NEW JERSEY STANDARDS FOR

APPELLATE REVIEW

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CONTENTS

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SECTION ONE:

INTRODUCTION

Standards for appellate review are the guidelines used by appellate courts to answer this question: was error that occurred in a trial court or administrative agency so serious that it requires reversal or other intervention by the appellate court?

Trial judges make many kinds of decisions, for example: whether to admit evidence, grant a motion, dismiss a case, or grant a new trial. Agencies make similar decisions and also make findings of fact. Trial judges do too when there is no jury.

When a case is appealed, the appellant will argue that someone (judge, agency, jury, attorney) committed error during a trial or an agency hearing. The appellate court must look at the record and decide whether the appellant is correct. If there was error, then the court needs to decide whether the error was serious enough to warrant intervention. Often, it was not.

In deciding whether there was error and whether any error warrants appellate intervention, appellate courts sometimes use the same standards that the trial court or agency used, for example, when they interpret a statute or review a grant of summary judgment.

But more often appellate courts use different standards, so they look at decisions made by a trial judge or agency from a different point of view. An appellate court, after all, only reviews decisions and the trial judge or agency was in a better position to make those decisions and an appellate court. For that reason, most appellate standards differ from trial-level standards: they have built-in limits that make it difficult for appellate courts to reverse, even when there has been error.

That is why it is essential to know and understand the standards for appellate review. They show how an appellate court decides whether an error warrants reversal or other intervention.

This outline will help you find and apply those standards.

SECTION TWO:

PREREQUISITES TO REVIEW

Be sure your case does not involve a problem in one of the following areas. Remember that (1) there must be an appealable judgment or order, (2) counsel may not submit to the appellate court any evidence that was not before the trial court or agency, and (3) an appellate court is reluctant to consider issues not raised below. Moreover, in most situations, a trial court no longer has jurisdiction over a case once it is in the appellate court.

I. Is there an Appealable Judgment or Order?

A. No judgment at all:

1. The rule is that there can be no appeal from an oral opinion, only from a formal judgment. Credit Bureau Collection Agency v. Lind, 71 N.J. Super. 326, 328 (App. Div. 1961); Homeowner's Taxpayers Ass'n. of S. Plainfield v. Borough of S. Plainfield Sewerage Auth., 60 N.J. Super. 321, 323 (App. Div. 1960). Sometimes, even though it looks as though the case has been fully decided, a brief says only that the verdict was rendered or that defendant was sentenced, but there is no copy of any formal judgment in the appendix. It may be that counsel has simply failed to include a copy of the judgment in the appendix, but sometimes no judgment has been entered. If there is no final judgment, there is no right to appeal.

B. Judgment filed after notice of appeal:

The appeal can be dismissed if judgment wasn't entered before appeal was filed, but the court can allow the party to have the judgment entered late and keep the appeal. Judgment entered after notice of appeal renders the appeal premature, but the court usually ignores the defect and does not dismiss.

C. Appeals as of Right to the Appellate Division:

1. R. 2:2-3(a) sets out appeals allowed as of right to the Appellate Division:

a) from final judgments of Superior Court trial divisions and Tax Court; from summary contempt proceedings (except in municipal courts);

b) from final decisions of state administrative agencies (except tax matters (R. 8:2) and Wage Collection Section appeals (R. 4:74-8)), provided administrative remedies have been pursued (this latter requirement can be waived in the interest of justice);

c) from the promulgation of any rule by an agency;

d) whenever otherwise provided by law.

2. Although final judgments are thus normally appealable as of right, R. 2:2-3(b) sets out cases where appeal to the Appellate Division from final judgments is by leave only:

a) from final judgments of a court of limited jurisdiction (such as a municipal court); or

b) from "actions or decisions" of an administrative agency or officer if the matter is appealable as of right to a trial division of Superior Court.

D. Appeals as of Right to the Supreme Court:

1. R. 2:2-1 says that there is a right to appeal to the Supreme Court only where:

a) the Appellate Division has determined a substantial constitutional question; or

b) there's a dissent in the Appellate Division; or

c) the death penalty has been imposed and in post-conviction relief proceedings in such cases (this kind of appeal comes directly from the trial court); or

d) in such other cases as provided by law.

All other appeals to the Supreme Court from final judgments must be by petition for certification to the Appellate Division pursuant to R. 2:12. R. 2:2-1(b).

2. Appeal as of right to the Supreme Court arising where there's a dissent in the Appellate Division as to issues in the dissent only. Other issues will be considered only if certification is granted. Gilborges v. Wallace, 78 N.J. 342 (1978); R. 2:2-1(a)(2).

3. Research note: when someone appeals to the Supreme Court as of right based on a dissent in the Appellate Division, you will not be able to find that by Shepardizing because the Court has not had to grant an order for certification. Thus, there will be no published cite.

E. Appeals to the Appellate Division from interlocutory orders:

1. For good general discussions, see Mark A. Sullivan, Interlocutory Appeals, 92 N.J.L.J. 161 (1969), and Robert L. Clifford, Civil Interlocutory Appeal in New Jersey, 47 Law and Contemporary Problems 88 (1984).

2. **Very important: a final judgment is one that resolves all issues as to all parties; any other order or decision is interlocutory.**

3. Once a final judgment has been entered, an appellant may appeal as of right from that judgment and raise as an issue that an interlocutory decision was erroneous. But before final judgment, one cannot appeal to the Appellate Division from an interlocutory order, unless the Appellate Division grants leave to appeal "in the interest of justice." R. 2:2-4. If appellant files a notice of appeal from an interlocutory order without leave, the court usually dismisses. Vitanza v. James, 397 N.J. Super. 516, 519 (App. Div. 2008).

4. But the court need not dismiss an appeal from an interlocutory order erroneously filed as of right; it can grant leave to appeal nunc pro tunc in its

discretion. R. 2:2-4; Caggiano v. Fontoura, 354 N.J. Super. 111,125 (App. Div. 2002).

5. However, leave to appeal will not be readily granted, particularly where the appellant filed notice of appeal before seeking leave. Piecemeal appeals are disapproved. Frantzen v. Howard, 132 N.J. Super. 226, 227 (App. Div. 1975).

6. R. 2:2-3(a) notes the general rule that, so long as there is still a right of review within the administrative agency, a decision of an administrative agency is not appealable as of right to the Appellate Division. The appellant must exhaust all administrative remedies first, although that requirement can be waived in the interest of justice.

7. Examples of interlocutory orders that require leave are:

a) order for partial summary judgment (for example, against only one defendant or on less than all issues) (Yuhas v. Mudge, 129 N.J. Super. 207, 209 (App. Div. 1974));

b) order for divorce where custody, alimony, etc., have not been determined (Kerr v. Kerr, 129 N.J. Super. 291, 293 (App. Div. 1974));

c) order denying summary judgment or granting it on some but not all substantive issues (Applestein v. United Board & Carton Corp., 35 N.J. 343, 350-51 (1961); Rendon v. Kassimis, 140 N.J. Super. 395, 398 (App. Div. 1976); Frantzen v. Howard, 132 N.J. Super. 226 (App. Div. 1975));

d) order granting a new trial (Olah v. Slobodian, 119 N.J. 119, 129 (1990));

e) order referring a juvenile for trial as an adult (State in Interest of R.L., 202 N.J. Super. 410, 411-12 (App. Div.), certif. denied, 102 N.J. 357 (1985));

f) Council on Affordable Housing's order returning exclusionary zoning controversy to Law Division (Fair Share Housing Center, Inc. v.

Township of Cherry Hill, 242 N.J. Super. 76, 81 (App. Div. 1990));

g) consent order of dismissal permitting plaintiff to reinstate certain claims once appeals on other claims had been resolved; this just creates "the illusion of finality," where some claims have really not been disposed of. (Ruscki v. City of Bayonne, 356 N.J. Super. 166, 168-69 (App. Div. 2002))(but see an exception to this rule at 8(a), below);

h) order in an action initiated by DYFS (now DCPP) alleging abuse or neglect of a child where the order comes at the end of only the first part of the process (N.J.S.A. 9:6-8.47 requires first a fact-finding hearing and then a dispositional hearing. An order at the end of the fact-finding hearing is not a final order.) (New Jersey DYFS v. L.A., 357 N.J. Super. 155, 164-65 (App. Div. 2003));

i) order denying dismissal of an indictment on the ground of double jeopardy (State v. Nemes, 405 N.J. Super. 102, 105 (App. Div. 2008)).

8. There are, however, some orders that are appealable as of right even though they appear interlocutory. Most of them are listed in R. 2:2-3(a). See Pressler & Verniero, Current N.J. Court Rules, comment 2.3.2 on R. 2:2-3 (2018) and see comment on R. 2:2-4 re the Appellate Division's ability to grant a motion for leave to appeal. Some examples are:

a) where parties to a consent judgment reserve the right to appeal an interlocutory order "by providing that the judgment would be vacated if the interlocutory order were reversed on appeal," they may appeal even though they consented to the judgment; this applies even where they do not explicitly so provide, if it can be inferred from the consent judgment (N. J. Schools Constr. Corp. v. Lopez, 412 N.J. Super. 298, 309 (App. Div. 2010), quoting Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207 (App. Div. 2009));

b) an order that unconditionally stays execution of a final order (Estate of Carroll v. Samuel Geltman & Co., 214 N.J. Super. 306, 308 (App. Div. 1986);

c) a final custody order under R. 5:8-6 where a matrimonial action has been bifurcated (R. 2:2-3(a)(3));

d an order entered under R. 5:10-6 after a preliminary hearing in an adoption case (R. 2:2-3(a)(3));

e) in a condemnation case, an order appointing commissioners (N.J.S.A. 20:3-12; see Borough of Rockaway v. Donofrio, 186 N.J. Super. 344, 349, 354 (App. Div. 1982)), or dismissing for failure to comply with statutory prerequisites (County of Morris v. 8 Court St. Ltd., 223 N.J. Super. 35, 38-39 (App. Div. 1988));

f) an interlocutory order appropriately certified as final by a trial judge under R. 4:42-2; (There is a fuller discussion of this rule in subsection F on the next page.) This rule is often misapplied and when it is, the Appellate Division is not bound by the certification and will dismiss the appeal (Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 551-52 (App. Div. 2007); see also cases cited in Grow Company, Inc. v. Chokshi, 403 N.J. Super. 443, 456 n.3 (App. Div. 2008));

g) an order under R. 3:28(f) enrolling a defendant in the pre-trial intervention program over the prosecutor's objection (R. 2:2-3(a)(3));

h) an order under R. 4:53-1 appointing a statutory or liquidating receiver (R. 2:2-3(a)(3));

i) a material witness order under R. 3:26-3 (R. 2:2-3(a)(3));

j) an order granting or denying extension of time to file notice under Tort Claims Act (R. 2:2-3(a)(3));

k) an order to either compel or deny arbitration is appealable as of the date the order is entered, regardless of whether all issues have been resolved (GMAC v. Pittella, 205 N.J. 572, 587 (2011); Wein v. Morris, 194 N.J. 364, 380(2008)).

F. Inappropriate Certification of Interlocutory Orders as Final:

1. R. 4:42-2 allows certification, in some situations, of an interlocutory order as final and entry of final judgment on less than all claims. But it does not allow trial judges, in effect, to grant a motion for leave to appeal. The rule can be used only 1) where there has been a complete adjudication of a separate claim, or 2) upon complete adjudication of all rights and liabilities of a particular party, or 3) upon partial summary judgment or other order for payment of part of a claim.

Even in one of these situations a judge may enter as a final judgment only an order that would be subject to enforcement if the order were final, and only if the judge certifies that there is no just reason to delay enforcement.

An order that affords no affirmative relief, such as an order granting dismissal of some counts of the complaint, would confer no enforcement rights, and is not certifiable under this rule. Kurzman v. Appicie, 273 N.J. Super. 189, 191-92 (App. Div. 1994).

2. It is a misuse of the rule for a judge to certify an order that doesn't meet the requirements of the rule for the purpose of trying to make the order appealable. It is not meant to be a device to circumvent the Appellate Division's right to decide whether to grant leave. Janicky v. Point Bay Fuel, Inc., 396 N.J. Super. 545, 551-52 (App. Div. 2007); Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:42-2 (2018).

In Vitanza v. James, 397 N.J. Super. 516, 519 (App. Div. 2008), the court said: "The time has come to enforce the Rules and not to decide an appeal merely

because the respondent did not move to dismiss it and it was fully briefed." And in Grow Company, Inc. v. Chokshi, 403 N.J. Super. 443, 456 (App. Div. 2008), the court allowed the appeal because the parties had not asked for the certification, but it also gave an extensive review of this problem and the court's attempt to deal with it. See, id. at n.3 for an extensive list of cases that have dealt with the issue.

3. An appeal from an interlocutory order will be dismissed where the attorney did not seek R. 4:42-2 certification on finality until after the Appellate Division had denied a motion for leave to appeal. D'Oliviera v. Micol, 321 N.J. Super. 637, 641-43 (App. Div. 1999).

G. When Does Time Begin to Run When There is a Settlement and a Later Stipulation of Dismissal?

When parties settle a case, and even when the court marks the case closed for administrative purposes, the time for appeal does not begin to run until a stipulation of dismissal is filed. Until then, not all issues have been determined as to all parties. McGlynn v. State, 434 N.J. Super. 23, 30-31 (App. Div. 2014).

H. Appeals to the Supreme Court from interlocutory orders:

1. R. 2:2-2 provides that appeals may be taken to the Supreme Court, by leave, from interlocutory orders in only three circumstances: where the death penalty has been imposed (this appeal would be directly from a trial court); where necessary to prevent irreparable injury due to an interlocutory Appellate Division order; on certification to the Appellate Division under R. 2:12-1.

I. Appeal by the State in criminal cases and quasi-criminal cases:

1. Appeal by the State from acquittal of a defendant is generally not allowed unless the matter can be construed as civil instead of criminal. The distinction can be difficult in quasi-criminal cases

and in violations of ordinances. Even if the Legislature has designated a sanction as civil, that "does not foreclose the possibility that it has a punitive character," thus making it a criminal sanction instead. State v. Widmaier, 157 N.J. 475, 492 (1999). See, e.g., State v. Fiore, 69 N.J. 122, 124 (App. Div. 1961); Newark v. Pulverman, 12 N.J. 105, 115 (1953); State v. Yaccarino, 3 N.J. 291, 295 (1949) (where violations of zoning and health ordinances were considered criminal in nature); Borough of Verona v. Shalit, 96 N.J. Super. 20, 23 (App. Div. 1967) (violation of a health ordinance was considered civil and hence the State could appeal). In State v. Widmaier, 157 N.J. at 499-501, the Court held that a charge of refusal to take a breathalyzer test was quasi-criminal, so that the State could not appeal acquittal of the refusal charge. The factors used to determine which cases are criminal are set out in State v. Widmaier, id. at 492-94.

2. Appeal from acquittal in criminal cases is not allowed if it would constitute double jeopardy. United States v. Scott, 437 U.S. 82 (1978); State v. Widmaier, 157 N.J. 475, 499-501 (1999); State v. Barnes, 84 N.J. 362, 369 (1980).

3. Where a criminal indictment, accusation, or complaint is dismissed because a statute or ordinance is unconstitutional, the State may appeal that ruling only if the issue was raised by motion before or after trial. R. 2:3-1; State v. Barnes, 84 N.J. 362, 368 (1980).

4. Where sentence imposed for a first or second degree crime is appropriate for a crime of a lesser degree, the State may appeal within ten days. N.J.S.A. 2C:44-1(f)(2); State v. Farr, 183 N.J. Super. 463 (App. Div. 1982). This time limit is strictly construed. State v. Watson, 183 N.J. Super. 481, 484 (1982).

But the State may appeal from a decision on collateral consequences of a criminal sentence, such as when a sentencing judge fails to impose mandatory forfeiture of public employment. State v. Kennedy, 419 N.J. Super. 475, 478 (App. Div. 2011). In fact, earlier cases allowed appeal by the State from denial of a

prosecutor's application for a mandatory forfeiture as an appeal from an illegal sentence. See, e.g., State v. Ercolano, 335 N.J. Super. 236, 243 (App. Div. 2000).

J. No appeal from consent judgments:

Parties cannot consent to a judgment and then appeal. The rule allowing an appeal as of right from a final judgment contemplates a judgment entered involuntarily against the loser. Winberry v. Salisbury, 5 N.J. 240, 255 (1950); Cooper Medical Ctr. v. Boyd, 179 N.J. Super. 53, 56 (App. Div. 1981). However, there is an exception to that rule. Where "the parties to the consent judgment reserve the right to appeal an interlocutory order 'by providing that the judgment would be vacated if the interlocutory order were reversed on appeal,'" then the consent judgment is appealable. N.J. Schools Constr. Corp. v. Lopez, 412 N.J. Super., 298, 309 (App. Div. 2010), quoting Janicky v. Point Bay Fuel, Inc., 410 N.J. Super. 203, 207 (App. Div. 2009)

K. Agency Appeals May go to the Law Division or to the Appellate Division:

An appeal to review the action or inaction of a local administrative agency is by complaint in lieu of prerogative writ in the Law Division. R. 4:69-1. It does not go to the Appellate Division. But an appeal to review the action or inaction of a State agency goes to the Appellate Division. R. 2:2-3(1).

There used to be an exception that required appeals from State administrative agencies with only local jurisdiction to go to the Law Division. See Selobyt v. Keough-Dwyer Correctional Facility, 375 N.J. Super. 91, 99-100 (App. Div. 2005). But the Supreme Court ruled, in Infinity Broadcasting Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 225 (2006), that that exception would no longer be followed. Now, (except for situations noted in the next paragraph) even State agencies with only "local" jurisdiction must appeal to the Appellate Division.

Nevertheless, on rare occasions, even a decision of a State agency with statewide jurisdiction is better

reviewed in the trial court. Where the ordinary rules on allocation of jurisdiction within the Superior Court would result in separate courts hearing parts of the same controversy, then it is better to assign responsibility to one tribunal. Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976). And where it is necessary to develop a record before there can be meaningful review, then the appeal should be in the Law Division. Condemnation cases fall into that category. Infinity Broadcasting Corp. v. N.J. Meadowlands Comm'n, 187 N.J at 225.

