1987 REPORT OF THE

SUPREME COURT COMMITTEE ON

CIVIL PRACTICE

Dated: May 26, 1987

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APPENDIX

Report of Mental Commitments Subcommittee

I. PROPOSED RULE AMENDMENTS RECOMMENDED

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

Rule 1:7-4, R. 2:4-3 and R. 4:49-2 were amended effective January 1, 1987 to provide explicitly that a trial judge may reconsider a decision and to set forth procedural requirements for and limitations on requests for reconsideration. Although the intent of the amendments was that the reconsideration procedure should apply to orders as well as judgments and, in fact, this was explicitly stated in the amendments to R. 2:4-3 and R. 4:49-2, the amendments to R. 1:7-4 neglected expressly to extend the reconsideration procedure to orders. Accordingly, the Committee recommends that this oversight be remedied by explicit inclusion in R. 1:7-4 of orders as well as judgments as eligible for reconsideration.

The proposed amendment to R. 1:7-4 reads as follows:

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

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

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

B. Proposed Amendment to R. 1:8-3--Examination of Jurors; Challenges

The Committee reviewed a proposal from the Criminal Practice Committee establishing a standard procedure for exercising peremptory challenges. This proposal was developed by the Criminal Practice Committee in response to State v. Brunson, 101 N.J. 132 (1985) and, if adopted, will apply to civil as well as criminal matters. The Committee recommends the adoption of proposed subsection (e) to R. 1:8-3, setting forth the order of exercising peremptory challenges.

The proposed amendment to R. 1:8-3 reads as follows:

1:8-3. Examination of Jurors; Challenges

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) Order of Exercising Peremptory Challenges.

(1) In any case in which each side is entitled to an equal number of challenges, these challenges shall alternate one by one, with the State in a criminal case and the plaintiff in a civil case exercising the first challenge.

(2) In any case in which there is more than one plaintiff or defendant or in which the parties do not all have the same number of peremptory challenges, the order of challenge shall be established by the court.

(3) The passing of a peremptory challenge by a party shall not constitute a waiver of the right thereafter to challenge any juror until all parties have successively passed challenges.

Note: Source--R.R. 3:7-2(b)(c), 4:48-1, 4:48-3. Paragraphs (c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; pagagraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (d) amended November 5, 1986 to be effective January 1, 1987[.] ; paragraph (e)(1)(2) and (3) adopted to be effective January 1, 1988.

C. Proposed Amendment to R. 2:2-5--Consequences of Certain Appellate Division Judgments

The Supreme Court asked the Committee to review an amendment to R. 2:2-5 that would distinguish between the reviewability of Appellate Division judgments on appeals from interlocutory orders as opposed to those on appeals from final judgments. The Committee recommends that the rule be amended as proposed by the Court.

The proposed amendment reads as follows:

2:2-5. Consequences of Certain Appellate Division Judgments

(a) Interlocutory Orders. A judgment of the Appellate Division on an appeal to it from an interlocutory order, decision or action shall be deemed to be interlocutory and not [appealable to] reviewable by the Supreme Court as a final judgment, unless the judgment of the Appellate Division is dispositive of the action.

(b) Final Judgments. A judgment of the Appellate Division on an appeal to it from a final judgment shall be reviewable by the Supreme Court on certification or, when appropriate, as of right, notwithstanding the remand of the matter by the Appellate Division for further proceedings. If jurisdiction is retained, however, the matter is interlocutory and subject to R. 2:5-6 and R. 2:8-1.

Note: Source--R.R. 1:2-1, 2:2-2. Amended by order of September 5, 1969 effective September 8, 1969[.] ; former rule designated paragraph (a) and new paragraph (b) adopted , 1987 to be effective January 1, 1988.

D. Proposed Amendments to Rules 2:6-2, 2:6-4, 2:6-11, 2:9-11, 2:10-3, 2:11-1 and 2:13-2

The Committee reviewed and recommends a package of amendments to numerous rules governing appellate practice that had been proposed by the Appellate Division Rules Committee:

- R. 2:6-2(a) and (b): proposed amendments would conform rule to current practice by making explicit its inapplicability to sentencing appeals.
- R. 2:6-4(a), (b), (c) and (d): proposed amendments would conform rule to current sentencing calendar procedure.
- R. 2:6-11(a) and (b): proposed amendments would conform rule to current practice by making explicit its inapplicability to sentencing appeals; in addition, amendments would remove unnecessary brackets around captions of subsections (c), (d) and (e).
- R. 2:9-11: this new rule codifies the sentencing calendar procedure.
- R. 2:10-3: the proposed amendment would permit the appellate court to review the leniency as well as the excessiveness of a sentence.
- R. 2:11-1: the proposed amendment would conform the rule to current practice.

° R. 2:13-2(b): the proposed amendment provides for flexibility in the structure of the Appellate Division.

The proposed appellate rule amendments read as follows:

2:6-2. Contents of Appellant's Brief; Responsiblity to File

(a) Formal Brief. Except as otherwise provided by R. 2:6-4(c)(1) (statement in lieu of brief), by R. 2:9-11 (sentencing appeals), and by paragraph (b) of this rule, the brief of the appellant, with every tenth line numbered in the margin, shall contain the following material, under distinctive titles, arranged in the following order:

(1) ... no change

(2) ... no change

(3) ... no change

(4) ... no change

(5) ... no change

(b) Letter Brief. In lieu of filing a formal brief in accordance with paragraph (a) of this rule and except as otherwise provided by R. 2:9-11 (sentencing appeals), the appellant may file a letter brief. Letter briefs shall not exceed 20 pages and shall conform with the requirements of subparagraphs (1), (3), (4) and (5) of paragraph (a). As to any point not presented below a statement to that effect shall be included in parenthesis in the point heading. No cover need be annexed provided that the information required by R. 2:6-6 is included in the heading of the letter.

(c) ... no change

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

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

(a) Contents. Except as otherwise provided by R. 2:9-11 (sentencing appeals), [T] the respondent's brief shall conform either to the requirements of R. 2:6-2(a) (formal brief) or (b) (letter brief), insofar as applicable, except that a counterstatement of facts need be included only if the respondent disagrees with such statements in the appellant's brief.

(b) Consequences of Failure to File. Except as otherwise provided by R. 2:9-11 (sentencing appeals) and paragraphs (c) and (d) of this rule, if a respondent fails to file a brief conforming to the requirements of these rules, the court may consider the appeal unopposed and deny the respondent permission to present his opposition orally or may make such other order, including an imposition of sanctions, as may be appropriate.

(c) Statement in Lieu of Brief. A statement in lieu of brief may be filed [only in the following circumstances:

(1) in a criminal matter where the only issue on appeal is an allegedly illegal or excessive sentence.

(2)] if the appeal is from a quasi-judicial decision of a named respondent which represents to the court that the general public interest does not require

its adversarial participation in the appeal and that the parties directly affected by its decision have adequately presented, or may be expected to so present the issues.

(d) Filing Responsibility of Public Agencies. In all appeals, where a respondent is the State, a political subdivision thereof, a public or quasi-public body, or a public officer appearing in his official capacity, such respondent shall file a brief or, if paragraph (c)[(2)] is applicable, a statement in lieu of brief.

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

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

(a) Time Where no Cross Appeal Taken. Except as otherwise provided by R. 2:9-11 (sentencing appeals), [T] the appellant shall serve and file his brief and appendix, and the transcript, within 45 days after the delivery to him of the transcript, if a verbatim record was made of the proceedings below; or within 45 days after the filing of the settled statement of the proceedings, if no verbatim record was made of the proceedings below; or within 45 days of the filing of the notice of appeal if a transcript or settled statement has been filed prior to a filing of the notice of appeal or if no transcript or settled statement is to be filed; or, on an appeal from a state administrative agency, within the time stated above or within 45 days after the service of the statement of the items comprising the record on appeal required by R. 2:5-4(b), whichever is later. The respondent shall serve and file his brief and appendix, if any, within 30 days after the service of the appellant's brief. The appellant may serve and file a reply brief within 10 days after the service of the respondent's brief.

(b) Time Where Cross Appeal Taken. Except as otherwise provided by R. 2:9-11 (sentencing appeals), [I] if a cross appeal has been taken, the party first

appealing shall serve and file the first brief and appendix, and the transcript, within 30 days after the service of the notice of cross appeal or within the time prescribed for appellants by R. 2:6-11(a), whichever is later. Within 30 days after the service of such brief, appendix and transcript, the opposing party shall serve and file his answering brief and appendix, if any, which shall also include therein the points and arguments on his own appeal. Within 30 days thereafter, the party filing the first brief and appendix shall serve and file his reply brief, which shall also include the points and arguments answering the opposing party's brief. Within 10 days thereafter, the opposing party may serve and file his reply brief. No other briefs shall be served or filed without leave of court.

(c) Scheduling Order. The time provisions of this rule notwithstanding, the court may enter a separate scheduling order in any case on appeal.

(d) Letter to Court After Brief Filed. No briefs other than those herein specified shall be filed or served without leave of court. A party may, however, without leave, serve and file a letter calling to the court's attention, with a brief indication of their significance, relevant cases decided or legislation enacted subsequent to the filing of his brief. Any other party to the appeal may, without leave, file and

serve a short letter in response thereto within 5 days after his receipt thereof.

