2006 Supplemental Report of the Supreme Court Civil Practice Committee

March 7, 2006

TABLE OF CONTENTS

APPENDICES

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *Rules* 1:2-4, 1:13-4, 4:23-5, 6:1-1, Appendices XI-S and XII-A, and New *R.* 1:13-10

AOC's Management Services Bulletin # MS212, which became effective September 1, 2005, provides that "checks received by the Judiciary, with the exception of Child Support, should be made payable to Treasurer, State of New Jersey." The rules committees were directed to recommend amendments to any rules affected by this requirement. Accordingly, the Committee proposes changes to *Rules* 1:2-4, 1:13-4, 4:23-5, 6:1-1, Appendix XI-S and the first page of Appendix XII-A to conform the affected rules to the policy, and also recommends the adoption of a new general rule to clarify that all court fines, fees and penalties should be made payable to the Treasurer, State of New Jersey.

See Section I.E. of this Report for additional revisions to *R.* 4:23-5, which the Committee recommends.

The proposed Amendments to *Rules* 1:2-4, 1:13-4, 4:23-5, 6:1-1, Appendix XI-S, the first page of Appendix XII-A and new *R.* 1:13-10 follow.

1:2-4. Sanctions: Failure to Appear; Motions and Briefs

(a) Failure to Appear. If without just excuse or because of failure to give reasonable attention to the matter, no appearance is made on behalf of a party on the call of a calendar, on the return of a motion, at a pretrial conference, settlement conference, or any other proceeding scheduled by the court, or on the day of trial, or if an application is made for an adjournment, the court may order any one or more of the following: (a) the payment by the delinquent attorney or party or by the party applying for the adjournment of costs, in such amount as the court shall fix, to the [Clerk of the Superior Court, or, in the Tax Court to its clerk,] Clerk of the Court made payable to "Treasurer, State of New Jersey," or to the adverse party; (b) the payment by the delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate.

(b) Motions; Briefs. For failure to comply with the requirements of *R.* 1:6-3, 1:6-4 and 1:6-5 for filing motion papers and briefs and for failure to submit a required brief, the court may dismiss or grant the motion or application, continue the hearing to the next motion day or take such other action as it deems appropriate. If the hearing is continued, the court may impose sanctions as provided by paragraph (a) of this rule.

Note: Source-*R.R.* 1:8-5, 4:5-5(b) (second sentence), 4:5-10(e), 4:6-3(b), 4:29-1(c), 4:41-6. Amended June 20, 1979 to be effective July 1, 1979; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended to be effective .

1:13-4. Transfer of Actions

(a) …no change.

(b) …no change.

(c) Payment of Fees. Where pursuant to this rule an action is ordered transferred to or judgment or decision ordered entered in the proper court or agency, the order shall be conditioned upon the payment by the parties to the clerk of such court or to such agency of the fees that would have been payable had the action originally been instituted in such court or agency. Payments to the clerk of any court shall be made payable to the "Treasurer, State of New Jersey."

Note: Source — *R.R.* 1:27D; paragraphs (a), (b) and (c) amended July 24, 1978 to be effective September 11, 1978; paragraph (c) amended to be effective

4:23-5. Failure to Make Discovery

(a) Dismissal.

(1) Without Prejudice. If a demand for discovery pursuant to *R.* 4:17, *R.* 4:18-1, or *R.* 4:19 is not complied with and no timely motion for an extension or a protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and stating that the moving party is not in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-F of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore. If the delinquent party is appearing pro se, service of the order and notice hereby required shall be made by counsel for the moving party. The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court , made payable to the "Treasurer, State of New Jersey," if the motion to vacate is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. If, however, the motion is not made within 90 days after entry

of the order of dismissal or suppression, the court may also order the delinquent party to pay sanctions or counsel fees and costs, or both, as a condition of restoration.

(2) …no change.

(3) …no change.

[(4) Applicability. The July 5, 2000 amendments to paragraphs (a)(1) and (a)(2) of this rule shall be applicable to all actions, whenever commenced, in which a party seeks relief from a failure of an adverse party to make discovery that has been demanded.]

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 4:23-6(c)(f), 4:25-2 (fourth sentence); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) caption amended and subparagraphs (a)(1) captioned and amended, and (a)(2) and (3) captioned and adopted, June 29, 1990 to be effective September 4, 1990; paragraph (a)(3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; caption amended, paragraphs (a)(1) and (a)(2) amended, and new paragraph (a)(4) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended and new paragraph (c) added July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended and paragraph (a)(4) deleted to be effective .

6:1-1. Scope and Applicability of Rules

The rules in Part VI govern the practice and procedure in the Special Civil Part, heretofore established within and by this rule continued in the Law Division of the Superior Court.

(a) …no change.

(b) …no change.

(c) Fees. The fees charged for actions in the Special Civil Part shall be in accordance with *N.J.S.A.* 22A:2-37.1, provided that the face of the pleading and summons alleges the amount in controversy does not exceed $15,000, and the fees for actions which are not filed in the Special Civil Part shall be in accordance with *N.J.S.A.* 22A:2-6 et seq. Checks for fees and all other deposits shall be made payable to the [Clerk, Special Civil Part] Treasurer, State of New Jersey.

(d) …no change.

(e) …no change.

(f) …no change.

(g) …no change.