Where parties in the Chancery Division voluntarily choose to use the alternative dispute resolution process under N.J.S.A. 2A:23A-1 to -30, they accept a limited right of review of the arbitrator's or umpire's decision, which requires them to go to the Chancery Division, not to the Appellate Division. And any further review by the Appellate Division would occur only in rare circumstances "where public policy would trigger the general supervisory power of the Courts." Weinstock v. Weinstock, 377 N.J. Super. 182, 188-89 (App. Div. 2005).

See further discussion at page 62 of this outline.

II. Submission on Appeal of Evidence Not Before Trial Court or Agency:

Occasionally, without moving for permission to expand the record on appeal, an attorney will annex to his or her brief on appeal material that was not in evidence below. This is not permitted; the court will not consider such material and often notes that fact in its opinion. New Jersey DYFS v. M.M., 189 N.J. 261, 278 (2007); State v. Sidoti, 120 N.J. Super. 208, 211 (App. Div. 1972). See also Pressler & Verniero, Current N.J. Court Rules, comment on R. 2:5-4(a) (2018), for a list of cases.

III. Issues Not Raised Below:

Although an appellate court (under the plain error rule discussed at Section Three, II, B, below) will consider allegations of error not brought to the trial judge's

attention, it frequently declines to consider issues that were not presented at trial. Generally, unless such an issue (even a constitutional issue) goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the appellate court will not consider it. State v. Robinson, 200 N.J. 1, 20-22 (2009). State v. Arthur, 184 N.J. 307, 327 (2005); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see cases cited at Pressler & Verniero, Current N.J. Court Rules, comment on R. 2:6-2 (2018).

IV. Jurisdiction of Trial Court After Filing of Notice of Appeal:

R. 2:9-1(a) provides that except for very limited exceptions, "supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification is filed." Nevertheless, the same rule provides that the trial court "shall have continuing jurisdiction to enforce judgments and orders pursuant to R. 1:10 and as otherwise provided." And the appellate court can entertain a motion for directions to the lower court or agency to modify or vacate any order. R. 2:9-1(a). This rule means, among other things, that a trial court does not have jurisdiction to rule on a motion for reconsideration once a notice of appeal has been filed, although it can correct clerical errors in the judgment pursuant to R. 1:13-1, even on its own initiative. Kiernan v. Kiernan, 355 N.J. Super. 89, 94 (App. Div. 2002).

SECTION THREE:

GENERAL STANDARDS: PLAIN ERROR AND HARMFUL ERROR

I. General Rule:

"Plain" or "harmful" error is error that is "clearly capable of producing an unjust result." R. 2:10-2. The plain error rule and the harmful error rule are identical. The different terms are just used in different situations, depending on whether the error was brought to the attention of the trial judge. If error has occurred in the trial court, but the appellant did not bring it to the attention of the trial judge, then use the term "plain error." If it was raised at trial, talk about "harmful error."

In either case, unless an error is "clearly capable of producing an unjust result," thereby meeting the definition of "plain" or "harmful" error, the appellate court will not reverse on the basis of that error (except in some well-defined circumstances where case law identifies certain error as always so serious that the court will not even examine whether the error was "plain" or "harmful").

II. Plain Error Rule:

This rule is used when the trial error was not brought to trial judge's attention and is either raised for the first time on appeal or is not raised even then.

A. General Rule: R. 2:10-2:

1. If the error has not been brought to the trial court's attention, the appellate court will not reverse on the ground of such error unless the appellant shows plain error: i.e., error "clearly capable of producing an unjust result." R. 2:10-2.

Rule 2:10-2 reads, in full:

> Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain

> error not brought to the attention of the trial or appellate court.

2. Not any possibility of an unjust result will suffice. Stated in terms of its effect in a jury trial, the possibility must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." State v. Macon, 57 N.J. 325, 336 (1971).

3. Here is an example of the scope of the plain error rule. In considering a jury charge, plain error is

> legal impropriety in the charge prejudicially affecting the substantial rights of the defendant sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result.
>
> [State v. Hock, 54 N.J. 526, 538 (1969), quoted in State v. Nero, 195 N.J. 397, 406 (2008)]

4. However, certain kinds of jury instructions are so crucial to a jury's deliberations on the guilt of a criminal defendant that errors in those instructions are presumed to be reversible. "Errors impacting directly upon these sensitive areas of a criminal trial are poor candidates for rehabilitation" under the plain error theory. State v. Simon, 79 N.J. 191, 206 (1979). See also State v. Weeks, 107 N.J. 396, 410 (1987). For example, the court must always charge on the elements of the crime. State v. Vick, 117 N.J. 288, 291 (1989).

5. Another example is Szczecina v. P.V. Holding Corp., 414 N.J. Super. 173, 185 (App. Div. 2010), where defense counsel made extensive disparaging remarks about plaintiffs and their attorney in opening and closing statements but plaintiff's counsel never objected. The Appellate Division reversed for plain

error, emphasizing that the trial judge had had a duty to intervene.

6. Note, too, the part of R. 2:10-2 that provides that "the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." This means that even when no party to the appeal raises a particular issue, the appellate court may raise it "where upon the total scene it is manifest that justice requires consideration of an issue central to a correct resolution of the controversy and the lateness of the hour is not itself a source of countervailing prejudice." Center for Molecular Medicine and Immunology v. Twp. of Belleville, 357 N.J. Super. 41, 48 (App. Div. 2003) (quoting In re Appeal of Howard D. Johnson Co., 36 N.J. 443, 446 (1962)).

B. Corollaries to Plain Error Rule:

1. Frequently, an appellate court, besides invoking the plain error rule, assigns a certain interpretation to counsel's failure to raise the error below: it notes that that failure can be taken to mean that counsel did not consider the error to be significant in the context of the trial. State v. Macon, 57 N.J. 325, 333 (1971). One such example is counsel's failure to object to opposing counsel's remarks on summation. State v. Wilson, 57 N.J. 39, 50-51 (1970).

2. Errors created by counsel will not ordinarily be grounds for reversal. State v. Harper, 128 N.J. Super. 270, 276-77 (App. Div. 1974).

3. "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996), quoted in N.J. Div. of Youth & Family Servs. v. M.C. III, 201 N.J. 328, 340 (2010).

C. Conclusion:

Always look first to see if the error raised on appeal was raised below. (If it was not, counsel must indicate that when he or she states the issue in the appellate brief. R. 2:6-2(a).) If the error wasn't raised below, the plain error rule will be applied.

III. Harmful Error Rule:

This rule is used when a specified error was brought to the trial judge's attention.

The "harmful error" rule is essentially identical to the "plain error" rule even though it applies to error which was properly raised below. Under both rules an error will not lead to reversal unless it is "clearly capable of producing an unjust result." R. 2:10-2.

Thus, even though an alleged error was brought to the trial judge's attention, it will not be ground for reversal if it was "harmless error." Harmless error will be disregarded by the appellate court, even where the judge is found to have abused his discretion in admitting evidence and failed to properly instruct the jury. See State v. Prall, 231 N.J. 567, 581, 587-88(2018).

Here, as with "plain error," an error will be found "harmless" unless there is a reasonable doubt that the error contributed to the verdict. This is true even if the error is of constitutional dimension. State v. Macon, 57 N.J. 325, 338 (1971); State v. Slobodian, 57 N.J. 18, 23 (1970).

The standard for determining whether constitutional error warrants reversal differs from the usual standard. Here the respondent (the State in criminal cases) must convince the appellate court beyond a reasonable doubt that the error complained of did not contribute to the conviction. Chapman v. California, 386 U.S. 18, 24 (1967)(cited in State v. Camacho, 218 N.J. 533, 548 (2014)); State v. Scherzer, 301 N.J. Super. 363, 441 (App. Div. 1997).

Note, however, that there are some errors that are so serious that that the harmless error doctrine will not even be applied. For example, when a trial judge improperly denied a defendant's request to represent himself in a criminal trial, the error is not amenable to the harmless error doctrine. The appellate court will not even try to

assess the impact of the denial; automatic reversal is required. State v. Thomas, 362 N.J. Super. 229, 244 (App. Div. 2003).

Similarly, in State v. Camacho, 218 N.J. 533, 554 (2014), the Court held that the failure to charge the jury that it could not draw an adverse inference from defendant's failure to testify, even where the judge had agreed to give such a charge at defendant's request, was constitutional error, but not harmful error in the context of that trial. Most constitutional errors that occur during a trial can be harmless. Id. at 547, citing Arizona v. Fulmanante, 499 U.S. 279, 306 (1991). But "trial error" subject to a harmful error analysis differs from a "structural error," which affects the whole framework within which the trial is conducted (for example, failure to provide counsel). Such errors are so intrinsically harmful as to require reversal. State v. Comacho, 218 N.J. at 549-50, citing Neder v. United States, 527 U.S. 1, 7 (1999).

State v. Gillispie, 208 N.J. 59, 93 (2011), held that the admission of other crimes evidence was unduly prejudicial and not outweighed by any probative value, but was harmless because there was independent, overwhelming evidence of guilt.

IV. Conclusion: Plain and Harmful Error:

If an appellant claims error, and if the error was brought to the trial judge's attention, the appellate court decides first whether it was error at all by applying whatever standards govern that type of error. If it was error, then it decides if it was harmful. If it was not, the court won't reverse.

If the alleged error was not raised at trial, the court goes through the same process: it first decides if it was error, then decides if it was plain error.

Remember that the standards for deciding whether an error not raised below was "plain" are identical to those used to decide if error raised below was "harmful." In either case the issue is whether the error is clearly capable of producing an unjust result. The only real difference is

the terminology: just be sure to use the right term at the right time.

SECTION FOUR:

STANDARDS ON APPEAL GOVERNING ERROR IN BOTH CIVIL AND CRIMINAL CASES

I. Error in Charge to Jury:

When an appellant raises error in the jury charge, the charge must be read as a whole. The court will not read just the portion alleged as error. State v. Wilbely, 63 N.J. 420, 422 (1973).

No party is entitled to have the jury charged in his or her own words. All that is necessary is that the charge as a whole be accurate. State v. Thompson, 59 N.J. 396, 411 (1971); Kaplan v. Haines, 96 N.J. Super. 242, 251 (App. Div. 1967), aff'd, 51 N.J. 404 (1968), overruled on other grounds, Largey v. Rothman, 110 N.J. 204, 206 (1988).

Nevertheless, erroneous jury instructions are "poor candidates for rehabilitation under the harmless error philosophy." State v. Simon, 79 N.J. 191, 206 (1979). For example, the judge must always charge the elements of the crime. State v. Vick, 117 N.J. 288, 291 (1989). But where the appellant failed to object to the charge, R. 1:7-2 specifically provides that a showing of plain error must be made when appellant claims error on appeal. Moreover, R. 1:8-7 specifically requires written requests to charge.

State v. Walker, 322 N.J. Super. 535, 546-53 (App. Div. 1999), gives an excellent general review of what kinds of general and special instructions should be given in a criminal case, particularly with reference to identification testimony.

II. Error in Certain Discretionary Decisions:

A. General Rules:

Administrative agencies and other governmental bodies, as well as courts, have a great deal of discretion in many areas. For example, a municipality has the discretion "to accept or reject, for valid reasons, a bid that does not conform with specifications or formal requirements in non-material respects." Such

exercises of discretion "are entitled to respectful review under an abuse of discretion standard." Serenity Contracting v. Fort Lee, 306 N.J. Super. 151, 159 (App. Div. 1997).

Certain decisions made by a court in the course of a trial are said to be addressed to the court's discretion and will be reversed on appeal only if an "abuse" or "mistaken exercise" of that discretion is shown.

B. Exceptions to the rule on trial court discretion (Interpretation or Misapplication of the Law) :

If a judge makes a discretionary decision, but acts under a misconception of the applicable law, the appellate court need not give the usual deference. The court instead must adjudicate the controversy in the light of the applicable law in order that a manifest denial of justice be avoided. State v. Steele, 92 N.J. Super. 498, 507 (App. Div. 1966); Kavanaugh v. Quigley, 63 N.J. Super. 153, 158 (App. Div. 1960). In any case, a "trial court's interpretation of the law and the consequences that flow from established facts are not entitled to any special deference." State v. Pomianik, 221 N.J. 66, 80 (2015)(quoting Manalapan Realty v. Manalapan Tp. Comm., 140 N.J. 366, 378 (1995)).

C. Examples of Discretionary Decisions in trial courts:

1. Adjournment:

Decision to deny a motion for an adjournment. State v. D'Orsi, 113 N.J. Super. 527, 532 (App. Div. 1970). This applies to a decision on a request for an adjournment for a criminal defendant to obtain new counsel. State v. McLaughlin, 310 N.J. Super. 242, 259 (App. Div. 1989).

2. Alimony:

A judge has broad, but not unlimited, discretion in awarding alimony. His or her discretion must take into account the factors set out in N.J.S.A. 2A:34-23(b) and case law defining the purpose of alimony. Steneken v. Steneken, 367 N.J. Super. 427, 434 (App.

Div. 2004), aff'd in part, modified in part 183 N.J. 290 (2005).

3. Attorneys' Fees, Punitive Damages, or Prejudgment Interest (Decision to Award):

All of these decisions rest within the discretion of the trial judge (attorneys' fees and prejudgment interest) or the factfinder (punitive damages). All must be reviewed by using an abuse of discretion standard. Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-44 (2001) (attorneys' fees); Musto v. Vidas, 333 N.J. Super. 52, 74 (App. Div. 2000) (prejudgment interest); Maul v. Kirkman, 270 N.J. Super. 596, 619-20 (App. Div. 1994)(punitive damages). Note, however, that the issue of whether punitive damages are so excessive as to violate the Fourteenth Amendment to the United States Constitution is not reviewed under this standard. That issue requires a de novo review. Cooper v. Leatherman Tool Group, 532 U.S. 424, 431 (2001).

4. Civil Commitment:

Review of a trial court's decision following a commitment hearing is extremely narrow. It is given the "'utmost deference' and modified only where the record reveals a clear abuse of discretion." In re Commitment of J.P., 339 N.J. Super. 443, 459 (App. Div. 2001), quoted in In re Commitment of V.A., 357 N.J. Super. 55, 63 (2003). When the commitment is pursuant to the Sexually Violent Predator Act the State must prove that the person is a threat to the health and safety of others because of the likelihood that he or she will engage in sexually violent behavior. That threat must be proven "by demonstrating that the individual has serious difficulty controlling sexually harmful behavior such that it is highly likely that he or she will not control his or her sexually violent behavior and will reoffend." In re Commitment of W.Z., 173 N.J. 109, 132 (2002).

5. Discovery: general rule:

Appellate courts should "defer to the trial judge's discovery rulings absent an abuse of discretion or a judge's misunderstanding or misapplication of the law." Capital Health System, Inc. v. Horizon Healthcare Services, Inc., 230 N.J. 73, 79-80 (2017).

6. Discovery: whether to grant motion to extend discovery period under R. 4:24-1(e):

This is a discretionary decision. Huszar v. Greate Bay Hotel, 375 N.J. Super. 463, 471-72 (App. Div. 2005).

7. Dismissal of Criminal Case After Multiple Mistrials:

A judge may dismiss an indictment after two or more mistrials, but his or her discretion must be governed by the factors set out in State v. Abbati, 99 N.J. 418, 436 (1985).

8. Dismissal of Indictment:

A decision on whether to dismiss an indictment is addressed to the sound discretion of the trial judge and will be reversed only for an abuse of discretion. State v. Warmbrun, 277 N.J. Super. 51, 59 (App. Div. 1994)(1995). But see State v. Hogan, 336 N.J. Super. 319, 344 (App. Div. 2001), for a special rule where the prosecutor's instruction to the Grand Jury is the basis for seeking dismissal of the indictment.

9. Dispersal of Jury:

Decision to allow jury to disperse for lunch or the night. R. 1:8-6.

10. Equitable Distribution:

Although what assets are available for distribution and valuation of assets are subject to the sufficient credible evidence rule, the issues of the manner of allocation of assets and amount of the award are addressed to judge's discretion. Borodinsky v.

Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978).

11. Equitable remedies:

Because equitable remedies are largely left to the judgment of the court, which has to balance the equities and fashion a remedy, such a decision will be reversed only for an abuse of discretion. Sears Mortgage Corp. v. Rose, 134 N.J. 326, 354 (1993). For example, "the entire controversy doctrine is an equitable principle and its application is left to judicial discretion." 700 Highway 33 LLC v. Pollio, 421 N.J. Super. 231, 238 (App. Div. 2011).

12. Evidence (Excluding or Admitting):

N.J.R.E. 403 specifically allows a judge, in his or her discretion, to exclude otherwise admissible evidence under specified circumstances. Most other evidence rules do not specifically permit an exercise of discretion, but while the cases under other rules first apply the specific rule to determine whether the requirements for admissibility have been met, they also say that "[A] trial court's evidentiary rulings are entitled to deference absent a showing of an abuse of discretion." State v. Nantambu, 221 N.J. 390, 402 (2015), (quoting State v. Harris, 209 N.J. 431, 439 (2012)).

For example, a ruling under N.J.R.E. 404(b) whether to admit other crime evidence is reviewed under the abuse of discretion standard. State v. Erazo, 126 N.J. 112, 131 (1991); State v. Ramseur, 106 N.J. 123, 266 (1987).

But if a trial court fails to apply the correct test in analyzing the admissibility of evidence, then the appellate court's review is de novo. State v. Lykes, 192 N.J. 519, 534 (2007).

A ruling on whether an expert is competent to testify is addressed to the discretion of the trial judge (Carey v. Lovett, 132 N.J. 44, 64 (1993); Pressler & Verniero, Current N.J. Court Rules, comment 4.7(b) on R. 2:10-2 (2018)), but the issue of whether novel scientific evidence should be admitted requires the

appellate court to perform an independent review of the issue (State v. Harvey, 151 N.J. 117, 167-68 (1997)).

And if a judge rules on a summary judgment motion, and also has to decide whether certain evidence is admissible on the motion, it must first decide whether the evidence is admissible, then decide whether the motion should be granted. When the appellate court reviews those decisions, it also reviews the two decisions separately: the evidentiary ruling under the abuse of discretion standard, and the legal conclusions that support the summary judgment ruling is reviewed de novo. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010).

13. Family Court Enforcement Orders:

Appellate review of Family Part enforcement rulings gives deference to the judge's selection of a remedy. The appellate court accepts the finding that the party had violated a parenting order if it is supported by the record as a whole, and, so long as there is a rational explanation consistent with law and the evidence, will not disturb the judge's discretionary choice of a remedy. Milne v. Goldenberg, 428 N.J. Super. 184, 197-99 (App. Div. 2012); see, e.g., P.T. v. M.S., 325 N.J. Super. 193, 219-20 (App. Div. 1999).