(e) Advising Court of Custodial Change. In criminal, quasi-criminal and juvenile matters the appellant shall by letter advise the court of any change in the custodial status of a defendant, juvenile or other party subject to confinement, during the pendency of the appeal.

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

2:9-11. Sentencing Appeals

In a criminal, quasi-criminal or juvenile action in the Appellate Division in which the only issue on appeal is whether the court imposed a proper sentence, briefs shall not be filed without leave of court and the matter shall be placed on a sentencing calendar for consideration by the court following oral argument. The appellate court at its discretion may direct the removal of any case from the sentencing calendar.

Note: Adopted , 1987 to be effective January 1, 1988.

2:10-3. Review of Sentence

If a judgment of conviction is reversed for error in or for excessiveness or leniency of the sentence, the appellate court may impose such sentence as should have been imposed or may remand the matter to the trial court for proper sentence.

Note: Source--R.R. 1:5-1(c). Caption amended July 7, 1971 to be effective September 13, 1971[.] ; text amended , 1987 to be effective January 1, 1988.

2:11-1. Appellate Calendar; Oral Argument

(a) Calendar. The clerk of the appellate court shall enter all appeals upon a docket in chronological order [as of the date of the filing of appellant's brief] and cases shall be argued or submitted for consideration without argument in that order unless entitled to a preference [pursuant to R. 1:2-5 or 2:11-2, or advanced on motion of the court, its presiding judge or any party.] or unless the court otherwise orders.

(b) ... no change

Note: Source--R.R. 1:8-1(a)(b), 1:8-2(a), 1:8-3, 1:8-4, 2:8-3. Amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended November 5, 1986 to be effective January 1, 1987[.] ; paragraph (a) amended , 1987 to be effective January 1, 1988.

2:13-2. Quorum; Temporary Assignment

(a) ... no change

(b) Appellate Division. The Appellate Division shall consist of such parts [of 3 judges] with such number of judges as the Chief Justice shall from time to time designate. Appeals shall be decided by panels of 2 judges designated by the presiding judge of the part except when the presiding judge in his discretion determines that an appeal should be decided by a panel of 3 judges. Such a determination may be made where the appeal presents a question of public importance, of special difficulty, of precedental value, or for such other special reason as the Presiding Judge shall determine. The panel of two judges to which an appeal is submitted for decision may elect to call [the] a third judge to participate in the decision at any time before making its determination and shall do so if the 2 judges cannot agree as to the determination. In either case the appeal shall be reargued if it has already been argued unless reargument is waived. When an appeal is designated for decision by the full part, 3 judges shall constitute a quorum unless all parties consent to a quorum of 2 judges and, if only 2 of the 3 judges have heard the oral argument, the parties may consent to the participation in the

court's decision by the third judge. Judges assigned to one part may be assigned to serve temporarily in any other part.

Note: Source--R.R. 1:1-4, 1:1-6, 2:1-5, 2:1-8. Paragraph (a) amended November 27, 1974 to be effective April 1, 1975[.] ; paragraph (b) amended , 1987 to be effective January 1, 1988.

E. Proposed Amendment to R. 4:4-4--Substituted Service of Process

The Committee reviewed a request from an attorney to consider whether a clarification of R. 4:4-4 was necessary to ensure uniform application of substituted service procedures. He advised that in some counties the filing of an affidavit to the effect that the defendant cannot be served is sufficient to permit service by mail. In other counties, however, a court order must be obtained before mail service is permitted. The Committee agreed that substituted service should be permissible upon the filing of an affidavit only, without court order, and recommends that R. 4:4-4 be amended to make this explicit.

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

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

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

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) ... no change

(f) ... no change

(g) ... no change

(h) ... no change

(i) [As Provided by] Court Order. If service can be made by any of the modes provided by this rule, no court order shall be necessary. If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process of law.

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

F. Proposed Amendments to R.4:6-4 and R. 4:6-5--re Impropriety of Pleadings

At its final meeting in 1986, the Committee reviewed a proposal from the Administrative Director designed to deal with the problem of individual litigants whose lawsuits are both repetitive and abusive to judges and other parties. At that time, the Committee agreed to defer its recommendation on this issue to the next committee year, in order to be able to review the matter in depth.

After review, the Committee recommends that R. 4:6-5 should be amended to provide a mechanism for striking a pleading for legal insufficiency only. Rule 4:6-4 should be then expanded to serve as the vehicle for dismissing or striking all or any part of any pleading for any other impropriety, i.e., all or any part of a pleading that is redundant, immaterial, impertinent, scandalous or abusive of the court or another person. These proposed amendments do not deny litigants access to the court but do make it clear that they and their attorneys may not use the courts as a forum for baseless claims or as a license to defame. The enforcement provision of proposed amendment of R. 4:6-4 is its stipulation that the order of dismissal may require, as a condition of refiling, the

payment of adverse parties' attorneys' fees as well as the costs of the party who moved for the dismissal.

The proposed amendments to R. 4:6-4 and R. 4:6-5 reads as follows:

4:6-4. Motion for More Definite Statement or to Strike or Dismiss for Impropriety of Pleading

(a) More Definite Statement. If a responsive pleading is to be made to a pleading which is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court not complied with within 10 days after notice of the order or within such other time as the court fixes, the court may strike the pleading to which the motion was directed or make such order as it deems appropriate. The statement shall become a part of the pleading which it supplements.

(b) Impropriety of Pleading. On the court's or a party's motion, the court may either (1) dismiss any pleading that is, overall, scandalous, impertinent, or, considering the nature of the cause of action, abusive of the court or another person; or (2) strike any such part of a pleading or any part thereof that is immaterial or redundant. The order of dismissal shall comply with R. 4:37-2(a) and may expressly require, as a condition of the refiling of a pleading asserting a claim or defense based on the same transaction, the payment

by the pleading party of attorney's fees and costs incurred by the party who moved for dismissal.

Note: Source--R.R. 4:12-5. Caption amended, paragraph (a) caption provided and paragraph (b) adopted , 1987 to be effective January 1, 1988.

4:6-5. Motion to Strike for Insufficiency

On motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, on motion made within 20 days after the service of the pleading upon him, or upon the court's own initiative at any time, the court may order stricken from any pleading any defense insufficient in law [or any redundant, immaterial, impertinent, or scandalous matter].

Note: Source--R.R. 4:12-6. Caption and text amended _____, 1987 to be effective January 1, 1988.

G. Proposed Amendment to R. 4:17-4--re Answers to Interrogatories

The Committee considered a recommendation from an attorney to delete from R. 4:17-4(a) the requirement that answers to uniform interrogatories be provided in the space following the question, thereby standardizing the requirements for uniform and non-uniform interrogatories. This amendment would accommodate the capabilities of modern word processing equipment. The Committee agreed to recommend such an amendment.

The proposed amendment reads as follows:

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

(a) Form of Answers; By Whom Answered. Interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if a public or private corporation, a partnership or association, or governmental agency, by an officer or agent who shall furnish all information available to the party. The party shall furnish all information available to the party, his agents, employees, and attorneys. The person answering the interrogatories shall designate which of such information is not within his personal knowledge and as to that information shall state the name and address of every person from whom it was received, or, if the source of the information is documentary, a full description including the location thereof. [Where uniform interrogatories are served, each] Each question shall be answered separately, fully and responsively either in the space following the question or [if insufficient, on additional pages or retyped pages repeating each interrogatory in full followed by the answer, in such manner that the final document shall have each interrogatory immediately succeeded by the separate answer. Where uniform interrogatories are not used, answers may be provided separately from the questions] on separate pages. Except as otherwise provided by paragraph (d) of this rule, if in any interrogatory

a copy of a paper is requested, the copy shall be annexed to the answer. If the interrogatory requests the name of an expert or treating physician of the answering party or a copy of the expert's or treating physician's report, the party shall comply with the requirements of paragraph (e) of this rule.

(b) ... no change

(c) ... no change

(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 , 1987 to be effective January 1, 1988.

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

The Arbitration Advisory Committee requested that the Committee consider two amendments to the rules relating to the auto arbitration program.

The first proposal would amend R. 4:21A-6(b) to make it clear that, although notice of a trial de novo demand must be served on all parties in the case, it is the party demanding the trial de novo and not the civil case manager who must arrange for such service. The Arbitration Advisory Committee advised that there is some confusion about this on the part of attorneys involved in auto arbitration. The Committee recommends the amendment to R. 4:21A-6(b) as proposed by the Arbitration Advisory Committee.

The second proposal would amend R. 4:21A-6(c) to permit arbitrated cases in which a trial de novo is requested to be listed for trial on an expedited basis. The present rule calls for such cases to be returned to the trial calendar in the position they would have occupied had they not been assigned to arbitration. The reason for the original wording of the rule was to prevent arbitrated cases from "losing their place" on the trial list and having to wait longer than other criteria would warrant should a trial de novo be requested. In actuality, however,

the rule restricts the practice employed in many vicinages, that of giving cases that have been arbitrated and in which a trial de novo is sought an accelerated trial date. This practice reduces the use of the trial de novo request as a delay tactic, and alleviates the burden on attorneys and litigants of having to prepare the case twice. The Committee recommends the amendment of R. 4:21A-6(c) to permit arbitrated cases in which the award is rejected to be returned to the trial list for disposition in accordance with vicinage scheduling procedures.

