agencies the right to intervene in actions initiated by individuals to enforce agency orders. In a case in which the agency consents to enforcement of its order, the agency's consent should be a necessary pre-condition to the enforcement action. As noted by the Supreme Court, permitting individuals to seek enforcement of agency orders without obtaining agency consent would be contrary to the principle that agencies have discretion as to whether and when to enforce their orders. Administrative agencies should not be deprived of the right to decide how best to regulate an area. Nevertheless, I do have a few concerns.

Most final orders in administrative proceedings are entered either by the agency head rendering a final decision or by an administrative law judge under N.J.S.A. 52:14B-10 when the agency head fails to review the initial decision in timely fashion. I anticipate that there will be few situations where an agency will object to the enforcement of one of its orders. An agency may be reluctant to permit enforcement when it is in the process of changing its policies or when an application is stale. There may also be some situations where agencies will be reluctant to enforce orders that are perceived to be wrong or contrary to their interests. Allowing an agency arbitrarily to decline to enforce orders may subvert the Administrative Procedure Act's legislative intent of encouraging agency heads to review initial decisions expeditiously and to render serious and careful final adjudications. It may also impair the finality of orders achieved when the parties fail to appeal an adjudication. An agency head declining arbitrarily to enforce its own valid order raises the specter of unfairly depriving a successful litigant of victory.

I can suggest two ways to check such possible abuses. One would be to require that the agency head's decision not to consent to enforcement of one of its orders be explained in sufficient detail to permit a court to evaluate its reasonableness without the need for additional testimony. Under this method, the agency head would not be required to intervene to preclude enforcement. The objection could be articulated in an economical and informal manner. Nevertheless, the agency head's decision should be subjected to an arbitrary and capricious review standard which would restrain unreasonable refusals to consent. Alternatively, in each situation in which an agency head withholds consent, the Committee and the Supreme Court may wish to consider making the agency a necessary party to the enforcement action. In this way, the reasonableness of the agency head's decision to withhold consent could be scrutinized in connection with the action to enforce.

In the opinion of the Office of Administrative Law, it does not matter which superior court division undertakes review of the agency's withholding of consent to an enforcement action. What does seem important from this Office's perspective is that the decision to withhold consent be subjected to the arbitrary and capricious review standard and that the reasons for any denial be clearly specified by the agency head, whether the judicial review occurs in connection with the enforcement action or separately.

On behalf of the Office of Administrative Law, I wish to express our appreciation for the Committee's and the Court's solicitation of our opinion on the proposed rule amendment. I hope the Office will be offered the opportunity again in the future to comment on other Court Rule suggestions which affect administrative agency practice.

Very truly yours,

Jaynee LaVecchia
Director

JLV/dgi

cc: Robert D. Lipscher, Director
Administrative Office of the Courts

State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
RICHARD J. HUGHES JUSTICE COMPLEX
CN 112
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PETER N. PERRETTI, JR.
ATTORNEY GENERAL

KENNETH S. LEVY
ASSISTANT ATTORNEY GENERAL
DIRECTOR

May 2, 1989

Honorable Sylvia B. Pressler, J.A.D.
Court Plaza North
25 Main Street
Fifth Floor
Hackensack, NJ 07601

Dear Judge Pressler:

The Supreme Court has asked for the written position of the Attorney General as to the adoption of an amendment to R. 4:67-6 which would allow an action to enforce an administrative agency order to be brought by a person other than the agency itself. As presently written, R. 4:67-6 only permits a State agency to bring summary actions to enforce its orders. We were asked to comment specifically on the Supreme Court's suggestion that enforcement by a person other than the agency be contingent upon the agency's consent.

Initially, we agree with Office of Administrative Law Director Jaynee LaVecchia's observation that permitting individuals to seek enforcement of agency orders without obtaining agency consent would be contrary to the principle that agencies have discretion as to whether and when to enforce their orders. There are a number of reasons why a State agency might not seek to enforce its order, including changed circumstances, agency efforts to resolve a dispute over enforcement, or an agency determination that its order has not been violated. Moreover, there is also a concern that an enforcement action brought by third parties could be motivated by collateral concerns.

While we agree with Director LaVecchia that consent is an appropriate requirement for a party other than the administrative agency to invoke R. 4:67-6, we do not believe a provision is required in the proposed amended rule to prohibit administrative agencies from arbitrarily refusing to consent to enforcement of their orders. Such a prohibition is inherent for any State administrative action. So long as a party meets the requisite standards for standing, a decision not to consent to a private enforcement action of an administrative agency order would be subject to review in the Appellate Division to determine whether it

was arbitrary, capricious or unreasonable. Newark v. National Resource Council, 82 N.J. 530, 539 (1982), cert. den. 449 U.S. 983 (1980). Moreover, as is the case with other agency decisions, the agency would be required to state the reasons for its decision. In addition, it should be noted that we have seen no evidence which would raise a concern that, under N.J.S.A. 52:14B-10, initial decisions of administrative law judges have become final due to the inattention of agency heads, or that agency heads would use the mechanism of refusal to enforce an order to avoid the effect of N.J.S.A. 52:14B-10. Given the longstanding principles of administrative law, there is no reason to place any specific restrictions, within the proposed rule, on agency decisions not to consent to enforcement.

Thank you for the opportunity to provide our comments on the proposed Rule.

Very truly yours,

Kenneth S. Levy
Assistant Attorney General
Director, Division of Law

/fc
c: Robert D. Lipscher, Director
Administrative Office of the Courts

Table of Contents

REPORT OF THE SUBCOMMITTEE ON MENTAL COMMITMENTS

Introduction

The Subcommittee recommends a court rule explicitly providing judicial review of those involuntarily committed patients who attempt to convert to voluntary status at any time. See Appendix B, proposed R. 4:74-7(g). The Subcommittee also recommends judicial review of the voluntary status of patients in certain facilities. See Appendix B, proposed R. 4:74-7(i).

During the 1987-88 term, the Subcommittee on Mental Commitments was assigned two tasks: (1) to revise Rule 4:74-7 to incorporate and explain the procedures required by L. 1987, c. 116 (codified at N.J.S.A. 30:4-27.1 et seq., attached as Appendix E) and (2) to consider whether the rule should include court review of an adult patient's voluntary status when that patient has converted from involuntary status. In its April 5, 1988 Report to the entire committee, the Subcommittee did not recommend a court rule establishing such review. The 1988 Subcommittee Report expressed concern because while the Public Advocate strongly

favored such a rule, the Attorney General equally strongly opposed it.[1]

The Subcommittee was asked to further consider this topic at the start of the 1988-90 term. The membership was expanded to include two trial judges with substantial experience in civil commitment proceedings: Hon. Rudolph N. Hawkins, Jr. and Hon. Richard S. Rebeck, and a private practitioner experienced in this area of law, Jack Harrington, Esq.

The Need for the Rule

The Subcommittee determined to seek factual information about conversions of involuntary patients and about the circumstances of voluntary patients, in order to determine whether judicial review is needed. The original concern of the Public Advocate, which led to the formation of this Subcommittee, was that duress, misinformation and misunderstanding are factors in conversions from involuntary to voluntary status. The Subcommittee also inquired into the practical effects of the rule change under consideration, particularly

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[1]Both departments were represented on the Subcommittee throughout.

its likely effect upon administrative, hospital and judicial resources. To this end, the Subcommittee interviewed persons experienced in and affected by the everyday process. We sought to understand the views and concerns of those persons likely to be most affected by court review of conversions to voluntary status. The Subcommittee sought especially to draw upon the experiences of the Essex County practice under In re G.M., 217 N.J. Super. 629 (Ch. Div. 1987) (Appendix D). Six persons representing varied perspectives on the process were invited to address the Subcommittee, three at each of two meetings.

The following persons addressed the Subcommittee on January 18, 1989: Hon. Theodore A. Winard, Superior Court Judge, Essex County; Deputy Public Advocate, Paula Chaffin Levy; and Director Alan Kaufman, Division of Mental Health and Hospitals. The following addressed the Subcommittee on March 1, 1989: Felix A. Ucko, M.D., Medical Director, Pequannock Valley Mental Health Center and former Medical Director, Essex County Hospital Center (1973-1980); William Butler, member of the Consumer Operated Self Help Advocacy Program, a former patient and now a client representative employed by the Department of Human Services at Marlboro State Hospital; and Marilyn Goldstein, President of the New Jersey Chapter of the Alliance for the Mentally Ill and

the mother of a patient. Their views, as expressed on these occasions, are summarized at Appendix A to this Report.

Over the course of the two information-gathering meetings, it became increasingly clear that so-called "voluntary" patients are too often subjected to duress, false promises, threats and misinformation which are not limited to decisions to convert from involuntary to voluntary status. Patient decisions to remain voluntarily (e.g., to rescind a request for discharge) are also vulnerable to these pressures. The Subcommittee therefore felt compelled to expand the focus of its inquiry to include all patients in voluntary status, whether converted from involuntary or originally admitted as voluntary.

At present, only Essex County provides routine review of a patient's decision to convert from involuntary to voluntary status. This is a result of In re G.M., supra. At the present time, in Essex as well as elsewhere throughout the State, a patient listed as a voluntary admission receives judicial review only if s/he makes written request for discharge, and if the hospital then obtains a court order for temporary commitment (rather than discharge the

patient). In that event a court hearing will take place within 22 days of the request for discharge, but only so long as the patient does not (1) rescind the request before the temporary order is obtained or (2) (with the exception of Essex County) convert back to voluntary status before the hearing. It is at these two critical stages that the informed and voluntary nature of the patient's decision is in serious question.

Based upon the information gathered, the Subcommittee is convinced that undue influences are at least on some occasions exerted, and may succeed in getting the patient to rescind a discharge request or convert to voluntary status. The Subcommittee was particularly impressed by the statements of both Dr. Ucko, concerning the practices of his professional peers, and the experiences of William Butler, an employee of the Department of Human Services who has daily contacts with patients and is himself a former patient. Their experiences and observations (that duress, false promises and misrepresentation are often utilized by doctors, staff and family members to get a patient to sign voluntary papers) were supported by the statements of Deputy Public Advocate Levy and Marilyn Goldstein, the mother of a patient. These views were uncontradicted throughout the Subcommittee's consideration of these questions.

Thus court review of involuntary patients, as mandated by statute, can be and too often is frustrated. Patients to whom the nominal status of "voluntary" is attributed are patients excluded from judicial review. They may in effect be involuntary patients in the true sense of the word, victimized by duress, misrepresentation and their own lack of understanding.[2] The Subcommittee therefore concludes that there exists a clear and compelling need for a court rule to ensure judicial review of all involuntary patients who seek to convert to voluntary status. This includes patients who, under the new statute, convert to voluntary status during the 72-hour period that they can be held by a screening service without even a temporary commitment order. See N.J.S.A. 30:4-27.9(c).

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[2]At the recent Judicial College a course was given on involuntary civil commitments. The panel of speakers included one of four deputy attorneys general assigned to represent the Department of Human Services. The DAG expressed concern that involuntary patients convert to voluntary status specifically in order to avoid having to take medication (voluntary patients have the right to refuse medication; involuntary patients do not). He explained that where the medication is a necessary element of the patient's treatment, the patient is often times simply "playing games" with the system, delaying effective treatment and ultimately leaving the institution no choice but to refile for involuntary commitment in order to administer effective treatment. He encouraged judges not to accept conversions to voluntary status on face value but rather to interview the patient to ascertain whether the patient is indeed willing to be a voluntary patient, i.e., willing to accept necessary treatment.

There is also grave concern that those who remain voluntary patients over a long period of time may in fact be involuntary, but without the statutory protections afforded those who have gone through the commitment process. The Subcommittee further recommends a court rule that explicitly provides the opportunity for judicial review to patients who are initially voluntary admissions by assigning counsel to these patients as the statute permits. These patients have not always made a decision knowingly and freely at the time of their admission. Thereafter, they may continue to be labeled "voluntary" indefinitely only because they do not understand their rights. Moreover, these patients are no less likely to be subjected to false promises, duress and misrepresentations than are the patients who convert from involuntary. Such tactics are used to coerce patients not to request discharge and, where a request has been made, to rescind the request prior to the hospital's being required to file commitment papers. There are also patients who are mentally or emotionally incapable of making an informed and voluntary decision, though not legally incompetent. For them the label "voluntary patient" is also a misnomer.

The existing procedures also encourage inequitable distribution of limited placement resources. There is

a tendency for involuntary patients under a CEPP order[3] to receive preferential treatment over voluntary patients awaiting placement. That is because the court reviews the involuntary but not the voluntary patients' status. If an involuntary patient remains in CEPP status too long, the judge questions staff efforts at placement and can set deadlines. Since there is no judicial oversight of voluntary patients, and no equivalent of CEPP status, there is less pressure on staff to promptly place the voluntary patient who could be discharged. In turn, this situation creates an incentive for staff to encourage involuntary patients in CEPP status to convert, thereby circumventing judicial pressure for placement. The Subcommittee's recommendation addresses this problem.

The Subcommittee is unanimous in its conclusion that patients who convert from involuntary status, as well as those already admitted as voluntary, should be afforded judicial review. Eight of the nine Subcommittee members concluded that the proposed rule is needed and constitutes an appropriate exercise of

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[3]This is an Order of Conditional Extension [of hospitalization] Pending Placement [in an appropriate unconfined living situation]. It applies to patients who are no longer committable but who cannot make their own living arrangements. See R. 4:74-7(g)(2); Matter of S.L., 94 N.J. 128 (1983).

the Court's authority. Only the Attorney General's representative dissents. The Subcommittee is satisfied, based upon the information summarized in Appendix A, that its recommendations, if adopted, will not unduly increase the demand on mental health or judicial resources.

The Authority for the Rule

The Subcommittee finds that circumstances surrounding the so-called "voluntary" patient frequently amount to de facto but not de jure commitment. The absence of judicial scrutiny clearly violates the intent of the Legislature, which is set forth, in part, at N.J.S.A. 30:4-27.1(b) and (c). The Legislature clearly incorporates federal and state constitutional guarantees against involuntary confinement without due process of law:

> b. Because involuntary commitment entails certain deprivations of liberty, it is necessary that State law balance the basic value of liberty with the need for safety and treatment, a balance that is difficult to effect because of the limited ability to predict behavior; and, therefore, it is necessary that State law provide clear standards and procedural safeguards that ensure that only those persons who are dangerous to themselves, to others or to property, are involuntarily committed.

> c. It is the policy of this State that persons in the public mental health system receive inpatient treatment and rehabilitation services in accordance with the highest professional standards and which will enable those hospitalized persons to return to their community as soon as it is clinically appropriate. Further, it is the policy of this State that the public mental health system shall be developed in the manner which protects individual liberty and provides advocacy and due process for persons receiving treatment and insures that treatment is provided in a manner consistent with a person's clinical condition.

See, e.g., Addington v. Texas, 441 U.S. 418, 425, 99 S.Ct. 1804, 1808-09, 60 L.Ed. 2d. 323, 330-31 (1979):

> This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.

The proposed court rule tracks the express statutory intent "that the provisions of the [act] apply to persons involuntarily admitted to special psychiatric hospitals and do not apply to persons voluntarily admitted to special psychiatric hospitals unless specifically provided for in the [act]."[4] Senate Revenue,

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[4]Definitions appear at N.J.S.A. 30:4-27.2. See Appendix E.

Finance and Appropriations Committee Statement to Assembly Bill No. 1813, L. 1987, c. 116.

The statutory direction appears at N.S.J.A. 30:4-27.3:

> The standards and procedures in this act apply to all adults involuntarily committed to a short-term care facility, psychiatric facility or special psychiatric hospital and all adults voluntarily admitted from a screening service to a short-term care facility or psychiatric facility. The standards and procedures in this act shall not apply to adults voluntarily admitted to psychiatric units in general hospitals or special psychiatric hospitals, except as provided in section 11 or 20 of this amendatory and supplementary act.[5]

The Legislature has declared it to be among the rights of all patients, voluntary and involuntary, "to be represented by an attorney and, if unrepresented or unable to afford an attorney, the right to be provided with an attorney . . . " N.J.S.A. 30:4-27.11(c). The Legislature cannot have intended a futile act. Appointment of counsel implies that counsel advise the patient/client and act to protect him/her. The statute

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[5] N.J.S.A. 30:4-27.11 provides for the rights of both voluntary and involuntary patients at all facilities. N.J.S.A. 30:4-27.20 provides the conditions for discharge of voluntary patients. See Appendix E.

states that the patient is to be provided with a verbal explanation of the reasons for the admission, of the right to counsel and all other rights, as well as a written statement of the rights. But the statute is silent regarding procedure to exercise those rights. The court rule should be amended to provide for voluntary patient's rights under the statute, including the inherent right to have his/her status accurately determined. N.J.S.A. 30:4-27.9 permits voluntary admission only after the patient has been advised of the right to discharge and exposure to involuntary commitment.