14. Forum Non Conveniens (Decision on Whether to Dismiss on this Ground):

This decision is addressed to the judge's discretion because forum non conveniens is an equitable doctrine. Kurzke v. Nissan Motor Corp., 164 N.J. 159, 165 (2000).

15. Further Deliberation:

Decision to send a jury back for further deliberations after it has announced a deadlock is discretionary. State v. Williams, 39 N.J. 471, 484 (1963).

16. Malpractice Case: How to Try One:

Often, a malpractice case is proven by having a "trial within a trial." But that is not the only way to prove such a case. Trial judges should not become involved in determining how such a case is to be tried, unless the parties disagree. Then the final determination of the court is discretionary and is entitled to deference. Garcia v. Kozlov, 179 N.J. 343, 361 (2004).

17. Mistrial:

Decision to grant or deny a motion for mistrial is addressed to the sound discretion of the trial judge. State v. Winter, 96 N.J. 640, 647 (1984); State v. DiRienzo, 53 N.J. 360, 383 (1969); Greenberg v. Stanley, 30 N.J. 485, 503 (1959).

18. Municipality's Rejection of Bid with Non-Material Defect:

A municipality has the discretion "to accept or reject, for valid reasons, a bid that does not conform with specifications or formal requirements in non-material respects." Such exercises of discretion "are entitled to respectful review under an abuse of 30 discretion standard." Serenity Contracting Group v. Fort Lee, 306 N.J. Super. 151, 159 (App. Div. 1997).

19. Parole:

This decision is subject to the discretion of the Parole Board, but can be reviewed by the appellate court for arbitrariness. Since the parole eligibility statute creates a presumption that a person should be released on his or her eligibility date, a decision not to release must be considered arbitrary if it is not supported by a preponderance of the evidence in the record. Kosmin v. N.J. State Parole Board, 363 N.J. Super. 28, 41-42 (App. Div. 2003).

20. Photos (Admission):

Decision on whether to admit photos is discretionary. State v. Conklin, 54 N.J. 540, 545 (1969).

21. Plea Bargain (Decision on Whether to Accept):

The appropriate appellate standard for reviewing judicial rejection of a plea bargain is whether the judge abused his or her discretion, not whether the recommended bargain constituted an abuse of prosecutorial discretion. And the judge must exercise "sound discretion." "Judicial discretion is not unbounded and it is not the particular predilection of the particular judge." State v. Madan, 366 N.J. Super. 98, 109 (2004); See also, State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994).

22. Plea: Decision on Whether to Allow Withdrawal:

A motion to withdraw a plea before sentence should be liberally granted. State v. Deutsch, 34 N.J. 190, 198 (1961). The burden is on the defendant to show why the plea should be withdrawn. State v. Huntley, 129 N.J. Super. 13, 17 (1974). The trial judge has considerable discretion in deciding such a motion, although he or she should take into account the interests of the State. State v. Bellamy, 178 N.J. 127, 135 (2003); State v. Luckey, 366 N.J. Super. 79, 87 (2004). But where the plea is part of a knowing and voluntary plea bargain, defendant's "burden of presenting a plausible basis for his request to withdraw . . . is heavier." State v. Huntley, 129 N.J. Super. at 18. A voluntary plea should not generally be vacated absent "some plausible showing of a valid defense against the charges." State v. Gonzalez, 254 N.J. Super. 300, 303 (App. Div. 1992).

A motion to withdraw a plea after sentencing should be granted only to correct a manifest injustice. R. 3:-21-1; State v. Fischer, 38 N.J. 40, 48 (1962); State v. Deutsch, 34 N.J. 190, 198 (1961).

23. Pre-trial Detention decisions:

A decision on whether a defendant should be held in pretrial detention under the Bail Reform Act (N.J.S.A. 2A:162-15 to -26) is reviewed for an abuse of

discretion. "The proper standard of review is whether the court abused its discretion by relying on an impermissible basis, by relying on irrelevant or inappropriate factors, by failing to consider all relevant factors, or by making a clear error in judgment." State v. S.N., 231 N.J. 497, 515 (2018)

"but de novo review applies with respect to alleged errors or misapplications of law within that court's analysis." State v. C.W., 449 N.J. Super. 231, 235 (App. Div. 2017).

24. Reading to Jury:

A decision to read or refuse to read certain testimony to jury is discretionary. State v. Wolf, 44 N.J. 176, 185 (1965).

25. Reconsideration (Motion for):

Decision on whether to deny motion for reconsideration is addressed to the judge's discretion. Fusco v. Newark Bd. of Educ., 349 N.J. Super. 455, 462 (App. Div. 2002); Marinelli v. Mitts & Merrill, 303 N.J. Super. 61, 77 (App. Div. 1997); Cummings v. Bahr, 295 N.J. Super. 374, 389 (App. Div. 1996).

26. Reconsideration Before Final Judgment of Trial Court's Own Interlocutory Orders:

A trial judge's reconsideration of, and grant of relief from, an interlocutory order before final judgment is a matter committed to the sound discretion of the trial judge. Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 263 (App. Div. 1987). This remains true even where a party moves for reconsideration of the issue in the trial court after the Appellate Division has already ruled on the issue in an interlocutory appeal. Burt v. West Jersey Health Systems, 339 N.J. Super. 296, 310 (App. Div. 2001).

27. Recusal:

Whether a judge should disqualify himself or herself is a matter within the sound discretion of the judge. Jadlowski v. Owens-Corning, 283 N.J. Super. 199, 221 (App. Div. 1995). A judge cannot be considered partial or biased merely because of rulings that are unfavorable toward the party seeking recusal. State v. Marshall, 148 N.J. 89, 186-87 (1997).

28. Reinstatement of Complaint:

Reinstatement of a civil complaint dismissed for lack of prosecution is within the judge's discretion. Baskett v. Cheung, 422 N.J. Super. 377, 382-383 (App. Div. 2011).

29. Reopening of Case after Summations but Prior to Jury Charge:

This decision is addressed to the judge's discretion. State v. Cooper, 10 N.J. 532, 564 (1952).

30. Review of Trial Court's Findings Based on View of Recorded Interrogation:

For a few years, the following was the standard adopted in State v. Diaz-Bridges, 208 N.J. 544, 566 (2012), for reviewing fact findings based on only viewing a video: "When the trial court's factual findings are based only on its viewing of a recorded interrogation that is equally available to the appellate court and are not dependent on any testimony uniquely available to the trial court, deference to the trial court's interpretation is not required. Appellate courts need not, and we will not, close our eyes to the evidence that we can observe in the form of the videotaped interrogation itself."

However, that standard was not the law for long. First, in State v. Hubbard, 222 N.J. 249, 270 (2015), the Court emphasized that Diaz-Bridges was not intended to alter the traditional appellate standard of review of trial court fact-findings. Thus, when the trial court has based its findings not just on a recorded statement, but also on testimonial and documentary evidence it is "uniquely situated to integrate the testimony and the video record to formulate its findings of fact." Ibid. The Appellate

Division in should not have reviewed the video de novo and rejected the findings of the trial court.

Then, in State v. S. S., 229 N.J. 360, 379-81 (2017), the Court "rejected the de novo standard introduced in Diaz-Bridges." The rule now is the same as review of any fact finding: if there is sufficient credible evidence to uphold the trial court's findings on the credibility of what it sees in the video, those findings will be affirmed. The appellate court may not substitute its own findings.

31. Sanctions:

Decision on how to sanction someone who disobeys a court order, such as an order to testify, is addressed to the discretion of the trial judge. Gonzalez v. Safe & Sound Security, 185 N.J. 100, 115 (2005).

32. Sequestration:

Decision to sequester jury is discretionary. Pessini v. Massie, 115 N.J. Super. 555, 562 (Law Div. 1971), aff'd sub. nom. Eberhardt v. Vanarelli, 121 N.J. Super. 293, 295 (App. Div. 1972); R. 1:8-6(b).

33. Trustee's Request to Charge Attorneys' Fees Against Estate:

A judge's denial of a trustee's request to charge attorneys' fees against the trust estate will be reversed only for an abuse of discretion. Mears v. Addonizio, 336 N.J. Super. 474, 479 (App. Div. 2001).

34. Trustee (Decision on Whether to Remove):

Decision on whether to remove a fiduciary, such as a trustee under a will, is addressed to the trial court's discretion and will not be disturbed on appeal absent a manifest abuse of discretion. Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 306 (App. Div. 1985).

35. Vacating a Judgment (General Rule):

A decision to vacate a judgment lies within the sound discretion of the trial judge, guided by principles of equity. Housing Authority of Town of Morristown v. Little, 135 N.J. 274, 283 (1994).

36. Vacating Judgment Based on R. 4:50-1(f):

R. 4:50-1 allows a motion to vacate a default judgment on several grounds. The ground in subsection (f) allows vacation for "any other reason justifying relief from the operation of the judgment or order." For this subsection, the policy favoring the finality of judgments is an important factor so that relief is available only when "truly exceptional circumstances are present." Subsection (f) should be used "sparingly" and only "in situations in which, were it not applied, a grave injustice would occur." Housing Auth. of Town of Morristown v. Little, 135 N.J. 274, 274, 286 (1994), quoted in First Morris Bank and Trust v. Roland Offset Service, Inc., 357 N.J. Super. 68, 71 (App. Div. 2003). Therefore, while the initial decision on an application under subsection (f) lies within the trial court's discretion, the appellate court will reverse where that discretion has been abused. Mancini v. E.D.S., 132 N.J. 330, 334 (1993).

III. Jury Verdict Allegedly Against Weight of Evidence: R. 3:20-1; R. 4:49:

A. New Trial Motion:

The appellate court will not consider an argument that a jury verdict is against the weight of the evidence unless the appellant moved for a new trial on that ground. R. 2:10-1; Fiore v. Riverview Medical Center, 311 N.J. Super. 361, 362-63 (App. Div. 1998); State v. Perry, 128 N.J. Super. 188, 190 (App. Div. 1973), aff'd, 65 N.J. 45 (1974).

B. Right to Appeal:

1. If a new trial was denied, the movant can appeal denial as of right.

2. If new civil trial was granted, the opponent can appeal only by leave, since this is an interlocutory order.

3. If a new trial is granted to a criminal defendant, the State has a right to seek leave to appeal. State v. Sims, 65 N.J. 359, 363 (1974). (The standards for deciding whether to grant leave are also set out in that case.)

C. Standard of Review:

1. Whether the motion was granted or denied, the standard on appeal for review of the decision on the motion is:

> The trial court's decision on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.
>
> [R. 2:10-1.]

2. To decide if there was a miscarriage, the appellate court defers to the trial court with respect to "intangibles" not transmitted by the record (e.g., credibility, demeanor, "feel of the case") but otherwise makes its own independent determination of whether a miscarriage of justice occurred. Carrino v. Novotny, 78 N.J. 355, 360 (1979); Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977); Dolson v. Anastasia, 55 N.J. 2, 6-8 (1969).

3. The "weight of the evidence" standard is not used in non-jury trials. Fanarjian v. Moskowitz, 237 N.J. Super. 395, 406 (App. Div. 1989). For the standard used in non-jury trials (whether there was "sufficient credible evidence"), see the next section of this outline.

D. Result of Reversal:

Where the appellate court decides that the verdict in a criminal case is against the weight of the evidence, acquittal is not mandated, only a new trial. A

reversal based on insufficient evidence does require acquittal. Tibbs v. Florida, 457 U.S. 31, 42-43 (1982).

IV. Error in Factfindings of An Administrative Agency or of a Judge Sitting Without a Jury:

A. Prerequisite to Review:

Administrative Agencies and trial judges must make factfindings that are sufficiently clear and complete to permit review. Otherwise the court will remand, for factfindings, to the agency (Matter of Vey, 124 N.J. 534, 544 (1991); Matter of Issuance of a Permit, 120 N.J. 164, 173 (1990)), or to the court. If the findings are bad enough and the record sparse, the court may order a whole new trial. Hewitt v. Hollahan, 56 N.J. Super. 372, 382-84 (App. Div. 1959).

B. General Rule:

When error in a factfinding of a judge or administrative agency is alleged, the scope of appellate review is limited. The court will only decide whether the findings made could reasonably have been reached on "sufficient" or "substantial" credible evidence present in the record, considering the proof as a whole. The court gives "due regard" to the ability of the factfinder to judge credibility and, where an agency's expertise is a factor, to that expertise. In re Adoption of Amend. to Northeast Water, 435 N.J. Super. 571, 583-84 (App. Div. 2014).

C. Review of Factfindings of Administrative Agencies:

While the Administrative Procedure Act, N.J.S.A. 52:14B-10(c), as amended July 1, 2001, allows an agency head to reject or modify the findings of an administrative law judge (ALJ), it prohibits the agency head from rejecting or modifying findings of an ALJ as to issues of credibility of lay witnesses unless those findings are arbitrary, capricious or unreasonable or are not supported by the record. And the agency head must then state "with particularity"

his or her reasons for rejecting any kind of findings made by the ALJ, and must make new findings supported by the evidence.

A reviewing court has never needed to defer to an agency head who reversed credibility findings of an ALJ because it was the ALJ, not the agency head who was in the best position to judge credibility. S.D. v. Div. of Medical Assistance, 349 N.J. Super. 464, 485 (App. Div. 2002), citing Lefelt, Miragliotta & Prunty, Administrative Law & Practice, New Jersey Practice Series, § 7.20 at 390 (2000 ed. & 2001 Supp.). But now, because of the requirements of N.J.S.A. 52:14B-10(c) cited above, the court must also make sure that when the agency head rejects ALJ findings, the agency head follows the requirements of the Administrative Procedure Act. Cavalieri v. Board of Trustees of PERS, 368 N.J. Super. 527, 534 (App. Div. 2004); S.D. v. Div. of Medical Assistance, 349 N.J. Super. at 485.

Note that the court reviews the factfindings of the agency head whose decision is on appeal, not of the ALJ. It upholds those findings if supported by the record even if the findings are contrary to factfindings of the ALJ whose decision the agency head reviewed, provided the agency head follows the requirements of the Administrative Procedure Act and makes the necessary statement of his or her reasons for rejecting the ALJ's findings. Because the agency head does have the power to reject the administrative law judge's findings, the court may examine the administrative law judge's findings to see whether the agency head's findings are supported, but neither court nor agency head is bound by the ALJ's findings. In re Suspension of License of Silberman, 169 N.J. Super. 243, 255-56 (App. Div. 1979), aff'd, 84 N.J. 303 (1980); S.D. v. Division of Medical Assistance, 349 N.J. Super. at 483-84. It is not the function of the reviewing court to substitute its independent judgment on the facts for that of an administrative agency. In re Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974).

D. Exceptions to General Rule on Agency Findings:

1. Tax Cases: You may see tax cases decided by the old Division of Taxation before institution of the Tax Court. Then, the agency made factfindings based on documents and affidavits only, and there was no hearing. The Appellate Division did not use the general standard; it made fact findings de novo. Citizens Bank & Trust Co. v. Glaser, 70 N.J. 72, 80 (1976); Lyon v. Glaser, 60 N.J. 259, 273-76 (1972).

But since there has been a Tax Court and such informal proceedings no longer take place, the general rule (sufficient credible evidence) applies. Hackensack Water Co. v. Borough of Haworth, 2 N.J. Tax 303, 311-12, 178 N.J. Super. 251, 259 (App. Div. 1981).

2. Non-Governmental Bodies such as Hospitals: When a court reviews a decision of a non-governmental body (such as a hospital board), it must focus on the reasonableness of the action taken with reference to the interests of the public, the applicant and the non-governmental body. The standard is not substantial credible evidence; however, the record must "contain sufficient reliable evidence, even though of a hearsay nature, to justify the result." Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. 549, 565 (1979). This modified Guerrero v. Burlington Cty. Memorial Hosp., 70 N.J. 344, 356 (1976).

So long as the hospital's decisions concerning medical staff are reasonable, are consistent with the public interest, and further the hospital's health care mission, courts will not interfere. Desai v. St. Barnabas Medical Ctr., 103 N.J. 79, 93 (1986); Berman v. Valley Hosp., 103 N.J. 100, 106-07 (1986).

There are slightly different standards governing judicial review of a decision admitting a physician to staff privileges and a decision denying privileges. A court will not interfere with a hospital's decision setting a standard for admission so long as the standard is rationally related to the delivery of health care. Nanavati v. Burdette Tomlin Memorial Hosp., 107 N.J. 240 (1987); Desai v. St. Barnabas Medical Ctr., 103 N.J. at 93. The standard for reviewing a decision denying staff privileges, however, does not require a court to give so much

deference to the hospital. The test is whether the hospital's decision is supported by sufficient reliable evidence, even though of a hearsay nature, the general test set out above in Garrow v. Elizabeth Gen. Hosp. & Dispensary, 79 N.J. at 565. See also Desai v. St. Barnabas Medical Ctr., 103 N.J. at 92.

A decision terminating a physician's staff privileges need be supported only by sufficient reliable evidence. Proof of disharmony on the staff can support that decision; actual harm to patients need not be proven. Nanavati v. Burdette Tomlin Memorial Hosp., 107 N.J. at 254.

3. Division on Civil Rights: When a court reviews the decision of the Division on Civil Rights on a claim that an educational institution discriminated in tenure or promotion decisions, it not only follows the usual rule governing agency factfindings, but also must take care not to interfere with the subjective determinations regarding such matters as teaching ability, scholarship, and professional stature. Thus, "[w]hen a decision to hire, promote or grant tenure . . . is reasonably attributable to an honest even though partially subjective evaluation of their qualifications, no inference of discrimination can be drawn." Chou v. Rutgers, 283 N.J. Super. 524, 540 (App. Div. 1995) (quoting Lieberman v. Gant, 630 F.2d 60, 67 (2d Cir. 1980)); Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3d Cir. 1980).

E. Examples of General Rule:

1. Civil Service Commission (now the Department of Personnel): Henry v. Rahway State Prison, 81 N.J. 571, 579-81 (1980); Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963).

2. Board of Review: Zielenski v. Board of Review, 85 N.J. Super. 46, 54 (App. Div. 1964).

3. Merit System Board: In re Taylor, 158 N.J. 644 (1999).

4. Motor Vehicle Bureau: Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

5. PERC: In re Bridgewater Twp., 95 N.J. 235, 249 (App. Div. 1984); N.J.S.A. 34:13A-5.2(f).

6. Trial judge sitting without jury: State v. Johnson, 42 N.J. 146, 162 (1964). This cite is used in criminal cases and is the classic cite for this standard. A more recent cite for the same proposition is State v. Locurto, 157 N.J. 463, 470-71 (1999). Use Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974), for civil cases.