The proposed amendments to R. 4:21A-6 read as follows:

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

(a) ... no change

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

(1) within 30 days after filing of the arbitration award, a party thereto files with the civil case manager and serves on all other parties a notice [, to be served on all other parties] of rejection of the award and demand for trial de novo; or

(2) ... no change

(3) ... no change

(c) Trial De Novo. An action in which a trial de novo has been demanded shall be returned to the trial calendar [subject to trial listing as if it had not been assigned to arbitration] for disposition. A party demanding a trial de novo shall be required to pay $150 towards the arbitrators fee and may be liable to pay the reasonable costs, including attorney's fees, incurred after rejection of the award by those parties not demanding a trial de novo. Reasonable costs shall be awarded on motion supported by detailed certification subject to the following limitations:

(1) ... no change

(2) ... no change

(3) ... no change

(4) ... no change

(5) ... no change

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

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

The Committee reviewed correspondence from an attorney who noted that parties making motions to dismiss for failure to answer interrogatories themselves have often failed to submit timely responses to their adversaries' interrogatories. The attorney suggested that granting a motion to dismiss for failure to answer interrogatories be conditioned upon the movant's certification that he or she is in compliance with applicable discovery rules.

The Committee recommends that, with respect to both ex parte applications and motions on notice to dismiss or strike a pleading for failure to answer interrogatories, R. 4:23-5(a) should be amended to require a certification to the effect that the moving party is not in default or out of time in providing answers to any interrogatories served upon him or her by the respondent on the motion.

The proposed amendment to R. 4:23-5 reads as follows:

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

(a) Dismissal or Suppression. 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. Thereafter such relief may be granted only by motion. The affidavit in support of the motion shall certify that the moving party is not in default in providing answers to interrogatories served upon him by the respondent on the motion. It shall also 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. On formal motion made by the delinquent party within 30 days after service upon him of the order, the court may vacate it, provided fully responsive answers to the propounded interrogatories are presented and the delinquent party pays costs in the amount of $50.00 to the Clerk of the Superior Court.

(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 _____, 1987 to be effective January 1, 1988.

J. Proposed Alternative Amendments to R. 4:42-11(b)--re Prejudgment Interest

At the request of the Supreme Court and of an attorney serving as in-house counsel to a major insurance carrier, the Committee considered at various of its meetings throughout the term the question of prejudgment interest and whether the present 12 percent figure provided in R. 4:42-11(b) should be modified to conform directly or proportionally with the sliding scale provided for post-judgment interest by reason of the 1986 amendment of R. 4:42-11(a).

The Committee reached consensus on the recommendation that the present 12 percent rate for prejudgment interest not be retained but that the rate should, rather, be subject to annual adjustment in the manner now provided for post-judgment interest. The Committee was unable to agree as to whether the percentage of interest should be the same as post-judgment interest or should be two percent greater than whatever the post-judgment interest is for a given year. At the first vote taken by the Committee on this proposition, a relatively slim majority concluded that the prejudgment interest rate should be the same as the post-judgment interest rate. At a vote taken at a subsequent meeting, a relatively slim majority concluded that

prejudgment interest should be two percent greater than post-judgment interest. The reasons supporting these positions are annexed herewith. The Committee was, however, unanimous in concluding that prejudgment interest should be assessed in the same manner as post-judgment interest, that is, that the applicable percentage for each separate portion of the overall period should apply where the percentage has changed during the overall period.

A minority of the Committee took the view that the most relevant factor to consider in fixing prejudgment interest is the actual investment income of the insurance industry as a professional investor. The proponents of this view urge no action at all should be taken on prejudgment interest until the Commissioner of Insurance has completed his presently in-progress effort to determine what the actual investment return is. The majority of the committee was generally of the view that the concerns which the minority expressed were more appropriately addressed by the technique of the "two percent override" which takes into account the professional investment status of the

insurance industry as well as the disparity of actual return among individual carriers.*

Because of the inability of the Committee to reach a clear majority position on the rate of prejudgment interest, two separate proposals are appended to the report which vary only in that respect.

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*After completion of the report, a Committee member submitted to staff information on direct losses paid, premium receipts, underwriting income and investment income for four insurance carriers during the period 1983-1985. The Committee may well reconsider next year the question of the appropriate rate of prejudgment interest in light of this information.

ALTERNATIVE I

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

(a) ... no change

(b) Tort Actions. Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest, calculated in the amount and manner provided for by paragraph (a) of this rule [at 12% per annum on the amount of the award] from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

Note: Adopted December 21, 1971 to be effective January 31, 1972. Paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) and (b) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended

July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986[.] ; paragraph (b) amended , 1987 to be effective January 1, 1988.

STATEMENT OF PROPONENTS OF ALTERNATIVE I

Proponents of Alternative I were of the opinion that there should be no differential in prejudgment and post-judgment interest rates. The Supreme Court in Busik v. Levine, 63 N.J. 351, 358-359 (1973) stated:

> Interest is not punitive, ...; here it is compensatory to indemnify the claimant for the loss of what the moneys due him would presumably have earned if payment had not been delayed. We mentioned earlier the judge-made limitation that interest should not be allowed if the claim were unliquidated. That limitation apparently rested upon the view that a defendant should not be deemed in default when the amount of his liability has not been adjudged. But interest is payable on a liquidated claim when liability itself is denied, even in good faith... The fact remains that in both situations the defendant has had the use, and the plaintiff has not, of moneys which the judgment finds was the damage plaintiff suffered.

Any differential in interest would be similar to a penalty rather than the loss of use of money. Such a differential would not facilitate settlement but could give plaintiff the advantage of making up any loss as a result of a jury verdict by the addition of prejudgment interest.

ALTERNATIVE II

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

(a) ... no change

(b) Tort Actions. Except where provided by statute with respect to a public entity or employee, and except as otherwise provided by law, the court shall, in tort actions, including products liability actions, include in the judgment simple interest [at 12% per annum on the amount of the award] from the date of the institution of the action or from a date 6 months after the date the cause of action arises, whichever is later, provided that in exceptional cases the court may suspend the running of such prejudgment interest. The amount of interest shall be calculated in the manner provided by paragraph (a) of this rule except that for each separate period the interest rate shall be 2% higher than that provided for by paragraph (a). The contingent fee of an attorney shall not be computed on the interest so included in the judgment.

Note: Adopted December 21, 1971 to be effective January 31, 1972. Paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) and (b) amended November 27, 1974 to be effective April 1, 1975;

paragraph (a) and (b) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986[.] ; paragraph (b) amended , 1987 to be effective January 1, 1988.

STATEMENT OF PROPONENTS OF ALTERNATIVE II

Proponents of Alternative II believe that R. 4:42-11 should continue to provide a prejudgment rate of interest in tort actions which is higher than the post-judgment rate because the two rates serve different functions. In the post-judgment context, the rate should compensate judgment creditors for delays in payment without turning judgments into attractive long-term investments. There is no need to set the rate at a higher level to encourage debtors to pay; affluent judgment debtors can be subjected to execution procedures by the creditor and other debtors will be able to satisfy the judgment faster if the rate is kept relatively low.

In the context of prejudgment interest in the tort cases addressed by part (b) of the rule, the defendants are mainly defended by insurance companies who are professional investors. They will find it profitable to put off resolving cases as long as they can because they are earning a high rate of return on their investment funds. Cases may take years to come to trial and involve large sums of money, so this factor can be substantial. Delay not only prejudices plaintiffs, it causes expense and inefficiency for the entire court system.

Prejudgment interest assessed against tort defendants does not aim to punish their insurance companies or coerce them into settlements, but only to recover the profits they have reaped from delay so that there is no incentive on their part to defer the resolution of cases. If delay has been caused by the plaintiff the court can refuse to award interest under the rule. In any case the insurance company does not lose anything; it is only paying back some of what it gained in investment income while the case was coming to trial.

The post-judgment rate was pegged to an index, the rate earned on the State's Cash Management Fund, which would approximate what the ordinary judgment creditor might earn on its money. Proponents of Alternative II believe that insurance companies earn more. Since the companies have not made this information available to our committee we can only guess how much more; two percent over the Cash Management Fund is, in that light, reasonable and realistic.

K. Proposed Amendments to R. 4:43-2(b)--Final Judgment by Default

The Committee reviewed a suggestion by an Assignment Judge that R. 4:43-2(b) was in need of clarification. The current language of that rule requires a party entitled to a judgment by default in a deficiency suit or a claim based upon the sale of a chattel that has been repossessed to provide "before the court" the description of the property, the amount realized at the sale or credited to the defendant, and the costs of the sale. This language is interpreted in some counties as requiring the personal appearance and testimony of the plaintiff, whereas in other counties judgment may be entered on affidavits alone.