At its first meeting of the present term, the Subcommittee invited the office of the Attorney General to explain its argument that a rule requiring judicial review of the conversion from involuntary status to voluntary (as well as review of long-term voluntary status) is outside the rule-making authority of the Supreme Court under Winberry v. Salisbury, 5 N.J. 240 (1950). Its response (attached as Appendix C) does not persuade the remaining members of the Subcommittee. No dispute with the substantive findings regarding "voluntary" patients was offered. Rather the Attorney General continues to argue the Winberry issue, relying on an unreported Appellate Division decision and what

the remaining members believe to be a misreading of the statutory provision for appointing counsel for all, including voluntary, patients.

The only New Jersey Supreme Court opinion cited by the Attorney General, In re S.L., 94 N.J. 128 (1983), supports the power of the Court "by rule or by decision" to establish "procedures ensuring the rights of individuals in the judicial process..." Id. at 133 n.5.

There is no constitutional or statutory impediment to the narrow intrusion upon the voluntary patient's rights. There is, however, a risk of liability to a patient whose "voluntary" admission was without competent consent. See Burch v. Apalachee Community Mental Health Services, Inc., 840 F.2d 797 (11th Cir. 1988) (rehearing en banc),[6] certif. granted sub nomine Zinermon v. Burch, _____ U.S. _____, 109 S.Ct. 1337, 103 L.Ed.2d 807 (1989) (complaint for reckless admission of psychotic patient as "voluntary" and 152-day confinement without a hearing states a claim under § 1983). Oral argument was heard on October 11, 1989.

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[6]The several opinions filed address various constitutional grounds for the action.

There has been concern that a truly voluntary patient not be subjected to intrusion upon his right of confidentiality (which is equally applicable to involuntary patients), or to less formalized privacy interests, while hospitalized. That concern can be met (1) by existing rules of confidentiality, including provisions for sealing the records of judicial proceedings concerning patients and for holding hearings in camera; and (2) by using initials and/or code numbers to identify patients in judicial proceedings. The Public Advocate has submitted a memorandum on the issue of confidentiality. See Appendix F.

We sympathize with the possibility that some individuals who are voluntarily admitted to inpatient, public psychiatric facilities may suffer some annoyance at the visit of the assigned lawyer.[7] However, that potential intrusion upon a few individuals seems a reasonable price to avoid a far greater intrusion on those other individuals who present as voluntary, but are involuntary. That greater intrusion is confinement in a psychiatric facility without true consent.

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[7] N.J.S.A. 30:4-27b establishes the right of voluntary and involuntary patients to a verbal explanation of their rights. Some intrusion is thus contemplated.

Based upon the information gathered by the Subcommittee and summarized in Appendix A, additions to the present court rule are necessary to protect involuntary and voluntary patients' rights that are mandated both by statute and by constitutional principles.

Recommendations

For all of the foregoing reasons, the Subcommittee recommends the adoption of the procedures embodied in the proposed addition as new sections (g) and (i) to R. 4:74-7, attached as Appendix B. The procedures encompass patients who convert from involuntary to voluntary status as well as patients who are initially admitted voluntarily.

The proposed rule would have these results:

(1) All involuntarily committed patients who attempt to convert to voluntary status get a hearing within 20 days of conversion.

(2) Those patients who have been detained at a screening service and then admit themselves as voluntary patients at a "short-term care facility" or "psychiatric facility" get a hearing within 20 days of admission, i.e., they are treated as conversions. See N.J.S.A. 30:4-27.3.

(3) Those patients who have voluntarily admitted themselves to a psychiatric unit in a general hospital or to a special psychiatric hospital will not get an initial hearing. See Id.

(4) All voluntary patients who remain for three months get appointed counsel and a summary review of voluntary status. The attorney can get a hearing by raising a question as to voluntariness.

Respectfully submitted,

HON. BARBARA BYRD WECKER, Chair
PROF. ROBERT CARTER, Rutgers Law School
RUSSELL H. GALE, Esq. (Designee of Legal Services of New Jersey)
MICHAEL J. HAAS, Deputy Attorney General (Designee of the Attorney General)
JACK HARRINGTON, Esq.
HON. RUDOLPH N. HAWKINS
LINDA LASHBROOK, Esq.
PAULA S. LEVY, Esq. (Designee of the Public Advocate)
HON. RICHARD S. REBECK

November 29, 1989

APPENDIX A

Summaries of Invited Speakers' Views

HON. THEODORE A. WINARD, ESSEX COUNTY

Judge Winard's experience with the Essex practice has been that (1) in the vast majority of cases where a patient is scheduled for status review, the status is not contested and the only action by the court is to order the matter to be re-listed in six months and (2) the practice of status review does not impose upon the court any significant additional work.

The mere listing of voluntary patients on the court's calendar for review of status serves an important purpose: it ensures hospital review of the patient.

DEPUTY PUBLIC ADVOCATE, PAULA CHAFFIN LEVY*

In 1988, in Essex County, 238 patients were listed for status review over 21 court dates (approximately 12 per date).

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* Ms. Levy was not a member of the subcommittee at the time of her presentation. She was appointed Director of the Division of Mental Health Advocacy in September 1989, replacing Linda Rosenzweig, Esq., who became Camden County Counsel.

There are two types of challenges to a patient's voluntary status which are raised at the calendar call: (1) the patient is truly involuntary (or incapable of making a decision to change status) or (2) the patient's status should be changed to Conditional Extension Pending Placement ("CEPP") because the patient does not meet the standard for commitment and the patient's willingness to remain at the hospital is prompted solely by the unavailability of appropriate placement outside the hospital.

For the five years that status reviews have been conducted in Essex County: (1) there have been an average of 15 cases per year where voluntary status has been challenged, (2) most of the challenges involve abuse of the CEPP status, (3) all challenges have been successful and (4) the number of challenges per year have decreased with each passing year (indicating to Ms. Levy the deterrent effect).

In Essex, if a matter appears on the calendar for an involuntary commitment hearing but the patient is listed as having converted to voluntary status the attorney interviews the patient and, if a challenge is made to the voluntary status, a hearing takes place that same day so long as the patient desires to proceed

with the previously scheduled hearing. If no challenge is made, the matter is thereafter periodically listed on the court's calendar for status review. If a challenge to voluntary status is entered at the calendar call, a hearing is scheduled for two weeks hence. [The scheduling of a hearing does not affect the patient's right to request discharge ("48 hour notice"), compelling the hospital to decide whether to institute involuntary commitment proceedings.] If upon the conclusion of the hearing, the patient is found to not be voluntary, the court voids the voluntary status and orders the hospital to make another suitable disposition, i.e., discharge the patient or commence involuntary commitment proceedings.

The hearings referred to in the preceding paragraph may consist of two parts: (1) the judge interviews the patient to determine whether he or she is a voluntary patient and (2) if not voluntary, whether patient meets the standard of involuntary commitment.

The Essex program does not include review of patients who originally enter the hospital as a voluntary admission and never request discharge. Voluntary admission patients are only reviewed when a request for discharge results in the filing of papers for involuntary commitment by the hospital or others.

ALAN KAUFMAN, DIRECTOR OF DIVISION OF MENTAL HEALTH AND HOSPITALS, DEPARTMENT OF HUMAN SERVICES

Of the 3,100 patients in state and county psychiatric hospitals at any given time, approximately 25% (775) are listed as voluntary, most of whom have converted from involuntary. For the year ending June 1988, 10,380 patients passed through the 3,100 beds of the state institutions.

Director Kaufman does not favor automatic review of all voluntary patients. Nevertheless, he candidly admits that court review of conversions would not impose a significant administrative burden upon the state mental health care system. He estimated that listing 2,500 patients (25% of 10,000) for review each year would require 50 administrative hours of work.

He opposes automatic court review of all voluntary status patients on the basis that such review would serve to deminish the therapeutic benefit of the patient's conversion from involuntary to voluntary, where conversion reflects increasing responsibility for self.

In 1987, of 588 admissions in Essex County 18% or roughly 106 patients were voluntary admissions.

Director Kaufman recommended, and the subcommittee members concurred, that the the input of consumers, organizations of former mental health patients and families of patients, should be sought before making any decisions regarding rule proposals. The subcommittee further determined it prudent to hear from a psychiatrist experienced in working with involuntarily committed patients.

DR. FELIX UCKO

Patients listed by the hospital as voluntary, including voluntary admissions, often have signed the necessary papers without any understanding of what they are doing. Some patients, for example, have signed voluntary admission papers while intoxicated.

Patients who make a knowing decision to be admitted voluntarily or to convert to voluntary status may and often do deteriorate during their hospitalization to the point that they no longer understand their status or their rights.

It is "common practice" for doctors to convince their patients to sign voluntary papers by making false promises or threats regarding the court hearing. The doctors do so knowing that the patient does not meet

the standard for commitment but sincerely believing inpatient treatment to be in the patient's best medical interests. Doctors on some occasions act upon interests other than what is best for their patient, i.e., keeping the hospital beds full. He has seen families coerce patients into converting to voluntary status by threats and promises that are not accurate.*

In Doctor Ucko's opinion, court review of voluntary status would not have an adverse effect on therapeutic benefits derived from the patient's conversion to voluntary so long as the procedure for the review is kept simple, with the truly voluntary patient having to do no more than speak with his or her attorney. In almost every case, he believes a patient should be told the truth about his/her status.

Regarding placement, involuntary patients under an Order of Conditional Extension Pending Placement (CEPP) are likely to receive preferential treatment (by staff responsible for arranging placement) over clinically identical voluntary patients, including those who have

* Another of Dr. Ucko's concerns is that "voluntary" patients are pressured not to request discharge by threats of involuntary commitment.

been waiting longer for placement. This is because of the judicial scrutiny of the hospital's efforts regarding CEPP's and the absence of any outside oversight of placement efforts for voluntary patients. Moreover, in his experience conversions to voluntary status are coerced specifically to avoid judicial scrutiny.

Dr. Ucko believes that status review would discourage doctors and family members from applying pressure on patients to convert to voluntary and, overall, would help to make a better system. He considers the absence of voluntary status review to be inhumane and unfair.

WILLIAM BUTLER

The views he presented to the subcommittee were represented to be those of a consensus of the members of the Consumer Operated Self Help Advocacy Program, an organization of former mental health in-patients.

Mr. Butler was adamant that voluntary patients must be afforded status review and judicial hearings.

From his personal experience as a patient and as the client representative at Marlboro State Hospital, Mr. Butler stated that patients often sign voluntary

papers after being told they will have the right to sign themselves out on 72 hours' notice. They then sign the 72 hour notice, expect that they are going home, and at the last minute the hospital tells them "no" and files commitment papers. The emotional upset -- a combination of disappointment, frustration, fear and anger -- often results in violent behavior (throwing chairs, hitting walls, etc.) which is then used at the court hearing as evidence justifying commitment. Similarly, hospital privileges, which have nothing to do with voluntary status, are often promised in order to coerce patients to convert to voluntary status or to rescind a request for discharge. He himself experienced many of the abuses he describes.

Mr. Butler maintains that there is no substance to the classification of patients as voluntary and involuntary. Voluntary patients do not have any more rights (and without judicial review, have fewer rights) than involuntary patients and are no less subject to abuse and neglect. He believes that if there is going to be this classification, being a voluntary patient should mean having "absolute freedom to leave."

Patients on back wards who may want to be discharged need what is often lacking: a contact with an outside agent. Hospital staff, more often than not, simply

aren't listening. Status review would provide this needed contact. Moreover, reviews will help most patients feel better about themselves, serving to improve their self-esteem.

With respect to court hearings, Mr. Butler believes too many matters are presently scheduled for one day, resulting in too little time per case for the judge to explore issues of coercion by doctors, hospital staff or family members.

Social Workers are not working to place many deserving patients due to understaffing. Court orders of CEPP are often critically viewed by hospital administration -- they "want to see the judge's medical degree."

MARILYN GOLDSTEIN

Mrs. Goldstein stated that there absolutely should be judicial review of voluntary patients as duress is frequently utilized to get patients to sign voluntary papers. The parent's perspective, however, is that voluntary patients should not be released upon request without some opportunity for the family or hospital to seek further commitment.

Voluntary patients often appear better treated but suffer from benign neglect, failure to treat. Moreover, there are voluntary patients taking up space in hospitals, who do not need to be institutionalized. Mrs. Goldstein was personally aware of a situation where a patient was in a state psychiatric hospital for 12 years, although no longer committable. The patient was there because the hospital didn't know what to do with her, i.e., she wasn't capable of managing if discharged. According to Mrs. Goldstein this is a frequent problem.

Mrs. Goldstein had also personally experienced a situation where there was a ratio of one social worker to 60 patients. The social worker did not even know the identity of her patients, let alone their placement needs.

APPENDIX B

Proposed Rule 4:74-7(g) and (i)

4:74-7. Civil Commitment

(a) thru (f) . . . no change.

(g) Conversion to Voluntary Status and Voluntary Admissions.

(1) Where a patient has been involuntarily committed to a short-term care facility, a psyciatric facility or a special psychiatric hospital, as defined in N.J.S.A. 30:4-27.2, and thereafter seeks to convert to voluntary status, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to convert to voluntary status and whether the decision was made voluntarily. Counsel previously appointed shall represent the patient at this hearing.

(2) Where a patient has been evaluated by a screening service and thereafter admitted to a short-term care facility or a psychiatric facility as a voluntary patient and where no

court order or temporary commitment has been entered, the court shall hold a hearing within 20 days to determine whether the patient had the capacity to make an informed decision to make an informed decision to be admitted voluntarily and whether the decison was made voluntarily. Counsel shall be appointed to represent the patient at this hearing.

[(g)] (h) . . . no other change.

(i) Voluntary Status: Appointment of Counsel and Periodic Review

(1) A patient's continuing voluntary status is to be periodically reviewed, not less than once every six months, in the presence of counsel for the patient. At such review, if counsel for the patient certifies to an in-person interview with the patient within the previous 10 days and the patient's continuing voluntary status, no further judicial action is required. If counsel is unable to so certify, the court shall schedule the matter for a hearing to determine whether the patient has the capacity to make an informed decision to remain as a voluntary patient and whether such a decision has been made knowingly and voluntarily.

(2) Where a patient was voluntarily admitted prior to the effective date of this rule, the court shall appoint counsel for the patient and shall list the matter for periodic review as in (1) above. The matter shall be listed initially within 60 days of the effective date of this rule and periodically thereafter not less than once every six months.

(3) Every hearing scheduled because counsel could not certify to the patient's continuing voluntary status shall be held no less than two weeks nor more than four weeks from the date of the periodic review.

[(h)] (j) . . . no other change.

[(i)] (k) . . . no other change.

[(j)] (l) . . . no other change.

COMMENT OF THE ATTORNEY GENERAL ON THE PROPOSED RULE PROVIDING FOR JUDICIAL REVIEW OF VOLUNTARY ADMISSIONS TO PSYCHIATRIC FACILITIES.

The Subcommittee on Mental Commitments has asked the Attorney General's Office to comment upon a proposed court rule which would provide for judicial review of voluntary patients in psychiatric facilities. This office has also been asked to comment upon a draft modification of this proposal, which would require that counsel be appointed for every patient who is admitted as a voluntary patient in a psychiatric facility.