Note: Caption amended and paragraphs (a) through (g) adopted November 7, 1988 to be effective January 2, 1989; paragraph (c) amended July 17, 1991 to be effective immediately; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended to be effective .

APPENDIX XI-S

Landlord/Tenant Pre-Calendar Call Instructions

Preamble

…no change.

Instructions

…no change.

1. The Calendar Call

A. …no change.

B. …no change.

2. Settlements

…no change.

3. Waiting for Trial

If you are not able to settle your case, you will have to wait until a judge is available to hear your case. We expect to reach all cases today. However, if your case cannot be completed today, then the tenant may have to deposit with the clerk of the court the amount of rent to be determined by the court, no later than 4:30 p.m. today, in cash or money order or bank cashier's check made payable to the [Clerk of the Special Civil Part] Treasurer, State of New Jersey, rather than to the landlord. If it is deposited, the Clerk will reschedule the case with a new trial date. If the rent is not deposited today, a Judgment for Possession will be entered in favor of the landlord. That means that a landlord will be able to have a tenant evicted by a Special Civil Part Officer. A landlord cannot lock out a tenant by himself or herself; a Special Civil Part Officer must be used to evict a tenant.

4. Non-Payment Cases

Introduction. …no change.

A. Dismissal Upon Payment or Deposit. …no change.

B. Items Constituting Rent. …no change.

C. Limitation on Court's Powers. …no change.

5. Eviction Procedures

A. Issuance of Warrant. …no change.

B. Service of the Warrant. …no change.

6. Stopping an Eviction After a Judgment for Possession

A. By Agreement. …no change.

B. By Going to the Court. …no change.

7. Jurisdictional Instruction

…no change.

8. Services/Facilities Available

…no change.

PLEASE WAIT UNTIL THE LIST OF CASES HAS BEEN COMPLETED AND ADDITIONAL INSTRUCTIONS HAVE BEEN GIVEN

Note: Appendix XI-S adopted July 18, 2001 to be effective November 1, 2001; number 3 amended to be effective .

APPENDIX XII. SUMMONS AND CIVIL CASE INFORMATION STATEMENT (CIS)

APPENDIX XII-A. SUMMONS

Attorney(s):
Office Address & Tel. No.:
Attorney(s) for Plaintiff(s)

_____

SUPERIOR COURT OF NEW JERSEY
COUNTY
DIVISION

Plaintiff(s) Docket No.

vs. CIVIL ACTION

Defendant(s) SUMMONS

_____

From The State of New Jersey To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (The address of each deputy clerk of the Superior Court is provided.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the [Clerk of the Superior Court] Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of $135.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live. A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.

_____
DONALD F. PHELAN
Clerk of the Superior Court

DATED:

Name of Defendant to Be Served:

Address of Defendant to Be Served:

…no change to county addresses listed on reverse side of summons.

Note: Adopted July 13, 1994, effective September 1, 1994; amended June 28, 1996, effective September 1, 1996; address/phone information updated July 1, 1999, effective September 1, 1999; amended July 12, 2002 to be effective September 3, 2002; amended _____ to be effective _____.

1:13-10. Payment of Fees, Penalties, and Sanctions

Checks in payment of any fees, penalties, and sanctions required by these rules to be paid directly to the court shall be made payable to Treasurer, State of New Jersey.

Note: Adopted to be effective .

B. Proposed Amendments to *R.* 1:6-2 — Form of Motion; Hearing

A practitioner reported problems relating to the situation where a judge decides a motion on the record in open court, but does not notify counsel when his or her decision is to be rendered. In such situations, if the order does not reflect the reasons for the decision the only way to obtain the judge's reasoning is to order a transcript. This procedure is both time consuming and expensive. The practitioner suggested that if a judge is going to reserve decision and put the matter on the record at a subsequent time, counsel ought to be given sufficient notice in order to be in attendance either in person or telephonically. He further proposed that if the court is relying on reasons set forth on the record, the transcript should become part of the court's file and should be forwarded to counsel along with the order, as it is unfair to require a client to expend further monies to find out why a court made its decision.

The Committee recognized the practitioner's complaint as a problem, being of the view that attorneys should not have to pursue the court to obtain the reasons for a decision. It was, however, noted that an attorney can request an audio tape of the proceeding for $10.00 which will provide the reasons for the judge's decision and allow the attorney to advise the client and make an informed decision on whether to file an appeal. Moreover, several of the judges on the Committee indicated that they frequently take advantage of unexpected periods of time to put their reasons on the record and thus would not be able to give counsel notice. To accommodate both views, the Committee members agreed that decisions should be rendered either on notice to the parties or with a copy of the transcript attached to the order. The Committee decided to limit the notice and/or transcript requirement to motions that were argued orally. While the original proposal had suggested an amendment to *R.* 1:7-4, the Committee was of the view that the language is more appropriate for inclusion in *R.* 1:6-2(f) and recommends accordingly.

See Section I. C. of the 2006 Report of the Supreme Court Civil Practice Committee for a discussion of other proposed revisions to *R*. 1:6-2, which the Committee recommends.

The proposed amendments to *R*. 1:6-2 follow.

1:6-2. Form of Motion; Hearing

(a) …no change.