Appellate review of Family Part enforcement rulings gives deference to the judge's selection of a remedy. The appellate court accepts the finding that the party had violated a parenting order if it is supported by the record as a whole, and, so long as there is a rational explanation consistent with law and the evidence, will not disturb the judge's discretionary choice of a remedy. Milne v. Goldenberg, 428 N.J. Super. 184, 197-99 (App. Div. 2012); see, e.g., P.T. v. M.S., 325 N.J. Super. 193, 219-20 (App. Div. 1999).

There is law that says that if findings are not supported by the record, an appellate court may "appraise the record as if we were deciding . . . at inception and make our own findings and conclusions." Pioneer Nat'l Title Ins. Co. v. Lucas, 155 N.J. Super. 332, 338 (App. Div.), aff'd o.b., 78 N.J. 320 (1978).

But more recent Supreme Court decisions have disapproved of such factfinding by an appellate court. It is "improper for the Appellate Division to engage in an independent assessment of the evidence as if it were the court of first instance." State v. Locurto, 157 N.J. 463, 471 (1999). And where the lower court has made credibility determinations, even without specifically articulating detailed findings on credibility, where the reasons for its determination may be inferred from the record the Appellate Division is not free to make its own credibility determination. Id., 472-75.

In State v. Micelli, 215 N.J. 284, 293-94 (2013), the Court held that the Appellate Division had

inappropriately exercised original jurisdiction. The trial judge, applying the two-step test for admissibility of an out-of-court identification set by Manson v. Brathwaite, 432 U.S. 98, (1977), and State v. Madison, 109 N.J. 223 (1998), had found, under the first prong, that the identification process was not impermissibly suggestive, so that the identification was admissible. The Appellate Division disagreed, but because the Manson/Madison test still allowed admission if the objectionable procedure did not result in a substantial likelihood of irreparable misidentification, it made findings on the second prong. The Supreme Court held that it should not have done that, and remanded to the trial court for findings on that second prong.

7. Workers' compensation judge: Close v. Kordulak Bros., 44 N.J. 589, 599 (1965), and De Angelo v. Alsan Masons, Inc., 122 N.J. Super. 88, 89-90 (App. Div.), aff'd o.b., 62 N.J. 581 (1973). This is the rule where a court reviews the Division of Compensation judge. Where the Commissioner considers the recommendation of the judge of compensation on Second Injury Fund liability, the Commissioner may make de novo findings and conclusions. Lewicki v. New Jersey Art Foundry, 88 N.J. 75, 82 (1981).

F. Note:

Counsel may argue on appeal that the fact-findings of a judge or administrative agency are "against the weight of the evidence." That standard is used only in jury trials. The correct standard for non-jury trials is the one set out in this section. Don't confuse the two.

V. Credibility Findings:

This issue may come up in the context of a claim that a verdict is against the weight of the evidence or that findings are not supported by the evidence. But it may also be raised in the context of other issues.

Credibility is always for the factfinder to determine. Ferdinand v. Agric. Ins. Co. of Watertown, N.Y., 22 N.J. 482, 492 (1956). And "a case may present credibility issues requiring resolution by the trier of fact even

though a party's allegations are uncontradicted." D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997), quoted in CPC Int'l, Inc. v. Hartford Accident and Indem. Co., 316 N.J. Super. 351, 375 (App. Div. 1998).

VI. Prior Appeal:

If an issue has been determined on the merits in a prior appeal it cannot be relitigated in a later appeal of the same case, even if of constitutional dimension. State v. Cusick, 116 N.J. Super. 482, 485 (App. Div. 1971).

VII. Improper Influence on Jury:

A new trial must be granted because of juror misconduct or irregular influences whenever such matters "could have a tendency to influence the jury in arriving at its verdict in a manner inconsistent with the legal proofs and the court's charge." Panko v. Flintkote Co., 7 N.J. 55, 61 (1951). "If the irregular matter has that tendency on the face of it, a new trial should be granted without further inquiry as to its actual effect." Ibid. State v. Vaszorich, 13 N.J. 99, 114 (1953), however, held that the Panko holding would not apply if the parties and the court had the opportunity to avoid any improper influence of the irregular matter.

VIII. Municipal Court's Decision Appealed to Superior Court:

A. Law Division's Standard:

Municipal court decisions are appealed first to the Law Division of Superior Court. R. 7:13-1; R. 3:23-1; State v. Buchan, 119 N.J. Super. 297 (App. Div. 1972). There is one exception to that rule: when a Law Division judge is assigned to hear a municipal court matter, then the appeal is taken directly to the Appellate Division, rather than have one Law Division judge review the decision of another. State v. Cerefice, 335 N.J. Super. 374, 381-82 (App. Div. 2000). Except for forfeiture and penalty cases, these municipal court decisions are in criminal or quasi-criminal cases.

When the appeal is from the municipal court to the Law Division, the review is de novo on the record, except for some situations governed by R. 3:23-8. The Law

Division makes a new decision on its own, although it gives "due regard to the municipal judge's opportunity to view the witnesses." State v. Johnson, 42 N.J. 146, 157 (1964). Since the Law Division judge is not in a position to judge the credibility of witnesses, he or she should defer to the credibility findings of the municipal court judge. State v. Locurto, 157 N.J. 463, 472-74 (1999). See R. 3:23-8(a) on criminal trials de novo.

If the Law Division finds the evidence in a municipal court criminal or quasi-criminal case to have been insufficient, it must acquit the defendant, rather than remanding to municipal court to give the State a second chance to prove its case. State v. Sparks, 261 N.J. Super. 458, 461-62 (App. Div. 1993). Moreover, if the Law Division holds that certain evidence should have been excluded and that the excluded evidence would be necessary to sustain a conviction, it must acquit, not remand. Ibid.

In the rare case where the initial decision was made by a Law Division judge sitting as a municipal court judge, and the appeal therefore goes to the Appellate Division, the review is not de novo. Rather, the Appellate Division reviews the decision of the Law Division judge as it would normally review any other Law Division decision. State v. Cerefice, 335 N.J. Super. at 383.

B. Appellate Standard:

The issue in the Appellate Division is whether there is sufficient credible evidence present in the record to uphold the findings of the Law Division, not the municipal court. State v. Johnson, 42 N.J. 146, 162 (1964). But like the Law Division, the Appellate Division is not in a good position to judge credibility, and should not make new credibility findings. State v. Locurto, 157 N.J. 463, 470 (1999). It may not "weigh the evidence, assess the credibility of the witnesses, or make conclusions about the evidence." State v. Barone, 147 N.J. 599, 615 (1998). It should defer to the trial court's credibility findings. State v. Cerefice, 335 N.J. Super. at 383.

The Supreme Court reviews the Appellate Division. While the basic standard is the same, see State v. Locurto, 157 N.J. at 470-74, and State v. Johnson, 42 N.J. at 163, to see how the Supreme Court does that review.

IX. Appellate Court's Review of Trial Court's Interpretation of the Law:

"A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995).

X. Appellate Division's Exercise of Original Jurisdiction:

Rule 2:10-5 allows an appellate court to exercise original jurisdiction as "necessary to the complete determination of any matter on review." But that should be done only "with great frugality." Tomaino v. Burman, 364 N.J. Super. 224, 234-35 (App. Div. 2003). Exercising original jurisdiction is discouraged if factfinding is necessary. State v. Santos, 210 N.J. 129, 142 (2012).

In State v. Micelli, 215 N.J. 284, 293-94 (2013), the trial judge found that an identification procedure had not been impermissibly suggestive, and therefore he did not have to decide the second prong of the admissibility test: whether the identification was nevertheless admissible because it was reliable. See State v. Madison, 109 N.J. 223, 232-33 (1988). The Appellate Division disagreed with the trial judge, holding that the identification procedure was impermissibly suggestive. That required a determination of whether the identification was nevertheless reliable.

Noting that that determination depended on the trial judge's assessment of the evidence, the Supreme Court held that the Appellate Division had erred by exercising its original jurisdiction to make factfindings on that issue. It should have remanded to the trial court for decision on whether the second Madison prong had been met. State v. Micelli, 255 N.J. at 293-94.

XI. Decision on New Trial Motion Not Based on Weight of the Evidence:

Where an issue raised on a new trial motion involves not the court's factfindings, but rather a decision that is addressed to the trial court's discretion, the appellate court will not reverse unless there was an abuse of discretion. See cases listed in Pressler & Verniero, Current New Jersey Court Rules, comment 4 on R. 2:10-2 (2018). See also comment 1 on R. 2:10-1, which explains that these two rules are intertwined and are therefore discussed together under the comments on R. 2:10-2.

XII. Counsel's Improper Remarks:

Counsel has broad latitude, but "Summations must fair and courteous, grounded in the evidence and free from any 'potential to cause injustice.'" Risko v. Thompson Muller, 206 N.J. 506, 522 (2011) (quoting Jackowitz v. Lang, 408 N.J. Super. 495, 505 (App. Div. 2009)). Counsel must not say things that would undermine the jury's deliberations. Id. at 522-23. In deciding whether to grant a new trial because of improper comments, the court will look at things like whether opposing counsel objected and whether the judge gave a curative instruction. Id. at 522-24.

SECTION FIVE:

STANDARDS GOVERNING ERRORS IN

CRIMINAL CASES ONLY

I. Error in Denial of Defendant's Motion to Acquit:

A. Trial judge's standard:

1. R. 3:18-1: At the close of the State's case or after all evidence has been given, the court must, on motion by defendant or on its own initiative, grant a motion to acquit if "the evidence is insufficient to warrant a conviction." R. 3:18-1.

2. Meaning of R. 3:18-1: when a motion is made at the close of the State's case, the trial judge must deny the motion if "viewing the State's evidence in its entirety, be that evidence direct or circumstantial," and giving the State the benefit of all reasonable inferences, "a reasonable jury could find guilt beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458-59 (1967).

3. R. 3:18-2: when a motion to acquit n.o.v. is made after jury verdict, the same standard is used, i.e., only the State's evidence will be considered. State v. Sugar, 240 N.J. Super. 148, 152-53 (App. Div. 1990); State v. Kluber, 130 N.J. Super. 336, 341-42 (App. Div. 1974). There is, however, an exception to this rule (see next paragraph).

4. Where defendant has been convicted of a lesser included offense, and makes a motion for acquittal after the jury's verdict, the standard is different. Because defendant has had the benefit of submission to the jury of a lesser included offense based on proofs adduced in his or her own case, even if he or she objected to its submission, then the sufficiency of the evidence should be tested by the whole record, not just by the State's proofs, in deciding whether the conviction for the lesser included offense can be sustained. State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990).

B. Appellate Court's Standard:

The appellate court will apply the same standard as the trial court to decide if the trial judge should have acquitted defendant. State v. Moffa, 42 N.J. 258, 263 (1964). Note that the appellate court will not consider any evidence adduced in defendant's case when the motion was made at the close of the State's case. State v. Reyes, 50 N.J. 454, 459 (1967).

C. Consequences of Reversal:

Reversal on the ground of insufficient evidence requires an acquittal. Hudson v. Louisiana, 450 U.S. 40, 43 (1981); Burks v. United States, 437 U.S. 1, 16 (1978). This rule therefore differs from that governing reversal on the ground that a verdict is against the weight of the evidence; no acquittal is required them, only a new trial. Tibbs v. Florida, 457 U.S. 31, 42-43 (1982).

II. Erroneous Acceptance of Guilty Plea:

A. Trial Judge's Standard:

R. 3:9-2 says that when a defendant offers to plead guilty a trial court cannot accept the plea unless it:

1. addresses defendant personally, and

2. determines, by inquiry of defendant and others, in the court's discretion, that the plea is made (1) voluntarily and without any threats, inducements or promises not on the record, and (2) with understanding of the charge and the consequences of the plea. This means (among other things) that the judge must make sure defendant understands the possibility that a stated period of parole ineligibility may be part of the sentence. State v. Kovack, 91 N.J. 476, 484 (1982). The judge must also determine that there is a factual basis for the plea. R. 3:9-2.

B. Appellate Court's Standard:

1. If the record shows that the judge either failed altogether to ask the required questions, or that the answers elicited failed to show voluntariness, understanding of the charge and consequences, and factual basis, the appellate court can remand for trial or new plea. See State v. Rhein, 117 N.J. Super. 112, 121 (App. Div. 1971).

2. "The standard of review of a trial court's denial of a motion to vacate a plea for lack of an adequate factual basis is de novo." State v. Tate, 220 N.J. 393 403-04 (2015). An appellate court is in the same position as a trial court when it assesses whether the factual admissions were adequate to show the essential elements of the crime. If they were not, then the plea must be vacated. Ibid.

3. As in any case, the court could refuse to remand if it finds that the failure to comply with any of the requirements of R. 3:9-2 is harmless.

4. The appellate court considers a claim that the judge erroneously accepted a guilty plea to be "tantamount" to a request to withdraw a plea after sentencing. It then uses the standards set out in section V below to decide whether a reversal is in order (i.e, whether there was a "manifest injustice").

III. Erroneous Refusal to Accept Plea Bargain:

Rule 3:9-2 provides that the court "in its discretion, may refuse to accept a plea of guilty . . . ." In State v. Blise, 244 N.J. Super. 20, 30 (Law Div. 1990), the court held that a judge should not substitute his or her judgment as to the merits of a proposed plea bargain unless "clearly warranted by the facts readily available to the court through the presentence report." But that was rejected by the Appellate Division in State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994), which held that Blise had imposed "a stricter standard for rejection upon the sentencing judge than the simple exercise of discretion test unequivocally set down in R. 3:9-2."

Thus, the appropriate appellate standard for reviewing judicial rejection of a plea bargain is whether the judge abused his or her discretion, not whether the recommended bargain constituted an abuse of prosecutorial discretion.

A judge must exercise "sound discretion." "Judicial discretion is not unbounded and it is not the personal predilection of the particular judge." State v. Madan, 366 N.J. Super. 98, 109 (2004); See also, State v. Daniels, 276 N.J. Super. at 487.

IV. Ability of Defendant to Appeal After Pleading Guilty:

A. General Rule:

Usually, a guilty plea is a "break in the chain of events" and prevents a defendant from raising on appeal any non-jurisdictional defects (even of constitutional dimension) which occurred prior to plea. Tollett v. Henderson, 411 U.S. 258, 267, (1973); State v. Taylor, 140 N.J. Super. 242, 244-45 (App. Div. 1976). But see Menna v. New York, 423 U.S. 61, 62 n.2 (1975), and Blackledge v. Perry, 417 U.S. 21, 30-31(1974), which modify this rule somewhat.

B. Exceptions:

1. There are two significant exceptions to the rule set out in the previous paragraph. First, denial of a motion to suppress evidence may be reviewed on appeal even though the judgment of conviction is entered following a guilty plea. R. 3:5-7(d). Second, under R. 3:9-3(f), with the approval of the court and consent of the prosecutor, a defendant may enter a conditional guilty plea and reserve the right to appeal from the adverse determination of any specified pretrial motion. This rule is aimed primarily at the pretrial issues encompassed by R. 3:13-1(b) (that is, confession and identification issues). Pressler & Verniero, Current N.J. Court Rules, comment on R. 3:9-3 (2015).

2. The distinction between R. 3:5-7(d) and R. 3:9-3(f) is discussed in State v. Morales, 182 N.J. Super. 502 (App. Div. 1981).

3. An appellate challenge to the existence of a factual basis for the plea is not waived by the entry of a guilty plea. State v. Butler, 89 N.J. 220, 224 (1982).

V. Error in Denying Motion to Withdraw Guilty Plea:

R. 3:21-1 requires a motion to withdraw to be made before sentencing, but allows it after sentencing to correct a manifest injustice.

A motion to withdraw a plea before sentence should be liberally granted. State v. Deutsch, 34 N.J. 190, 198 (1961). The burden is on the defendant to show why the plea should be withdrawn. State v. Huntley, 129 N.J. Super. 13, 17 (1974). The trial judge has considerable discretion in deciding such a motion, although he or she should take into account the interests of the State. State v. Bellamy, 178 N.J. 127, 135 (2003); State v. Luckey, 366 N.J. Super. 79, 87 (2004). But where the plea is part of a knowing and voluntary plea bargain, defendant's "burden of presenting a plausible basis for his request to withdraw . . . is heavier." State v. Huntley, 129 N.J. Super. at 18. A voluntary plea should not generally be vacated absent "some plausible showing of a valid defense against the charges." State v. Gonzalez, 254 N.J. Super. 300, 303 (App. Div. 1992).

A motion to withdraw a plea after sentencing should be granted only to correct a manifest injustice. R. 3:21-1; State v. Fischer, 38 N.J. 40, 48 (1962); State v. Deutsch, 34 N.J. 190, 198 (1961).

VI. Error in Sentencing Procedure:

A. Right of Allocution:

1. R. 3:21-4(b) requires the sentencing judge to address defendant personally and ask if he or she wants to make a statement.

2. A failure to so afford defendant the "right of allocution" warrants automatic remand for resentencing if defendant brings a direct appeal. State v. Cerce, 46 N.J. 387, 395-97 (1966); State v. Harris, 70 N.J. Super. 9, 18-19 (App. Div. 1961). When a defendant moves for post-conviction relief, though, if defendant's counsel spoke for him or her at sentencing, that will suffice unless the court finds some prejudice in that procedure. State v. Cerce, 46 N.J. at 395-97.

B. Pre-Sentence Report:

Pursuant to State v. Kunz, 55 N.J. 128, 144 (1969), the court must show the defendant the presentence report and provide a "fair opportunity to be heard on any adverse matters relevant to the sentencing." Defendant may challenge the contents of the report. If, upon inquiry, the court finds that "the challenge relates to matter of insufficient importance to warrant the taking of proof" it "may disregard the challenged matter and so declare." Otherwise, it should take proof on the matter. Id. at 145-46.

C. Reasons for Sentence:

A judge must state his or her reasons for the sentence imposed (R. 3:21-4(e)) and those reasons must be in the judgment (R. 3:21-5). Failure to give complete, specific reasons can result in remand for amended reasons. State v. Martelli, 201 N.J. 378, 385 (App. Div. 1985); State v. Sanducci, 150 N.J. Super. 400, 402-04 (App. Div. 1977).