As in the past, it is the recommendation of the Attorney General's office that neither proposed rule should be adopted. It is important to note that the Legislature has not provided for any court involvement in the voluntary admission of patients to psychiatric hospitals whether in the current laws or L. 1987, c. 116. By contrast, L. 1987, c. 116, §16 encompasses many protections, including judicial review, for involuntary committed individuals. It may be concluded that the Legislature determined that there is no need to mandate judicial review for an essentially private determination by an individual to seek psychiatric care and a professional determination by medical staff to admit that individual to a psychiatric hospital. Nor has the Legislature mandated that legal counsel be appointed for each and every voluntary patient or that a court hearing be conducted for the

purpose of inquiring whether appointed counsel has met with the voluntary patient.*

Moreover, neither the Supreme Court nor any court of statewide jurisdiction has rendered a determination in any case involving the substantive rights of voluntary patients. Indeed, we believe that, until such time as the Supreme Court speaks to these issues, it would be inappropriate to engage in rulemaking which would arguably create substantive law. See generally, Const. 1947, Art. VI, §II, ¶3; State v. Leonardis, 73 N.J. 360 (1977); Busik v. Levine, 63 N.J. 351 (1973), appeal dismissed 414 U.S. 1106 (1973); Winberry v. Salisbury, 5 N.J. 240, 248 (1950), cert. den. 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed. 638 (1950).

Our recommendation is supported by the Appellate Division's approach in In re G.S., A-2751-84T5 (1985) (unreported). In that case, the court considered earlier cases wherein Judge Rudd, the trial judge in In re G.M., 217 N.J. Super 629 (Ch. 1987), apparently issued an opinion identical to that in the published case. While the Appellate Division dismissed the appeals and cross-appeals on procedural grounds, the opinion articulated a number of the issues which should be considered by an appellate court:

> First, must the voluntary admission be approved by the court based on a judicial inquiry into the patient's capacity to execute the application and his understanding of the

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* L. 1987, c. 116, §11c merely provides that patients admitted on either a voluntary or involuntary basis shall have the right to be represented by an attorney. There is no legislative provision requiring that counsel be appointed.

> consequences of voluntary status? If so must such an inquiry be made in all cases or only in cases in which questions of capacity and understanding are raised? Must such an inquiry be made at all where the voluntary application is executed by an incompetent patient's duly appointed legal guardian? If judicial approval of the voluntary admission is required, should there be any further judicial involvement in approved voluntary admissions by way of periodic review in the manner provided for by R. 4:74-7(f)? If so, what is the subject of review? Is the subject limited to determining whether capacity and understanding continue or should it include an inquiry into placement planning, treatment and other details of the hospitalization? [Slip op. at 2].

The court further noted at pp. 12-13 that it should refrain from dealing with these issues in an abstract manner until such time as a proper record is established and an appeal perfected "to allow the court to consider the questions raised in the context of the particular controversy." Slip op. at 13. The Attorney General's Office is of the opinion that it is only after these issues have been crystallized in such a case--and a determination made as to whether there is a need for procedural safeguards in connection with voluntary admittees--that rulemaking in this area should occur.

It is important to note that because involuntary commitment is a governmental action to deprive an individual of liberty, the State is bound by constitutional considerations in both committing the individual and retaining the individual in committed status. See general discussion in In re S.L., 94 N.J. 128, 136-137. However, in the case where patients are admitted voluntarily, no such spectre of governmental action is raised. As

noted by Justice Stewart in a case involving the commitment of minors:

> Clearly, if the appellees in this case were adults who had voluntarily chosen to commit themselves to a state mental hospital, they could not claim that the State had thereby deprived them of liberty in violation of the Fourteenth Amendment. [Parham v. J.R., 442 U.S. 584, 621 (1979) (concurring opinion)].

This fundamental difference between commitments and admissions requires, at the very least, that an appellate court first review the issues which are raised by the proposed rules prior to any consideration of a rule amendment.

For the above reasons, the proposed rules should be rejected at this time. Issues connected with voluntary admissions will eventually be considered by the higher courts; until such time, this subcommittee should refrain from recommending the adoption of a far-reaching rule which alters existing substantive law.

STATE OF NEW JERSEY

DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF LAW
MEMORANDUM

Date: November 15, 1989

TO: John J. Baxter
Administrative Office
of the Courts

FROM: Michael J. Haas
Deputy Attorney General

SUBJECT: Subcommittee Report

Thank you again for inviting me to the Subcommittee's meeting on November 8. At that meeting, the Subcommittee members were asked to provide additional comments on the Subcommittee's final report and Rule proposal. The Attorney General's primary comments in opposition to the proposed Rule are set forth in Appendix C to the current version of the report and I request that these comments be included in any revision of the report that is presented to the Civil Practice Committee.

Reflecting upon the comments made by other Subcommittee members at our meeting on November 8, I have the following additional comments: First, it continues to be the Attorney General's position that the entire proposed amendment is beyond the scope of the Court's rule-making authority as defined in Winberry v. Salisbury, 5 N.J. 240 (1950). Specifically, in Winberry, the Court interpreted the phrase "subject to law" in Article VI, Section II, paragraph 3 of the New Jersey Constitution, holding that:

> The rule-making power as to practice and procedure must not invade the field of the substan-

> tive law as such. While the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power. [5 N.J. at 248.]

For the reasons set forth in my prior comments, the Court would be making new substantive law if the proposed Rule amendment were adopted and, therefore, under Winberry, the proposed Rule should not be adopted.

At the Subcommittee meeting, we reviewed various portions of the commitment statute to attempt to find support for the proposed amendments. It continues to be the Attorney General's position that the statute contains no authorization for the proposed Rule. In addition, the Senate Revenue, Finance and Appropriations Committee Statement to L. 1987, c. 116 specifically states that the law was "amended ... to clarify that the provisions of the bill apply to persons involuntarily admitted to special psychiatric hospitals and do not apply to persons voluntarily admitted to special psychiatric hospitals unless specifically provided for in the bill." (Emphasis added). The provisions of the law discussing voluntary patients, N.J.S.A. 30:4-27.11 and N.J.S.A. 30:4-27.20, do not provide for either the conducting of hearings regarding voluntary admissions or the mandatory appointment of counsel to voluntary patients. See also N.J.S.A. 30:4-27.3. Because there is no statutory authority for the proposed Rule, it is respectfully submitted that it should not be adopted.

Contrary to the position taken by some of the Subcommittee members, the law does not provide that an attorney be appointed to advise the voluntary patient of the reasons for admission, the availability of an attorney and the rights provided in the law (N.J.S.A. 30:4-27.11b) or of the discharge provisions established by the act. N.J.S.A. 30:4-27.9b. Rather, this function is obviously to be performed by personnel at the facility. The Subcommittee's fear that a facility would not perform this function, in violation of the law, unless an attorney was appointed for each voluntary patient, appears speculative. The Subcommittee's concern could better be addressed by requiring, through a regulation promulgated by the facility's licensing authority, that a record be kept that the voluntary patient has been advised of the rights provided for under the commitment law. For example, under the newly enacted General Hospital Bill of Rights Law, L. 1989, c. 170, persons admitted to general hospitals are to receive certain information concerning the rights they have. The Legislature did not require that an attorney be appointed to ensure that this information is conveyed to the patient. Rather, it left the enforcement of the act to the licensing agency, the State Department of Health. See, L. 1989, c. 170. §5. Likewise, enforcement of the requirements of L. 1987, c. 116, has been entrusted to the Department of Human Services and/or the Department of Health. See e.g. N.J.S.A. 30:4-27.4, 27.5, 27.8. There is, therefore, no authority to require that an attorney be appointed for voluntary patients.

As was brought out at the full Committee's last meeting, the proposed Rule would also infringe upon the voluntary patient's right to privacy. The Rule would require that, upon voluntary admission to any psychiatric facility, the patient would have an attorney appointed for him and become involved in a court proceeding to determine the "voluntariness" of his private choice to seek care and treatment. This would clearly intrude upon the patient's right of privacy. For example, under the General Hospital Bill of Rights Act, L. 1989, c. 170, a patient has been afforded a right to privacy and confidentiality of all records pertaining to his treatment. A patient voluntarily admitted to a psychiatric facility should not be stripped of these basic rights just because he has decided to seek treatment in a psychiatric, rather than a general, hospital. While there was some suggestion that the patient's identity could be protected through the use of a numerical identifying code, etc., this would not appear viable from a practical standpoint. It would also not protect the patient from the intrusion into his privacy that would be caused by the proposed Rule or the chilling effect it might have on the patient's decision to seek treatment.

The cases that were discussed at the Subcommittee meeting do not appear to be on point. For example, Whalen involved a statute requiring prescription forms to be filed with the Department of Health. This is a much different case than what we would have under the proposed Rule where the person's choice of treatment

would be disclosed to an appointed attorney and to the court system and the person would be required, in effect, to justify his private decision to seek treatment. The other cases that were discussed appear primarily to deal with the disclosure of a person's medical condition to employers (FOP v. Philadelphia; McKenna); or licensing authorities (Shoemaker; Martin). Here, the proposed Rule would require that the person's choice of treatment be disclosed to an attorney he doesn't even know and to the court system. It is difficult to imagine a more intrusive invasion of a patient's right of privacy.

Finally, there are two other concerns that are not addressed by the proposed Rule. First, the Rule would require the appointed attorney to make a determination as to the patient's competency to voluntarily admit himself to a facility. With due respect to the many government and private attorneys with expertise in the mental health law field, this determination is properly one for the medical experts. Second, the Rule provides for the appointment of counsel in all cases, which would mean that the patient would have an attorney which he did not choose. These concerns provide further reasons for not adopting the proposed Rule.

Based upon the foregoing, it is the Attorney General's position that there is no statutory justification for the Rule and that it is barred by the Winberry doctrine. The additional comments expressed herein provide further reasons for rejecting the Rule as proposed.

Thank you again for the opportunity to participate in the Subcommittee's proceedings.

mjh
M.J.H.

c: Hon. Barbara Byrd Wecker
Paula S. Levy

search. *See State v. Leandry*, 151 *N.J.Super.* 92, 96–97 (App. Div.1977), certif. den. 75 *N.J.* 532 (1977). Clearly, in the circumstances, the handbag on the front seat of the unlocked vehicle was one of those "other area[s] where a registration might normally be kept in a vehicle...." *Patino, supra*, 83 *N.J.* at 12. The initial search which was limited to the handbag on the front seat, was reasonable in scope and tailored to determine the owner of the vehicle. The touchstone of the Fourth Amendment and Article 1, paragraph 7 of the New Jersey Constitution is reasonableness. *Bruzzese, supra*, 94 *N.J.* at 216–217. Once the contraband was observed while looking for evidence of ownership, it was not necessary to first obtain a warrant before seizing the contraband. *State v. Alston*, 88 *N.J.* 211, 233 (1981).

We agree with the trial judge that the State sustained its burden of proving the reasonableness and validity of the warrantless search and seizure. *State v. Valencia*, 93 *N.J.* 126, 133 (1983). Consequently, we affirm the order denying the motion to suppress as well as the judgment of conviction.

Affirmed.

IN THE MATTER OF THE VOLUNTARY COMMITMENT OF G.M.

Superior Court of New Jersey
Chancery Division Family Part
Essex County

Decided March 10, 1987.

SYNOPSIS

County challenged decision to require judicial review of voluntary patient's status in county hospital. The Superior

Court, Chancery Division, Essex County, Rudd, J.S.C., held that Superior Court had power to order judicial review of voluntary patient's status in county hospital and correctly ordered review of status.

Judicial review ordered.

Mental Health ⇐59

Superior Court had power to order judicial review of voluntary patient's status in county hospital and correctly ordered review of status, even though judicial review was not statutorily required. R. 4:74–7(f).

Steven J. Bercik, Jr. for the voluntary mental patients (*Alfred A. Slocum*, Public Advocate, attorney).

Denise P. Coleman for Essex County (*H. Curtis Meanor*, Acting Essex County Counsel, attorney).

RUDD, J.S.C.

G.M., the patient herein, was admitted to the Essex County Hospital Center by application for temporary commitment dated October 8, 1981. By order of the Honorable Paul T. Murphy, J.J.D.R.C. dated October 21, 1981, G.M. was detained in the hospital under a temporary class c order, *N.J.S.A.* 30:4–38, pending a final hearing to be held on November 9, 1981. On the date of the final hearing, Judge Murphy entered a final order of commitment. Thereafter, several review-of-commitment hearings were held on February 1, 1982, May 3, 1982, May 9, 1983, May 8, 1984, August 7, 1984 and November 7, 1984. G.M.'s commitment status remained unchanged throughout these review proceedings. On the next scheduled commitment-review date, April 9, 1985, the court was advised that G.M. had signed papers for voluntary admission to the Essex County Hospital Center on April 8, 1985. Hence, on the latter date, G.M.'s patient status in the hospital center changed from

that of a committed patient to that of one voluntarily admitted to that facility.

On the April 9, 1985 hearing date, the court noted the voluntary status and scheduled a review in six months. Similar orders were issued by the court on October 8, 1985, April 9, 1986 and October 7, 1986.

The question in this case is whether the court has the power and is correct in ordering such a review.

In the legal area of commitments to mental institutions, "slipping through the cracks" is a terror oft noted in the classic literature which is our heritage. Though it is an administrative problem, we have required periodic judicial review to prevent it. *In re S.L.*, 94 *N.J.* 128 (1983); *R.* 4:74–7(f); *State v. Fields*, 77 *N.J.* 282 (1978).

And correctly so. How easily a patient, unfortunate enough to be hospitalized for mental disorder, having lost contact with reality, can also lose contact with family, guardian, lawyer, *amicus* of any kind.

But what to review? The categories of those unfortunates need reciting and take some understanding. There are "Committed Patients"—those with mental disorder, who may be dangerous to others or themselves. There are "Committed Patients"—no longer dangerous but needing treatment. There are "Discharged Patients"—not dangerous, needing treatment, who are awaiting placement and referred to as "Confined Pending Placement" (formerly "Discharged Pending Placement"). All these are included in the group of patients for whom judicial review is required. *R.* 4:74–7(f); *In re S.L.*, *supra*, 94 *N.J.* at 140–142.

There is another category of patients called "Voluntary Patients"—those in the hospital because for one reason or another (length of stay, infirmity, senility, without family, disassociated one way or another, incapable of caring for themselves, on the brink of madness) of whom the county says no review is

necessary. The county has no fear they will be "lost in the cracks."

The public advocate argues that they are no different than other patients and cites precedent for such review. *State v. Krol*, 68 *N.J.* 236 (1975); *In re S.L., supra*; *State v. Fields, supra*. New York State has held that review is necessary for voluntary patients, *In re Buttonow*, 23 *N.Y.*2d 385, 393, 244 *N.E.*2d 677 (Sup.Ct.1968). On the other hand the county asks that no review take place and argues for freedom of choice for the patients, and freedom from responsibility for the county.

I agree with the public advocate. There should be a review of the status of "Voluntary Patients" by the judiciary.

I find no difference in the vulnerability of the voluntary patient "to being lost in the cracks" as against the vulnerability of committed or pending placement patients being "lost in the cracks." They are all disordered or disoriented or in need of treatment and care. They cannot, any of them, stand alone and speak for themselves. They need help. A lack of statutory definition that they need help must not prevent us from giving it to them under the general equity powers. They look, sound and talk like, and are like their helpless "Committed" or "Confined" colleagues. What good is the sieve of judicial review if any of the helpless volunteers can still leak through? What good is all our effort in preventing patients from being "lost in the cracks" if such a hapless category as the so-called "volunteers" is subject to being lost?

Judicial review of voluntary patients is needed.

It is ordered.

Law Review Commentaries

Mental health patients' right to refuse forcible administration of medication. (1981) 11 Seton Hall L.Rev. 796.

ARTICLE 3. COMMITMENT AND ADMISSION

A. DEFINITIONS AND GENERAL PROVISIONS

Table

Showing where subject matter of sections repealed by L. 1987, c. 116, is now located.