The Committee agreed that clarification was necessary to avoid disparate procedures among the counties. Although it appears that most applications for default judgment in deficiency cases are perfunctory, consumers may be harmed if the creditor minimizes the value of the repossessed chattel or unfairly represents the amount of the debt or repossession costs. The reason that applications for deficiency judgments must be submitted to the court (under R. 4:43-2(b)) rather than to the clerk (under R. 4:43-2(c)), is that N.J.S.A. 12A:9-504(3) requires the "commercially reasonable" disposition of repossessed collateral. Such determination of whether the disposition

occurred in a commercially reasonable manner requires the exercise of discretion and judgment, which in turn dictates that the judge have the opportunity to inquire into the particulars of the manner of disposition of the collateral, the amount realized and how this amount was applied. Accordingly, the Committee recommends an amendment to R. 4:43-2(b) to require the appearance of the plaintiff in court on an application for a deficiency judgment. Further, the Committee recommends the removal of a superfluous infinitive in the third sentence of subsection (b).

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

4:43-2. Final Judgment by Default

When a default has been entered in accordance with R. 4:43-1 a final judgment may be entered in the action as follows:

(a) ... no change

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

defendants but such questions as defendants' respective percentages of liability and total damages due plaintiff shall be reserved for trial or other final disposition of the action. If application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel which has been repossessed, the plaintiff shall appear and by its testimony prove before the court the description of the property, the amount realized at the sale or credited to the defendant and the costs of the sale. In actions for possession of land, however, the court need not require proof of title by the plaintiff.

(c) ... no change

(d) ... no change

Note: Source--R.R. 4:55-4 (first sentence), 4:56-2(a) (b) (first three sentences)(c), 4:79-4. Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 15, 1982 to be effective September 13, 1982[.] ; paragraph (b) amended , 1987 to be effective January 1, 1988.

L. Proposed Amendment to R. 4:47--Entry of Judgment

The Committee recommends that R. 4:47 be amended to correct an error. A judgment is effective as of the date of its entry into the Civil Docket not, as the rule now provides, the date of its entry into the Civil Judgment and Order Docket. Only final judgments for the payment of a sum certain are entered into the latter. The proposed amendment to R. 4:47 would correct this.

The proposed amendment to R. 4:47 reads as follows:

4:47. Entry of Judgment

Subject to the provisions of R. 4:42-2 (judgment on multiple claims) judgment shall be entered as follows:

(a) ... no change

(b) ... no change

The notation of a judgment in the [civil judgment and order docket] Civil Docket constitutes the entry of the judgment, and the judgment shall not take effect before such entry unless the court in the judgment shall, for reasons specified therein, direct that it take effect from the time it is signed, but no such direction shall affect the lien or priority of the judgment. The entry of the judgment shall not be delayed for the taxing of costs.

Note: Source--R.R. 4:59. Amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (b) amended July 26, 1984 to be effective September 10, 1984[.] ; amended , 1987 to be effective January 1, 1988.

M. Proposed Amendment to R. 4:59-1(d)--re Notice of Application for Wage Execution

The Committee considered a recommendation referred by the Special Civil Part Practice Committee that R. 4:59-1(d) be amended to make clear that a wage execution will not issue unless the notice of application for that wage execution has been filed within 30 days of its service upon defendant. The Special Civil Part Practice Committee had ascertained last term that the customary practice in most counties is first to serve the notice on the judgment debtor and, after the expiration of the 10-day period in which the judgment debtor may object, then to file with the Clerk of the Special Civil Part both the notice and an order for wage execution. One county, however, had imposed the requirement that the notice of application for wage execution be filed simultaneously with service of that notice upon the judgment. debtor. Procedurally, this requirement eliminates the confusion that results when a judgment debtor files an objection to a notice of application for wage execution when that notice has never been made a part of the court's record. Substantively, it prevents the judgment creditor from utilizing the judicial system to intimidate the judgment debtor with a notice of application for wage execution

that has never been filed with the court and may in fact be filed only when a negotiated payment plan falls through.

The Committee recommends that R. 4:59-1(d) be amended to require that the notice of wage execution be filed with the court at least 20 days prior to service on the judgment debtor.

The proposed amendment to R. 4:59-1(d) reads as follows:

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 notice of wage execution , which shall be filed at least 20 days prior to its service on the debtor, 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.

(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 , 1987 to be effective January 1, 1988.

N. Proposed Amendment to R. 4:69-6(b)(3)--Limitation on Bringing Certain Actions

An attorney had inquired of the Committee if the proviso contained in R. 4:69-6(b)(3) was intended to suggest an additional alternative action. The Committee agreed that the substance of the rule was complete, but that the structure would be clarified if the semicolon preceding the proviso were changed to a comma.

The proposed amendment to R. 4:69-6(b)(3) reads as follows:

4:69-6. Limitation on Bringing Certain Actions

(a) ... no change

(b) Particular Actions. No action in lieu of prerogative writs shall be commenced

(1) ... no change

(2) ... no change

(3) to review a determination of a planning board or board of adjustment, or a resolution by the governing body or board of public works of a municipality approving or disapproving a recommendation made by the planning board or board of adjustment, after 45 days from the publication of a notice once in the official newspaper of the municipality or a newspaper of general circulation in the municipality[;] , provided, however, that if the determination or resolution results in a denial or modification of an application, after 45 days from the publication of the notice or the mailing of the notice to the applicant, whichever is later. The notice shall state the name of the applicant, the location of the property and in brief the nature of the application and the effect of the determination or resolution (e.g., "Variance--Store in residential zone denied"), and shall advise that the determination or resolution has been filed in the office of the board or the municipal clerk and is available for inspection; or

(4) ... no change

(5) ... no change

(6) ... no change

(7) ... no change

(8) ... no change

(9) ... no change

(10) ... no change

(11) ... no change

(c) ... no change

Note: Source--R.R. 4:88-15(a)(b)(1)(2)(3)(4)(5)(6)(8)(9)(10)(11)(12)(c). Paragraph (b)(1) amended July 7, 1971 to be effective September 13, 1971[.] ; paragraph (b)(3) amended , 1987 to be effective January 1, 1988.

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

At the end of the 1985-86 Committee year, the Administrative Director asked the Committee to review the recommendations of the Supreme Court Task Force on Mental Commitments, as contained in the Task Force's 1985 Report. The Committee established a subcommittee to conduct that review. Under the chairmanship of Hon. Marshall Selikoff, the subcommittee met three times during 1986-87. Its first effort was a revision of R. 4:74-7(h), Legal Settlement. This rule had been the subject of considerable dispute based on due process considerations because of the key role accorded to the county adjuster--the official charged with collecting revenue for the county--in investigating, holding hearings and submitting recommendations to the court concerning the patient's ability to pay for his or her care and treatment. The proposed amendments to R. 4:74-7(h), which were acceptable to both the Attorney General and Public Advocate representatives on the subcommittee, call for the court to enter an order imposing liability for the expenses of the patient's care and treatment only after the county adjuster has filed with the court and served upon the patient or any other person who may be legally responsible for payment, a petition for recovery of expenses and a report stating the results of the county adjuster's investigation and his or her recommendations. If no timely (i.e.,

within 20 days of service of the petition and report) objections to the petition and report are filed, the court may enter an order for payment. If timely objections are filed, a hearing must be held. The Committee endorses the proposal of the subcommittee to amend R. 4:74-7(h).

The subcommittee also proposed amendments to R. 4:74-7(e), (f) and (g), which proposals are more fully discussed in the subcommittee report (see Appendix). In brief:

-- R. 4:74-7(e), as amended, would permit the testimony at the hearing of a licensed psychologist who had examined the patient, in addition to the required testimony of a licensed psychiatrist. This amendment was originally proposed by the Supreme Court Task Force on Mental Commitments in its 1985 Report.

-- R. 4:74-7(f), as amended, explicitly states that the standard of proof for commitment is "clear and convincing evidence." This amendment was originally proposed by the Supreme Court Task Force on Mental Commitments in its 1985 Report.

-- R. 4:74-7(g), as amended, addresses the situation identified in In re S.L., 94 N.J. 128 (1983), namely, that of patients who no longer meet legal commitment criteria yet for whom no

appropriate placement has been found. The amendments also deal with the issue of disclosure of patient's records for placement purposes and in this respect were originally proposed by the Supreme Court Task Force on Mental Commitments in its 1985 Report.

The Committee endorses the subcommittee's recommendations with respect to the proposed amendments to R. 4:74-7(e), (f) and (g), with minor editorial changes and renumbering of subsections, where appropriate. As to the amendment to subsection (f), which would include a statement of the standard of proof, the Committee's position is that this "clear and convincing" standard applies to all patients for whom commitment is sought, including those committed under Krol. The Committee recognizes, however, that the Criminal Practice Committee may have a different view in this respect.

(See Section II.R. and Section V.D. of this Report for other proposals considered by the Mental Commitments Subcommittee that the Committee has declined to recommend or has deferred for future consideration.)

The proposed amendments to R. 4:74-7 read as follows:

4:74-7. Civil Commitment.