(b) Civil Motions in Chancery Division and Specially Assigned Cases. When a civil action[, by reason of its complexity or other good cause,] has been specially assigned [prior to trial] to an individual judge for case management and disposition of all pretrial and trial proceedings and in all cases pending in the Superior Court, Chancery Division, [all motions therein shall be made directly to the judge assigned to the cause, who] the judge, upon receipt of motion papers, shall determine the mode and scheduling of [their] the disposition of the motion. Except as provided in *R.* 5:5-4, motions filed in causes pending in the Superior Court, Chancery Division, Family Part, shall be governed by this paragraph.

(c) …no change.

(d) …no change.

(e) … no change.

(f) Order; Record Notation. If the court has made findings of fact and conclusions of law explaining its disposition of the motion, the order shall so note indicating whether the findings and conclusions were written or oral and the date on which they were rendered provided, however, that if the motion was argued and the court intends to place its findings on the record at a later time, it shall either give all parties one day's notice, which may be telephonic, of the time and place it shall do so or annex a transcript thereof to the order. If no such findings have been made, the court shall append to the order a statement of reasons for its disposition if it concludes that explanation is either necessary or appropriate. If the order directs a plenary or other evidential hearing, it shall specifically describe the issues to be so tried. A

written order or record notation shall be entered by the court memorializing the disposition made on a telephone motion.

Note: Source — *R.R.* 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (f) amended January 21, 1999 to be effective April 5, 1999; paragraphs (c) and (d) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) and (f) amended to be effective .

C. Proposed Amendments to *R.* 1:8-8 — Materials to be Submitted to the Jury; Note-taking; Juror Questions

At the request of the Conference of Civil Presiding Judges, the Committee was asked to recommend amendments to *R.* 1:8-8 that would specifically prohibit a witness from being recalled to respond to juror questions unless all attorneys and the court consent. The Committee endorsed this proposal and recommends the necessary change.

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

1:8-8. Materials to be Submitted to the Jury; Note-taking; Juror Questions

(a) …no change.

(b) …no change.

(c) Juror Questions. Prior to the commencement of the *voir dire* of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court's discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers. A witness who has been excused shall not be recalled to respond to juror questions unless counsel agree or the court otherwise orders for good cause shown.

Note: Source — *R.R.* 4:52-2; caption and text amended July 15, 1982 to be effective September 13, 1982; amended and paragraphs (a) and (b) designated July 10, 1998 to be effective September 1, 1998; new paragraph (c) added July 12, 2002 to be effective September 3, 2002; caption amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended to be effective .

D. Proposed Amendments to *Rules* 1:9-2, 4:5B-2, 4:10-2, 4:17-4 4:18-1, and New *R.* 4:23-6 — re: Electronically Stored Information

The Discovery Subcommittee was asked to review the proposed changes to the Federal Rules of Civil Procedure regarding discovery of electronically stored information (ESI) (which changes will take effect on December 1, 2006) and to recommend whether New Jersey should adopt similar provisions. The subcommittee concluded that the New Jersey rules should be amended to parallel the structure and language of the proposed Federal Rules regarding the term "electronically stored information," the two-tier plan for the production of ESI depending on its accessibility, the form of production, the procedure for protection of privileged and protected material produced either inadvertently or prior to review, and a safe harbor from sanctions for ESI lost in the routine and good faith operation of the system. Specifically, the subcommittee recommended amendments to *Rules* 1:9-2, 4:5B-2, 4:10-2, 4:17-4, 4:18-1 and a new *R.* 4:23-6 to incorporate the language of the changes to the federal rules. The full report of the subcommittee is contained as an appendix to this Report. The Committee supported the subcommittee's recommendations.

See Section I.F. of this Report for a discussion of other revisions to *R.* 4:10-2, which the Committee recommends.

The proposed amendments to *Rules* 1:9-2, 4:5B-2, 4:10-2, 4:17-4, 4:18-1, and new *R.* 4:23-6 follow.

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

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

Note: Source — *R.R.* 3:5-10(c), 4:46-2, 6:3-7(b), 7:4-3 (second paragraph), 8:4-9(c); amended November 27, 1974 to be effective April 1, 1975; amended June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:5B-2 Case Management Conferences

In cases assigned to Tracks I, II, and III, the designated pretrial judge may *sua sponte* or on a party's request conduct a case management conference if it appears that such a conference will assist discovery, narrow or define the issues to be tried, address issues relating to discovery of electronically stored information, or otherwise promote the orderly and expeditious progress of the case. A case management conference shall not, however, ordinarily be conducted after the case is ready for trial. In Track IV cases, except for actions in lieu of prerogative writs and probate and general equity actions, an initial case management conference shall be conducted as soon as practicable after joinder and, absent exceptional circumstances, within 60 days thereafter. In actions in lieu of prerogative writs, case management conferences shall be held pursuant to *R.* 4:69-4. In probate actions, case management conferences may be scheduled at the discretion of the judge. In all actions in general equity, except summary actions pursuant to *R.* 4:67 and foreclosure actions, an initial case management conference shall be held within 30 days following the filing of the answers of all defendants initially joined, and the court may hold such additional case management conferences as it deems appropriate. All decisions and directives issued at a case management conference shall be memorialized by order as required by *R.* 1:2-6. The order may include provisions for disclosure of discovery of electronically stored information and any agreements the parties reach for asserting claims of privilege or protection as trial-preparation material after production.

Note: Adopted July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004: amended _____ to be effective _____.

4:10-2. Scope of Discovery; Treating Physician

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

(b) …no change.