Former Section	New Section
30:4-23	30:4-27.2
30:4-25	None
30:4-26.2	None
30:4-26.3	30:4-27.5
30:4-26.3a	30:4-27.5
30:4-27	30:4-27.3
to	to
	30:4-27.6,
30:4-30	30:4-27.10
30:4-33	30:4-27.10
30:4-36	None
30:4-37	None
30:4-38	None
30:4-39	30:4-27.17
	to
	30:4-27.19
30:4-41	30:4-27.11
	to
	30:4-27.14
30:4-42	30:4-27.14
	to
	30:4-27.16
30:4-44	30:4-27.17
30:4-45	30:4-27.13
	30:4-27.9
30:4-46	30:4-27.3,
	30:4-27.9
30:4-46.1	30:4-27.5,
	30:4-27.6,
	30:4-27.9
30:4-46.2	30:4-27.9
30:4-48	30:4-27.17
	to
	30:4-27.20
30:4-58	None
30:4-59	30:4-27.21
30:4-61	None
30:4-62	None
30:4-81	30:4-27.5,
	30:4-27.6,
	30:4-27.9
30:4-82	30:4-27.22
30:4-83	30:4-27.21
30:4-84	30:4-27.22
30:4-84.1	30:4-27.10
30:4-84.2	30:4-27.21
30:4-107	30:4-27.17,
	30:4-27.22
30:4-115	30:4-27.17,
	30:4-27.21
30:4-120	None
30:4-126.1	None
30:4-161	30:4-27.22
30:4-163	None
30:4-165	None

30:4-23. Definitions

As used in this article:

"Chief executive officer" means the chief executive and administrative officer of any institution as designated for that purpose by the board of managers.

"County counsel" includes the chief legal officer or adviser of the board of chosen freeholders of any county in this State or his duly authorized representative.

"Institution" includes, except as herein otherwise provided, any State or county institution for the care and treatment of the mentally ill, the tuberculous, or the mentally retarded in this State, as the case may be.

"Court" means the County Court of any county in this State or the Juvenile and Domestic Relations Court of any county.

"Medical director" means the physician charged with the overall professional responsibility for the operation of a mental or tubercular hospital.

last deletions by ~~strikeouts~~

"Patient" includes any person or persons alleged to be mentally ill, tuberculous, or mentally retarded whose admission to any institution for care and treatment of such class of persons in this State has been applied for.

"Discharge" shall mean relinquishment by all agents of the department of all legal rights and responsibilities acquired by reason of the admission, with or without court order, of that person to any residential or functional service whose operation is in any way authorized by the department, except that the right and responsibility to pursue and recover unpaid charges shall be maintained.

"Police official" shall mean any permanent and full-time active policeman of any police department of a municipality or a member of the State Police or a county sheriff or his deputy.

"Evaluation services" shall mean those services and procedures in the department by which eligibility for functional services for the mentally retarded is determined and those services provided by the department for the purpose of advising the courts concerning the need for guardianship of individuals over the age of 18 who appear to be mentally deficient.

"State school" shall mean any residential institution of the State of New Jersey which is so designated by the State Board of ~~Control~~ Institutional Trustees and whose primary purpose is to provide functional services for the mentally retarded.

"Mental hospital" shall mean any inpatient medical facility, public or private, so designated by the Board of ~~control~~ Institutional Trustees. Such a hospital may be an institution exclusively for the care of the mentally ill, or it may be a general hospital providing facilities for the diagnosis, care and treatment of individuals with mental illnesses on an inpatient basis.

"Practicing physician" shall mean a physician licensed to practice medicine in any one of the United States; provided, however, that "practicing physician," with reference to admission to mental hospitals, shall not include any physician who is a relative, either by blood or marriage, of the patient, nor the director, chief executive officer, or proprietor of any institution for the care and treatment of the mentally ill to which application for admission is being prepared.

"State residential services" shall mean observation, examination, care, training, treatment, rehabilitation and related services, including family care, provided by the department to patients who have been admitted or transferred to, but not discharged from, any State hospital for the mentally ill or tuberculous or any residential functional service for the mentally retarded; "county residential services" shall mean comparable services provided to patients who have been admitted or transferred to, but not discharged from, any county hospital.

"Admitting physician" shall mean that physician designated by the medical director to act as his agent in authorizing the admission of patients to a mental hospital.

"Attending physician" shall mean a practicing physician in the community attending the patient in his home or in a mental hospital, or the physician on the staff of a mental hospital who is immediately responsible for the care and treatment of the patient.

"Chief of service" shall mean the physician charged with overall responsibility for the professional program of care and treatment in the particular administrative unit of the mental hospital to which the patient has been admitted, or such other member of the medical staff as may be designated by the medical director. He shall have the custody and control of every person admitted to his service until properly transferred or discharged.

"Custody" shall mean the right and responsibility to provide immediate physical attendance and supervision.

"Family care" shall mean a program conducted under the regulations of the State Board of ~~Control~~ Institutional Trustees for the placement with suitable private families or in boarding homes holding a certificate of approval in accordance with State law of individuals who are eligible for care in mental hospitals or for functional services for the retarded, who have no need for professional nursing services, who have no suitable homes of their own, and who have no relatives able to provide minimum sheltered care.

"Eligible mentally retarded person" shall mean a person who has been declared eligible for admission to functional services of the department.

"Functional services" shall mean those services and programs in the department available to provide the mentally retarded with education, training, rehabilitation, adjustment, treatment, care and protection.

"Mental deficiency" shall mean that state of mental retardation in which the reduction of social competence is so marked that persistent social dependency requiring guardianship of the person shall have been demonstrated or be anticipated.

"Mental retardation" shall mean a state of significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

"Mental illness" shall mean mental disease to such an extent that a person so afflicted requires care and treatment for his own welfare, or the welfare of others, or of the community.

Amended by L.1985, c. 145, § 11.

Repeal

Section 30:4-23 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

The 1985 amendment also deleted the former definition of "mental retardation".

Effective date and date of implementation of L.1985, c. 145, see note under § 30:6D-23.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, § 30:4-27.2.

Statement: Committee statement to Senate, No. 1826-L.1985, c. 145, see § 30:6D-23.

Notes of Decisions

Institution 4

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3. Mental illness

Governing zoning for community residences for developmentally disabled was not void for vagueness, since terms "developmentally disabled" and "mentally ill" were specifically defined. Mental Health Ass'n of Union County, Inc. v. City of Elizabeth, 180 N.J.Super. 304, 434 A.2d 688 (L.1981).

4. Institution

Provision, which is within "Bill of Rights for the Mentally Retarded" and which relates to rights of patients in treatment, applies only to institutions whose primary or substantial function is to care for and treat the mentally impaired. Matter of Grady, 85 N.J. 235, 426 A.2d 467 (1981).

30:4-24. Application of title; public policy

Library References

Mental Health ⇐31 et seq.
C.J.S. Insane Persons §§ 58, 61.

Notes of Decisions

2. Mentally ill, in general

Provision, which is within "Bill of Rights for the Mentally Retarded" and which relates to rights of patients in treatment, applies only to institutions whose primary or substantial function is to care for and treat the mentally impaired. Matter of Grady, 85 N.J. 235, 426 A.2d 467 (1981).

30:4-24.1. Civil rights and medical care for mentally ill

Administrative Code References

Patient supervision at state psychiatric hospitals, see N.J.A.C. 10:36-1.1.

Law Review Commentaries

Court of equity's inherent power to exercise mentally retarded individual's right to sterilization. (1981) 12 Seton Hall L.Rev. 96.

Mental health law. Steven B. Lieberman, 118 N.J.Law. 65 (Feb.1987).

Mental health patients' right to refuse forcible administration of medication. (1981) 11 Seton Hall L.Rev. 796.

Standards for effective legal advocacy. Steven J. Schwartz, Robert D. Fleischner, Marilyn J.

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Schmidt, Heather M. Gates, Cathy Costanzo and Nancy Winkelman (1983) 14 Rutgers L.J. 541.

Notes of Decisions

3. Constitutional rights

To determine whether a substantive right of a mentally retarded individual has been violated, court must balance the individual's liberty against the state's reasons for restraining that liberty. Matter of Commitment of J.L.J., 196 N.J.Super. 34, 481 A.2d 563 (A.D.1984) certification denied 101 N.J. 209, 210, 501 A.2d 893, 894.

4. Treatment

New Jersey courts would recognize a state law right to reasonable care as necessary predicate to other more explicit patient rights. Scott By and Through Weintraub v. Plante, C.A., 691 F.2d 634 (1982).

30:4-24.2. Rights of patients

Law Review Commentaries

Access to medical records. Robert J. Conroy, Mark D. Brylski and Kathy Opperman, 118 N.J. Law. 32 (Feb.1987).

Court of equity's inherent power to exercise mentally retarded individual's right to sterilization. (1981) 12 Seton Hall L.Rev. 96.

Mental health patients' right to refuse forcible administration of medication. (1981) 11 Seton Hall L.Rev. 796.

United States Supreme Court

Conditions of confinement, restraint and training, see Youngberg v. Romeo, 1982, 102 S.Ct. 2452, 457 U.S. 307, 73 L.Ed.2d 28, on remand 687 F.2d 33.

Drug therapy, refusal by patient, see Mills v. Rogers, 1982, 102 S.Ct. 2442, 457 U.S. 291, 73 L.Ed.2d 16, on remand 738 F.2d 1.

Notes of Decisions

1. Construction and application

Rennie v. Klein, D.C., 476 F.Supp. 1294 (1979) stay denied in part, granted in part 481 F.Supp. 552 [main volume] modified on other grounds and remanded 653 F.2d 836, certiorari granted and vacated 102 S.Ct. 3506, 458 U.S. 1119, 73 L.Ed.2d 1381, on remand 720 F.2d 266.

Matter of Grady, 170 N.J.Super. 98, 405 A.2d 851 (1979) [main volume] vacated 85 N.J. 235, 426 A.2d 467.

New Jersey courts would recognize a state law right to reasonable care as necessary predicate to other more explicit patient rights. Scott By and Through Weintraub v. Plante, C.A., 691 F.2d 634 (1982).

Provision, which was within "Bill of Rights for the Mentally Retarded" and which related to rights of patients in treatment, did not apply to certain hospital merely due to fact that mentally retarded persons were included among its patients for whom general medical services were performed. Matter of Grady, 85 N.J. 235, 426 A.2d 467 (1981).

Provision, which is within "Bill of Rights for the Mentally Retarded" and which relates to rights of patients in treatment, applies only to institutions whose primary or substantial function is to care for and treat the mentally impaired. Id.

1.5. Actions and proceedings

A federal court action to enforce settlement agreement entered in *Goodwin*, a federal class action challenging general policies and conditions at Essex County Hospital Center, is not the exclusive avenue for redress of disputes involving tension between an individual patient's personal and privacy rights and the clinical decision of the patient's treatment team, and *Goodwin* did not preclude patient's state court action under state law "Bill of Rights" to challenge decision that the patient, who suffered from delusion that she was a physician, be precluded from receiving mail addressed to her known aliases and prefaced by "Dr." Smith v. Shapiro, 197 N.J.Super. 320, 484 A.2d 1282 (A.D.1984) certification denied 101 N.J. 235, 501 A.2d 912.

Monitoring section of *Goodwin* agreement settling federal action arising out of class action involving general policies and conditions at Essex County Hospital Center was not an "administrative remedy" required to be exhausted before patient could maintain action under statutory "Bill of Rights" concerning right to receive mail and unopened correspondence as master had no power to either adjudicate or make rules but served merely as mediator. Smith v. Shapiro, 197 N.J. Super. 320, 484 A.2d 1282 (A.D.1984) certification denied 101 N.J. 235, 501 A.2d 912.

2. Jurisdiction

Matter of Patterson, 156 N.J.Super. 91, 383 A.2d 467 (1978) [main volume] certification denied 77 N.J. 469, 391 A.2d 484.

6. Commitment

Once mentally ill individual is determined dangerous to himself or others, court is empowered to fashion restrictions on him which will reduce that risk to an acceptable level, not to eliminate that risk altogether. Matter of Commitment of J.L.J., 196 N.J.Super. 34, 481 A.2d 563 (A.D.1984) certification denied 101 N.J. 209, 210, 501 A.2d 893, 894.

Criteria for committing either criminal defendant to mental hospital after he has been found not guilty by reason of insanity or anyone else are same; there must be finding of mental illness and

dangerousness to self, others or property. Matter of A.L.U., 192 N.J.Super. 480, 471 A.2d 63 (A.D. 1984) certification denied 97 N.J. 589, 483 A.2d 131.

Because commitment effects a great restraint on individual liberty, this power of state is constitutionally bounded. Matter of S.L., 94 N.J. 128, 462 A.2d 1252 (1983).

State cannot constitutionally commit individuals to mental hospitals solely on basis of mental illness, but state must show that an individual is likely to pose a danger to self or others or property by reason of mental illness. Id.

7. Treatment—In general

Rennie v. Klein, D.C., 476 F.Supp. 1294 (1979) stay denied in part, granted in part 481 F.Supp. 552 [main volume] modified and remanded 653 F.2d 836, certiorari granted and vacated 102 S.Ct. 3506, 453 U.S. 1119, 73 L.Ed.2d 1381, on remand 720 F.2d 266.

8. —— Refusal of treatment

Rennie v. Klein, D.C., 476 F.Supp. 1294 (1979) stay denied in part, granted in part 481 F.Supp. 552 [main volume] modified and remanded 653 F.2d 836, certiorari granted and vacated 102 S.Ct. 3506, 458 U.S. 1119, 73 L.Ed.2d 1381, on remand 720 F.2d 266.

10. —— Classification for treatment

Matter of Patterson, 156 N.J.Super. 91, 383 A.2d 467 (1978) [main volume] certification denied 77 N.J. 469, 391 A.2d 484.

13. Injunctions

Rennie v. Klein, D.C., 476 F.Supp. 1294 (1979) stay denied in part, granted in part 481 F.Supp. 552 [main volume] modified and remanded 653 F.2d 836, certiorari granted and vacated 102 S.Ct. 3506, 453 U.S. 1119, 73 L.Ed.2d 1381, on remand 720 F.2d 266.

16. Best interest of incompetent person

State's interest in preventing birth of genetically defective or uncared for children is not sufficient to necessitate sterilization of anyone who does not want to be sterilized; in determining whether to authorize sterilization, court should consider only the best interests of the incompetent person, not the interests or convenience of society in having such person sterilized. Matter of Grady, 85 N.J. 235, 426 A.2d 467 (1981).

17. Sterilization

Neither provision, which is within "Bill of Rights for the Mentally Retarded" and which relates to rights of patients in treatment, nor Developmentally Disabled Rights Act's provision, which states that no person receiving services for the developmentally disabled at any facility is to be subjected to certain treatment, including sterilization, without express and informed consent of such person, restrict judicial authorization of sterilization to the situations covered by such provisions. Matter of Grady, 85 N.J. 235, 426 A.2d 467 (1981).

18. Least restrictive treatment

Exercise of clinical judgment in assigning a privilege level to mental patient eligible for discharge pending appropriate placement to effectuate treatment goals did not impinge upon those patients' right under the patient's bill of rights [N.J.S.A. 30:4–24.2] to least restrictive conditions necessary to achieve purposes of treatment, or the federal constitutional right to liberty. K.P. v. Albanese, 204 N.J.Super. 166, 497 A.2d 1276 (A.D.1985) certification denied 102 N.J. 355, 508 A.2d 225.

30:4–24.3. Confidential nature of certificates, applications, records and reports

All certificates, applications, records, and reports made pursuant to the provisions of this Title and directly or indirectly identifying any individual presently or formerly receiving services in a noncorrectional institution under this Title, or for whom services in a noncorrectional institution shall be sought under this act shall be kept confidential and shall not be disclosed by any person, except insofar as:

(1) the individual identified or his legal guardian, if any, or, if he is a minor, his parent or legal guardian, shall consent; or

(2) disclosure may be necessary to carry out any of the provisions of this act or of article 9 of chapter 82 of Title 2A of the New Jersey Statutes; [1] or

(3) a court may direct, upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make such disclosure would be contrary to the public interest.

Nothing in this section shall preclude disclosure, upon proper inquiry, of information as to a patient's current medical condition to any relative or friend or to the patient's personal physician or attorney if it appears that the information is to be used directly or indirectly for the benefit of the patient.

Nothing in this section shall preclude the professional staff of a community agency under contract with the Division of Mental Health and Hospitals in the Department of Human Services, or of a screening service, short-term care or psychiatric facility as those facilities are defined in section 2 of P.L.1987, c. 116 (C.