VII. Sentence Review:

A. Former Rule:

The longstanding rules on excessive sentences changed with the passage of the criminal code. The cases used to hold that a sentence would not be upset for excessiveness unless the defendant convinced the appellate court that there was an abuse of discretion. State v. Whitaker, 79 N.J. 503, 512 (1979). A plea bargained sentence, although it could be excessive, was presumed to be reasonable. State v. Spinks, 66 N.J. 568, 573 (1975). No sentence would be reduced merely because the co-defendant got a lighter sentence. State v. Deegan, 126 N.J. Super. 475, 495 (App. Div. 1974).

B. Current Rule:

Under the Criminal Code, the "unfettered sentencing discretion" of pre-code law has been replaced with "a structured discretion designed to foster less

arbitrary and more equal sentences." State v. Roth, 95 N.J. 334, 345 (1984). The code is offense-oriented and does not focus on rehabilitation. State v. Hodge, 95 N.J. 369, 375 (1984).

C. Standards Under Current Rule:

Thus, the appellate court must now make sure that the trial judge followed the sentencing guidelines in the criminal code. It must (1) "require that an exercise of discretion be based on findings that are grounded in competent, reasonably credible evidence"; (2) "require that the factfinder apply correct legal principles in exercising its discretion"; and (3) modify sentences only when the facts and law show "such a clear error of judgment that it shocks the judicial conscience." State v. Roth, 95 N.J. 334, 363-64 (1984). A reviewing court must make sure that sentencing guidelines were not violated, determine that findings on aggravating and mitigating factors are based on the evidence, and decide whether application of the guidelines makes a particular sentence clearly unreasonable. Id. at 364-65.

D. Plea Bargains and Consecutive Sentences:

See State v. Yarbough, 100 N.J. 627, 643-45 (1985), for factors governing imposition of consecutive sentences, and State v. Sainz, 107 N.J. 283, 292 (1987), for standards for reviewing plea-bargained sentences. Sainz held that State v. Roth, 95 N.J. 334 (1984), applies to plea bargained sentences. It also held that a trial judge need not base his or her sentence solely on the facts elicited from defendant when he or she pleaded guilty; the judge may look at other evidence in the record as well.

E. Controlled Dangerous Substances Offenses:

In sentencing for a controlled dangerous substance offense, the trial judge must explicitly determine and weigh aggravating and mitigating factors. State v. Sainz, 107 N.J. 283, 291 (1987).

F. Youthful Offenders:

State v. McBride, 66 N.J. 577, 580 (1975), used to mandate a preference for sentencing youthful offenders to the youth complex. That preference no longer exists. A sentence under the youthful offender statute is now merely an option that should be used only in limited cases when the court, in its discretion, deems it appropriate. State v. Styker, 262 N.J. Super. 7, 21 (App. Div.), aff'd o.b., 134 N.J. 254 (1993).

G. Appeal by State from Sentence:

1. Appeal from Sentence:
When a defendant is convicted of a first or second-degree crime and the judge either imposes a term appropriate for one degree lower or imposes a non-custodial or probationary term under N.J.S.A. 2C:44-1(d), the State may appeal. The appeal must be filed within ten days of pronouncement of sentence (not of judgment of conviction). N.J.S.A. 2C:44-1(f)(2); State v. Roth, 95 N.J. 334, 344-35 (1984); R. 3:21-4(g). The ten-day limit is strictly enforced. State v. Sanders, 107 N.J. 609, 616 (1987).

2. Standard of Review:
The same standard is used to review a sentence when the State appeals as when the defendant appeals. State v. Roth, 95 N.J. 334 (1984).

3. Post-Conviction Relief:
The State may appeal from a judgment in a post-conviction proceeding collaterally attacking a sentence, as well as from one attacking a conviction. R. 2:3-1(b)(4).

VIII. Error in Denial of Post-Conviction Relief:

A. Grounds for Post-Conviction Relief:

1. On appeal from a denial of post-conviction relief the court checks first to see if defendant raised any proper grounds for post-conviction relief. If proper grounds were not raised denial of relief must be affirmed.

2. Four cognizable grounds for relief on a first petition are set out in R. 3:22-2. One such ground is that a sentence is illegal. R. 3:22-2(c). But that ground cannot be raised alone. If there are no other cognizable P.C.R. issues, the illegal sentence claim must be brought instead under R. 3:21-10(b)(5) as a motion to correct an illegal sentence. R. 3:22:2(c).

3. Grounds for relief on a second or subsequent petition are different from those allowed in a first petition. R. 3:22-4(b). This rule became effective on February 1, 2010, and provides that such a petition must allege on its face one of three specified claims. If it does not, it "shall be dismissed."

4. Any matter which could have been, but was not, raised in any prior proceeding or on any appeal cannot be a ground for relief in either a first or a subsequent petition, unless it couldn't reasonably have been raised before, or unless enforcing the bar would result in a fundamental injustice, or unless denial of relief would be unconstitutional. R. 3:22-4 (a).

6. But a defendant's failure to raise ineffective assistance of counsel on direct appeal rarely bars raising that issue on petition for post-conviction relief because it usually falls within R. 3:22-4(a)(1): it could not reasonably have been raised in an earlier proceeding. State v. Preciose, 129 N.J. 451, 459-61 (1992). If a defendant makes out a prima facie case of ineffective assistance of trial counsel, then the court on post-conviction relief judge should allow an evidentiary hearing and make a determination on the merits of defendant's claim. Id. at 462-64.

7. Any matter previously expressly adjudicated cannot be raised on PCR. R. 3:22-5.

B. Time for P.C.R. Petition:

1. A first petition must be filed within five years of judgment of conviction (that is, within five years of the date of the sentence). R. 3:22-12(1); State v. Dugan, 289 N.J. Super. 15, 19 (App. Div. 1996).

2. Before February 1, 2010, a first petition could be filed after five years if the petitioner could show excusable neglect. The rule was amended to add an additional requirement: the petitioner must now also show "that there is a reasonable probability that if the defendant's factual assertions were found to be true, enforcement of the time bar would result in fundamental injustice."

3. R. 3:22-4(b), which sets out the cognizable grounds for a second or subsequent petition, also requires that a such a petition must be timely under R. 3-22:12(a)(2). That latter rule sets a one-year deadline from the time one of the events supporting a cognizable claim happened, rather than the five years from sentencing allowed for a first petition. R. 3-22:12(a)(2).

R. 3-22:12(a)(2) also does not provide for relaxing the rule for excusable neglect and a showing of a probability of fundamental injustice like the rule for first petitions does. In fact, the rule governing second or subsequent petitions specifically provides that the time limits in it cannot be relaxed except as provided in that rule. R. 3:22-12(c). That means that the limits cannot be relaxed under the general relaxation rule, R. 1:1-2. Later petitions must be brought within only one year of the date on which the event supporting one of those grounds occurred. R. 3:22-12(a)(2). Read both rules carefully.

C. Deciding the Appeal:

Standards for deciding whether there was any error in denial of post-conviction relief (once it is established that the grounds raised are cognizable on P.C.R. petition) depend on what errors are alleged, and hence are the same as those used in any appeal: for example, did defendant show ineffective assistance of counsel and were the factfindings supported by sufficient credible evidence?

IX. Ineffective Assistance of Counsel:

The old rule was that, to warrant reversal for inadequacy of counsel, what counsel did or failed to do had to be "of

such magnitude as to thwart the fundamental guarantee of a fair trial." State v. Dennis, 43 N.J. 418, 428 (1964). Counsel "must have been so incompetent as to make the trial a farce or mockery of justice." State v. Woodard, 102 N.J. Super. 419, 429 (App. Div. 1968).

However, New Jersey courts now follow the rule formulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984). Now, under New Jersey's interpretation of its own constitution, to show ineffective assistance a defendant must identify acts or omissions allegedly showing unreasonable professional judgment, then must show that they had a prejudicial effect on the judgment. State v. Fritz, 105 N.J. 42, 58 (1987). This standard is also applied in one kind of civil proceeding: termination of parental rights. Div. of Youth & Family Services v. B.R., 192 N.J. 301, 308-09 (2007). (See page 77 of this outline.)

X. Prosecutor's Improper Remarks:

In assessing whether prosecutorial misconduct, such as improper remarks in summation, requires reversal, an appellate court should determine whether "the conduct was so egregious that it deprives the defendant of a fair trial." State v. Frost, 158 N.J. 76, 83 (1999); State v. Loftin, 146 N.J. 295, 386 (1996); State v. Ramseur, 106 N.J. 123, 322 (1987). In determining whether a defendant's right to a fair trial has been denied, the court should look at such factors as whether defense counsel made a timely objection, whether the remark was withdrawn promptly, whether the trial judge ordered the remarks stricken, and whether the judge instructed the jury to disregard them. State v. Ramseur, 106 N.J. at 322-23.

An attorney may make remarks that constitute legitimate inferences from the facts. State v. Perry, 65 N.J. 45, 48 (1974); State v. Mayberry, 52 N.J. 413, 437 (1968). He or she may not go beyond the facts before the jury. State v. Farrell, 61 N.J. 99, 103 (1972). An unfair attack on defense counsel can warrant reversal. State v. Sherman, 230 N.J. Super. 10, 15-19 (App. Div. 1988). A prosecutor's remarks may be harmless if they are only a response to

remarks by opposing counsel. State v. DePaglia, 64 N.J. 288, 297 (1974).

XI. Speedy Trial:

A determination by a trial judge on whether defendant was deprived of right to speedy trial should not be overturned unless "clearly erroneous." State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).

XII. Contempt Conviction:

R. 2:10-4 provides that every summary conviction for contempt shall be reviewable on the law and the facts; the appellate court renders any order it deems just. In re Educ. Ass'n of Passaic, Inc., 117 N.J. Super. 255, 259 (App. Div. 1971).

XIII. Review of Decision on Disclosure of Juvenile's Identity or Waiver of Juvenile to Adult Court:

The appellate court first looks to see if the correct legal standards were applied to decisions to disclose a juvenile's identity, and if the findings of the trial judge are supported by the evidence; it then decides whether the trial judge abused his or her discretion in ordering or denying disclosure. State in Interest of B.C.L., 82 N.J. 362, 379-80 (1980).

As for waiver to the adult court, N.J.S.A. 2A:4A-26(a)(2) provides that a juvenile shall be waived to adult court so long as he or she is at least fourteen years old and there is probable cause to believe he or she committed an act enumerated in the statute. If the person is charged with a less serious offense, the prosecutor must also show that the public interest requires waiver. N.J.S.A. 2A:4A-26(a)(3).

N.J.S.A. 2A-4A-26(e) changed earlier law by providing that a juvenile over the age of sixteen no longer has the opportunity to prevent waiver by showing the possibility or rehabilitation by age nineteen.

The standard for reviewing the prosecutor's decision to waive was changed in September 2012. The earlier standard

had been set in In re R.C., 351 N.J. Super. 248, 259 (App. Div. 2002), and held that in order for a judge to overturn a prosecutor's decision to waive a juvenile to the adult court there had to be proof that the prosecutor had committed a "patent and gross abuse of discretion" in the decision to waive. Addressing the issue for the first time, the Supreme Court in State in the Interest of V.A., 212 N.J. 1, 21; 24-26 (2012), held that a trial court need only find an "abuse of discretion," not a "patent and gross" abuse of discretion. Moreover, when a prosecutor chooses to waive a juvenile over sixteen to the adult court, the prosecutor must compile written reasons for seeking waiver and those reasons are subject to judicial review. Id. at 26-28.

XIV. Review of Dismissal of Indictment with Prejudice after Several Mistrials:

A trial judge may dismiss with prejudice after several mistrials if he or she determines that the chance of conviction upon further retrial is "highly unlikely." The judge must apply the factors set out in State v. Abbati, 99 N.J. 418, 435 (1985), to make that determination.

An appellate court must: 1) make sure the Abbati standard was applied by the trial court; and 2) (if the standard was correctly applied) affirm the dismissal unless there was a mistaken exercise of discretion. Id. at 436.

XV. Admission to Pretrial Intervention Program:

Extreme deference is given to the prosecutor's decision whether to admit a defendant to PTI. Defendant has a heavy burden in trying to overcome prosecutor's decision not to admit to the program. After conviction, a defendant can appeal denial of admission into the program even if he or she pleaded guilty. R. 3:28(g). The trial and appellate courts must not substitute their own discretion for the prosecutor's even when the prosecutor's decision seems harsh. To overturn the prosecutor's decision, the court must find patent and gross abuse of discretion. State v. Kraft, 265 N.J. Super. 106, 112-13 (App. Div. 1993). See R. 3:28 for further information about pretrial intervention.

XVI. Prosecutor's Assignment of Aggravating and Mitigating Factors Under Sentencing Guidelines for Purposes of Plea Negotiations:

Under guidelines promulgated by the Attorney General pursuant standard to State v. Brimage, 153 N.J. 1 (1998), the prosecutor may assign points for aggravating and mitigating factors that will raise or lower the term the prosecutor will offer during plea negotiations. (The guidelines can be found at www.state.nj.us/lps/dcj under "guidelines" then "Brimage Guidelines 2." State v. Coulter, 326 N.J. Super. 584 (App. Div. 1999), held that when a trial judge reviews the plea offer it is the burden of the defendant to bring to the judge's attention any objection he or she has to the prosecutor's assignment of factors. Then, the defendant must show by clear and convincing evidence that the prosecutor's decision reflects a gross and patent abuse of discretion because the facts do not support use of a specific factor or because the prosecutor overlooked facts that would indisputably constitute a mitigating factor. The Appellate Division uses the same standard. Id. at 590.

XVII. Review of Prosecutor's Refusal to Enter Into Plea Bargain or Post-Conviction Agreement in Drug Cases:

Certain drug offense statutes impose mandatory prison or parole ineligibility terms. N.J.S.A. 2C:35-12 requires a judge, in such cases, to impose any such mandatory sentence unless defendant has entered into a plea bargain, or unless defendant and the prosecutor have entered into a post-conviction agreement for a lesser term. The prosecutor has the discretion to decide whether to enter into such an agreement, and the court should reverse the prosecutor's decision only if defendant shows that it was arbitrary and capricious. State v. Gonzalez, 254 N.J. Super. 300, 309 (App. Div 1992).

XVIII. Review of Inconsistent Verdicts:

The general rule is that inconsistent verdicts will be upheld so long as there is sufficient evidence to uphold the convictions beyond a reasonable doubt. Dunn v. United States, 284 U.S. 390, 393 (1932); United States v. Powell, 469 U.S. 57, 65 (1984). But that applies only when the

reasons for the inconsistent verdicts cannot be determined. State v. Grey, 147 N.J. 4, 11 (1996). Where the reasons can be determined, as where the jury was improperly charged and it convicted for felony murder while acquitting on the underlying felony, the verdict cannot stand. Id. at 17-18.

XIX. Decision Whether to Remove Juror for Cause:

Trial judges have considerable discretion in determining the qualifications of prospective jurors, and their decisions on whether to remove a juror for cause will not be reversed except for an abuse of discretion. The judge must decide "whether the responses elicited from a prospective juror indicate a view that would prevent or substantially impair that juror's performance in accordance with the court's instructions and that juror's oath." State v. DiFrisco, 137 N.J. 434, 459-60 (1994). To prove that the forced use of a peremptory challenge is reversible error, the defendant has to show: "(1) that the trial court erred by failing to remove a juror for cause; (2) that the juror in question was eliminated by the exercise of defendant's peremptory challenge and that defendant exhausted his remaining challenges; and (3) that at least one of the remaining jurors that sat on the jury was a partial juror." Id. at 471.

XX. Decision on Whether to Dismiss Indictment and Prosecutor's Instruction to Grand Jury as Basis for Dismissing Indictment:

A decision on whether to dismiss an indictment is left to the sound discretion of the trial judge and will be reversed only for an abuse of discretion. State v. Warmbrun, 277 N.J. Super. 51, 59 (App. Div. 1994). An indictment should be dismissed only on the clearest and plainest ground, where it is manifestly deficient or palpably defective. State v. Hogan, 144 N.J. 216, 228-29 (1996). And any defect in the Grand Jury proceeding that affects the decision to indict will be cured or rendered moot if a petit jury later convicts, because a jury verdict establishes that there was probable cause to indict. United States v. Mechanick, 475 U.S. 66, 70 (1986); State v. Warmbrun, 277 N.J. Super. at 60.

"Because an indictment should be dismissed only on the clearest and plainest grounds," only in exceptional cases

will a prosecutor's decision on how to instruct a grand jury constitute grounds for challenging an indictment. An "indictment should not be dismissed on this ground unless the prosecutor's error is clearly capable of producing an unjust result. This standard can be satisfied by showing that the grand jury would have reached a different result but for the prosecutor's error." State v. Hogan, 336 N.J. Super. 319, 344 (App. Div. 2001).

XXI. Review of Assignment Judge's Review of Grand Jury's Presentment Censuring a Public Official:

R. 3:6-9(a) allows a grand jury to make a presentment censuring a public official "only where that public official's association with the deprecated public affairs or conditions is intimately and inescapably a part of them." R. 3:6-9(c) requires that the proof be "conclusive that the existence of the condemned matter is inextricably related to non-criminal failure to discharge that public official's public duty." The judge must strike the presentment in whole or in part if it "is false, or is based on partisan motives, or indulges in personalities without basis, or if other good cause appears." R. 3:6-9(c). A grand jury must never charge someone "unless the proof is conclusive." In re Presentment by Camden County Grand Jury, 34 N.J. 378, 391 (1961).

R. 3:6-9(e) governs appellate review: "The action taken by the Assignment Judge pursuant to this rule is judicial in nature and is subject to review for abuse of discretion . . . . " And if the judge misapplies the law, his or her exercise of discretion becomes arbitrary and the reviewing court must "adjudicate the matter in light of the applicable law to avoid a manifest denial of justice." In re Presentment of Bergen County Grand Jury, 193 N.J. Super. 2, 9 (App. Div. 1984).

XXII. Decision Whether to Grant Prisoner Parole:

This decision is subject to the discretion of the parole board, but can be reviewed by the appellate court for arbitrariness. Since the parole eligibility statute creates a presumption that a person should be released on his or her eligibility date, a decision not to release must be considered arbitrary if it is not supported by a

preponderance of the evidence in the record. Kosmin v. N.J. State Parole Board, 363 N.J. Super. 28, 41-42 (App. Div. 2003).