(a) ... no change

(b) ... no change

(c) ... no change

(d) ... no change

(e) Hearing. No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral testimony of at least one psychiatrist licensed in any one of the United States who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. If a licensed psychologist has examined the patient, the court may also require the psychologist to appear and testify in the matter. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify on his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se.

(f) Final Judgment of Commitment; Review. The court shall enter a judgment of commitment to an appropriate institution if it finds [from the evidence] , by clear and convincing evidence presented at the hearing, that the institutionalization of the patient is required by reason of his being a danger to himself or others or property if he is not so confined and treated or, alternatively, if the patient is a minor and the court finds that he is in need of intensive psychiatric therapy which cannot practically or feasibly be rendered in the home or in the community or on any outpatient basis. If the patient is an adult, the judgment shall provide for review of the commitment no later than (1) three months from the date of judgment, and (2) on or before six months from the date of the first review hearing, and (3) on or before one year from the date of the second review hearing, and (4) at least annually thereafter, if the patient is not sooner discharged. If the patient is a minor, the commitment shall be reviewed every three months from the date of its entry until the minor is discharged or reaches his majority. All reviews shall be conducted in the manner required by paragraph (e) of this rule except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration of two years from the date of judgment

may be summary, provided all parties in interest are are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no less than three months prior thereto. The court may, in its discretion, at a review hearing, where the advanced age of the mental patient or where the cause or nature of the mental illness renders it appropriate, and where it would be impractical to obtain the testimony of a psychiatrist (as defined in paragraph (e)), support its findings by the oral testimony of a physician licensed in any one of the United States. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(g) [Judgment of Release] Discharge.

(1) Judgment of Discharge. A judgment discharging the patient may contain in appropriate circumstances conditions for release such as attendance at a non-residential mental health facility or other form of supervision. Any such conditions shall be stated in the order of discharge with particularity. The continuation of any such conditions shall be subject to periodic review as provided in paragraph (f) hereof.

(2) Judgment of Conditional Extension Pending Placement. If the court concludes at the review hearing that the evidence does not warrant continued commitment, it shall order that the patient be discharged. If a patient, otherwise entitled to discharge, cannot be immediately discharged due to the unavailability of an appropriate placement, the court shall enter an order conditionally extending the patient's hospitalization and scheduling a placement review hearing within 60 days thereafter. If the patient is not sooner discharged, another placement review hearing shall be held no later than six months after the initial placement review hearing and subsequently at no greater than six-month intervals. At all placement review hearings the court shall inquire into and receive evidence of the patient's placement as is necessary to support the entry of an order conditionally extending the patient's hospitalization. If the court is advised at a hearing that an appropriate placement is available, it shall forthwith order such placement. If an appropriate placement becomes available during the interval between scheduled hearings, the patient may be administratively discharged to said placement without hearing provided that such discharge and placement are memorialized by an appropriate order.

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

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

(i) Contents. The petition shall set forth the person or facility making the application,

the name of the patient, the type of facility in which placement is sought, the commitment status of the patient, the reasons for the request, the response of the patient and his or her next-of-kin, and the relief requested.

(ii) Service; Protective Order. A copy of the petition shall be served on the patient and the patient's attorney, if any. The court may in its discretion appoint an attorney to represent an unrepresented patient. The court shall enter a protective order to preserve the confidentiality of the records to the greatest extent possible.

(h) [Legal Settlement] Order for Placement.

(1) The patient's legal settlement [providing for the payment of the expense of his care and treatment shall be considered either at the commitment hearing or at a hearing on notice which may be held by the county adjuster thereafter and reported to the court. In either case the settlement shall be on order of the court.] and provision for payment of the expenses of the patient's care and treatment shall be determined by the court on petition of the county adjuster, which shall be accompanied by a report stating the results of his investigation and his recommendations. The county adjuster's petition and report shall be served upon the patient or his legal guardian if any, his attorney, and any person who may be legally responsible for payment. The petition

shall set forth the name and address of the county adjuster and the address of the court and shall state that any objection to the recommendations of the county adjuster shall be filed with the court and served upon the county adjuster within 20 days after service of the petition and report. The petition shall further state that if no objection is filed within the 20-day period, the court may enter an order imposing liability in accordance with the recommendations of the report of the county adjuster. If no objection is filed, the court may enter an appropriate order based on the petition. If an objection is filed, an order may be entered only after a hearing on notice, which may be summary in nature.

(2) The person or public body charged with the [legal settlement] responsibility for payment of the expenses of the patient's care and treatment shall also be charged with the fee of assigned counsel and guardian ad litem and [necessary] reasonable costs , including the costs of experts, incurred by [him] either of them in representing the patient. If the assigned counsel or guardian ad litem is employed by a legal services project, his fee shall be ordered payable thereto. If he is employed by the State or county, no fee allowance shall be made.

(i) ... no change

(j) ... no change

Note: Source--paragraphs (a)(b)(c)(d)(e)(f) and (g) captions and text deleted and new text adopted July 17, 1975 to be effective September 8, 1975; paragraphs (a)(b)(c)(e)(f) amended and (j) caption and text deleted and new caption and text adopted September 13, 1976 to be effective September 13, 1976; paragraphs (b), (d), and (f) amended July 24, 1978, to be effective September 11, 1978; paragraph (f) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 22, 1983 to be effective September 12, 1983[.] ; paragraphs (e) and (f) amended and paragraphs (g) and (h) caption and text amended , 1987 to be effective January 1, 1988.

P. Proposed Amendment to R. 7:9--Municipal Courts

The Committee observed that the caption and text of R. 7:9 make reference to "bastardy proceedings," terminology obsolete since the enactment of the 1983 New Jersey Parentage Act, N.J.S.A. 9:17-38 through -59. This legislation also removed proceedings to determine the parent-child relationship from the jurisdiction of the municipal courts. The Committee recommends that R. 7:9 be amended to reflect the change wrought by this legislation. The proposed amendment has been reviewed by the staff of the Municipal Court Rules Committee.

The proposed amendment to R. 7:9 reads as follows:

7:9. Municipal Courts: [Bastardy Proceedings;] Statutory Penalty Proceedings

The provisions of [R. 5:5-9 and] R. 4:70 govern [, respectively,] the practice and procedure in the municipal court in [bastardy proceedings and] summary proceedings for enforcement of statutory penalties and for confiscation or forfeiture of chattels.

Note: Source--R.R. 7:18-1, 7:18-2, 7:18-3, 7:18-4. Amended June 29, 1973 to be effective September 10, 1973[.] ; amended , 1987 to be effective January 1, 1988.

II. PROPOSED RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendment to R. 1:6-2(d)--Civil Motions

The Committee reviewed a request from a judge to amend R. 1:6-2(d) to provide that when the moving party has requested oral argument but timely answering papers have not been filed, the respondent should not be permitted to present oral argument and the motion should be decided on the papers unless the court determines that oral argument is necessary. The Committee agreed that such an amendment is unnecessary, and recommends that no change be made to R. 1:6-2(d).

B. Proposed Amendment to R. 1:6-2, R. 1:7-4 and R. 4:46-2 --re Advising Attorneys of Ruling on Motions Decided on the Papers

The Committee considered an attorney's proposal for a rule amendment to require, alternatively: a) that if a judge's decision on a motion on the papers, particularly a summary judgment motion, is to be rendered orally, the parties should be advised as to when the decision will be placed on the record so that they may be present to hear the ruling; or, b) that the judge deciding a motion on the papers, particularly a summary judgment motion, write to the attorneys involved stating the legal and factual reasons for granting or denying the motion. The attorney described difficulties he had experienced in obtaining timely information from the court on its determination of motions.

The Committee noted that R. 1:6-2(f) was adopted effective January 1986 to require that if the court has made findings of fact and conclusions of law explaining its disposition of a motion, the order shall so note, indicating whether the findings and conclusions were written or oral and the date on which they were rendered. If the court made no such findings, it must append to the order a statement of reasons for the disposition if it concludes that explanation is either necessary or appropriate.

Further, R. 4:46-2 in conjunction with R. 1:7-4 provides that when deciding a summary judgment motion, the court shall find the facts and state its conclusions of law by an opinion or memorandum decision, either written or oral. Nonetheless, the Committee recognizes that the rules cited above do not address the problem of providing prompt notice of the court's determinations to counsel. The Committee agreed that the issue of untimely transmittal of orders and determinations is not appropriate for inclusion in the rules of court. It recommends, therefore, that no rule or rule amendment addressing this issue be adopted. Concluding that this problem should be administratively handled, it has, however, through the Administrative Director, referred the matter to the Conference of Assignment Judges and to the Committee on Judicial College and Seminars.

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

The Committee reviewed the slip opinion in Bell v. Bell (decided 12/2/86) to consider whether an amendment to R. 1:6-3 is necessary. The question raised in that opinion was whether the interplay of R. 1:5-2, R. 1:5-4(b) and R. 1:6-3 operated to deprive litigants of procedural due process by permitting an insufficient time for an opposing party to prepare and file a response prior to the return date of a motion. The trial judge resolved the question by interpreting the term "served" as it appears in R. 1:6-3 to mean "received by opposing counsel."