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30:4-27.2) from disclosing information that is relevant to a patient's current treatment to the staff of another such agency.

Amended by L.1987, c. 116, § 24, eff. Nov. 7, 1988.

[1] Section 2A:32-41.

L.1987, c. 116, effective Nov. 7, 1988

1987 Legislation

Adoption, modification, repeal and enforcement of rules and regulations to effectuate purposes of L.1987, c. 116, see Historical Note under § 30:4-27.5.

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

Law Review Commentaries

Access to medical records. Robert J. Conroy, Mark D. Brylski and Kathy Opperman. 118 N.J. Law. 32 (Feb.1987).

Mental health law. Steven B. Lieberman. 118 N.J.Law. 65 (Feb.1987).

30:4-24.4. Written reports accounting for expenditures of moneys of mentally retarded persons

The Commissioner of the Department of Human Services shall require employees in the Division of Mental Retardation to make written reports accounting for all expenditures which they may make of moneys of mentally retarded persons who receive functional services from the division pursuant to sections 16 and 18 of P.L. 1965, c. 59 (C. 30:4-25.4 and 30:4-25.6).

L.1983, c. 223, § 1, eff. June 27, 1983.

Senate Institutions, Health and Welfare Committee Statement

Assembly, No. 1811—L.1983, c. 223

This bill, as amended by committee, requires Division of Mental Retardation employees who handle personal funds of their clients living in private facilities to maintain written expenditure reports on the use of the funds. The bill also requires the Commissioner of Human Services to conduct a detailed study of the management and handling of client funds and adopt regulations to improve the present system.

The committee made technical amendments to the bill to clarify the intent of the sponsor and limit the bill to clients of the Division of Mental Retardation. As amended, this bill is identical to Senate Bill No. 1926 Sca.

Title of Act:

An Act concerning certain moneys of mentally retarded persons. L.1983, c. 223.

30:4-24.5. Study of management and handling of moneys; regulations

The commissioner shall, in consultation with the State Auditor, conduct a detailed study of the management and handling of the moneys described in section 1 of this act [1] and shall adopt regulations to improve present systems and procedures where appropriate.

L.1983, c. 223, § 2, eff. June 27, 1983.

[1] Section 30:4-24.4.

Statement: Committee statement to Assembly, No. 1811—L.1983, c. 223, see § 30:4-24.4.

Library References

Mental Health ⇐31 et seq.

C.J.S. Insane Persons §§ 58, 61.

30:4–25. Classes of commitment

Repeal

Section 30:4–25 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

Statement: Committee statement to Assembly, No. 1313—L.1987, c. 116, see § 30:4–27.1.

30:4–25.1. Definitions; classes for application for admission of eligible mentally retarded persons to functional services

a. For the purpose of Title 30 of the Revised Statutes:

(1) "Eligible mentally retarded person" means a person who has been declared eligible for admission to functional services of the department.

(2) "Evaluation services" means those services and procedures in the department by which eligibility for functional services for the mentally retarded is determined and those services provided by the department for the purpose of advising the court concerning the need for guardianship of individuals over the age of 18 who appear to be mentally deficient.

(3) "Functional services" means those services and programs in the department available to provide the mentally retarded with education, training, rehabilitation, adjustment, treatment, care and protection.

(4) "Mental deficiency" or "mentally deficient" means that state of mental retardation in which the reduction of social competence is so marked that persistent social dependency requiring guardianship of the person shall have been demonstrated or be anticipated.

(5) "Mental retardation" or "mentally retarded" means a significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which are manifested during the development period.

(6) "Residential services" means observation, examination, care, training, treatment, rehabilitation and related services, including community care, provided by the department to patients who have been admitted or transferred to, but not discharged from any residential functional service for the mentally retarded.

b. Application for admission of an eligible mentally retarded person to functional services of the department may be made under any of the following classes:

Class F. Application to the commissioner by the parent, guardian or person or agency having care and custody of the person of a minor or by the guardian of the person of a mentally deficient adult;

Class G. Application to the commissioner by a mentally retarded person over 18 years of age on his own behalf;

Class H. Application to the commissioner by a juvenile court having jurisdiction over an eligible mentally retarded minor;

Class I. Application to the commissioner with an order of commitment to the custody of the commissioner issued by a court of competent jurisdiction during or following criminal process involving the eligible mentally deficient person.

Application shall be made on such forms and accompanied by such relevant information as may be specified from time to time by the commissioner.

Amended by L.1987, c. 116, § 25, eff. Nov. 7, 1988.

L.1987, c. 116, effective Nov. 7, 1988

1987 Legislation

Adoption, modification, repeal and enforcement of rules and regulations to effectuate purposes of L.1987, c. 116, see Historical Note under § 30:4–27.5.

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

Statement: Committee statement to Assembly, No. 1313—L.1987, c. 116, see § 30:4–27.1.

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30:4–25.3. Determination by commissioner

Notes of Decisions

1. In general

Committing court did not abuse its discretion in permitting the Division of Mental Retardation to proceed with administrative process authorized by N.J.S.A. 30:4–25.3 for purpose of determining patient's eligibility for services. Matter of Commitment of B.R., 202 N.J.Super. 182, 494 A.2d 333 (A.D.1985) certification denied 102 N.J. 354, 508 A.2d 224.

30:4–25.4. Report; statement of eligibility

Cross References

Juvenile delinquents, care and custody to receive services of division of mental retardation, see § 2A:4A–43.

30:4–25.7. Provision for health, safety, welfare, etc., of persons admitted

Administrative Code References

Guardianship services for the mentally retarded, see N.J.A.C. 10:45–1.1 et seq.

Notes of Decisions

In general 1
Guardianship service 2

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1. In general

Grant of authority to administrative agency engaged in protecting health and welfare of public is to be liberally construed in order to enable agency to accomplish its statutory responsibilities, and courts should readily imply such incidental powers as are necessary to effectuate fully legislative purpose. In re Guardianship Services Regulations, 198 N.J.Super 132, 486 A.2d 888 (A.D. 1984) affirmed as modified on other grounds 103 N.J. 619, 512 A.2d 453.

State statutes (§§ 30:4–165.1, 30:4–165.2) requiring the state department of human services to provide treatment, education, training, habilitation, care and protection to adult residents at institution for the mentally retarded granted individual residents the legal right to those specialized services and did not merely obligate the institution to make those services available at the facility. New Jersey Ass'n for Retarded Citizens, Inc. v. New Jersey Dept. of Human Services, 89 N.J. 234, 445 A.2d 704 (1982).

2. Guardianship service

Department of Human Services' regulations which extended guardianship services to children receiving functional services from Division of Mental Retardation who were orphaned, abandoned, or otherwise without legal guardian were not ultra vires, but rather comported with public policy and legislature's mandate to Department. In re Guardianship Services Regulations, 198 N.J. Super. 132, 486 A.2d 888 (A.D.1984) affirmed as modified on other grounds 103 N.J. 619, 512 A.2d 453.

30:4–26.2 to 30:4–26.3a

Repeal

Sections 30:4–26.2 to 30:4–26.3a are repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, § 30:4–27.5.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

B. APPLICATION AND PROCEEDINGS THEREON

30:4–27. Action for admission; persons entitled to bring

Repeal

Section 30:4–27 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

Notes of Decisions

Due process 1.5
Hearing 7

1. In general

It was error not to dismiss indictment brought against defendant who had participated in pretrial intervention program, and it was fundamentally unfair for defendant to be subjected to further penalties of criminal process rather than having public interest served by resorting to available civil proceedings, where prosecutor had originally consented to defendant's participation in program, prosecutor had consented to dismissal of indictment, hearing on motion to dismiss the indictment was held approximately three years after alleged criminal incident, defendant made genuine efforts to comply with all of requirements of program, there had been total absence of any further criminal behavior, and defendant was returned to criminal process for exclusive purpose of insuring his participation in out-patient mental health therapy. State v. Von Smith, 177 N.J.Super. 203, 426 A.2d 59 (A.D.1980).

1.5. Due process

Involuntary commitment to a mental hospital is state action which deprives the subject of important liberty interests and, therefore, invokes significant due process requirements. Matter of Z.O., 197 N.J.Super. 330, 484 A.2d 1287 (A.D.1984) certification denied 101 N.J. 223, 501 A.2d 903.

7. Hearing

Patient is entitled to prompt judicial hearing at which grounds for involuntary commitment must be established by at least clear and convincing evidence; those grounds must be more than mere mental illness; applicant must show by clear and convincing evidence that the patient is likely to pose a danger to himself or others or property in that there is a substantial risk of dangerous conduct within the reasonably foreseeable future. Matter of Z.O., 197 N.J.Super. 330, 484 A.2d 1287 (A.D.1984) certification denied 101 N.J. 223, 501 A.2d 903.

30:4-27.1. Legislative findings and declarations

a. The State is responsible for providing care, treatment and rehabilitation services to mentally ill persons who are disabled and cannot provide basic care for themselves or who are dangerous to themselves, to others or to property; and because some of these mentally ill persons do not seek treatment or are not able to benefit from treatment provided on an outpatient basis, it is necessary that State law provide for the voluntary admission and the involuntary commitment of these persons as well as for the public services and facilities necessary to fulfill these responsibilities.

b. Because involuntary commitment entails certain deprivations of liberty, it is necessary that State law balance the basic value of liberty with the need for safety and treatment, a balance that is difficult to effect because of the limited ability to predict behavior; and, therefore, it is necessary that State law provide clear standards and procedural safeguards that ensure that only those persons who are dangerous to themselves, to others or to property, are involuntarily committed.

c. It is the policy of this State that persons in the public mental health system receive inpatient treatment and rehabilitation services in accordance with the highest professional standards and which will enable those hospitalized persons to return to their community as soon as it is clinically appropriate. Further, it is the policy of this State that the public mental health system shall be developed in a manner which protects individual liberty and provides advocacy and due process for persons receiving treatment and insures that treatment is provided in a manner consistent with a person's clinical condition.

d. It is the policy of this State to encourage each county or designated mental health service area to develop a screening service and a short-term care facility which will meet the needs for evaluation and acute care treatment of mentally ill persons in the county or service area. The State encourages the development of screening services as the public mental health system's entry point in order to provide accessible crisis intervention, evaluation and referral services to mentally ill persons in the community; to offer mentally ill persons clinically appropriate alternatives to inpatient care, if any; and, when necessary, to provide a means for involuntary commitment. Similarly, the State encourages the development of short-term care facilities to enable a mentally ill person to receive acute, inpatient care in a facility near the person's community. Development and use of screening services and short-term care facilities throughout the State are necessary to strengthen the Statewide community mental health system, lessen inappropriate hospitalization and

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reliance on psychiatric institutions and enable State and county facilities to provide the rehabilitative care needed by some mentally ill persons following their receipt of acute care.

L.1987, c. 116, § 1, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

Senate Revenue, Finance and Appropriations Committee Statement

Assembly, No. 1813—L.1987, c. 116

The Senate Revenue, Finance and Appropriations Committee reported Assembly Bill No. 1813 (OCR) favorably, with committee amendments.

This bill, as amended, revises the statutes concerning involuntary civil commitment to reflect clinical and programmatic advances and to incorporate language based on recent court decisions and rules. The bill provides that a person shall be involuntarily committed to a short-term care or psychiatric facility or a special psychiatric hospital only if mentally ill and dangerous to himself, others or to property, and be retained based upon clear and convincing evidence only. The bill requires treatment consistent with the person's clinical condition and a person shall be hospitalized only when clinically necessary. This bill also encourages the development of community-based mental health screening services and short-term care facilities.

COMMITTEE AMENDMENTS:

The committee amended the bill to clarify that the provisions of the bill apply to persons involuntarily admitted to special psychiatric hospitals and do not apply to persons voluntarily admitted to special psychiatric hospitals unless specifically provided for in the bill. Other amendments are technical and clarifying in nature. The bill, as amended, is identical to Senate Bill No. 800 SCS Sca.

FISCAL IMPACT:

The bill appropriates $100,000.00 to the Department of Human Services for additional psychiatric and outreach services and for the development of training procedures for law enforcement personnel.

1987 Legislation

Section 33 of L.1987, c. 116, approved May 7, 1987, provides:

"This act shall take effect 18 months from the date of enactment except that section 32 shall take effect immediately."

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Title of Act:

An Act revising the law concerning admission to inpatient facilities for the treatment of persons who are mentally ill, and revising parts of the statutory law and making an appropriation. L. 1987, c. 116.

30:4–27.2. Definitions

As used in this act:

a. "Chief executive officer" means the person who is the chief administrative officer of an institution or psychiatric facility.

b. "Clinical certificate" means a form prepared by the division and approved by the Administrative Office of the Courts, that is completed by the psychiatrist or other physician who has examined the person who is subject to commitment within three days of presenting the person for admission to a facility for treatment, and which states that the person is in need of involuntary commitment. The form shall also state the specific facts upon which the examining physician has based his conclusion and shall be certified in accordance with the Rules of the Court. A clinical certificate may not be executed by a person who is a relative by blood or marriage to the person who is being screened.

c. "Clinical director" means the person who is designated by the director or chief executive officer to organize and supervise the clinical services provided in a

screening service, short-term care or psychiatric facility. The clinical director shall be a psychiatrist, however, those persons currently serving in the capacity will not be affected by this provision. This provision shall not alter any current civil service laws designating the qualifications of such position.

d. "Commissioner" means the Commissioner of the Department of Human Services.

e. "County counsel" means the chief legal officer or advisor of the governing body of a county.

f. "Court" means the Superior Court of a municipal court.

g. "Custody" means the right and responsibility to ensure the provision of care and supervision.

h. "Dangerous to self" means that by reason of mental illness the person has threatened or attempted suicide or serious bodily harm, or has behaved in such a manner as to indicate that the person is unable to satisfy his need for nourishment, essential medical care or shelter, so that it is probable that substantial bodily injury, serious physical debilitation or death will result within the reasonably foreseeable future; however, no person shall be deemed to be unable to satisfy his need for nourishment, essential medical care or shelter if he is able to satisfy such needs with the supervision and assistance of others who are willing and available.

i. "Dangerous to others or property" means that by reason of mental illness there is a substantial likelihood that the person will inflict serious bodily harm upon another person or cause serious property damage within the reasonably foreseeable future. This determination shall take into account a person's history, recent behavior and any recent act or threat.

j. "Department" means the Department of Human Services.

k. "Director" means the chief administrative officer of a screening service, a short-term care facility or a special psychiatric hospital.

l. "Division" means the Division of Mental Health and Hospitals in the Department of Human Services.

m. "In need of involuntary commitment" means that an adult who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others or property and who is unwilling to be admitted to a facility voluntarily for care, and who needs care at a short-term care, psychiatric facility or special psychiatric hospital because other services are not appropriate or available to meet the person's mental health care needs.

n. "Institution" means any State or county facility providing inpatient care, supervision and treatment for the mentally retarded; except that with respect to the maintenance provisions of Title 30 of the Revised Statutes, institution also means any psychiatric facility for the treatment of the mentally ill.

o. "Mental health agency or facility" means a legal entity which receives funds from the State, county or federal government to provide mental health services.

p. "Mental health screener" means a psychiatrist, psychologist, social worker, registered professional nurse or other individual trained to do outreach only for the purposes of psychological assessment who is employed by a screening service and possesses the license, academic training or experience, as required by the commissioner pursuant to regulation; except that a psychiatrist and a State licensed clinical psychologist who meet the requirements for mental health screener shall not have to comply with any additional requirements adopted by the commissioner.

q. "Mental hospital" means, for the purposes of the payment and maintenance provisions of Title 30 of the Revised Statutes, a psychiatric facility.

r. "Mental illness" means a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, behavior or capacity to recognize reality, but does not include simple alcohol intoxication, transitory reaction to drug ingestion, organic brain syndrome or developmental disability unless it results in the severity of impairment described herein.

s. "Patient" means a person over the age of 18 who has been admitted to, but not discharged from a short-term care or psychiatric facility.