XXIII. Decision on Whether a Defendant is Competent to Stand Trial:

Appellate review of a decision on whether a defendant is competent to stand trial is "highly deferential." State v. Moya, 329, 499, 506 (App. Div. 2000).

XXIV. Decision Whether to Disqualify Attorney from Representing a Party:

This presents an issue of law and an appellate court reviews it de novo. The trial judge is not accorded deference. J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 221-22 (App. Div. 2006).

XXV. Review of Trial Court's Findings Based Only on View of Recorded Interrogation:

For a few years, the following was the standard adopted in State v. Diaz-Bridges, 208 N.J. 544, 566 (2012), for reviewing fact findings based on only viewing a video: "When the trial court's factual findings are based only on its viewing of a recorded interrogation that is equally available to the appellate court and are not dependent on any testimony uniquely available to the trial court, deference to the trial court's interpretation is not required. Appellate courts need not, and we will not, close our eyes to the evidence that we can observe in the form of the videotaped interrogation itself."

However, that standard was not the law for long. First, in State v. Hubbard, 222 N.J. 249, 270 (2015), the Court emphasized that Diaz-Bridges was not intended to alter the traditional appellate standard of review of trial court fact-findings. Thus, when the trial court has based its findings not just on a recorded statement, but also on testimonial and documentary evidence it is "uniquely situated to integrate the testimony and the video record to formulate its findings of fact." Ibid. The Appellate Division should not have reviewed the video de novo and rejected the findings of the trial court.

Then, in State v. S. S., 229 N.J. 360, 397-82 (2017), the Court "rejected the de novo standard introduced in Diaz-Bridges." The rule now is the same as review of any fact finding: if there is sufficient credible evidence to uphold the trial court's findings on the credibility of what it sees in the video, those findings will be affirmed. The appellate court may no longer substitute its own findings for findings based only on viewing a video.

SECTION SIX

STANDARDS GOVERNING ERRORS IN

CIVIL CASES ONLY

I. Errors by Administrative Agencies Other than Erroneous Factfindings:

In addition to allegedly erroneous fact findings by an administrative agency, errors are frequently alleged in the agency's ultimate determination or interpretation of the law. The following standards are used.

A. Where Are Decisions of Administrative Agencies Reviewed?:

1. General Rule:

Review of the action or inaction of a State agency goes to the Appellate Division. But any proceeding to review the action or inaction of a local administrative agency is by complaint in lieu of prerogative writ in the Law Division.

Even if a State agency has only local jurisdiction, review is still in the Appellate Division just like review of the actions of a State agency with statewide jurisdiction. Infinity Broadcasting Corp. v. N.J. Meadowlands Comm'n, 187 N.J. 212, 225 (2006).

And since R. 2:2-3(a)(2) says that every proceeding to review state action or inaction is by appeal to the Appellate Division, the Appellate Division is also the appropriate venue where a state agency has not taken final action. A party should not bring a prerogative writ action in the Law Division in order to shortcut the agency process and the Appellate Division's jurisdiction.

See further discussion at pages 12-13 of this outline.

2. Exceptions:

On rare occasions, even a decision of a State agency with statewide jurisdiction is better reviewed in the trial court.

Where the ordinary rules on allocation of jurisdiction within the Superior Court would result in separate courts hearing parts of the same controversy, then it is better to assign responsibility to one tribunal. Pascucci v. Vagott, 71 N.J. 40, 51-54 (1976).

Where the Attorney General refused to provide counsel to a state employee, that denial should have been reviewed by the trial court that would conduct the trial. Prado v. State of New Jersey, 376 N.J. Super. 231, 239 (App. Div. 2005).

Pfleger v. N.J. State Highway Dept., 104 N.J. Super. 289, 290-91 (App. Div. 1968), held that the Law Division had jurisdiction over inverse condemnation

cases because the Highway Department had no way to condemn land and make a record that the Appellate Division could review.

Actions for access to information under the Open Public Records Act, N.J.S.A. 47:1A-1 are also reviewed in the Law Division because of the need for trial and fact-finding. Hartz Mountain v. NJSEA, 369 N.J. Super. 175, 187-88 (App. Div.), cert. denied, 182 N.J. 147 (2004).

B. General Standard of Review on Determinations by Agencies:

An appellate court will not upset the ultimate determination of an agency unless shown that it was arbitrary, capricious or unreasonable, or that it violated legislative policies expressed or implied in the act governing the agency (or, as noted at pages 14-19 above, that the findings on which the decision is based are not supported by the evidence). Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963). See Prado v. State, 186 N.J. 413, 427 (2006), which applies this standard to the Attorney General's decision denying a state employee's request for representation when the employee is sued. In re Proposed Quest Academy Charter School, 216 N.J. 370, 385-87 (2013), applied the standard to an appeal from the Commissioner of Education's denial of a license to create a charter school. The Court also noted that the standard assumes that there is sufficient credible evidence to support the decision; otherwise, the decision would be arbitrary, capricious or unreasonable. Ibid.

See an extensive review of all aspects of the standard of review of agency decisions at In re Adoption of Amendments, 435 N.J. Super. 571, 583-84 (2014).

C. Special Rule Governing Decisions on Bids in State Contracts:

Where the director of the state Division of Purchase and Property awards or rejects a bid, the courts will not reverse absent bad faith, corruption, fraud or gross abuse of discretion. Keyes Martin & Co. v.

Director, Div. of Purchase & Property, 99 N.J. 244, 253 (1985).

D. Agency's Interpretation of Statute or Decision on Strictly Legal Issue:

An appellate court respects the agency's expertise but, ultimately, interpretation of statutes is a judicial, not administrative, function and the court is in no way bound by the agency's interpretation. Mayflower Securities Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

E. Review of Administrative Regulations:

The scope of the appellate court's review of administrative regulations is extremely limited. Administrative regulations have a presumption of validity. A party who challenges them bears the burden of showing that they are arbitrary, capricious or unreasonable, or beyond the scope of the power delegated to the agency by the Legislature. The courts have a "strong inclination to defer to agency action provided it is consistent with the legislative grant of power." Lewis v. Catastrophic Illness Fund, 336 N.J. Super. 361, 369-70 (App. Div. 2001). "When an administrative agency interprets and applies a statute it is charged with administering in a manner that is reasonable, not arbitrary or capricious, and not contrary to the evident purpose of the statute, that interpretation should be upheld, irrespective of how the forum court would interpret the same statute in the absence of regulatory history." Blecker v. State, 323 N.J. Super. 434, 442 (App. Div. 1999), quoted in Reck v. Director, Div. of Taxation, 345 N.J. Super. 443, 449 (App. Div. 2001), aff'd, 175 N.J. 54 (2002).

F. Burden of Proof on Disciplinary Charges Brought Before Agency:

Generally, such charges need be proven only by a preponderance of the evidence, not beyond a reasonable doubt. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). But there has long been a different rule for attorneys, requiring proof by clear and convincing evidence. In re Pennica, 36 N.J. 401 (1962). In re

Polk License Revocation, 90 N.J. 550, 569 (1982), refused to extend that higher standard to physicians. Only proof by a preponderance of the evidence is required for them. The "clear and convincing" standard is only for attorneys.

G. Review of Decision Denying Prisoner Transfer to Another Country:

N.J.S.A. 30:7D-1 allows the Commissioner of Corrections to grant a prisoner's request for a transfer to another country. But the courts do not review a decision on such a request under the ordinary "arbitrary, capricious or unreasonable" standard. Instead, they will reverse only upon a showing that the Commissioner acted maliciously or in such disregard of constitutional rights as to constitute bad faith. Shimoni v. N.J Dept. of Corr., 412 N.J. Super. 218, 223-24 (App. Div. 2010).

H. Review of Tax Court's Decision Reviewing Decision of Director of the Division of Taxation:

The appellate court generally defers to the expertise of the Tax Court and has a limited scope of review following a determination of that court. But it also recognizes the expertise of the Director of the Division of Taxation, whose decision the Tax Court may have reviewed. That is particularly true when the Director's expertise is exercised in the "specialized and complex area" of the tax statutes. Metromedia v. Director, Div. of Taxation, 97 N.J. 313, 337 (1984).

II. Error in Grant of Summary Judgment:

A. General Rule: R. 4:46-2:

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2.

B. All papers on file must be considered. Even though the allegations of the pleadings may raise an issue of

fact, if the other papers show that, in fact, there is no real material issue, then summary judgment can be granted. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). But "Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." United States Pipe & Foundry Co. v. American Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961). An opposing party who offers no substantial or material facts in opposition to the motion can't complain if the court takes as true the uncontradicted facts in the movant's papers. Judson v. Peoples Bank & Trust Co. of Westfield, supra, 17 N.J. at 75; R. 4:46-5. Disputed issues that are "of an insubstantial nature" cannot overcome a motion for summary judgment. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 530 (1995).

Nevertheless, even without submitting supporting affidavits, "a party may defeat a motion for summary judgment by demonstrating that the evidential materials relied upon by the moving party, considered in light of the applicable burden of proof, raise sufficient credibility issues 'to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.'" D'Amato v. D'Amato, 305 N.J. Super. 109, 114 (App. Div. 1997), (quoting Brill, supra at 523).

"A case may present credibility issues requiring resolution by a trier of fact even though a party's allegations are uncontradicted." D'Amato, supra, at 115. On the other hand, in Liberty Mutual Ins. Corp. v. Amoroso, P.A., 189 N.J. 436, 450 (2007), the Court held (citing Brill) that "Even when credibility may be an issue," if there is a single unavoidable resolution to the alleged factual issue, that would not constitute a genuine issue of material fact, and summary judgment might be appropriate.

A 1996 amendment to the rules made "substantial changes in summary judgment procedure." Pressler & Verniero, Current N.J. Court Rules, comment on R. 4:46-2 (2015). That rule now requires the movant to file "a statement of material facts," either with or without supporting affidavits, that sets forth "a concise statement of each material fact as to which

the movant contends there is no genuine issue" with citations to the record. And the respondent must "file a responding statement either admitting or disputing each of the facts in the movant's statement." All material facts in the movant's statement will be deemed admitted unless the respondent specifically disputes them and demonstrates the existence of a genuine issue of fact. R. 4:46-2(a) and (b).

C. The trial court must not decide issues of fact: it must only decide whether there are any such issues. Brill v. Guardian Life Ins. Co., supra, 142 N.J. at 540; Judson v. Peoples Bank & Trust Co. of Westfield, supra, 17 N.J. at 75; R. 4:46-5.

D. Brill v. Guardian Life Ins. Co., supra, 142 N.J. at 540, articulates the rule for determining whether there is a genuine issue of fact. The judge must engage in a weighing process like the one used in deciding motions for directed verdicts under Rules 4:37-2(b), 4:40-1 and 4:40-2. The judge must decide whether "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." Ibid. Thus, "when the evidence 'is so one-sided that one party must prevail as a matter of law,' . . . the trial court should not hesitate to grant summary judgment." Ibid.

In fact, after Brill was decided, R. 4:46-2(c) was amended in 1996 to add the following sentence: "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact."

The Brill standard, as articulated in the amendment to the rule, has been followed for some time in Federal

and many state courts, as cited in Brill. Id. at 530-40.

E. Generally, where discovery is not complete, summary judgment is not appropriate, at least where it is clear that at least one of the parties still wishes discovery. See, for example, Crippen v. Cent/ Jersey Concrete Pipe Co., 176 N.J. 397, 409 (2003). But in Liberty Surplus Ins. Co. v. Amoroso, P.A., 189 N.J. 436, 451 (2007), the Court rejected the argument that summary judgment should not have been granted because discovery was not complete. That was because the party complaining on appeal about incomplete discovery was the one who filed first for summary judgment and was never denied the ability to complete discovery.

F. An appellate court uses the same standard as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). It decides first whether there was a genuine issue of fact. If there wasn't, it then decides whether the lower court's ruling on the law was correct. Walker v. Alt. Chrysler Plymouth, 216 N.J. Super. 255, 258 (App. Div. 1987).

And if a judge rules on a summary judgment motion, and also has to decide whether certain evidence is admissible on the motion, it must first decide whether the evidence is admissible, then decide whether the motion should be granted. When the appellate court reviews those decisions, it also reviews the two decisions separately: the evidentiary ruling under the abuse of discretion standard, and the legal conclusions that support the summary judgment ruling de novo. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 384-85 (2010).

III. Error in Denial of Summary Judgment:

Denial of summary judgment is an interlocutory order and is not appealable until final judgment has been entered, unless the court grants leave to appeal. The appellate court can dismiss the appeal or can grant leave to appeal nunc pro tunc if appellant has failed to apply for leave. United Cannery Maintenance v. Local 80-A, 16 N.J. 264, 265 (1954); R. 2:2-3; R. 2:2-4.

If leave is granted, the standard for deciding the appeal is as set out in the previous section.

IV. Error in Grant or Denial of Civil Party's Motion for Judgment:

When an appellant claims that the judge erroneously denied an order for judgment, the issue for the trial judge and the appellate court is the same: could the evidence, together with legitimate inferences that can be drawn from it, sustain a judgment in favor of the party opposing the motion? R. 4:37-2(b).

This means: accepting as true all evidence supporting the party opposing the motion and according him or her the benefit of all favorable inferences, if reasonable minds could differ, the motion must be denied. Dolson v. Anastasia, 55 N.J. 2, 5 (1969).

The standard is the same for jury and non-jury trials. R. 4:37-2(b); Lyons v. Hartford Ins. Group, 125 N.J. Super. 239, 243 (App. Div. 1973), certif. denied, 64 N.J. 322 (1974).

According to Dolson v. Anastasia, supra, 55 N.J. at 5, the standard applies to:

> motion for dismissal for failure to state a cause of action; R. 4:6-2 (see Burg v. State, 147 N.J. Super. 316, 319-20 (App. Div.), certif. denied, 75 N.J. 11 (1977));
>
> motion for judgment at close of plaintiff's case, R. 4:37-2(b);
>
> motion for judgment at close of all evidence, R. 4:40-1;
>
> motion for judgment notwithstanding the verdict, R. 4:40-2(b).

A motion to dismiss a complaint for failure to state a cause of action, R. 4:6-2(e) (see Burg v. State, supra, 147 N.J. Super. at 319-20), must be denied if, giving plaintiff the benefit of all his or her allegations and all favorable inferences, a cause of action has been made out. The

inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. But the reviewing court must search the complaint "in depth and with liberality" to see whether the basis for a cause of action may be found even in an obscure statement of a claim; and opportunity should be given to amend if necessary. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989).

Note: Neither trial nor appellate court is concerned with the weight, worth, nature or extent of the evidence. Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969).

V. Error in Trial Court's Upholding or Reversing Decision of Municipal Body

A. Procedural Background:

In some cases the trial judge acts as an appeal court to review a decision of a municipal body. Some of those municipal body decisions are discretionary. Examples are review of a decision to condemn land, and review of a zoning plan or ordinance.

Other municipal decisions are based on fact findings by the municipal body and those get a de novo review.

B. General Rule (discretionary decisions):

1. When he or she reviews any decision where the municipality was allowed to exercise discretion, for example a decision to grant a variance, the trial judge starts by recognizing that the Legislature has vested the municipality with discretion to make the decision involved. Booth v. Board of Adj. of Rockaway, 50 N.J. 302, 306 (1967).

2. The Board's actions are presumed to be valid, and the party challenging them must prove otherwise. N.Y. SMSA L.P. v. Bd. of Adj., Bernards Twp., 342 N.J. Super. 149, 163 (App. Div. 1999). In fact, the Board's factual findings are entitled to substantial

deference and are presumed to be valid. Burbridge v. Twp. of Mine Hill, 117 N.J. 376, 385 (1990). But its conclusions of law are subject to de novo review. Nuckel v. Little Ferry Plan. Bd., 208 N.J. 95, 102 (2011).

3. Therefore, the trial court may not substitute its judgment for that of the municipal body unless it is proven that the Board's action was arbitrary, unreasonable or capricious. See, e.g., Cell S. of N.J., Inc. v. Zoning Bd. of Adj. of W. Windsor Twp., 172 N.J. 75, 81 (2002); Medici v. BPR Co., 107 N.J. 1, 15 (1987).

C. Appellate Review (discretionary decisions):

The appellate court makes the same kind of decisions the trial court made. It gives deference to the municipality's broad discretion and reverses only if the municipal action was arbitrary, capricious or unreasonable. Cell S. of N.J., Inc. v. Zoning Bd. of Adj. of W. Windsor Twp., supra, 172 N.J. at 81.

D. The Rule in Zoning Cases:

The general rule applies to judicial review of decisions by municipal bodies in zoning variance cases. Under the municipal land use law, N.J.S.A. 40:55D-1 to -136, the planning board or the zoning board of adjustment, as the case may be, makes the final decision on all variances except those governed by N.J.S.A. 40:55D-70(d), which typically involve use variances.

If, and only if, the board of adjustment grants a (d) variance, the governing body may permit appeals to it by objectors. If the governing body has jurisdiction over the appeal, it reviews the record and makes de novo findings and conclusions. N.J.S.A. 40:55D-17 (a) & (d). It is not required to affirm merely because the board of adjustment did not act arbitrarily. Evesham Zoning Board of Adj. v. Evesham Twp. Counc.,

86 N.J. 295, 300-01 (1981); Illes v. Zoning Board of Adj. of Edison, 203 N.J. Super. 598, 609 (Law Div. 1985). The trial court, the Appellate Division and the Supreme Court then apply the general standard of review and determine whether the findings and conclusions of the governing body, not the board of adjustment, are supported by the record. Evesham, supra, 86 N.J. at 302.

Where an applicant seeks a use variance and does not show that the use would inherently serve the public good (such as a school or hospital), the applicant must show and the municipal body must specifically find, either (1) hardship or (2) that the use would promote the general welfare because the proposed site is particularly suited for it. Medici v. BPR Co., 107 N.J. 1, 4 (1987).

Moreover, for applications heard after the date of the Medici decision, the municipal body is given less discretion with respect to that prong of the negative criteria that requires the municipal body to determine whether the variance will substantially impair the intent and purpose of the master plan and zoning ordinance. Id. at 22-23. There must be specific findings that would reconcile the grant of the variance with the omission of the proposed use from the zoning ordinance. Id. at 21-23.