(c) Trial Preparation; Materials. Subject to the provisions of *R*. 4:10-2(d), a party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under *R*. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, *indemnitor*, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of *R*. 4:23-1(c) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, [electrical] electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of *R*. 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) …no change.

(2) …no change.

(3) …no change.

(4) A party shall not seek a voluntary interview with another party's treating physician unless that party has authorized the physician, in the form set forth in Appendix XII-C, to disclose protected medical information.

(e) Claims of Privilege or Protection of Trial Preparation Materials.

(1) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without

revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(2) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved.

(f) Claims that Electronically Stored Information is not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On a motion to compel discovery or for a protective order, the party from whom discovery is sought shall show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause, considering the limitations of *Rule* 4:10-2(g). The court may specify conditions for the discovery.

(g) Limitation. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had

ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act on its own initiative after reasonable notice or pursuant to motion.

Note: Source — *R.R.* 4:16-2, 4:23-1, 4:23-9, 5:5-1(f). Amended July 14, 1972 to be effective September 5, 1972 (paragraphs (d)(1) and (2) formerly in *R.* 4:17B1); paragraph (d)(2) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c) and (d)(1) and (3) amended July13, 1994 to be effective September 1, 1994; paragraph (d)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) adopted July 10, 1998 to be effective September 1, 1998; paragraph (d)(1) amended July 12, 2002 to be effective September 3, 2002; corrective amendments to paragraph (d)(1) adopted September 9, 2002 to be effective immediately; amendments to paragraphs (a), (c) and (e); new paragraphs (d)(4), (f) and (g)added to be effective .

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

(a) ...no change.

(b) …no change.

(c) …no change.

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from or requires annexation of copies of the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation abstract or summary based thereon, or from electronically stored information, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(e) …no change.

Note: Source — *R.R.* 4:23-4, 4:23-5, 4:23-6(a)(b)(c)(d). Paragraph (a) amended and paragraph (d) adopted July 14, 1972 to be effective September 5, 1972; paragraph (a) amended September 13, 1976 to be effective September 13, 1976; paragraph (a) amended and paragraph (e) adopted July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a), (b) and (e) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended July 5, 2000 to be effective September 5,

2000; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; paragraph (e) amended July 28, 2004 to be effective September 1, 2004; paragraph (d) amended _____ to be effective _____ .

4:18-1 Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes; Pre-litigation Discovery

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect,[and] copy, test, or sample any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images, electronically stored information, [phono-records,] and any other data or data compilations stored in any medium from which information can be obtained and translated, if necessary, by the respondent [through electronic devices] into reasonably usable form), or to inspect,[and] copy, test, or sample any designated tangible things which constitute or contain matters within the scope of *R*. 4:10-2 and which are in the possession, custody or control of the party upon whom the request is served; or (2) … no change.

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A copy of the request shall also be simultaneously served on all other parties to the action. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. The party upon whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within 50 days after service of the summons and complaint upon that defendant. On motion, the court may allow a shorter or longer time. The written response, without documentation annexed but which shall be made available to all parties on request, shall

be served by the party to whom the request was made upon all other parties to the action. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, [in which event]stating the reasons for objection.[shall be stated.] If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information or if no form was specifed in the request, the responding party shall state the form or forms it intends to use. The party submitting the request may move for an order of dismissal or suppression or an order to compel pursuant to *R*. 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. If a party who has furnished a written response to a request to produce or who has supplied documents in response to a request to produce thereafter obtains additional documents that are responsive to the request, an amended written response and production of such documents, as appropriate, shall be served promptly. Unless the parties otherwise agree, or the court otherwise orders: (1) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request[.]; (2) if a request does not specify the form or forms for producing electronically stored information, a responding party shall produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and (iii) a party need not produce the same electronically stored information in more than one form.

(c) …no change.

Note: Source — *R.R.* 4:24-1. Former rule deleted and new *R*. 4:18-1 adopted July 14, 1972 to be effective September 5, 1972; rule caption and paragraph (c) amended July 14, 1992 to

be effective September 1, 1992; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) and (b) amended to be effective .

4:23-6 Electronically Stored Information.

Absent exceptional circumstances, the court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system.

Note: Adopted _____ be effective _____.

E. Proposed Amendments to *R.* 2:5-3 — Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request form

While the Appellate Division Management Committee had rescinded its request to eliminate the requirement that diskettes have to be ordered and paid for by counsel incident to the preparation of a transcript on appeal (See Section IV.A. of the 2006 Report of the Supreme Court Civil Practice Committee), there was a suggestion that the format of the transcript on the computer diskette be updated to eliminate references to WordPerfect and ASCII and include references to Microsoft Word, Microsoft Word compatible and Adobe PDF. The Committee recognized this substitution as necessary and recommends the proposed changes.

See Section I.P. of the 2006 Report of the Supreme Court Civil Practice Committee for proposed amendments to *R.* 2:5-3, which the Committee recommends, Section II.D. for proposed amendments that the Committee does not recommend, and Section IV.A. for a discussion of proposed amendments that were initially recommended and later withdrawn from consideration.

See also Section II.A. of this Report for proposed rule amendments, which the Committee does not recommend.

The proposed amendments to *R.* 2:5-3 follow.