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t. "Physician" means a person who is licensed to practice medicine in any one of the United States or its territories, or the District of Columbia.

u. "Psychiatric facility" means a State psychiatric hospital listed in R.S. 30:1–7, a county psychiatric hospital, or a psychiatric unit of a county hospital.

v. "Psychiatrist" means a physician who has completed the training requirements of the American Board of Psychiatry and Neurology.

w. "Psychiatric unit of a general hospital" means an inpatient unit of a general hospital that restricts its services to the care and treatment of the mentally ill who are admitted on a voluntary basis.

x. "Psychologist" means a person who is licensed as a psychologist by the New Jersey Board of Psychological Examiners.

y. "Screening certificate" means a clinical certificate executed by a psychiatrist or other physician affiliated with a screening service.

z. "Screening service" means a public or private ambulatory care service designated by the commissioner, which provides mental health services including assessment, emergency and referral services to mentally ill persons in a specified geographic area.

aa. "Screening outreach visit" means an evaluation provided by a mental health screener wherever the person may be when clinically relevant information indicates the person may need involuntary commitment and is unable or unwilling to come to a screening service.

bb. "Short-term care facility" means an inpatient, community based mental health treatment facility which provides acute care and assessment services to a mentally ill person whose mental illness causes the person to be dangerous to self or dangerous to others or property. A short-term care facility is so designated by the commissioner and is authorized by the commissioner to serve persons from a specified geographic area. A short-term care facility may be a part of a general hospital or other appropriate health care facility and shall meet certificate of need requirements and shall be licensed and inspected by the Department of Health pursuant to P.L. 1971, c. 136 (C. 26:2H–1 et seq.) and in accordance with standards developed jointly with the Commissioner of Human Services.

cc. "Special psychiatric hospital" means a public or private hospital licensed by the Department of Health to provide voluntary and involuntary mental health services, including assessment, care, supervision, treatment and rehabilitation services to persons who are mentally ill.

dd. "Treatment team" means one or more persons, including at least one psychiatrist or physician, and may include a psychologist, social worker, nurse and other appropriate services providers. A treatment team provides mental health services to a patient of a screening service, short-term care or psychiatric facility.

ee. "Voluntary admission" means that adult who is mentally ill, whose mental illness causes the person to be dangerous to self or dangerous to others or property and is willing to be admitted to a facility voluntarily for care, needs care at a short-term care or psychiatric facility because other facilities or services are not appropriate or available to meet the person's mental health needs. A person may also be voluntarily admitted to a psychiatric facility if his mental illness presents a substantial likelihood of rapid deterioration in functioning in the near future, there are no appropriate community alternatives available and the psychiatric facility can admit the person and remain within its rated capacity.

L.1987, c. 116, § 2, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

Library References

Words and Phrases (Perm. Ed.)

30:4-27.3. Application of standards and procedures

The standards and procedures in this act apply to all adults involuntarily committed to a short-term care facility, psychiatric facility or special psychiatric hospital and all adults voluntarily admitted from a screening service to a short-term care facility or psychiatric facility. The standards and procedures in this act shall not apply to adults voluntarily admitted to psychiatric units in general hospitals or special psychiatric hospitals, except as provided in section 11 or 20 of this amendatory and supplementary act.[1]

L.1987, c. 116, § 3, eff. Nov. 7, 1988.

[1]Section 30:4-27.11 or 30:4-27.12.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3 to 30:4-27.6, 30:4-27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4-27.4. Designation of mental health agencies or facilities as screening services; accessibility; preferred process for entry into short-term care or psychiatric facilities

The commissioner, in consultation with the appropriate county mental health board and consistent with the approved county mental health plan, shall designate one or more mental health agencies or facilities in each county or multi-county region in the State as a screening service. The commissioner shall so designate an agency or facility only with the approval of the agency's or facility's governing body. In designating the screening services, the commissioner shall ensure that screening services are accessible to all persons in the State who need these services and that screening service evaluation is the preferred process for entry into short-term care facilities or psychiatric facilities so that appropriate consideration is given to less restrictive treatment alternatives.

L.1987, c. 116, § 4, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3 to 30:4-27.6, 30:4-27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4-27.5. Screening services; purposes and procedures; rules and regulations

The commissioner shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.) regarding a screening service and its staff that effectuate the following purposes and procedures:

a. A screening service shall serve as the facility in the public mental health care treatment system wherein a person believed to be in need of commitment to a short-term care, psychiatric facility or special psychiatric hospital undergoes an assessment to determine what mental health services are appropriate for the person and where those services may be most appropriately provided.

The screening service may provide emergency and consensual treatment to the person receiving the assessment and may transport the person or detain the person up to 24 hours for the purposes of providing the treatment and conducting the assessment.

b. When a person is assessed by a mental health screener and involuntary commitment seems necessary, the screener shall provide, on a screening document prescribed by the division, information regarding the person's history and available alternative facilities and services that are deemed inappropriate for the person. If a psychiatrist, in consideration of this document and in conjunction with the psychiatrist's own complete assessment, concludes that the person is in need of commitment, the psychiatrist shall complete the screening certificate. The screening certificate shall be completed by a psychiatrist except in those circumstances where the

division's contract with the screening service provides that another physician may complete the certificate.

Upon completion of the screening certificate, screening service staff shall determine the appropriate facility in which the person shall be placed taking into account the person's prior history of hospitalization and treatment. If a person has been admitted three times or has been an inpatient for 60 days at a short-term care facility during the preceding 12 months, consideration shall be given to not placing the person in a short-term care facility.

The person shall be admitted to the appropriate facility as soon as possible. Screening service staff are authorized to transport the person or arrange for transportation of the person to the appropriate facility.

c. If the mental health screener determines that the person is not in need of admission or commitment to a short-term care facility, psychiatric facility or special psychiatric hospital, the screener shall refer the person to an appropriate community mental health or social services agency or appropriate professional or inpatient care in a psychiatric unit of a general hospital.

d. A mental health screener shall make a screening outreach visit if the screener determines, based on clinically relevant information provided by an individual with personal knowledge of the person subject to screening, that the person may need involuntary commitment and the person is unwilling or unable to come to the screening service for an assessment.

e. If the mental health screener pursuant to this assessment determines that there is reasonable cause to believe that a person is in need of involuntary commitment, the screener shall so certify the need on a form prepared by the division.

L.1987, c. 116, § 5, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Section 29 of L.1987, c. 116, approved May 7, 1987, provides:

"Pursuant to the 'Administrative Procedure Act,' P.L.1968, c. 410 (C. 52:14B–1 et seq.), the commissioner shall adopt, modify, repeal and enforce rules and regulations necessary to effectuate the purposes of this act."

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.6. Bases for custody of person and transport to screening service by law enforcement officer

A State or local law enforcement officer shall take custody of a person and take the person immediately and directly to a screening service if:

a. On the basis of personal observation, the law enforcement officer has reasonable cause to believe that the person is in need of involuntary commitment;

b. A mental health screener has certified on a form prescribed by the division that based on a screening outreach visit the person is in need of involuntary commitment and has requested the person be taken to the screening service for a complete assessment; or

c. The court orders that a person subject to an order of conditional discharge issued pursuant to subsection c. of section 15 of this act [1] who has failed to follow the conditions of the discharge be taken to a screening service for an assessment.

The involvement of the law enforcement authority shall continue at the screening center as long as necessary to protect the safety of the person in custody and the safety of the community from which the person was taken.

L.1987, c. 116, § 6, eff. Nov. 7, 1988.

[1]Section 30:4–27.15.

Effective Nov. 7, 1988

Last additions in text indicated by underline:

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813–L.1987, c. 116, see § 30:4–27.1.

30:4–27.7. Law enforcement officers, screening service or short-term care staff or their employers; immunity from liability for assessment, custody, detention and transportation

A law enforcement officer, screening service or short-term care facility designated staff person or their respective employers acting in good faith pursuant to this act who takes reasonable steps to assess, take custody of, detain or transport an individual for the purposes of mental health assessment or treatment is immune from civil and criminal liability.

L.1987, c. 116, § 7, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.8. Designation of short-term care facilities

The commissioner, in consultation with the Commissioner of Health, shall designate one or more mental health agencies or facilities in each county or multi-county region in the State as short-term care facilities. The commissioner shall so designate an agency or facility only with the approval of the agency's or facility's governing body.

L.1987, c. 116, § 8, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.9. Purposes and procedures of short-term care facilities, psychiatric facilities, and special psychiatric hospitals

Short-term care facilities, psychiatric facilities and special psychiatric hospitals shall effectuate the following purposes and procedures:

a. The director or chief executive officer of a short-term care facility, psychiatric facility or special psychiatric hospital shall have custody of a person while that person is detained in the facility and shall notify:

(1) appropriate public or private agencies to arrange for the care of any dependents and to ensure the protection of the person's property; and (2) appropriate ambulatory mental health providers for the purposes of beginning discharge planning.

If a person is admitted to a psychiatric facility, the chief executive officer of the facility shall promptly notify the county adjuster of the person's county of residence that the person has been admitted to the facility.

The facility is authorized to provide assessment, treatment and rehabilitation services and shall provide discharge planning services as required pursuant to section 18 of this act.[1]

The facility is authorized to detain persons involuntarily committed to the facility.

b. A person shall not be involuntarily committed to a short-term care or psychiatric facility, or special psychiatric hospital unless the person is mentally ill and that mental illness causes the person to be dangerous to self or dangerous to others or property, and appropriate facilities or services are not otherwise available.

The person shall be admitted involuntarily only by referral from a screening service or temporary court order. The person may be admitted voluntarily only

after the person has been advised orally and in writing of the discharge provisions established pursuant to this act and of the subsequent possibility that the facility may initiate involuntary commitment proceedings for the person.

c. A short-term care or psychiatric facility, or special psychiatric hospital may detain a person, admitted to the facility involuntarily by referral from a screening service without a temporary court order, for no more than 72 hours from the time the screening certificate was executed. During this period of time the facility shall initiate court proceedings for the involuntary commitment of the person pursuant to section 10 of this act.[2]

L.1987, c. 116, § 9, eff. Nov. 7, 1988.

[1]Section 30:4–27.18.
[2]Section 30:4–27.10.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.10. Court proceedings for involuntary commitment

a. A short-term care or psychiatric facility or a special psychiatric hospital shall initiate court proceedings for involuntary commitment by submitting to the court a clinical certificate completed by a psychiatrist on the patient's treatment team and the screening certificate which authorized admission of the patient to the facility; provided, however, that both certificates shall not be signed by the same psychiatrist unless the psychiatrist has made a reasonable but unsuccessful attempt to have another psychiatrist conduct the evaluation and execute the certificate.

b. Court proceedings for the involuntary commitment of any person not referred by a screening service may be initiated by the submission to the court of two clinical certificates, at least one of which is prepared by a psychiatrist. The person shall not be involuntarily committed before the court issues a temporary court order.

c. Any person who is a relative by blood or marriage of the person being screened who executes a clinical certificate, or any person who signs a clinical certificate for any purpose or motive other than for purposes of care and treatment, shall be guilty of a crime of the fourth degree.

d. Upon receiving these documents the court shall immediately review them in order to determine whether there is probable cause to believe that the person is in need of involuntary commitment.

e. If the court finds that there is probable cause to believe that the person is in need of involuntary commitment, it shall issue a temporary order authorizing the admission to or retention of the person in the custody of the facility pending a final hearing.

f. In the case of a person committed to a short-term care facility or special psychiatric hospital, after the facility's treatment team conducts a mental and physical examination, administers appropriate treatment and prepares a discharge assessment, the facility may transfer the patient to a psychiatric facility prior to the final hearing; provided that: (1) the patient, his family and his attorney are given 24 hours' advance notice of the pending transfer; and (2) the transfer is accomplished in a manner which will give the receiving facility adequate time to examine the patient, become familiar with his behavior and condition and prepare for the hearing. In no event shall the transfer be made less than five days prior to the date of the hearing unless an unexpected transfer is dictated by a change in the person's clinical condition.

L.1987, c. 116, § 10, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly. No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.11. Rights of patients admitted to short-term care or psychiatric facility or special psychiatric hospital

A patient admitted to a short-term care or psychiatric facility or special psychiatric hospital either on a voluntary or involuntary basis has the following rights:

a. The right to have examinations and services provided in the patient's primary means of communication including, as soon as possible, the aid of an interpreter if needed because the patient is of limited English-speaking ability or suffers from a speech or hearing impairment;

b. The right to a verbal explanation of the reasons for admission, the availability of an attorney and the rights provided in this act; and

c. The right to be represented by an attorney and, if unrepresented or unable to afford an attorney, the right to be provided with an attorney paid for by the appropriate government agency. An attorney representing a patient has the right to inspect and copy the patient's clinical chart.

The clinical director shall ensure that a written statement of the rights provided in this act is provided to patients at the time of admission or as soon as possible thereafter, and to patients and their families upon request.

L.1987, c. 116, § 11, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly. No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.12. Hearing on issue of continuing need for involuntary commitment

A patient who is involuntarily committed to a short-term care or psychiatric facility or special psychiatric hospital shall receive a court hearing with respect to the issue of continuing need for involuntary commitment within 20 days from initial inpatient admission to the facility unless the patient has been administratively discharged from the facility pursuant to section 17 of this act.[1]

The assigned county counsel is responsible for presenting the case for the patient's involuntary commitment to the court.

A patient subject to involuntary commitment shall have counsel present at the hearing and shall not be permitted to appear at the hearing without counsel.

L.1987, c. 116, § 12, eff. Nov. 7, 1988.

[1]Section 30:4–27.17.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly. No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.13. Hearing: notice; copies of documents; witnesses; transcription; payment of expenses

a. At least 10 days prior to a court hearing, the county adjuster of the admitting county shall cause notice of the court hearing to be served upon the patient, the patient's guardian if any, the patient's next-of-kin, the patient's attorney, the director, chief executive officer, or other individual who has custody of the patient, the county adjuster of the county in which the patient has legal settlement and any other individual specified by the court. The notice shall contain the date, time and location of the court hearing. The patient and the patient's attorney shall also receive copies of the clinical certificates and supporting documents, the temporary court order and a statement of the patient's rights at the court hearing.

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b. 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, shall testify at the hearing to the clinical basis for the need for involuntary commitment. Other members of the patient's treatment team may also testify at the hearing.

c. The patient's next-of-kin may attend and testify at the court hearing if the court so determines.

d. The court shall transcribe the court hearing and arrange for the payment of expenses related thereto in the same manner as for other court proceedings.

L.1987, c. 116, § 13, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.14. Rights of persons subject to involuntary commitment at court hearing and review

A person subject to involuntary commitment has the following rights at a court hearing and any subsequent review court hearing:

a. The right to be represented by counsel or, if indigent, by appointed counsel;

b. The right to be present at the court hearing unless the court determines that because of the person's conduct at the court hearing the proceeding cannot reasonably continue while the person is present;

c. The right to present evidence;

d. The right to cross examine witnesses; and

e. The right to a hearing in camera.

L.1987, c. 116, § 14, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.15. Court findings and orders

a. If the court finds by clear and convincing evidence that the patient needs continued involuntary commitment, it shall issue an order authorizing the involuntary commitment of the patient and shall schedule a subsequent court hearing in the event the patient is not administratively discharged pursuant to section 17 of this act [1] prior thereto.

b. If the court finds that the patient does not need continued involuntary commitment, the court shall so order and the facility shall discharge the patient within 48 hours of the court's verbal order or by the end of the next working day, whichever is longer, with a discharge plan prepared pursuant to section 18 of this act.[2]

c. If the court finds that the patient's history indicates a high risk of rehospitalization because of the patient's failure to comply with discharge plans, the court may discharge the patient subject to conditions recommended by the facility and mental health agency staff and developed with the participation of the patient. Conditions imposed on the patient shall be specific and their duration shall not exceed 90 days.

The designated mental health agency staff person shall notify the court if the patient fails to meet the conditions of the discharge plan. The court shall determine, in conjunction with the findings of a screening service, if the patient needs to be rehospitalized and, if so, the patient shall be returned to the facility. The court shall hold a hearing within 20 days of the day the patient was returned to the facility to determine if the order of conditional discharge should be vacated.

L.1987, c. 116, § 15, eff. Nov. 7, 1988.