However, the courts have not applied Medici's enhanced-proof standard in the following situations:

1) expansions of existing uses: "Medici's enhanced-proof requirement focused on variances for new uses rather than on expansions of existing ones" (Burbridge v. Governing Body of Mine Hill, 117 N.J. 376, 398 (1990));

2) bulk variances: "[T]he grant of bulk variances does not generally require the enhanced quality of proof concerning the negative criteria that is mandated for use variances" (North Bergen Action Group v. Planning Board of North Bergen, 122 N.J. 567, 578 (1991));

3) inherently beneficial uses (Sica v. Board of Adj. of Wall, 127 N.J. 152, 160 (1992));

4) conditional uses: the Medici standard is "plainly inappropriate" in such cases (Coventry Square v. Westwood Bd. of Adj., 138 N.J. 285, 296-97 (1994));

5) variances based on economic hardship (Eagle Group v. Bd. of Adj. of Hamilton Twp., 274 N.J. Super. 551, 563 (App. Div. 1994)); height variances (Grasso v.Borough of Spring Lake, 375 N.J. Super. 41, 49 (App. Div. 2004)); floor area ratio (FAR) variances (Randolph Town Ctr. Assocs., 342 N.J. Super. 412, 416 (App. Div. 1999)); deviations from density requirements (Grubbs v. Slothower, 389 N.J. Super. 377, 388 (App. Div. 2007)).

E. Exceptions to the General Rule:

There are two exceptions to the general rule requiring that a court defer to the municipal body's discretion and reverse only for arbitrariness.

First, where the municipal body has not made a discretionary decision but has merely interpreted an ordinance, no deference need be given since a court can interpret any law as well as the municipality can. Cherney v. Zoning Bd. of Adj. of Matawan, 221 N.J. Super. 141, 144-45 (App. Div. 1987); Grancagnola v. Planning Bd. of Verona, 221 N.J. Super. 71, 75 (App. Div. 1987); Jantausch v. Borough of Verona, 41 N.J. Super. 89, 96 (Law Div. 1956), aff'd 24 N.J. 326 (1957).

Second, the planning board is often called upon to review applications which do not call for any variances, such as for site plans, subdivisions or conditional uses. For these types of applications the Legislature has required the municipality to adopt, by ordinance, definite specifications and standards. If the developer meets those standards, then the planning board lacks the authority to deny approval. PRB Enterprises, Inc. v. South Brunswick Planning Board,

105 N.J. 1, 7 (1987); Dunkin' Donuts of N.J., Inc. v. Township of N. Brunswick Planning Board, 193 N.J. Super. 513, 515 (App. Div. 1984); Lionel's Appliance CtR., Inc. v. Citta, 156 N.J. Super. 257, 268-69 (Law Div. 1978). The court gives deference to the planning board only if the ordinance confers discretion on the board. PRB Enterprises Inc. v. South Brunswick Planning Bd., supra, 105 N.J. at 7.

F. Telecommunications Cases:

The standard of review for claims brought pursuant to the federal Telecommunications Act varies depending on the nature of the claim. Generally, a court gives deference to a local zoning board's decision not to approve a cell tower. But if the decision not to deny permission to construct such a facility "has the effect of prohibiting the provision of personal wireless services, the court applies a de novo review that is not necessarily limited to the record compiled by the local authority." That is because the statute bars a local authority from banning service altogether. That de novo standard used by the Law Division also applies to appellate review, with no deference afforded to the trial court's factual findings. Sprint v. Upper Saddle River, 352 N.J. Super. 575, 602 (App. Div.), certif. denied, 174 N.J. 543 (2002).

G. Municipality's Review of Rent Control Board:

Where a governing body reviews a decision of a rent control board, it acts as it would to review decisions of boards of adjustment. It gives de novo review on the record. Judicial review of the governing body then asks whether the board's findings and conclusions are supported by the record, as in a zoning case. Reid v. Township of Hazlet, 198 N.J. Super. 229, 234-35 (App. Div. 1985).

H. Discipline of Municipal Police Officer:

N.J.S.A. 40A:14-147 to -151 provides for disciplinary proceedings for a police officer in a non-civil service municipality. A disciplined officer can seek

review in the Law Division, which hears the case de novo on the record to determine whether there was sufficient, competent evidence to uphold the decision, and its only options are to reverse, affirm or modify. It may not vacate the decision and order a remand. It does not apply an abuse of discretion standard. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 357-57 (2013). The Appellate Division reviews the action of the Law Division to make sure it applied that standard of review.

VI. Arbitration Award:

A. Voluntary Arbitration:

The standard of review of the validity of an arbitration agreement is do novo. For example, when that issue is before the Supreme Court, it owes no deference to either the Appellate Division or the trial court. Morgan v. Sanford Brown Institute, 225 N.J., 289, 302-03 (2016).

When reviewing the decision of an arbitrator, under prior law (Perini Corp. v. Greate Bay Hotel & Casino, 129 N.J. 479, 496 (1992)), an appellate court could vacate an arbitrator's decision for a number of reasons, among them a mistake in the interpretation of the applicable law. That standard was changed by Tretina Printing, Inc. v. Fitzpatrick & Assoc., Inc., 135 N.J. 349, 357-58 (1994). Now, arbitration awards can still be vacated by a court in cases of fraud, corruption, or similar wrongdoing by the arbitrators (see N.J.S.A. 2A:24-8 for arbitrations of collective bargaining agreements and N.J.S.A. 2A:23B-23 for other kinds of arbitrations). And awards on collective bargaining agreements can be corrected or modified for the reasons set forth in N.J.S.A. 2A:24-9, and on other kinds of agreements for the reasons in N.J.S.A. 2A:23B-24. But a court may no longer vacate for the arbitrator's mistaken interpretation of the law.

The Tretina Court recognized an exception to that strict standard of judicial non-intervention: "[I]n rare circumstances a court may vacate an arbitration award for public-policy reasons" (such as an

arbitration award affecting child support that may not provide adequate protection for the child). Tretina, supra, 135 N.J. at 364, quoted in Weiss v. Carpenter & Morrissey, 275 N.J. Super. 393, 401 (App. Div. 1994).

The Tretina standard applies to PIP arbitration. Habick v. Liberty Mutual Ins. Co., 320 N.J. Super. 244, 253 (App. Div.), certif. den., 161 N.J. 149 (1999).

Arbitrators' factual determinations are generally not reviewable by a court. Ukrainian Nat'l. Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 396 (App. Div.), certif. denied, 75 N.J. 529 (1977). However, when the appellate court reviews a trial judge's interpretation of an arbitration clause, the appellate court addresses the issue de novo because it is a matter of contractual interpretation. Coast Automotive Group, Ltd. v. Withum, Smith & Brown, 413 N.J. Super. 363, 369 (App. Div. 2010).

In Faherty v. Faherty, 197 N.J. 99, 108-09 (1984), the court approved arbitration of alimony and support issues. And if an award adversely affects the interests of the child, it is subject to review beyond the statutory grounds for vacation set in the statute, N.J.S.A. 2A:24-8. Ibid.

Similarly, in Fawzy v. Fawzy, 199 N.J. 456, 478-79 (2009), the Court held that the constitutionally protected right to parental autonomy includes the right of parents to agree to arbitrate child custody and parenting time issues. It set the standard of review of such arbitration decisions. Unless there is a showing of a threat of harm to the child, the parents are bound by the arbitrator's decision and are limited to the remedies in the Arbitration Act. But if harm to the child is shown, a judge should decide what is in the child's best interest.

Review of denial of a request for arbitration is de novo. Frumer v. Nat. Home Ins. Co., 420 N.J. Super. 7, 13 (App. Div. 2011).

B. Statutorily Required Arbitration:

But note that the preceding rules apply only where parties have agreed to arbitration. Where the arbitration was compelled by statute, the award must be affirmed if supported by sufficient credible evidence present in the record, Division 540 v. Mercer Cty. Improvement Auth., 76 N.J. 245, 253-54 (1978), and the court may decide if the arbitrator's legal conclusions are consistent with the law. Id. at 252-53.

Moreover, "[i]t is virtually axiomatic that unlike private arbitration, the standard of review of public-employment arbitration in an action to confirm or vacate an award requires the court to consider the consistency of the award both with the law and with the public interest." In re Newark v. Newark Council 21, 320 N.J. Super. 8, 20 (App. Div. 1999).

Where an appellate court reviews an arbitrator's discipline of a public employee, the standard of review requires that an appellate court not substitute its judgment for that of the arbitrator and that the court uphold the arbitrator's decision so long as it is "reasonably debatable." Linden Bd. of Ed. v. Linden Ed. Ass'n, 202 N.J. 268, 276 (2010); N.J Turnpike Auth. v. Local 196, 190 N.J. 283, 301 (2007).

And in Glassboro v. Fraternal Order of Police Lodge No. 108, 197 N.J. 1, 8 (2008), the Court held that a non-civil service municipality's promotion decision had to be affirmed unless clearly arbitrary, capricious or unreasonable." Such a decision is, however, subject to the statutory criteria and public interest and welfare. Id. at 9, citing Kearney PBA Local #21 v. Town of Kearney, 81 N.J. 208, 217 (1979).

C. Arbitration of Auto Accident Claims:

N.J.S.A. 39:6A-25 requires mandatory arbitration of certain auto accident claims. R. 4:21A-6 provides that any party dissatisfied with the result of an arbitration proceeding may demand a trial de novo. If no demand is filed, any party may move in the Law Division to confirm the award. The decision and award of the arbitrator is not appealable. Moreover, once the award has been confirmed, no party may appeal an

interlocutory order that had been made by the arbitrator prior to the award. The only way to get review of such an order would be to demand a trial de novo. Grey v. Trump Castle Assoc., 367 N.J. Super. 443, 447-49 (App. Div. 2004). Similarly, R. 4:21-6(a) bars review of an evidentiary ruling by an arbitrator in these cases. Martinelli v. Farm-Rite, Inc., 345 N.J. Super. 306, 313 (App. Div. 2001), certif. denied, 171 N.J. 338 (2002).

D. Arbitration Under the Alternative Procedure for Dispute Resolution Act (N.J.S.A. 2A:23A-1 to -30):

N.J.S.A. 2A:23A-18(b) provides that once a trial judge reviews an arbitration award under this statute, (APDRA) "there shall be no further appeal or review . . . ." So long as the trial judge applies the principles created by the Legislature, thereby acting within his or her limited scope of review created by the Act, the Appellate Division has no jurisdiction to review that decision. Fort Lee Surgery Ctr. v. Proformance Ins. Co., 412 N.J. Super. 99, 104 (App. Div. 2010).

However, there are exceptions. Appellate courts may review trial court decisions that reviewed arbitration decisions if that is necessary for the appellate courts to exercise their supervisory function. Mt. Hope Dev. Assoc. v. Mt. Hope Waterpower Project, 154 N.J. 141, 152 (1998). Because APDRA only precludes further review of decisions "confirming, modifying or correcting an award" (N.J.S.A. 2A:23A-18(b)), the Legislature did not intend that the appellate courts could not review other orders, such as the trial judge's orders denying leave to file an amended complaint and dismissing the complaint as untimely. Liberty Mut. Ins. Co. v. Garden State Surgical Ctr., 413 N.J. Super. 513, 520-21 (App. Div. 2010). See also Selective Ins. Co. v. Rothman, 414 N.J. Super. 331, 341-42 (App. Div. 2010), certif. granted, 205 N.J. 80 (2011), holding that the trial court's decision that physician assistants are authorized by statute to perform certain procedures that are actually prohibited by statute is a matter of significant public concern, and can be reviewed on appeal.

E. Substantive and Procedural Arbitrability:

Board of Educ. v. Alpha Educ. Ass'n, 190 N.J. 34, 42-43 (2006), makes a distinction between the standards of review for an arbitrator's rulings on "substantive arbitrability" and on "procedural arbitrability." "Substantive arbitrability" refers to whether the grievance is within the scope of the arbitrability clause stating what the parties have agreed to arbitrate. "Procedural arbitrability" refers to whether a party has met the procedural conditions for arbitration." Id. at 604. The first is generally decided by the court. The second is left to the arbitrator; the court should defer to the arbitrator's decision so long as it is "reasonably debatable." Ibid.

VII. Equitable Distribution:

Issues of what assets are available for distribution and of their value are governed by the sufficient credible evidence standard. Rothman v. Rothman, 65 N.J. 219, 233 (1974). Issues of the amount of the award and manner in which eligible assets are allocated are addressed to the trial judge's discretion. Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978).

VIII. Review of Condominium Association's Amendments to its Declaration of Covenants and Bylaws:

When a court reviews a condominium association's decision to amend its declaration of covenants and restrictions, or its bylaws, the court will uphold them if they are reasonable. They are not entitled to a presumption of validity, at least where they were passed only by a simple majority vote of the association's members, and not by the board of trustees. Mulligan v. Panther Valley, 337 N.J. Super. 293, 302-03 (App. Div. 2001).

IX. Supreme Court Review of Attorneys' and Judges' Disciplinary Matters:

Disciplinary matters involving attorneys are governed by R. 1:20-1 to R. 1:20-16.

Disciplinary matters for attorneys are heard first in the District Ethics Committees. Those committees must dismiss

the complaint if they do not find clear and convincing evidence of unethical conduct. If they don't dismiss, they can recommend to the Disciplinary Review Board that a specified kind of discipline be imposed.

The Disciplinary Review Board considers all recommendations for discipline. Except in cases where the District Committee recommends the lowest level of discipline (admonition), the Board hears public argument. The Board then makes a de novo determination on the record.

In all but disbarment cases, the Board's decision is final. This is a change from prior practice, under which the Board could only impose a private reprimand; any greater form of discipline could only be imposed by the Supreme Court after recommendation by the Board.

Disbarment recommendations are automatically scheduled for review by the Supreme Court. Other disciplinary actions imposed by the Board may be reviewed by the Court upon grant of petition for review or on the Court's own motion. The Court's review is de novo on the written record. In re Goldstaub, 90 N.J. 1, 5 (1982).

Similarly, in a proceeding for removal of a judge from office, final determinations of the facts are made by the Supreme Court after an independent review of the record, and the ultimate discipline to be imposed rests within the Court's sole judgment. "[T]he findings of fact and recommended discipline of the panel are essentially advisory." Matter of Yaccarino, 101 N.J. 342, 350 (1985).

X. Prosecutor's Decision not to Seek Waiver of Forfeiture or Disqualification for Public Office:

Under N.J.S.A. 2C:51-2(a)(2) a public employee convicted of an offense "involving or touching" his or her employment must forfeit employment. But N.J.S.A. 2C:51-2(e) allows the forfeiture or disqualification based on a disorderly persons offense or petty disorderly persons offense to be waived by the court upon application of the county prosecutor or Attorney General.

When a court reviews the prosecutor's or Attorney General's decision not to apply for a waiver of forfeiture or

disqualification, it applies an ordinary abuse of discretion standard. It does not give enhanced deference to the decision by applying a higher standard allowing reversal only for a patent or gross abuse of discretion because this kind of decision does not involve law enforcement policy issues. Flagg v. Essex County Prosecutor, 171 N.J. 571-72 (2002).

XI. Counsel's Summation in a Civil Case:

"[C]ounsel may argue from the evidence any conclusion which a jury is free to arrive at" so long as the language used does not go beyond the bounds of legitimate argument. Spedick v. Murphy, 266 N.J. Super. 573, 590-91 (App. Div.), certif. denied, 134 N.J. 567 (1993). Moreover, "counsel may draw conclusions even if the inferences that the jury are asked to make are improbable, perhaps illogical, erroneous or even absurd." Ibid.

XII. Shareholders' Derivative Action:

Rule 4:32-5 sets out the requirements for an action brought by shareholders of a corporation or other association on behalf of the association where the association itself refuses to enforce rights it could have asserted. In In re P.S.E.G. Shareholder Litigation, 173 N.J. 258, 286-87 (2002), the Court set out the standard of review courts should use when evaluating whether a corporation's board of directors has properly rejected shareholders' demand to begin legal action on the corporation's behalf.

The Court first ruled that the "modified business judgment rule" should be applied and set out the elements of that rule upon which the trial judge should pass. It then held that when an appellate court reviews the trial court's decision under either the modified business judgment rule or under the terms of R. 4:32-5, it must review de novo on the record. There is no need to defer to the discretion of the trial judge. Id. at 287.

XIII. Validity of Forum Selection Clauses:

The scope of review of a trial judge's decision whether to enforce a forum selection clause in a contract is not resolved in New Jersey. And some federal cases have held that the trial judge's decision would be a question of law, so that review in the appellate court would be de novo.

Paradise Enterprises Ltd. v. Sapir, 356 N.J. Super. 96, 103 n.3 (App. Div. 2002), certif. denied, 175 N.J. 549 (2003).

XIV. Decision on Whether to Dismiss on Forum Non Conveniens Grounds:

This decision is addressed to the discretion of the trial judge because the forum non conveniens doctrine is an equitable doctrine, and such a decision will therefore be reversed only for an abuse of discretion. Kurzke v. Nissan Motor Corp., 164 N.J. 159, 165 (2000).

XV. Review of Tax Court's Decision Reviewing Decision of Director of the Division of Taxation:

The appellate court generally defers to the expertise of the Tax Court and has a limited scope of review following a determination of that court. But it also recognizes the expertise of the Director of the Division of Taxation, whose decision the Tax Court may have reviewed. That is particularly true when the Director's expertise is exercised in the "specialized and complex area" of the tax statutes. Metromedia v. Director, Div. of Taxation, 97 N.J. 313, 337 (1984).

XVI. Punitive Damages:

A decision on whether to grant punitive damages is within the discretion of the fact finder. Maul v. Kirkman, 270 N.J. Super. 596, 619-20 (App. Div. 1994). It will not be overturned except for an abuse of discretion. Note, however, that the issue of whether punitive damages are so excessive as to violate the Fourteenth Amendment to the United States Constitution is not resolved by using the abuse of discretion test. Rather, the appellate court must review the issue de novo. Cooper Industries v. Leatherman Tool Group, 532 U.S. 424, 431, 121 S. Ct. 1678, 1683, 149 L. Ed. 2d 674, 685 (2002). Note that the statement in Rusak v. Ryan Auto., L.L.C., 418 N.J.Super. 107, 118 (App. Div. 2011), that "Our review of a trial court's ruling on punitive damages is de novo," is misleading, as de novo review applies only to questions of law, which were the subject of the review in that case.