2:5-3. Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

(a) Request for Transcript; Prescribed Form. Except as otherwise provided by *R.* 2:5-3(c), if a verbatim record was made of the proceedings before the court, agency or officer from which the appeal is taken, the appellant shall, no later than the time of the filing and service of the notice of appeal, serve a request for the preparation of an original and copy of the transcript, as appropriate, (1) upon the reporter who recorded the proceedings and upon the reporter supervisor for the county if the appeal is from a judgment of the Superior Court, or (2) upon the clerk of the court if the appeal is from a judgment of the Tax Court or a municipal court, or (3) upon the agency or officer if the appeal is from administrative action. The appellant may, at the same time, order from the reporter, court clerk, or agency the number of additional copies required by *R.* 2:6-12 to file and serve. If the appeal is from an administrative agency or officer which has had the verbatim record transcribed, such transcript shall be made available to the appellant on request for reproduction for filing and service. The request for transcript shall state the name of the judge or officer who heard the proceedings, the date or dates of the trial or hearing and shall be accompanied by a deposit as required by *R.* 2:5-3(d). The request for transcript shall be in a form prescribed by the Administrative Director of the Courts. A copy of the request for transcript shall be mailed to all other interested parties and to the clerk of the appellate court. The provisions of this paragraph shall not apply if the original and [first carbon] copy of the transcript have already been prepared and are on file with the court.

(b) …no change.

(c) …no change.

(d) …no change.

(e) Preparation and Filing. The court reporter, clerk, or agency, as the case may be, shall promptly prepare or arrange for the preparation of the transcript in accordance with standards fixed by the Administrator Director of the Courts. The person preparing the transcript shall deliver the original to the appellant and shall deliver a copy together with a computer diskette of the transcript [in WordPerfect, WordPerfect–compatible, ASCII or ASCII-compatible format,] to the court reporter supervisor in the case of an appeal from the Superior Court, to the clerk of the court in the case of an appeal from the Tax Court or a municipal court, or to the agency in the case of an administrative appeal. The diskette shall be in Microsoft Word, Microsoft Word compatible or Adobe PDF format. The person preparing the transcript shall also forthwith notify all parties of such deliveries. When the last volume of the entire transcript has been delivered to the appellant, the court reporter supervisor, clerk or agency, as the case may be, shall certify its delivery on a form to be prescribed by the Administrative Director of the Courts. That transcript delivery certification and a complete set of the transcripts and diskettes shall be forwarded immediately to the clerk of the court to which the appeal is being taken. A copy of the certification shall also then be sent to the appellant. The appellant shall serve a copy of the certification on all other parties within seven days after receipt and, if the appeal is from a conviction on an indictable offense, on the New Jersey Division of Criminal Justice, Appellate Section. The appellant shall file proof of such service with the clerk of the court to which the appeal has been taken

(f) …no change.

Note: Source — *R.R.* 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88-10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July

14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (e) amended to be effective .

F. Proposed "Housekeeping" Amendments to *Rules* 4:5A-3, 4:5B-4, 4:21A-9 and 4:23-5 — re: references to matters filed after 2000

Because the "Best Practices" amendments effective in 2000 were given prospective effect, some rules made specific reference to filings or court events noticed or scheduled after 2000. The Committee proposes amendments to *Rules* 4:5A-3, 4:5B-4, 4:21A-9, and 4:23-5 deleting outdated and unnecessary references to filings or court events noticed or scheduled after 2000.

See Section I.A. of this Report for other revisions to *R.* 4:23-5, which the Committee recommends.

The proposed amendments to *Rules* 4:5A-3, 4:5B-4, 4:21A-9 and 4:23-5 follow.

[4:5A-3. Applicability.

This rule shall be applicable to all actions filed on or after September 5, 2000.]

Note: Adopted July 5, 2000 to be effective September 5, 2000; rule deleted _____ to be effective _____.

[4:5B-4. Applicability

This rule shall be applicable to all actions filed on or after September 5, 2000.]

Note: Adopted July 5, 2000 to be effective September 5, 2000; rule deleted to be effective .

[4:21A-9. Applicability

The July 5, 2000 amendments to *R*. 4:21A shall apply to all actions commenced on or after September 5, 2000 and to all actions pending as of September 5, 2000 in which notice of arbitration hearing has not yet been sent.]

Note: Adopted July 5, 2000 to be effective September 5, 2000; rule deleted to be effective _____.

4:23-5. Failure to Make Discovery

(a) Dismissal.

(1) Without Prejudice. If a demand for discovery pursuant to *R.* 4:17, *R.* 4:18-1, or *R.* 4:19 is not complied with and no timely motion for an extension or a protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and stating that the moving party is not in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-F of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore. If the delinquent party is appearing pro se, service of the order and notice hereby required shall be made by counsel for the moving party. The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court , made payable to the "Treasurer, State of New Jersey," if the motion to vacate is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. If, however, the motion is not made within 90 days after entry

of the order of dismissal or suppression, the court may also order the delinquent party to pay sanctions or counsel fees and costs, or both, as a condition of restoration.

(2) …no change.

(3) …no change.

[(4) Applicability. The July 5, 2000 amendments to paragraphs (a)(1) and (a)(2) of this rule shall be applicable to all actions, whenever commenced, in which a party seeks relief from a failure of an adverse party to make discovery that has been demanded.]

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 4:23-6(c)(f), 4:25-2 (fourth sentence); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) caption amended and subparagraphs (a)(1) captioned and amended, and (a)(2) and (3) captioned and adopted, June 29, 1990 to be effective September 4, 1990; paragraph (a)(3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; caption amended, paragraphs (a)(1) and (a)(2) amended, and new paragraph (a)(4) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended and new paragraph (c) added July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended and paragraph (a)(4) deleted to be effective _____.