[1]Section 30:4–27.17.
[2]Section 30:4–27.18.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.
Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.16. Periodic court review hearings for committed patients

a. A patient committed pursuant to a court order who is not administratively discharged pursuant to section 17 of this act [1] shall be afforded periodic court review hearings of the need for involuntary commitment. The review hearing shall be conducted in the manner provided in section 15 of this act.[2] If the court determines at a review hearing that involuntary commitment shall be continued, it shall execute a new order. The court shall conduct the first review hearing three months from the date of the first hearing, the next review hearing nine months from the date of the first hearing and subsequent review hearings 12 months from the date of the first hearing and annually thereafter. The court may schedule additional review hearings but, except in extraordinary circumstances, not more often than once every 30 days.

b. At a court review hearing, when the advanced age of the patient or the cause or nature of the mental illness renders it appropriate and when it would be impractical to obtain the testimony of a psychiatrist as required in section 13 of this act,[3] the court may permit a physician on the patient's treatment team, who has personally conducted an examination of the patient as close to the hearing date as possible, but in no event more than five days prior to the hearing date, to testify at the hearing to the clinical basis for the need for involuntary commitment.

L.1987, c. 116, § 16, eff. Nov. 7, 1988.

[1]Section 30:4–27.17.
[2]Section 30:4–27.15.
[3]Section 30:4–27.13.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.
Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.17. Discharge

The treatment team at a short-term care or psychiatric facility or special psychiatric hospital shall administratively discharge a patient from involuntary commitment status if the treatment team determines that the patient no longer needs involuntary commitment. If a discharge plan has not been developed pursuant to section 18 of this act,[1] it shall be developed forthwith.

L.1987, c. 116, § 17, eff. Nov. 7, 1988.

[1]Section 30:4–27.18.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.
Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.18. Discharge plan

A person discharged either by the court or administratively from a short-term care or psychiatric facility or special psychiatric hospital shall have a discharge plan prepared by the treatment team at the facility pursuant to this section. The treatment team shall give the patient an opportunity to participate in the formulation of the discharge plan. In the case of patients committed to short-term care or

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psychiatric facilities, a community agency designated by the commissioner shall participate in the formulation of the plan. The facility shall advise the mental health agency of the date of the patient's discharge. The mental health agency shall provide follow-up care to the patient pursuant to regulations adopted by the commissioner. This section does not preclude discharging a patient to an appropriate professional.

Psychiatric facilities shall give notice of the discharge to the county adjuster of the county in which the patient has legal settlement.

L.1987, c. 116, § 18, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.19. Interim financial assistance to discharged patients

The chief executive officer of a State or county psychiatric facility, or his designee, may authorize the payment of interim financial assistance to discharged patients for living expenses, pending determination of public benefits entitlements, when this assistance is necessary and appropriate pursuant to regulations adopted by the commissioner. When public benefit entitlements are received, discharged patients shall reimburse the psychiatric facility for all interim financial assistance provided.

L.1987, c. 116, § 19, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.20. Discharge of voluntary patients

A voluntary patient at a short-term care or psychiatric facility or special psychiatric hospital shall be discharged by the treatment team at the patient's request. The treatment team shall document all requests for discharge, whether oral or written, in the patient's clinical record. The facility shall discharge the patient as soon as possible but in every case within 48 hours or at the end of the next working day from the time of the request, whichever is longer, except that if the treatment team determines that the patient needs involuntary commitment, the treatment team shall initiate court proceedings pursuant to section 10 of this act.[1] The facility shall detain the patient beyond 48 hours or the end of the next working day from the time of the request for discharge, only if the court has issued a temporary court order.

L.1987, c. 116, § 20, eff. Nov. 7, 1988.

[1]Section 30:4–27.10.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.21. Transfer between psychiatric facilities of involuntarily committed persons

a. A person involuntarily committed to a State psychiatric facility listed in R.S. 30:1–7 may be transferred to another State psychiatric facility in accordance with rules adopted by the commissioner that specify the clinical and programmatic factors and the procedures related to the transfer.

b. A person involuntarily committed to a State psychiatric facility may be transferred to a facility for psychiatric or medical care pursuant to an agreement

between the department and that facility which specifies the clinical and programmatic factors and the procedures related to the transfer.
L.1987, c. 116, § 21, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.22. Admitting or committing persons awaiting trial on criminal or disorderly persons charges; discharge

a. If a person in custody awaiting trial on a criminal or disorderly persons charge is admitted or committed pursuant to this act, the law enforcement authority which transferred the person shall complete a uniform detainer form, as prescribed by the division, which shall specify the charge, law enforcement authority and other information which is clinically and administratively relevant. This form shall be submitted to the admitting facility along with the screening certificate or temporary court order directing that the person be admitted to the facility.

b. The division shall prepare the form with the approval of the Administrative Office of the Courts.

c. When the person is administratively or judicially discharged and is still under the authority of the law enforcement authority, that authority shall, within 48 hours of receiving notification of the discharge, take custody of the person.
L.1987, c. 116, § 22, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27–3 to 30:4–27–6, 30:4–27–10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–27.23. Costs for compliance with act allowable in establishment of rates

Any costs incurred to comply with the provisions of this act will be considered allowable in establishment of rates, which are to be set in a regulatory environment.
L.1987, c. 116, § 31, eff. Nov. 7, 1988.

Effective Nov. 7, 1988

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–28. Forms of applications and physicians certificates for commitment and hospitalization

Repeal

Section 30:4–28 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.3 to 30:4–27.6, 30:4–27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–29. Physicians' certificate

Repeal

Section 30:4–29 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

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1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3 to 30:4-27.6, 30:4-27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

Notes of Decisions

Due process 7

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7. Due process

There was no violation of due process if plaintiff's civil commitment papers were signed by only one physician, although it would give rise to state claims against psychiatrist who allegedly failed to examine plaintiff as required by New Jersey's commitment procedure. Plain v. Flicker, D.N.J. 1986, 645 F.Supp. 893.

30:4-30. Contents of certificate or written statement

Repeal

Section 30:4-30 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3 to 30:4-27.6, 30:4-27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4-33. Misdemeanor to sign for commitment except for treatment

Repeal

Section 30:4-33 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, § 30:4-27.10.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4-34. County adjuster; duties; preparation of committal papers; civil service

In each county where county counsel, county solicitor, county clerk, county physician or county probation officer, or any of their assistants is in charge and supervision of the preparation of papers relating to the commitment of the ~~tubercular~~ mentally ill or mentally retarded, such person shall be known as "county adjuster" and such duties shall, except as otherwise provided in section 2 of this amendatory and supplementary act, continue to pertain to the office of such county counsel, county solicitor, county clerk, county physician or county probation officer or their successors in office, but, notwithstanding the foregoing, in case any other county official or employee shall be at the time of the adoption of this act, in charge and supervision of the preparation of papers relating to the commitment of the ~~tubercular~~, mentally ill or mentally retarded, the ~~board of chosen freeholders~~ governing body of the county may designate that county official or employee as county adjuster. In all other counties the judge of the ~~County~~ Superior Court, with the consent of the ~~board of chosen freeholders~~ county governing body, shall designate some county official or employee as county adjuster.

The county adjuster shall have charge and supervision of the preparation of papers relating to the commitment of the mentally ill or mentally retarded in such county, and in cases arising in other counties in which the legal settlement appears to be in his county. Classification under civil service rules shall not be affected by reason of such designation or additional duties, and additional compensation, if any, for such services may be fixed by the ~~board of chosen freeholders~~ county governing body and paid in the same manner as other county employees are paid. Each ~~board of chosen freeholders~~ county governing body shall notify the various institutions for

the ~~tubercular,~~ mentally ill or mentally retarded, of the name and address of the county adjuster.

The judge of the Superior Court ~~or County Court~~ within the county may appoint the county adjuster to act as referee for the purpose of taking testimony bearing solely on the question of legal settlement and the financial ability of the patient or his legally responsible relatives to pay the cost of maintenance and shall make return to the court of his findings, conclusions and recommendations. Such findings, conclusions and recommendations shall be subject to the approval of the court and shall not be effective until incorporated in an appropriate order or judgment of the court. The county adjuster, acting as such referee, may subpena witnesses and compel their attendance on forms approved by the court.

Amended by L.1981, c. 403, § 1, eff. Jan. 6, 1982.

30:4–34.1. Tenure after 5 years of service

A person who holds the position of county adjuster by virtue of holding one of the offices under R.S. 30:4–34 and who has held the position of county adjuster continuously for 5 years or more shall continue to hold the position of county adjuster, notwithstanding he is serving in one of the offices under R.S. 30:4–34 for a fixed term or at the pleasure of the governing body of the county, during good behavior and efficiency and shall not be removed therefrom except for good cause.

L.1981, c. 403, § 2, eff. Jan. 6, 1982.

Title of Act:

An Act concerning county adjusters amending R.S. 30:4–34 and supplementing chapter 4 of Title 30 of the Revised Statutes. L.1981, c. 403.

Library References

Counties ⇐65.
C.J.S. Counties §§ 106, 107.

30:4–36, 30:4–37

Repeal

Sections 30:4–36 and 30:4–37 are repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.17 to 30:4–27.19.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–38. Class "C"; detention; commitment

Repeal

Section 30:4–38 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.17 to 30:4–27.19.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

Notes of Decisions

Hearing 1.5

1. In general

Absent constitutional violation, a late "C" application for involuntary commitment of a patient to a psychiatric hospital should be entertained and, if otherwise facially valid, should be scheduled for prompt hearing. Matter of Z.O., 197 N.J.Super. 330, 484 A.2d 1287 (A.D.1984) certification denied 101 N.J. 223, 501 A.2d 903.

1.5. Hearing

Section 30:4–38 and Rule 4:74–7 requiring that a hearing on a class "C" application for involuntary commitment be held no more than 20 days after admission to psychiatric hospital do not mean 20 days from physical entrance to the hospital since that would create an impossibly compressed time schedule. Matter of Z.O., 197 N.J. Super. 330, 484 A.2d 1287 (A.D.1984) certification denied 101 N.J. 223, 501 A.2d 903.

2. Review

Superior Court had power to order judicial review of voluntary patient's status in county

hospital and correctly ordered review of status, even though judicial review was not statutorily required. Matter of Commitment of G.M., 217 N.J.Super. 629, 526 A.2d 744 (Ch.1987).

30:4–39. Discharge of patient as not mentally ill; notification of county adjuster; certificate of doubt

Repeal

Section 30:4–39 is repealed by L.1937, c. 116, § 30, eff. Nov. 7, 1938.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.17 to 30:4–27.19.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–41. Notice of judicial hearing; patients' rights

Repeal

Section 30:4–41 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1938.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.11 to 30:4–27.16.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

Notes of Decisions

Review 5

5. Review

Appeals by patients involuntarily committed to mental hospital were not rendered moot by their discharge from the hospital, since their cases presented problems that were capable of repetition and yet of evading review, same problems might be expected to arise in other cases and to continue to divide trial courts, and liability of the patients and perhaps many other patients for the cost of their care might arguably be affected by the propriety of their commitment proceedings. Matter of Z.O., 197 N.J.Super. 330, 484 A.2d 1287 (A.D. 1984) certification denied 101 N.J. 223, 501 A.2d 903.

30:4–42. Hearing; continuance; examination of witnesses; compensation of county adjuster

Repeal

Section 30:4–42 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.11 to 30:4–27.16.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

Notes of Decisions

1. In general

Individual who is the subject of commitment hearing has right to notice of hearing, the right to present evidence and the right to be represented by counsel. Matter of S.L., 94 N.J. 128, 462 A.2d 1252 (1983).

2. Preliminary hearing

Individual who is the subject of commitment hearing has right to notice of hearing, the right to present evidence and the right to be represented by counsel. Matter of S.L., 94 N.J. 128, 462 A.2d 1252 (1983).

5. Representation of government

County adjustor and not prosecutor had right to appear in adversary role at periodic review hearing of patient civilly committed to state hospital as condition of parole, and thus offer of assistance by prosecutor, who alleged that his duty included "mandate to oppose the release of an insane committee who was the perpetrator of a cold-blooded, heinous crime," but who could add nothing to proceedings by way of additional information, had to be refused as neither permitted nor necessary even if civil commitment proceeding was in nature of parole hearing. Matter of Trifari, 188 N.J.Super. 122, 456 A.2d 123 (L.1982).

8. Evidence

Individual is entitled to a judicial hearing at which state must establish grounds for commit-

ment by clear and convincing evidence. Matter of S.L., 94 N.J. 128, 462 A.2d 1252 (1983).

30:4-44, 30:4-45

Repeal

Sections 30:4-44 and 30:4-45 are repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3, 30:4-27.5 to 30:4-27.6, 30:4-27.9, 30:4-27.13 and 30:4-27.17.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

C. VOLUNTARY APPLICATIONS

30:4-46. Voluntary application for admission for treatment

Repeal

Section 30:4-46 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3, 30:4-27.5 to 30:4-27.6, 30:4-27.9, 30:4-27.13 and 30:4-27.17.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

United States Supreme Court:

Minors, parental decision to have child institutionalized for mental health care subject to inquiry by neutral factfinder, see Parham v. J.R., 1979, 99 S.Ct. 2493, 442 U.S. 584, 61 L.Ed.2d 100.

30:4-46.1. Admission for temporary period of observation upon certificate of physician

Repeal

Section 30:4-46.1 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3, 30:4-27.5 to 30:4-27.6, 30:4-27.9, 30:4-27.13 and 30:4-27.17.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

Law Review Commentaries

Therapist's duty to protect third parties. James E. George, Joel B. Korin, Madelyn S. Quattrone and Joyce J. Mandel (1983) 14 Rutgers L.J. 637.

Notes of Decisions

Actions 2.5

2. In general

In nonemergent cases, statute governing admission to a state hospital for observation for a period not exceeding seven days if one is suffering from mental or nervous illness or from psychosis caused by drugs or alcohol and providing that if person is to be longer detained, formal commitment proceedings be commenced cannot be used to circumvent protections of statute providing that when transfer or discharge on nonemergency basis of resident is requested by nursing home, resident or, in case of adjudicated mental incompetent resident, guardian, shall be given at least 30 days advance notice. Brehm v. Pine Acres Nursing Home, Inc., 190 N.J.Super. 103, 462 A.2d 178 (A.D.1983).

2.5. Actions

In action brought under the Nursing Home Bill of Rights, trial judge erred in providing that nursing home and its physician and owner and operator would be granted a new trial on a damage claim of the estate of a patient unless the executrix accepted a remittitur on the claim where transfer of patient pursuant to physician's certificate was improperly executed and in any event, verdict in favor of the estate was not so disproportionate to the wrong done to the patient that it may reasonably have been said to have the capacity to shock the conscience of the trial judge. Brehm v. Pine Acres Nursing Home, Inc., 190 N.J.Super. 103, 462 A.2d 178 (A.D.1983).

4. Certificate of physician

Nursing home physician improperly executed a certificate, which was the basis for a transfer of a

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patient when the certificate was executed under this section governing commitment of those incapable of executing voluntary applications for admission to an institution. Brehm v. Pine Acres Nursing Home, Inc., 190 N.J.Super. 103, 462 A.2d 175 (A.D.1983).

30:4-46.2. Discharge within observation period

Repeal

Section 30:4-46.2 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.3, 30:4-27.5 to 30:4-27.6, 30:4-27.9, 30:4-27.13 and 30:4-27.17.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4-48. Discharge; release of persons not discharged

Repeal

Section 30:4-48 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, §§ 30:4-27.17 to 30:4-27.20.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

D. COMMITMENT AND MAINTENANCE OF PATIENTS

30:4-49. Legal settlement in county; aliens

Notes of Decisions

Interest 2

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2. Interest

In view of fact that county had available to it the funds necessary to pay the state's claim and had invested those funds in certificates of deposit returning a substantially greater rate of return than the percentage fixed by trial court, trial court did not err in awarding prejudgment interest on state's claim against county for costs of maintenance of indigents confined in state institutions and specialized residential services who had their legal settlements in the county. Klein v. Hudson County, 187 N.J.Super. 433, 455 A.2d 491 (A.D. 1982) certification denied 91 N.J. 533, 453 A.2d 855.

30:4-58, 30:4-59

Repeal

Sections 30:4-58 and 30:4-59 are repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

See now, § 30:4-27.21.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4-61, 30:4-62

Repeal

Sections 30:4-61 and 30:4-62 are repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

Effective date of L.1987, c. 116, see Historical Note under § 30:4-27.1.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4-27.1.