XVII. Decision on Whether to Civilly Commit a Defendant Pursuant to the Sexually Violent Predator Act:

To show that a person should be civilly committed after serving a sentence for certain sexual offenses, the State must prove that the person is a threat to the health and safety of others because of the likelihood that he or she will engage in sexually violent behavior. That threat must be proven "by demonstrating that the individual has serious difficulty controlling sexually harmful behavior such that it is highly likely that he or she will not control his or her sexually violent behavior and will reoffend." In re Commitment of W.Z., 173 N.J. 109, 132 (2002).

The decision on whether this standard has been met is discretionary and "review of a trial court's decision regarding a commitment is extremely narrow." That decision is given "'utmost deference' and modified only where the record reveals a clear abuse of discretion." In re Commitment of J.P., 339 N.J. Super. 443, 459 (App. Div. 2001), (quoted in In re Civil Commitment of V.A., 357 N.J. Super. 55, 63 (App. Div.), certif. denied, 177 N.J. 490 (2003)).

The trial judges who make that decision, are "specialists" whose decisions are entitled to "special deference." The scope of appellate review is "extremely narrow." In re Civil Commitment of R.F., 217 N.J. 152, 174 (2014). In that case, the Court held that the Appellate Division had "overstepped the narrow scope of appellate review" by making its own fact findings, when it should only have determined whether there was sufficient credible evidence to support the trial judge's findings. Id. at 175-76.

XVIII. Decision on How a Malpractice Case Should be Tried:

Often, a malpractice case is proven by having a "trial within a trial." But that is not the only way to prove such a case. Trial judges should not become involved in determining how such a case is to be tried, unless the parties disagree. Then the final determination of the court is discretionary and is entitled to deference. Garcia v. Kozlov, 179 N.J. 343, 361 (2004).

XIX. Decision on Whether to Grant Remittitur:

In determining whether the grant or denial of remittitur was proper, the court is bound by the same strictures as a trial court. Jastram ex rel. Jastram v. Kruse, 197 N.J. 216, 228-231; 235 (2008); Baxter v. Fairmont Food Co., 74 N.J. 588, 598 (1977); McRae v. St. Michael's Med. Ctr., 349 N.J. Super. 583, 597 (App. Div. 2002). Unless a jury's award of damages is so disproportionate to the injury and resulting disability the trial judge should not disturb the award. Jastram, supra, 197 N.J. at 230; Baxter, supra, 74 N.J. at 595.

In He v. Miller, 207 N.J. 230, 252 (2011), the Court held that "the decision to order a remittitur must spring from an overriding sense of injustice, a shock to the court's conscience, a certain and abiding belief that the award, in light of the facts and the evidence, falls outside the relatively wide range of one that is acceptable and appropriate." It then discussed the factors that would allow a trial judge to determine the boundaries of what is within the wide range of acceptable verdicts. Those factors could include the verdicts in similar cases and the trial judge's personal experience as a litigator and a judge with personal injury verdicts. Id. at 256, 258-59. But in Cuevas v. Wentworth Group, 226 N.J. 480, 503 (2016), the Court abandoned that standard, saying: "[W]e now conclude that a trial judge's reliance on her personal experiences as a practicing attorney or jurist in deciding a remittitur motion is not a sound or workable approach."

Where defendant's motion for a new trial is denied because plaintiff has accepted a remittitur, plaintiff may not appeal, but if the defendant appeals denial of his or her motion for a new trial, then the plaintiff may cross-appeal. Mulkerin v. Somerset Tire Service, Inc., 110 N.J. Super. 173, 177 (App. Div. 1970).

XX. Decision on Whether to Remove a Fiducuary:

Removal of a fiduciary, such as a trustee under a will, is within the discretion of the judge and will not be disturbed on appeal absent a manifest abuse of discretion.

Wolosoff v. CSI Liquidating Trust, 205 N.J. Super. 349, 360 (App. Div. 1985).

XXI. Review of Trial Court's Decision on Whether a Jury Verdict on Punitive Damages is Excessive:

No special deference is given to a trial judge's decision on whether punitive damages are excessive. Baker v. National State Bank, 353 N.J. Super. 145, 152-53 (App. Div. 2002).

XXII. Ineffective Assistance of Counsel in Termination of Parental Rights Cases:

When DYFS seeks to terminate parental rights, the parents have a constitutional right to effective assistance of counsel, although that right usually applies only in criminal cases. The usual standard applies, that set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984), and State v. Fritz, 105 N.J. 42, 58 (1987). Div. of Youth & Family Services v. B.R., 192 N.J. 301, 305-07 (2007). A claim that the right has been violated must be raised on direct appeal. Id. at 311.

SECTION SEVEN

SUMMARY

	STANDARD	AUTHORITY
1.	Arbitration Award	Habick v. Liberty Mutual Ins. Co., 320 N.J. Super. 244, 253 (App. Div. 1999); Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349, 357-58 (1994); Ukrainian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 396 (App. Div.), certif. denied, 75 N.J. 529 (1977).
2.	Arbitration, Statutorily Required	Division 540 v. Mercer Cty. Improvement Auth., 76 N.J. 245, 253-54 (1978); In re Newark v. Newark Council 21, 320 N.J. Super. 8, 20 (App. Div. 1999).
3.	Administrative Agency, Discretionary Decision	Campbell v. Dep't of Civil Service, 39 N.J. 556, 562 (App. Div. 1963).
4.	Administrative Agency, Interpretation of Law	Mayflower Securities Co., v. Bureau of Securities, 64 N.J. 85, 93 (1973).
5.	Administrative Agency, Review of Regulations	Reck v. Director, Div. of Taxation, 345 N.J. Super. 443, 449 (App. Div. 2001), aff'd, 175 N.J. 54 (2002); Lewis v. Catastrophic Illness Fund, 336 N.J. Super. 361, 369-70 (App. Div. 2001).

6.	Attorney Discipline	In re Goldstaub, 90 N.J. 1, 5 (1982).
7.	Attorneys' Fees G5	Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 443-33 (2001).
8.	Civil Commitment	In re Commmittment of W.Z., 173 N.J. 109, 132 (2002); In re Commmitment of J.P., 339 N.J. Super. 443, 459 (App. Div. 2001).
9.	Credibility Findings	D'Amato by McPherson v. D'Amato, 305 N.J. Super. 109, 115 (App. Div. 1997); Ferdinand v. Agric. Ins. Co of Watertown, N.Y., 22 N.J. 482, 492 (1956).
10.	Contempt	In re Education Ass'n of Passaic, Inc., 117 N.J. Super. 255, 259 (App. Div. 1971), certif. denied, 60 N.J. 198 (1972).
11.	Discipline of Attorneys	In re Yaccarino, 102 N.J. and Judges 342, 350 (1985); In re Goldstaub, 90 N.J. 1, 5 (1982).
12.	Equitable Distribution	Rothman v. Rothman, 65 N.J. 219, 233 (1974); Borodinsky v. Borodinsky, 162 N.J. Super. 437, 443-44 (App. Div. 1978).
13.	Evidence, Excluding or Admitting	Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000).
14.	Expert, Competence	Carey v. Lovett, 132 N.J. 44, 64 (1993).

15.	Factfindings of Judge	State v. Locurto, 157 N.J. 463 (1999); State v. Johnson, 42 N.J. 146, 162 (1964); Rova Farms Resort Inc. v. Investors Ins. Co. of Am., 65 N.J. 474 (1974).
16.	Factfindings of Agency	S.D. v. Div. of Medical Assistance, 349 N.J. Super. 464, 485 (App. Div. 2002); Zielenski v. Board of Review, 85 N.J. Super. 46, 54 (App. Div. 1964).
17.	Factfindings of Comp. Judge	Close v. Kordulak Bros., 44 N.J. 589, 599 (1965); DeAngelo v. Alsan Masons Inc., 122 N.J. Super. 88, 89-90 (App. Div.), aff'd o.b., 62 N.J. 581 (1973).
18.	Forum Non Conveniens	Kurzke v. Nissan Motor Corp., 164 N.J. 159, 165 (2000).
19.	Guilty Plea, Acceptance	State v. Rhein, 117 N.J. Super. 112, 121 (App. Div. 1971).
20.	Guilty Plea, Motion to Withdraw	State v. Deutsch, 34 N.J. 190, 198 (1961); State v. Gonzales, 254 N.J. Super. 300, 303 (App. Div. 19 1992); R. 3:21-1.
21.	Guilty Plea, Refusal to Accept	State v. Daniels, 276 N.J. Super. 483, 487 (App. Div. 1994).
22.	Harmless Error	R. 2:10-2; State v. Macon, 57 N.J. 325, 340 (1971).
23.	Ineffective Assistance	Strickland v. Washington,

	of Counsel	466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Fritz, 105 N.J. 42, 58 (1987).
24.	Indictment, Dismissal After Several Mistrials	State v. Abbati, 99 N.J. 418, 436 (1985).
25.	Jury Charge	State v. Wilbely, 63 N.J. 420 (1973); State v. Walker, 322 N.J. Super. 535, 546-53 (App. Div.), certif. denied, 162 N.J. 487 (1999).
26.	Jury, Influences	Panko v. Flintkote Co., 7 N.J. 55, 61 (1951).
27.	Jury, Motion to Sequester	R. 1:8-6; Pessini v. Massie, 115 N.J. Super. 555 (Law Div. 1971), aff'd sub. nom. Eberhardt v. Vanelli, 121 N.J. Super. 293 (App. Div. 1972).
28.	Jury, Request to Read to	State v. Wolf, 44 N.J. 176, 185 (1965).
29.	Jury, Request to Send Back for more Deliberations	State v. Williams, 39 N.J. 471, 484 (1963), cert. denied, 374 U.S. 855, 183 S. Ct. 1924, 10 L. Ed. 2d 1075 (1963), and 382 U.S. 964, 86 S. Ct. 449, 15 L. Ed. 2d 366 (1965).
30.	Jury, Removal of Juror for Cause	State v. DiFrisco, 137 N.J. 343, 359-60; 471 (1994).
31.	Juvenile, Identity	State in Interest of B.C.L., 82 N.J. 362, 379-80 (1980).

32.	Juvenile, Waiver	State in the Interest of V.A., 212 N.J. 1, 21; 24-26 (2012).
33.	Motion to Acquit	R. 3:18-1; State v. Reyes, 50 N.J. 454, 458-59 (1967); State v. Sugar, 240 N.J. Super. 148, 153 (App. Div. 1990); State v. Kluber, 130 N.J. Super. 336, 341-42 (App. Div. 1974), certif. denied, 67 N.J. 72 (1975).
34.	Motion for Adjournment	State v. D'Orsi, 113 N.J. Super. 527, 532 (App. Div. 1970), certif. denied, 58 N.J. 335 (1971).
35.	Motion to Admit Photos	State v. Conklin, 54 N.J. 540, 545 (1969).
36.	Motion for Civil Judgment	R. 4:37:2(b); Dolson v. Anastasia, 55 N.J. 2, 5 (1969).
37.	Motion to Dismiss	R. 4:40-1; R. 4:40-2; R. 4:37(2)(b); Dolson v. Anastasia, 55 N.J. 2, 5 (1969).
38.	Motion for Mistrial	State v. DiRienzo, 53 N.J. 360, 383 (1969); Greenberg v. Stanley, 30 N.J. 485, 502 (1959).
39.	Motion for Reconsideration	Fusco v. Newark Bd. of Ed., 349 N.J. Super. 455, 462 (App. Div. 2002).
40.	Motion for Recusal	Jadlowski v. Owens-Corning, 283 N.J. Super. 199, 221 (App. Div. 1995).

41.	Motion to Vacate Judgment (General Rule)	Housing Authority of Town of Morristown v. Little, 135 N.J. 274, 283 (1994).
42.	Motion to Vacate Judgment (R. 4:50-1(f))	First Morris Bank and Trust v. Roland Offset Service, Inc., 357 N.J. Super. 68, 71 (App. Div. 2003).
43.	Municipal Court Reviewed	State v. Locurto, 157 N.J. 463, 471-02 (1999); State v. Sparks, 261 N.J. Super. 458, 461-62 (App. Div. 1993); State v. Johnson, 42 N.J. 146, 157 (1964).
44.	Municipal Decisions (general discretionary)	Harvard Enterprises, Inc. v. Board of Adj. of Madison, 56 N.J. 362 (1970); Kramer v. Board of Adj. of Sea Girt, 45 N.J. 268, 296 (1965).
45.	Municipal Decisions (interpretation of ordinance)	Jantausch v. Borough of Verona, 41 N.J. Super. 89, 96 (Law Div. 1956), aff'd, 24 N.J. 326 (1957); Cherney v. Zoning Board of Adj. of Matawan, 221 N.J. Super. 141, 144-45 (App. Div. 1987).
46.	Municipal Decisions (site plan, subdivision)	PRB Enterprises, Inc. v. South Brunswick Planning Board, 105 N.J. 1, 7 (1987); Dunkin' Donuts of N.J. Inc. v. N. Brunswick, 193 N.J. Super. 513, 515 (App. Div. 1984).
47.	Municipal Decisions (zoning cases)	Sica v. Board of Adj. of Wall, 127 N.J. 152 (1992); Medici v. BPR Property Co.,

		107 N.J. 1 (1987); Evesham Twp. Zoning Board of Adj. v. Evesham Tp. Council, 86 N.J. 295, 300-01 (1981); Grubbs v. Slothower, 389 N.J. Super. 377, 388 ((App. Div. 2007).
48.	Plain Error	R. 2:10-2; State v. Macon, 57 N.J. 325, 336 (1971); State v. Hock, 54 N.J. 526, 538 (1969), cert. denied, 399 U.S. 930, 90 S. Ct. 2254, 26 L. Ed. 2d 797 (1970); State v. Melvin, 65 N.J. 1, 18-19 (1974); State v. Simon, 79 N.J. 191, 206 (1979).
49.	Prejudgment Interest	Musto v. Vidas, 333 N.J. Super. 52, 74 (App. Div. 2000).
50.	Pretrial Intervention	State v. Kraft, 265 N.J. Super. 106, 112-13 (App. Div. 1993).
51.	Post-Conviction Relief	R. 3:22-1 to R. 3:22-12; State v. Preciose, 129 N.J. 451, 459-64 (1992).
52.	Prior Appeal	State v. Cusick, 116 N.J. Super. 482, 485 (App. Div. 1971).
53.	Prosecutor's Remarks	State v. Frost, 158 N.J. 76, 83 (1999); State v. Ramseur, 106 N.J. 123, 322 (1987).
54.	Punitive Damages	Maul v. Kirkman, 270 N.J. Super. 596, 619-20 (App. Div. 1994).
55.	Sentence, Appeal by Defendant (Excessive Sentence)	State v. Sainz, 107 N.J. 283, 292 (1987); State v. Hodge, 95 N.J. 369, 375; State v. Roth, 95 N.J. 334, 363-65

		(1984); State v. Winter, 96 N.J. 640, 647 (1984).
56.	Sentence, Appeal after Plea	State v. Sainz, 107 N.J. 283, 292 (1970).
57.	Sentence, Appeal by State	N.J.S.A. 2C:44-1F(2); R. 3:21-4(g); State v. Sanders, 107 N.J. 609, 616 (1987); State v. Roth, 95 N.J. 334, 344-45 (1984).
58.	Sentencing Procedure	R. 3:2-4; State v. Kunz, 55 N.J. 128, 144 (1969).
59.	Shareholders Derivative Suit	In re P.S.E.&G. Shareholder Litigation, 173 N.J. 258, 286-87 (2002).
60.	Speedy Trial	State v. Merlino, 153 N.J. Super. 12, 17 (App. Div. 1977).
61.	Summary Judgment	R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995).
62.	Trial Court's Interpretation of Law	Manalapan Realty v. Manalapan Twp. Comm., 140 N.J. 366, 378 (1995); .
63.	Videotaped Statement	State v. Hubbard, 222 N.J. 249, 270 (2015).
63.	Weight of Evidence (New Trial)	R. 2:10-1; Dolson v. Anastasia, 55 N.J. 2, 6-8 (1969).

SECTION EIGHT:

GENERAL PRINCIPLES GOVERNING APPEALS

1. Appeals are taken from judgments, not from oral opinions. Glaser v. Downes, 126 N.J. Super. 10, 16 (App. Div. 1973),

certif. denied, 64 N.J. 513 (1974). And, "without having filed a cross-appeal, a respondent can argue any point on the appeal to sustain the trial court's judgment." Chimes v. Oritani Motor Hotel Inc., 195 N.J. Super. 435, 443 (App. Div. 1984).

2. An order or judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it. Isko v. Planning Bd. of Twp. of Livingston, 51 N.J. 162, 175 (1968).

3. Only a party aggrieved by a judgment may appeal from it. Howard Sav. Inst. v. Peep, 34 N.J. 494, 499 (1961).

4. The appellate court can make fact findings if the trial court failed to do so, although it frequently remands instead. R. 2:10-5; State v. Odom, 113 N.J. Super. 186, 189 (App. Div. 1971).

5. An appeal can be dismissed where the appellant has willfully evaded the lower court's orders. D'Arc v. D'Arc, 175 N.J. Super. 598, 601 (App. Div.), certif. denied, 85 N.J. 487 (1980), cert. denied, 451 U.S. 971, 101 S. Ct. 2049, 68 L. Ed. 2d 350 (1981).

6. No party has the right to urge specious arguments created by piecemeal use of the evidence. State v. Kyles, 132 N.J. Super. 397, 400 (App. Div. 1975).

7. If evidence submitted on appeal was not before the trial court, the appellate court will not consider it. Middle Dep't Insp. Agency v. Home Ins. Co., 154 N.J. Super. 49, 56 (App. Div. 1977), certif. denied, 76 N.J. 234 (1978).

8. It is essential for a party on appeal to present an adequate legal argument. State v. Hild, 148 N.J. Super. 294, 296 (App. Div. 1977).

9. A brief which fails to comply with appellate rules will be cause for sanctions imposed on the appellate attorney personally. Miraph Enterprises, Inc. v. Board of Alcoholic Beverage Control for Paterson, 150 N.J. Super. 504, 506-08 (App. Div. 1977).

10. If an issue has been determined on the merits in a prior appeal it cannot be relitigated in a later appeal of the

same case, even if of constitutional dimension. State v. Cusik, 116 N.J. Super. 482, 485 (App. Div. 1971).

12. Trial courts and state agencies are free to disagree with decisions of appellate courts, but they are not free to disregard them. Kosmin v. N.J. State Parole Board, 363 N.J. Super. 28, 40 (App. Div. 2003).