The Committee declines to recommend an amendment to R. 1:6-3 to incorporate the interpretation enunciated in Bell v. Bell, and would rely instead upon trial judges to grant extensions of time when necessary.

D. Proposed Amendments to R. 1:8-3--Examination of Jurors; Challenges

Several proposed amendments to R. 1:8-3 were submitted to the Committee from various sources during the course of the year. (See Section I.B. of this Report for the Committee's favorable recommendation concerning the adoption of subsection (e) to the rule, setting forth a procedure for exercising peremptory challenges.)

At its first meeting of the year, the Committee reviewed a proposal from an Assistant Deputy Public Defender to revise R. 1:8-3 in three respects: (1) to provide explicitly for attorney-conducted voir dire; (2) to require each juror to complete a questionnaire which would be made available to counsel to assist them in examining the jurors; and (3) to require that, prior to the voir dire, the venire be given a written statement of the basic principles of law that will apply in the case. At that time, the Committee agreed not to recommend these proposed amendments to R. 1:8-3.

At its final meeting of the year, in response to a recommendation of the Criminal Practice Committee, the Committee again considered the specific issue of amending R. 1:8-3(a) to permit party supplementation of the court's voir dire examination of jurors for

peremptory challenge purposes. The Committee was not able to reach consensus on this recommendation. Almost all of the lawyers on the Civil Practice Committee favored the proposal, and all of the judges opposed it. Simply, lawyers feel that they are better able to make intelligent use of their peremptories if they have direct and relevant communication with prospective jurors, and the judges generally feel that the kind of communication lawyers want is not so much for the purpose of obtaining impartial jurors as it is for the purpose of providing an opportunity for a lawyer to establish a sense of rapport with a prospective juror. In short, the judge members of the Committee very much concur with the philosophy expressed by State v. Manley, 54 N.J. 259 (1969), and do not believe that that philosophy in any way impinges upon the fairness of the jury trial.

The Committee did, however, reach consensus in concluding that the supplementation opportunity presently permitted by R. 1:8-3(a) is frequently not afforded and that trial judges are sometimes overly restrictive in permitting or themselves conducting a supplemental interrogation. The Committee was of the view that the trial judge should routinely confer with the lawyers prior to the voir dire in the same manner as a charge

conference. The purpose of the conference, of course, would be for the attorneys to bring to the judge's attention those particular matters as to which prospective jurors should be questioned. The Committee is of the further view that supplementation of voir dire following this procedure should be liberally rather than restrictively accorded.

E. Proposed Amendment to R. 1:8-6--re Sequestration of Witnesses

The Committee reviewed a request from a judge to consider an amendment to R. 1:8-6 to address the issue of witness sequestration. The Committee noted that the problem is not whether to order witness sequestration, requests for which are liberally granted in most instances, but rather how to deal with a violation of such an order. This issue does not lend itself to remedy by rule change, but is the subject of considerable case law. Accordingly the Committee declined to recommend the proposed amendment.

F. Proposed Amendment to R. 1:16-1--Interviewing Jurors Subsequent to Trial

The Committee considered the proposal of an attorney-member for a rule or rule amendment that would permit an attorney, without leave of court, to discuss matters relating to the trial of a civil case with a juror on that case in the event the matter settles prior to the commencement of jury deliberations.

The majority of the Committee agreed that the educational benefits of such interviews to attorneys would be outweighed by their potential harm to the jury system. Accordingly, it does not recommend that R. 1:16-1 be amended to permit interviews of jurors in cases that settle before jury deliberations begin.

G. Proposed Amendment to R. 4:4-4(a)(2)--Optional Mailed Service

The Chief of Foreclosures in the Superior Court Clerk's Office proposed that R. 4:4-4(a)(2) be amended to include a statement that its provisions are limited to optional mailed service and do not apply to mailed service authorized under any other provision of a service rule. The Committee considered this proposal and agreed that amendment of R. 4:4-4(a)(2) as suggested is unnecessary.

H. Proposed Amendment to R. 4:5-2--Claim for Relief

The Committee reviewed a request from a judge to amend R. 4:5-2 to provide that reports of all treating physicians and other health care providers must be annexed to any pleading asserting a claim for physical or mental injury. The consensus of the Committee was that the proposed rule amendment is not necessary and would be counterproductive.

I. Proposed Amendments to R. 4:6-1(a)--re Time for Presentation of Defenses and Objections

The Committee considered two amendments to R. 4:6-1(a) that were proposed by the Chief of Foreclosures in the Superior Court Clerk's Office:

1. to amend R. 4:6-1(a) to provide for a 20-day answer period where an acknowledgement of service in response to service by mail is used, instead of the 35-day answer period now permitted in such circumstances; and
2. to restructure R. 4:6-1(a) to provide for a general 20-day answer period for in-state service, with a 35-day answer period for clearly delineated exceptions.

The Committee agreed that the answer periods currently set forth in R. 4:6-1(a) are appropriate and clearly defined, and that the proposed rule amendments are unnecessary.

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

The Committee reviewed a request from the Administrative Director, carried from the previous term, to consider whether a sound recording transcriber may transcribe a videotaped deposition in lieu of the current requirement that there be simultaneous shorthand recordation by a certified shorthand reporter of a videotaped deposition. Several members of the Committee had expressed reservations about dispensing with the requirement of verbatim stenographic recording and the transcript produced thereby. The Administrative Director, at the request of the Committee, published a Notice to the Bar in the September 25, 1986 issue of the New Jersey Law Journal requesting comments on this issue. Six comments were received; all were vehemently opposed to dispensing with the requirement of stenographic recording and preparation of the ensuing typewritten transcript. These comments reflected the view of the Committee, which agreed that R. 4:14-9 should not be amended to eliminate this requirement.

K. Proposed Amendment to R. 4:23-2--Failure to Comply with Order

The Committee reviewed the opinion in Canino v. D.R.C. Co., 212 N.J. Super. 620 (App. Div. 1986), holding that a contempt order issued pursuant to R. 4:23-2(b)(4) may not be issued under the court's inherent powers without compliance with the procedural safeguards set forth in R. 1:10-1 et seq. The Committee concluded that the holding in this opinion did not necessitate a rule change.

L. Proposed Amendments to R. 4:23-5--Failure to Serve Answer to Interrogatories

The Committee considered a proposal from a judge to amend R. 4:23-5 to limit application of the rule to situations where the interrogatories were served in timely fashion, and to preclude a motion to dismiss or strike a pleading if such motion is filed more than 120 days after the answer to interrogatories become due, unless good cause for the delay is demonstrated. The Committee agreed that the proposed amendments are unnecessary, and recommends against their adoption. (See Section I.I. of this Report for recommended changes to R. 4:23-5.)

M. Proposed Amendment to R. 4:26-4--Fictitious Names; In Personam Actions

The Committee considered a proposal from a judge to amend R. 4:26-4 to require that any motion to amend the complaint to name a fictitious defendant be made prior to the expiration of the permitted time for completion of discovery. The Committee agreed that any such requirement must be tied to plaintiff's reasonable acquisition of knowledge identifying the fictitious defendant, which might occur beyond the 150-day discovery period. Moreover, Viviano v. CBS, Inc., 101 N.J. 538 (1986) requires the plaintiff to exercise due diligence in this regard. Accordingly, the Committee does not recommend that R. 4:26-4 be amended as proposed.

N. Proposed Amendment to R. 4:42-8(a)--Costs

The Committee was asked by the Superior Court Clerk for guidance on whether he must automatically include in the calculation of taxed costs, without being so directed by court order, the fees paid to court reporters for deposition services.

The Committee concluded that taxed costs should not automatically include the cost of depositions. Although costs are normally allowed as a matter of course to a prevailing party, their allowance is nonetheless discretionary. There is no authority in statute (N.J.S.A. 2A:15-59) or rule (R. 4:42-8(a)) for the automatic inclusion of deposition transcript costs in the calculation of taxed costs. Thus deposition transcript costs may be included, but only if the court so directs.

The Committee agreed that no rule change is necessary.

O. Proposed Amendment to R. 4:42-9--Counsel Fees

The Chief of Foreclosures in the Superior Court Clerk's Office transmitted to the Committee his own and a judge's recommendation that R. 4:42-9(a)(5) be amended to provide that when multiple tax sale certificates are foreclosed on the same parcel only one attorney's fee should be permitted with respect to that parcel. The rule now provides that the court may award a counsel fee not exceeding $350 per tax sale certificate. The Committee was advised that multiple certificates on the same parcel are purchased and foreclosed by virtue of separate counts in the complaint. Attorney's fees in the amount of $350 per certificate are then sought.

The Committee noted that the current rule allows counsel fees in the court's discretion, and then only up to a maximum of $350 per certificate, except for special cause shown by affidavit. Accordingly, it agreed that no amendment to R. 4:42-9(a)(5), to limit further the amount of attorney's fees the court may award, is necessary.