30:4–66. Those liable for patient's support

Law Review Commentaries

Disability law—guardianship and estate planning. Herbert D. Hinkle (1985) 115 N.J.L.J. 753.

30:4–63. Patients unable to pay cost of hospitalization supported by county of legal settlement

Notes of Decisions

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Medicaid 5

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4. County payments

While accreditation by joint commission for accreditation of hospitals is prerequisite to participation as a "provider" in medicaid program, failure of one or more state institutions housing indigent patients to be accredited by joint commission, or loss of such accreditation, does not affect a county's responsibility under state statute (§ 30:4–78) for payment of all care and maintenance costs of indigents hospitalized in state facilities; therefore, failure of state to have all of its institutions accredited did not deprive county of receiving medicaid credit for all eligible indigent patients at unaccredited institutions. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

Facility providing nursing and psychiatric care exclusively for patients transferred from state psychiatric hospital was a "State hospital for the mentally ill" within meaning of statute (§ 30:4–78) providing that rate to be paid by counties to state on behalf of maintenance of county patients in state hospitals for the mentally ill shall be one half of actual per capita costs of maintenance of such patients in such hospital; therefore, county was responsible for one half of actual per capita cost of maintenance of its indigent patients at that facility. Id.

5. Medicaid

An indigent's participation in or eligibility for medicaid does not discharge or diminish a county's responsibility under this section and § 30:4–78 for all care and maintenance costs of indigents hospitalized in state facilities, notwithstanding contribution of county in funding state match for participation in federal medicaid. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

Action taken by commissioner of department of human services in providing that a county would receive no medicaid credit for its obligation to pay costs of hospitalized indigents in an intermediate care facility for the mentally retarded, whereas federal funds received for indigents in state hospitals for the mentally ill would be applied in satisfaction of a county's obligation for payment of costs, was within commissioner's permissible discretionary authority. Id.

6. Licensing of institution

Institutional licensure is not a condition precedent to a county's liability under this section and § 30:4–78 providing that county of legal settlement is responsible for all care and maintenance costs of indigents hospitalized in state facilities. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

7. Interest

County was liable for payment of prejudgment interest where it stopped making statutory payments for care and maintenance costs of indigents hospitalized in state facilities without explanation or resort to court for clarification of its position, where amounts sought by plaintiffs were at all times readily ascertainable, and manner of arriving at amounts due was never challenged. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

30:4–68.1. Medicaid and Medicare eligible patients

Library References

Social Security and Public Welfare ⇐241.5, 241.60.
C.J.S. Social Security and Public Welfare §§ 127, 132.

Notes of Decisions

Credit 1
Interest 2

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1. Credit

Actual credit due county under this section providing, inter alia, that maintenance costs to be paid by counties for care of indigent patients in state hospitals shall be satisfied by federal medicaid or medicare payments to state was incapable of being resolved without plenary hearing. Klein v. Hudson County, 187 N.J.Super. 603, 455

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A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

2. Interest

This section which provides, inter alia, that maintenance costs to be paid by counties for care and maintenance of indigents hospitalized in state facilities shall be satisfied by federal medicaid or medicare payments to state did not afford relief to county in form of credit for prejudgment interest on payments county failed to make. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

30:4–68.2. Monthly personal needs allowance

A person who is a resident of an institution as defined by R.S. 30:4–23 who is not eligible for medical assistance under the "New Jersey Medical Assistance and Health Services Act," P.L.1968, c. 413 (C. 30:4D–1 et seq.), but who is a recipient of other State assistance, shall be entitled to a $35.00 monthly personal needs allowance. L.1985, c. 292, § 1.

Senate Institutions, Health and Welfare Committee Statement

Assembly, No. 1955—L.1985, c. 292

This bill increases the monthly personal needs allowance from $25.00 to $35.00 for all residents of mental hospitals and State developmental centers for the mentally retarded who are not eligible for Medicaid or Supplemental Security Income assistance but who are receiving other State assistance.

The federal government originally provided in 1974 that recipients of Supplemental Security Income (SSI) assistance who reside in nursing facilities and long-term care State and county institutions are eligible for a monthly $25.00 personal needs allowance. The State has since maintained a policy of equity for non-SSI recipients residing at these facilities and set the personal needs allowance for State-supported residents of these facilities at the same rate of $25.00 per month.

This bill, which is identical to Senate Bill No. 1878, is a companion bill to Assembly Bill No. 1049 and Senate Bill No. 1876. These bills increase the personal needs allowance $10.00 for recipients of Medicaid and SSI who reside in nursing facilities or State or county institutions.

There are approximately 3,500 persons who reside in State and county institutions and receive State assistance but who do not qualify for Medicaid or SSI. The estimated annual State cost of increasing the monthly allowance $10.00 to $105,000.00. Since these persons do not qualify for federal assistance, federal financial matching is not available.

Sections 2, 3 of L.1985, c. 292, approved August 14, 1985, provide:

"2. The Commissioner of Human Services shall, pursuant to the provisions of the 'Administrative Procedure Act,' P.L.1968, c. 410 (C. 52:14B–1 et seq.), adopt rules and regulations necessary to effectuate the purposes of this act.

"3. This act shall take effect 60 days after enactment."

Title of Act:

An Act providing for the increase of personal needs allowances and supplementing chapter 4 of Title 30 of the Revised Statutes. L.1985, c. 292.

30:4–78. Rates for maintenance of state patients and convict and criminal mentally ill and payment thereof

Notes of Decisions

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Licensing of institution 8
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State hospital for mentally ill 6

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3. County payments

While accreditation by joint commission for accreditation of hospitals is prerequisite to participation as a "provider" in medicaid program, failure of one or more state institutions housing

indigent patients to be accredited by joint commission, or loss of such accreditation, does not affect a county's responsibility under this section for payment of all care and maintenance costs of indigents hospitalized in state facilities; therefore, failure of state to have all of its institutions accredited did not deprive county of receiving medicaid credit for all eligible indigent patients at unaccredited institutions. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

6. State hospital for mentally ill

Facility providing nursing and psychiatric care exclusively for patients transferred from state psychiatric hospital was a "State hospital for the mentally ill" within meaning of this section providing that rate to be paid by counties to state on behalf of maintenance of county patients in state hospitals for the mentally ill shall be one half of actual per capita costs of maintenance of such patients in such hospital; therefore, county was responsible for one half of actual per capita cost of maintenance of its indigent patients at that facility. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

7. Medicaid

An indigent's participation in or eligibility for medicaid does not discharge or diminish a county's responsibility under § 30:4–68 and this section for all care and maintenance costs of indigents hospitalized in state facilities, notwithstanding contribution of county in funding state match for participation in federal medicaid. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

Action taken by commissioner of department of human services in providing that a county would receive no medicaid credit for its obligation to pay costs of hospitalized indigents in an intermediate care facility for the mentally retarded, whereas federal funds received for indigents in state hospitals for the mentally ill would be applied in satisfaction of a county's obligation for payment of costs, was within commissioner's permissible discretionary authority. Id.

8. Licensing of institution

Institutional licensure is not a condition precedent to a county's liability under § 30:4–68 and this section providing that county of legal settlement is responsible for all care and maintenance costs of indigents hospitalized in state facilities. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

9. Interest

County was liable for payment of prejudgment interest where it stopped making statutory payments for care and maintenance costs of indigents hospitalized in state facilities without explanation or resort to court for clarification of its position, where amounts sought by plaintiffs were at all times readily ascertainable, and manner of arriving at amounts due was never challenged. Klein v. Hudson County, 187 N.J.Super. 603, 455 A.2d 583 (L.1980) affirmed 187 N.J.Super. 433, 455 A.2d 491, certification denied 91 N.J. 533, 453 A.2d 855.

ARTICLE 4. CONFINEMENT AND TRANSFER OF INMATES

30:4–81. Confinement for observation; transportation and delivery

Repeal

Section 30:4–81 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.5 to 30:4–27.6, 30:4–27.9, and 30:4–27.22.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

30:4–82. Confined persons transferred to institutions for mentally ill or mentally retarded; order of court; procedure

Repeal

Section 30:4–82 is repealed by L.1987, c. 116, § 30, eff. Nov. 7, 1988.

1987 Legislation

Effective date of L.1987, c. 116, see Historical Note under § 30:4–27.1.

See now, §§ 30:4–27.5 to 30:4–27.6, 30:4–27.9, and 30:4–27.22.

Statement: Committee statement to Assembly, No. 1813—L.1987, c. 116, see § 30:4–27.1.

last deletions by ~~strikeouts~~

State of New Jersey

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MEMORANDUM

TO: Honorable Barbara Byrd Wecker

FROM: Paula S. Levy PSL

DATE: November 21, 1989

RE: Judicial Review of Voluntary Hospitalization: Impact on Privacy Interests

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Attached is a memorandum of law on the issue whether the proposed amendment to R. 4:74-7, providing for judicial review of voluntary psychiatric hospital admissions, would impermissibly burden the admittees' interests in privacy. Under the relevant federal and state constitutional decisions concerning disclosure of medical and other personal information, the proposed rule would be a valid exercise of governmental authority.

The amendment would call for review of two classes of admittees: (1) those who have converted from committed to voluntary status, either before or after the initial commitment hearing, Proposed R. 4:74-7(f); and (2) those who ostensibly have admitted themselves voluntarily to a short-term care or psychia-

tric facility, or to a special psychiatric hospital.[1] Proposed R. 4:74-7(h). In both cases, the hospital would disclose the names of voluntary admittees to the court and to either this office or assigned counsel. Counsel would meet with the admittee and the court would schedule hearings to review voluntary status.[2]

RELEVANT CASELAW

The leading case is Whalen v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1977), in which the United States Supreme Court held that a disclosure of medical information to a government agency did not invade any constitutionally protected right or liberty. Id. at 603-4, 97 S.Ct. at 878. This case involved a far greater intrusion into privacy than the proposed amendment would require. In Whalen, a New York statute required physicians to forward all drug prescription slips on certain types of drugs to the New York Department of Health for storage and analysis; the slips contained the patient's name, address and age, and the plaintiffs in Whalen had offered to prove that they were deterred from seeking necessary medical treatment due to the disclosure. Id. at 592-5, 97 S.Ct. at 873-4.

The Supreme Court, while recognizing a privacy interest in non-disclosure of personal information, id. at 599, 97 S.Ct. at

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1. These latter terms are defined by reference to N.J.S.A. 30:4-27.2(bb), and (u), respectively. R. 4:74-7(a).

2. Those admitted voluntarily would be reviewed only if their admission is not truly voluntary. Proposed R. 4:74-7(h)(1). All hospital records are kept confidential, and all proceedings are in camera and records sealed.

876, nevertheless minimized both the invasiveness of the disclosure to government officials in that case, and the chilling effect on the plaintiffs' rights to determine their own treatment, finding that the disclosures were not " meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care." Id. at 602; 97 S.Ct. at 878.

Following Whalen, both the Third Circuit Court of Appeals and the New Jersey courts have repeatedly found that legitimate governmental interests embodied in reporting requirements outweigh the constitutional privacy interest in non-disclosure of medical and other personal information. United States v. Westinghouse Elec. Co., 638 F.2d 570 (3d Cir. 1980) (disclosure by employer of employees' medical files to National Institute for Occupational Safety and Health); Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105 (3d Cir. 1987) (disclosure of psychiatric histories of applicants for special unit to police department);[3] Shoemaker v. Handel, 608 F.Supp. 1151 (D.N.J. 1985), aff'd. 795 F.2d 1136 (3d Cir. 1986), cert. den. ___ U.S.

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3. The court held that the voluntariness of the job application in that case did not preclude assertion of privacy rights, though it would go to the weight of those interests. Thus, the court suggested that a volunteer has less right to complain of disclosures which are a condition of his or her application for a governmental opportunity or benefit. Similarly, voluntary admittees' privacy rights are less weighty than those of committed patients who are routinely listed for hearings pursuant to R. 4:74-7. It is recognized that public policy encourages voluntary treatment and that disclosure could have an inhibiting effect as, e.g., in HIV testing.

___, 107 S.Ct. 577 (1986) (State Racing Commission may require jockeys to disclose all drugs they are taking); McKenna v. Fargo, 451 F.Supp. 1355 (D.N.J. 1978), aff'd. 601 F.2d 575 (3d Cir. 1979) (Jersey City Fire Department may require applicants for employment as firefighters to be psychologically evaluated). The New Jersey Supreme Court has made it clear that it also will authorize government agencies to require disclosure of private information. In re Martin, 90 N.J. 295 (1982) (broad disclosure of personal information, including all held by courts and government agencies, to Casino Control Commission); see Kenny v. Byrne, 144 N.J.Super. 243 (App. Div. 1976), aff'd. 75 N.J. 458 (1978) (public financial disclosure by state officers); Lehrhaupt v. Flynn, 140 N.J.Super. 250 (App. Div. 1976) (local financial disclosure ordinance). These cases provide substantial authority for the constitutional validity of the proposed amendment, and they recognize the relevance of certain factors in the weighing of governmental and privacy interests that are applicable to the question at hand. These are discussed below.

ANALYSIS

As the above cases recognize, the weight accorded to an individual's privacy interest varies, depending on the nature of the mandated disclosure. See generally, Fraternal Order, above at 112. The disclosure contemplated by the proposed amendment is much more limited than those permitted in the cases cited above. Here, very little personal information would be disclosed, and only the court and counsel would receive it. Moreover, individuals could avoid disclosure by choosing voluntary admission to

community hospital psychiatric units, as noted above at 2, n.1. Therefore, the incursion into admittees' privacy interests is virtually de minimis.

This privacy interest is further diluted by the fact that disclosure to court and counsel is traditional and expected, especially in public inpatient units and special hospitals, where commitment hearings are held routinely. See N.J.S.A. 30:4-27.5 (c) (commitments must be made to these facilities); N.J.S.A. 30:4-34 (county adjuster investigation of settlement and financial ability of all patients). The Supreme Court in Whalen held that the expectation of privacy is less reasonable in modern medical care precisely because disclosures are common, as noted above at 3. See also, Fraternal Order, 812 F.2d above at 114 (historic disclosure requirement reduces employees' expectation of privacy); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986) (in traditionally regulated industry, jockeys' justifiable privacy expectations are reduced).

This disclosure is for the admittees' benefit, as noted in the Subcommittee's report and recommendation, thus again reducing the potential harm of the intrusion into privacy. See Westinghouse, 638 F.2d above at 579 (protective purpose of occupational safety institute's research reduces likelihood that disclosure will deter employees from seeking treatment); Lora v. Board of Education of City of New York, 74 F.R.D. 565 (E.D. N.Y. 1977) (need for plaintiff class discovery outweighed privacy interests of individual class members).

In fact, the amendment would not compromise at all the privacy of committed individuals who convert to voluntary status, because their identities and admissions are already known to court and counsel. R. 4:74-7. The Appellate Division rejected a similar suggestion in Kenny v. Byrne, above. There, state officials interposed privacy concerns against an executive order because it required public disclosure of financial information, even though the same information had been disclosed already under another provision. The court found the officials' argument to be "specious." Kenny v. Byrne, 144 N.J.Super., above at 250.

Public policy permits limited disclosures of confidential information when necessary to help institutionalized persons. The Access to Confidential Records Act expressly authorizes disclosure of medical information to an institutional admittee's lawyer where it appears that such information is to be used for the person's benefit. N.J.S.A. 30:4-24.3.

The Public Advocate reports that under Rule 4:74-7, as it is now formulated, all minors admitted to psychiatric hospitals, whether they are voluntary or involuntary, are reviewed by the court. Their parents' consent to their hospitalization is not relevant for purposes of judicial review. He has never had a parent object to his seeing a minor on the grounds that the Public Advocate is violating any privacy right. He has had objections from parents who do not understand that they cannot admit their children to a hospital without having the admission questioned by an attorney and the court, but the objections always go to parental rights, not to privacy.

Adults seeking in-patient voluntary psychiatric care who are covered by any kind of medical insurance have to consent to disclosure of their records and other information in order to obtain third party reimbursement.

PSL:smm