G. Proposed Amendments to *R.* 4:10-2 and New Appendix XII-C — *Ex Parte* Interviews of Physicians

In the 2002-2004 rules cycle, a subcommittee was formed to study the feasibility of drafting a HIPAA-compliant form acceptable to and for use by medical providers and attorneys alike and to examine the relationship between HIPAA and the interview of physicians as allowed in *Stempler v. Speidell,* 100 *N.J.* 368 (1985). During the course of the subcommittee's work, it became apparent that interest in creating a standardized HIPAA form had waned. Accordingly the subcommittee recommended that no such form be drafted as part of the Committee's work. The Committee agreed. With respect to the *Stempler* issue, however, the subcommittee drafted a release form, intended to protect the rights of physicians and patients, for inclusion in the appendix to the rules. The Committee endorsed the inclusion of the proposed release form and recommended further that *R.* 4:10-2 be amended to prohibit the *ex parte* interview of a physician without a release from the patient.

See Section I. D. of this Report for discussion of other proposed amendments to *R.* 4:10-2, which the Committee recommends.

The proposed amendments to *R.* 4:10-2 and new Appendix XII-C follow.

4:10-2. Scope of Discovery; Treating Physician

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

(b) …no change.

(c) Trial Preparation; Materials. Subject to the provisions of *R*. 4:10-2(d), a party may obtain discovery of documents, electronically stored information, and tangible things otherwise discoverable under *R*. 4:10-2(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of *R*. 4:23-1(c) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, [electrical] electronic, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(d) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of *R*. 4:10-2(a) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) …no change.

(2) …no change.

(3) …no change.

(4) A party shall not seek a voluntary interview with another party's treating physician unless that party has authorized the physician, in the form set forth in Appendix ___, to disclose protected medical information.

(e) Claims of Privilege or Protection of Trial Preparation Materials. (1)Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged

or protected, will enable other parties to assess the applicability of the privilege or protection. (2) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable efforts to retrieve it. The producing party must preserve the information until the claim is resolved.

(f) Claims that Electronically Stored Information is not Reasonably Accessible. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause, considering the limitations of *Rule* 4:10-2(g). The court may specify conditions for the discovery.

(g) The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of

the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act on its own initiative after reasonable notice or pursuant to motion.

Note: Source — *R.R.* 4:16-2, 4:23-1, 4:23-9, 5:5-1(f). Amended July 14, 1972 to be effective September 5, 1972 (paragraphs (d)(1) and (2) formerly in *R.* 4:17B1); paragraph (d)(2) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c) and (d)(1) and (3) amended July13, 1994 to be effective September 1, 1994; paragraph (d)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) adopted July 10, 1998 to be effective September 1, 1998; paragraph (d)(1) amended July 12, 2002 to be effective September 3, 2002; corrective amendments to paragraph (d)(1) adopted September 9, 2002 to be effective immediately; amendments to paragraphs (a), (c) and (e); new paragraphs (d)(4), (f) and (g)added to be effective .

NEW APPENDIX XII-C

AUTHORIZATION TO RELEASE PRIVATE HEALTH CARE INFORMATION AND FOR VOLUNTARY INTERVIEW

TO: _____ RE: _____

_____ DOB: _____

_____ SS#: _____

I hereby authorize you to disclose my protected health information to and to participate in a voluntary interview with:

_____

_____

_____

This interview is not at my request. It is to assist the defendant in the defense of a lawsuit that has been brought by me against _____. Your participation in any such interview is entirely voluntary, and you have the right to consent to the interview only if it takes place in the presence of my attorney.

You may disclose protected information reasonably related to the medical condition I have place in issue by my lawsuit. That condition relates to:

_____

_____

A disclosure by you of any medical information outside the scope of this authorization may result in civil liability against you pursuant to HIPAA, 42 U.S.C.A. §320 et seq.

This authorization may be revoked by me at any time, and expires 120 days from the date I execute the authorization as indicated below. If you have questions relating to the scope of this authorization, you may contact your own attorney or my attorney:

_____

_____

_____

Patient signature: _____ Date: _____

H. Proposed Amendments to *R.* 4:10-3 — Protective Orders

An *ad hoc* subcommittee was established in the 2000-2002 term to examine several procedural additions to the requirements for obtaining a protective order of confidentiality relative to documents exchanged in discovery, as suggested in *Estate of Frankl v. Goodyear,* MER-L-3052-99. In the 2002-2004 term, the subcommittee recommended and the Committee agreed that no change be made to the existing rule. The Supreme Court in its opinion in *Estate of Frankl v. Goodyear*, 181 *N.J.* 1 (2004) referred the issue of protective orders back to the Committee with directions to review for possible rule amendments regarding the public's right of access to unfiled discovery and the good cause requirement for the entry of a protective order. The subcommittee, chaired by Professor Howard Erichson, developed a proposed rule amendment to *R.* 4:10-3 to clarify that all protective orders providing that discovery material is confidential may be challenged by third parties by way of intervention on grounds that good cause does not exist to maintain the confidentiality of such materials, but that the vacation or modification of the order does not in itself provide a public right of access to unfiled discovery. The Committee was unanimous in its support of this proposal. The subcommittee further recommended that the introductory paragraph of the rule be amended to clarify that the court may enter a protective order either for good cause shown or by agreement of the parties. By a close vote of 15 for and 13 against, the Committee endorsed this proposal.