P. Proposed Amendment to R. 4:64-3--Surplus Moneys

The Committee considered a recommendation from an attorney that R. 4:64-3 be amended to provide that if a foreclosure surplus exists, the plaintiff must post the surplus with the Clerk of the Superior Court and, at the same time, give notice of the fact of posting and the amount of the surplus to all defendants, including secondary lienholders and judgment creditors. The attorney further proposed that this requirement of notice to all defendants of the existence and amount of surplus should be extended to surplus monies resulting from all kinds of actions involving executions on real estate or personal property, including judicial sales to satisfy judgments based on unsecured claims.

With respect to foreclosure surplus, the Committee in reviewing the proposed amendment noted that it is not the plaintiff but the sheriff, as an officer of the court conducting the sale, who posts the surplus with the Clerk. Since the plaintiff has no control over such surplus funds, it should not be burdened with mandatory duties concerning those monies. Present R. 4:64-3 requires that any petition for surplus funds must be made on motion to all defendants, including defaulting defendants. Further, with respect to the suggestion that all defendants be noticed as to the existence and amount of surplus in every execution sale against real or personal property, because such

sales are not usually made pursuant to a proceeding listing all parties with an interest in the property, the proposal would require the judgment creditor in most cases to make its own search against the property being levied upon.

For the above reasons, the Committee agreed that no rule change should be recommended expanding present notice requirements with respect to surplus monies.

Q. Proposed Amendments to R. 4:58--Offer of Judgment

The Supreme Court, in its response to the Report of the Committee on Civil Practice and Procedures, requested the Committee to review the rule concerning offers of judgment. That review began in the 1985-86 Committee year with the appointment of an Offer of Judgment Subcommittee. During the 1986-87 Committee year, that subcommittee drafted proposed amendments to R. 4:58-1 and R 4:58-2, and two alternative amendments to R. 4:58-3. These were published in the New Jersey Law Journal with a Notice to the Bar soliciting comments on the draft amendments as well as on a proposal to eliminate the rule altogether. Upon reviewing the comments received, the Committee agreed to recommend that R. 4:58 remain in its present form.

R. Proposed Amendment to R. 4:74-7(j)--Civil Commitments (Institutionalization of Minors)

The Committee was advised that the Mental Commitments Subcommittee was unable to reach consensus on a proposed amendment to R. 4:74-7(j) that would eliminate any specific age limitation for voluntary admission of minors for psychiatric treatment. (See Report of the Mental Commitments Subcommittee, included in Appendix to this Report.) Because of the conflicting opinions expressed by subcommittee members, the Committee agreed that R. 4:74-7(j) should not be amended at this time.

S. Proposed Amendment to R. 4:73--re Condemnation Filings

The Committee considered a proposal from an attorney that an amendment to R. 4:73 be adopted to assist municipalities in tracking condemnation proceedings through the trial and appellate courts by requiring that each paper filed in the condemnation action state at the outset the block and lot numbers and the street address of the property in question. The Committee rejected this proposal, noting that the docket numbers assigned at the trial and appellate levels provide an adequate means of tracking cases.

T. Proposed Amendments to N.J.S.A. 3B:22-4 and R. 4:96-1 --re Limitation of Creditors' Claims After Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)

Last term the Committee considered the effect of the notice requirements enunciated in the Mennonite decision on both the legislation and court rules governing in rem tax foreclosures, and made a recommendation for legislative change. This term, at the request of the chairperson of the Judiciary/Surrogates Liaison Committee, the Committee reviewed Mennonite to determine whether any rule or legislative amendments were necessary with respect to the limitation of creditors' claims under N.J.S.A. 3B:22-4 and R. 4:96-1.

The Committee agreed that Mennonite did not require amendments to either N.J.S.A. 3B:22-4 or R. 4:96-1, which now provide for adequate notice to both known and unknown creditors.

U. Notice Requirement of N.J.S.A. 30:4D-7.1(b)

The Department of Human Services, Division of Medical Assistance and Health Services, proposed a rule mirroring the notice requirement of N.J.S.A. 30:4D-7.1(b), which mandates that attorneys notify the Division of any tort action or recovery by or on behalf of a Medicaid recipient against a third party. Apparently this requirement is widely ignored. The Division suggested that a court rule requiring such notice would promote compliance with the statute.

The Committee noted that a similar statutory notice requirement exists for workers' compensation and welfare liens, among others. It agreed that the court rules should not be amended to incorporate the statutory Medicaid notice requirement, and suggested that a Notice to the Bar, published periodically in the New Jersey Law Journal might serve to remind attorneys of the mandates of the statute.

V. Service in Civil Forfeiture Actions

An attorney inquired of the Committee as to appropriate service procedures in civil forfeiture actions. The statute governing civil forfeitures procedures, N.J.S.A. 2C:64-3, provides that the notice requirements of the Rules of Court for an in rem action shall be followed to provide notice of the action to any person known to have an interest in the property. The attorney noted that, although R. 4:4-5 addresses service on absent defendants in in rem actions, no rule specifically deals with service on non-absent claimants (since the property is the defendant in a forfeiture action).

The Committee agreed that present in rem service procedures, as established in R. 4:4-5, are appropriate to provide notice to claimants in forfeiture actions. In addition, R. 4:70 sets forth procedures for actions for the confiscation or forfeiture of chattels. Accordingly, the Committee recommends that no rule amendment or adoption is necessary to provide a procedure to notice claimants in civil forfeitures.

W. Stempler v. Speidell, 100 N.J. 36 (1985)

At the request of the Supreme Court, the Committee appointed a subcommittee to consider the necessity of amending the court rules in light of Stempler. The Court held in that case that a defendant doctor's counsel in a medical malpractice, wrongful death action had a right to interview decedent's other treating physician ex parte with respect to matters relating to the litigation. During the 1985-86 committee year, the subcommittee met with lawyers who represented plaintiffs and defendants in medical malpractice/wrongful death cases. The consensus of the subcommittee was that Stempler did not necessitate the adoption of a new rule or a rule amendment. The Committee, however, deferred its recommendation on this question to the present Committee year in order to permit further discussion of the procedural implications of Stempler. In accordance with the results of such discussion, the Committee endorses the recommendation of the subcommittee that no rule or rule amendment is necessary to address issues in Stempler. The language of the opinion itself clearly sets forth the manner in which plaintiff's or claimant's physician may be interviewed. The Committee recognizes that a court rule would not be effective with respect to ex parte interviews of doctors prior to the institution of

litigation, nor would it protect doctors from allegations of a breach of a confidential relationship. If the problem with respect to the protection of the physician is to be considered, this is a matter for the Legislature rather than the court, since the issue goes to privilege as opposed to procedure.

X. Videotaping of Expert Witnesses

The Committee reviewed a request from a retired judge on recall to consider a rule that would require the testimony of expert witnesses to be videotaped prior to trial and would require it to be used at trial in lieu of live testimony unless the expert could be produced at trial without undue delay. The Committee recommends against the adoption of such a rule, noting that present R. 4:14-9(3) is sufficient to address the use of videotaped depositions at trial.

III. OTHER RECOMMENDATIONS

A. Identification of Final Judgments

The Committee considered two related issues concerning the identification of final judgments. The first, brought to Committee's attention by the Superior Court Clerk, related to the difficulty Clerk's Office staff experience in identifying those judgments and orders that, pursuant to N.J.S.A. 2A:16-22 and R. 4:101-1, must be entered without request on the Civil Judgment and Order Docket. Only final judgments or orders for payment of a sum certain must be entered; once entered, the judgment constitutes a lien on the real property of the judgment debtor. The Clerk advised that it is sometimes not clear from the language of the judgment or order whether it must be entered on the Civil Judgment and Order Docket and, if so, in what amount.

The second issue was raised by an attorney who proposed that R. 4:42-2 be amended to provide that every order or judgment for the payment of money shall state whether it is or is not final. Because only final judgments and orders may be executed, such a statement of finality would assist the Clerk and the parties in identifying those judgments and orders for the payment of money that are "executable."

The Committee discussed these issues at three meetings, one of which included a presentation by the Superior Court Clerk and two of his staff. Various solutions were suggested and, ultimately, rejected by the Committee. One possible solution, which during the course of the year garnered the most support among Committee members would have required attorneys to append to every final judgment or order for the payment of money an abstract of the judgment or order. The Committee's final vote on this proposal, however, indicated only one member's support. (It should be noted that the Conference of Civil Presiding Judges also discussed the issue of identifying final judgments, and considered and overwhelmingly rejected the proposed requirement of an appended abstract.)

The Committee reasoned that in the vast majority of cases the finality and terms of a judgment or order are clear. Thus the requirement of an appended abstract would be an unnecessary burden on attorneys. In those few cases in which the order or judgment is complicated and its terms ambiguous, it is unlikely that a simple form abstract would provide much assistance. Further, many members expressed concern for the consequences if the abstract did not accurately reflect the underlying judgment or order.

The Committee notes that the Clerk's entry of final judgments and orders on the Civil Judgment and Order

Docket is a mechanical, ministerial function. No discretion is invested in the Clerk with respect to this function. The Committee recommends that the problem be dealt with on a case-by-case basis, as follows: if ambiguous judgments or orders are submitted, the Clerk should seek clarification from the judge who signed the document, who may in his discretion further direct the Clerk to the attorneys. The Committee further recommends that the importance of ensuring that judgments and orders are clear and unambiguous be brought to the attention of the bench and the bar by means of a memorandum from the Administrative Director to the Assignment Judges and a Notice to the Bar published in the New Jersey Law Journal, respectively.