The proposed amendments to *R.* 4:10-3 follow.

4:10-3. Protective Orders

Upon motion by a party or by the person from whom discovery is sought, [and for good cause shown,] the court, either for good cause shown or by agreement of the parties, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, but not limited to, one or more of the following:

(a) That the discovery not be had;

(b) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(c) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) That discovery be conducted with no one present except persons designated by the court;

(f) That a deposition after being sealed be opened only by order of the court;

(g) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(h) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of *R.* 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

When a protective order has been entered pursuant to this rule, either by stipulation of the parties or after a finding of good cause, a non-party may, on a proper showing pursuant to *Rules* 4:33-1 or 4:33-2, intervene for the purpose of challenging the protective order on the ground that there is no good cause for the continuation of the order or portions thereof. Neither vacation nor modification of the protective order, however, establishes a right of access to unfiled discovery materials.

Note: Source — *R.R.* 4:20-2. Former rule deleted (see *R.* 4:14-3(a)) and new *R.* 4:10-3 adopted July 14, 1972 to be effective September 5, 1972 (formerly *R.* 4:14-2); paragraph (e) amended July 29, 1977 to be effective September 6, 1977; amended to be effective .

I. Proposed Amendments to *Rules* 4:32-1, 4:32-2, 4:32-3 and 4:32-5 — re: Class Actions

At the end of the 2002-2004 rules cycle, a subcommittee was established to study the recently adopted amendments to the Federal Rule governing class actions, *F.R.Civ.P.* 23, and to determine whether the New Jersey rules should be revised to comport with the federal changes. The subcommittee recommended the incorporation of all the changes to *F.R.Civ.P.* 23, including the 1998 amendment regarding interlocutory appeals. The full text of the subcommittee's report is included as an appendix to this Report. Most of the changes proposed were procedural and non-controversial, and were endorsed by the full Committee. Three provisions, however, were discussed in detail:

1) Second opt out. The federal rule provides for a second opt out for members of the class at the discretion of the trial judge. It would allow the trial court to condition the approval of a settlement on requiring a notice of the settlement terms, along with the right to opt out of the class, to be sent to the class even when the class has been previously certified and the class members had been given a prior right to opt out. The State Bar had objected to this provision, but the subcommittee recommended that it be included in the changes to our rules to insure the fairness of a settlement. The Committee agreed, reasoning that the second opt out addresses the dichotomy between class members' rights when settlement occurs after or before class certification and, accordingly, serves as a necessary safety valve.

2) Interlocutory appeal. The subcommittee recommended that the federal provision allowing an interlocutory appeal be included in the state rules. The Committee concluded that, while this provision was necessary in the federal rule because the federal courts do not usually entertain an action on interlocutory appeal, it was not necessary for New Jersey, whose rules

already provide for interlocutory appeals. On a vote, the majority of the Committee opted to eliminate the interlocutory appeal provision from the proposed class action amendments. Judge Pressler agreed that it would be sufficient to note in the comments to the rule that this provision was not adopted because of the pre-existing New Jersey rule governing interlocutory appeals.

3) Attorney fees. The Committee agreed with Judge Pressler's observation that the federal amendment to *F.R. Civ.P*. 23 addressing the attorney fee award was the same as New Jersey's *R*. 4:42-9, and therefore was unnecessary. Accordingly, Committee members declined to recommend the inclusion of this provision.

The Committee accepted the subcommittee's recommendation that New Jersey's class action rules be amended to incorporate the remainder of the federal rules.

The proposed amendments to *Rules* 4:32-1, 4:32-2, 4:32-3 and 4:32-5 follow.

4:32-1. Requirements for Maintaining Class Action

(a) ...no change.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of paragraph (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk either of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) …no change.

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. [The factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class action.] The factors pertinent to these findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability in concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

Note: Source — *R.R.* 4:36-1; paragraphs (b)(1) and (3) amended to be effective .

4:32-2. [Determination of Maintainability of Class Action; Notice; Judgment; Partially as Class Actions] Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in the Class; Multiple Classes and Subclasses

(a) Order Determining Maintainability; Certifying Class. When a person sues or is sued as a representative of a class, the court shall, [As soon as] at an early practicable time, [after the commencement of an action brought as a class action, the court shall] determine by order whether [it is to be so maintained] to certify the action as a class action. An order [under this subdivision may be conditioned, and may be altered or amended before the decision on the merits] certifying a class action shall define the class and the class claims, issues or defenses, and shall appoint class counsel in accordance with paragraph (g) of this rule. The order may be altered or amended prior to the entry of final judgment.

(b) Notice. [In any class action maintained under *R.* 4:32-1(b)(3) the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with due process of law. The notice shall advise that (1) each member, not present as a representative, will be excluded from the class by the court upon request by a specified date; (2) the judgment, whether favorable or not, will bind all members who do not request exclusion; and (3) any member who does not request exclusion may enter an appearance. The cost of notice may be assessed against any party present before the court, or may be allocated among parties present before the court, pending final disposition of the cause.]