With respect to the question of identifying those judgments and orders that may be executed, the Committee noted that no judgment is final unless it resolves all issues as to all parties or is certified as final by the trial judge, pursuant to R. 4:42-2. The Committee agreed that no amendment to R. 4:42-2 is necessary.

B. Publication of Opinions

During the 1985-86 committee year, a subcommittee on publications was established to study and make recommendations for the improvement of the process of determining which judicial opinions should be approved for publication. The report of that subcommittee was included in the 1986 Civil Practice Committee Report. The Committee is advised that the Court is awaiting a report on the same subject from the New Jersey State Bar Association, and will consider the Committee's recommendations in conjunction with those of the Bar. The Committee continues to endorse the report of its subcommittee and the recommendations set forth in the 1986 Civil Practice Committee Report.

IV. LEGISLATION

A. Proposed Amendment to N.J.S.A. 39:6A-4.3(c)

N.J.S.A. 39:6A-4.3(c), which deals with personal injury protection coverage deductibles, exclusions and setoffs, provides in part that "Under a contingent fee arrangement, the attorney shall also be entitled to reimbursement out of the amount of the setoff for costs actually incurred in the institution and prosecution of the claim or action, which amount shall in no instance exceed 10 percent of the amount of the setoff, in a manner to be prescribed by the Supreme Court." The Court has not prescribed a method for calculating such reimbursement.

The Committee agreed that the language of the statute itself provides a means of calculating an attorney's reimbursement--actual costs not exceeding 10 percent of the setoff amount. Accordingly, the Committee recommends that the Legislature be asked to delete the phrase "in a manner to be prescribed by the Supreme Court" from the statute.

B. Proposed Amendment to N.J.S.A. 39:6A-5(c)

N.J.S.A. 39:6A-5(c), which addresses payment of personal injury protection coverage benefits, provides with respect to the permitted recovery of attorney's fees in the arbitration of PIP claims that payment is to be made "in accordance with a schedule of hourly rates for services performed, to be prescribed by the Supreme Court of New Jersey." The Court has not prescribed such a fee schedule.

The Committee recommended that the Legislature be asked to amend N.J.S.A. 39:6A-5(c) to delete the requirement that the Supreme Court prescribe a schedule of hourly rates and, instead, to provide that the amount of reasonable attorney's fees recoverable be determined by the arbitrator.

V. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to R. 1:21-1(a)--re Bona Fide Office Requirements

The Committee reviewed inquiries from two attorneys, referred to it by the Advisory Committee on Professional Ethics, as to whether particular office arrangements comply with the bona fide office requirements of R. 1:21-1(a). Although the Committee does not provide advisory opinions concerning court rules, it was informed that no other judicial office or committee handled attorneys' inquiries on the subject of compliance with the bona fide office requirements of R. 1:21-1(a). The Committee is of the view that the text of R. 1:19-2, which confers on the Advisory Committee jurisdiction over inquiries not only respecting the Disciplinary Rules but also respecting "other rules of this court governing the practice of attorneys" covers inquiries of the nature here involved. Accordingly, the Committee has requested guidance from the Supreme Court as to how such inquiries should be handled, and, with the permission of the authors, has forwarded the inquiries to the Executive Committee of the Civil Trial Bar Section for its review and recommendations.

The Committee expects to reconsider this issue next year.

B. Proposed Amendment to R. 1:22-7--Proceedings Following Hearing (Committee on the Unauthorized Practice of Law)

Late in the 1985-86 term, the Committee reviewed a recommendation from the Trustees of the New Jersey State Bar Association to amend R. 1:22-7 to eliminate the need for a trial de novo in Superior Court upon violation of a written agreement between a respondent and the Committee on the Unauthorized Practice of Law (UPL Committee) or, if there were no agreement, to eliminate the need for a trial de novo once the UPL Committee had found that the party had been engaged in the unauthorized practice of law. In order to afford this issue full discussion, the Civil Practice Committee agreed to defer consideration of the State Bar Trustees' proposal to the 1986-87 term.

Upon the subsequent request of the Secretary of the UPL Committee, however, the Committee agreed to defer consideration of the issue once again in order to permit the UPL Committee to review the State Bar Trustees' proposal within the context of a general redrafting of R. 1:22.

The Committee will review the State Bar Trustees' proposal along with the recommendations of the UPL Committee in the forthcoming Committee year.

C. Interplay of R. 1:21-1A, RPC 7.5, the Business Corporation Act and the Professional Services Corporation Act

The Committee considered a 1985 inquiry, previously presented to the Advisory Committee on Professional Ethics and to the Committee on the Unauthorized Practice of Law, from a member of the New Jersey and Pennsylvania bars, who practices with a Pennsylvania firm that is a professional corporation organized under the laws of Pennsylvania for the purpose of practicing law in that state. The firm seeks to establish a bona fide office in New Jersey, yet R. 1:21-1A, RPC 7.5, the Business Corporation Act and the Professional Services Corporation Act apparently operate together to prevent this.

The Committee determined that it would seek the views of the New Jersey State Bar Association prior to discussing the matter in greater detail. The question will be carried to the next Committee year so that the views of the Bar can be obtained.

D. Civil Commitment

The Subcommittee on Mental Commitments, in its report to the Committee (see Appendix), recommended that a standing committee be appointed by the Supreme Court to review the rules, statutes and procedures relating to mental commitments. The subcommittee had felt itself handicapped by the lack of any members who dealt with mental commitment issues on a regular basis or who were familiar with commitment procedures. In light of the anticipated enactment of A-1813, which would significantly alter current commitment procedures, the subcommittee agreed that it would be very helpful if a committee whose members had real expertise in the area of mental commitments were established to oversee the rule and procedural changes that would be required by the new legislation. The Committee noted that A-1813 has not yet been signed into law and, if signed, would not become effective for 18 months. The Committee therefore agreed to table the subcommittee's recommendation, for reintroduction if and when A-1813 is enacted.

[N.B. The Governor signed A-1813 on May 7, 1987, some days following the Committee's final meeting.]

The subcommittee also considered a proposal from the Public Advocate for a rule providing for judicial review when the status of a patient

changes from involuntarily committed to voluntarily admitted. The subcommittee was unable to reach consensus on this proposal. The Committee agreed to defer consideration of the Public Advocate's proposal to the forthcoming Committee year.

E. Legislation in Response to Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983)

In its 1986 Report, the Civil Practice Committee recommended the adoption of legislation to satisfy the notice requirements of Mennonite. The Committee's recommendation would address the issue by amending the Recording Act, specifically N.J.S.A. 46:15-4.2, to provide that no mortgage may be recorded unless it includes an affidavit of the mortgagee asserting the affiant's knowledge of the opportunities afforded by N.J.S.A. 54:5-104.48 for answering his or her notification of any tax foreclosure proceedings against the property.

The Committee was recently advised of other legislation that had been introduced, S-389, to deal with the notice requirements of Mennonite. Senate Bill 389 would amend the In Rem Tax Foreclosure Act, N.J.S.A. 54:5-104.48, with the result that a municipality would have to undertake a mortgage search in every tax foreclosure.

The Committee continues to support its originally proposed legislative amendment as meeting the notice requirements of Mennonite without unduly burdening municipalities. It agreed, however, to seek the views of the League of Municipalities on both proposals, and to reconsider the issue next year in light of the League's response.

F. Judiciary Style Manual

The Committee acknowledged the need to update and revise the Judiciary Style Manual. It agreed to consider this issue more fully in the coming year.

G. Foreclosure Subcommittee

The Chief of Foreclosures in the Superior Court Clerk's Office proposed amendments to R. 4:64-1 and R. 4:64-2 in order to conform these rules with actual practice. A subcommittee consisting of Hon. William D'Annunzio (chair), Hon. William A. Dreier and Professor Robert Carter was appointed to meet with the Chief of Foreclosures to draft appropriate rule revisions. The Committee will consider these amendments in the coming year.

H. Subcommittee on Renotice Requirements of Adjourned Sheriff's Sale

The Committee appointed a subcommittee, consisting of Hon. Philip A. Gruccio (chair), Hon. Paul G. Levy and Bruce Schragger, Esq., to consider what rule or legislative amendments, if any, are appropriate in light of the decision in First Mutual Corporation v. Samojeden (slip opinion, A-2946-85T7, decided December 3, 1986). That opinion holds that R. 4:65-2 and R. 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 the statutes of both Pennsylvania and New York provide for formal renotice of the postponed date of the sheriff's sale. The subcommittee intends to consult with various sheriffs and will report back to the Committee in Fall 1987. The Committee has therefore deferred further discussion of the renotice issue until it receives the subcommittee's recommendations.

I. Capitalization and Life Expectancy Tables

Appendix I to the court rules contains capitalization and life expectancy tables. The Committee notes that the current market makes application to individual cases difficult. A subcommittee is working with AOC staff to prepare updated and additional tables for consideration by the Committee in the upcoming year.

Respectfully submitted,

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