(1) If a class is certified pursuant to *R.* 4:32-1(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(2) If a class is certified pursuant to *R.* 4:32-1(b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, consistent with the due

process of law. The notice shall state the following in concise, clear and easily understood language:

(A) the nature of the action;

(B) the definition of the class certified;

(C) the class claims, issues or defenses;

(D) that a class member may enter an appearance through counsel if the member so desires;

(E) that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and

(F) the binding effect of a class judgment on class members pursuant to paragraph (c) of this rule.

(c) …no change.

(d) Partial Class Actions; Subdivided Classes. If appropriate, an action may be brought or maintained as a class action with respect to particular issues[,]. [or a] A class may also be [sub]divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court shall approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court shall direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under this rule shall file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under *R*. 4:32-1(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under paragraph (f)(1) of this rule. An objection made under this paragraph may be withdrawn only with the court's approval.

(f) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the

representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. These orders may be combined with an order under *R*. 4:32-2(a) and may be altered or amended as may be desirable from time to time.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court must consider: (1) the work counsel has done in identifying or investigating potential claims in the action; (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class.

The court may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interest of the class and may direct potential class counsel to provide information on any subject pertinent to the appointment and to the

proposed terms for attorney fees and nontaxable costs. The court may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under this rule. If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under paragraph (h) of this rule.

(h) In an action certified as a class action, an application for the award of counsel fees and litigation expenses, if fees and costs are authorized by law, rule, or the parties' agreement, shall be made in accordance with *R*. 4:42-9. Notice of the motion shall be served on all parties. A motion by class counsel shall be directed to class members in a reasonable manner. A party from whom payment is sought as well as any class member may object to the motion.

Note: Effective September 8, 1969; [P]paragraphs (b) and (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; rule amended _____ to be effective _____.

4:32-3. [Orders in Conduct of Actions] Derivative Action by Shareholders

[In the conduct of actions to which this rule applies, the court may make appropriate orders: (a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (c) imposing conditions on the representative parties or on intervenors; (d) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (e) dealing with similar procedural matters. These orders may be combined with an order under *R.* 4:32-2(a) and may be altered or amended as may be desirable from time to time.]

In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction complained of, or that the share thereafter devolved by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as is desired, and the reasons for the failure to obtain such action or the reasons for not making such effort. Immediately on filing the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the action to the other shareholders as the court by order directs. The derivative action may not be maintained if it

appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. *R.* 4:32-4 (dismissal and compromise) is applicable to actions brought under this rule.

Note: Original *R.* 4:32-3 effective September 8, 1969; redesignated as *R.* 4:32-2(e) to be effective ; former *R.* 4:32-5 redesignated as *R.* 4:32-3 to be effective .

[4:32-5. Derivative Action by Shareholders

In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified and allege that the plaintiff was a shareholder at the time of the transaction complained of, or that the share thereafter devolved by operation of law. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as is desired, and the reasons for the failure to obtain such action or the reasons for not making such effort. Immediately on filing the complaint and issuing the summons, the plaintiff shall give such notice of the pendency and object of the action to the other shareholders as the court by order directs. The derivative action may not be maintained if it appears that the plaintiff does not fairly represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. *R.* 4:32-4 (dismissal and compromise) is applicable to actions brought under this rule.]

Note: Source — *R.R.* 4:36-2; amended July 13, 1994 to be effective September 1, 1994; rule redesignated as *R.* 4:32-3 to be effective .

J. Proposed Amendments to *Rules* 4:42-9 and 4:86-4 — re: award of counsel fees in a guardianship proceeding

The opinion in *IMO Vivian Landry, an Incapacitated Person,* 381 *N.J. Super.* 401 (Ch. Div. 2005), concluded that the court has the authority to make an award of attorney fees to the plaintiff in a guardianship where the incapacitated person has assets, but raised the concern that there is nothing in the court rules specifically addressing this issue. Subsequently, a Committee member requested that the Committee consider an amendment to *Rules* 4:42-9 and/or 4:86-6 to make it clear that an award of counsel fees is proper in a guardianship, where the incapacitated individual has adequate assets, subject to the usual certification of services and considerations of reasonableness. The Committee discussed this proposal and agreed that the clarifying language should be included. The Committee recommends amending *R.* 4:42-9(a)(3), with a concomitant reference in *R.* 4:86-4.

The proposed amendments to *Rules* 4:42-9 and 4:86-4 follow.

4:42-9. Counsel Fees

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

(1) In a family action, a fee allowance both *pendente lite* and on final determination may be made pursuant to *R*. 5:3-5(c).

(2) Out of a fund in court. The court in its discretion may make an allowance out of such a fund, but no allowance shall be made as to issues triable of right by a jury. A fiduciary may make payments on account of fees for legal services rendered out of a fund entrusted to the fiduciary for administration, subject to approval and allowance or to disallowance by the court upon settlement of the account.

(3) In a probate action, if probate is refused, the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate. In a guardianship action, the court may allow a fee in accordance with *R*. 4:86-4(e) to the attorney for the plaintiff seeking guardianship, counsel appointed to represent the alleged incapacitated person and the guardian *ad litem*.

(4) In an action for the foreclosure of a mortgage, the allowance shall be calculated as follows: on all sums adjudged to be paid the plaintiff amounting to $5,000 or less, at the rate of 3.5%, provided, however, that in any action a minimum fee of $75 shall be allowed; upon the excess over $5,000 and up to $10,000 at the rate of 1.5%; and upon the excess over $10,000 at the rate of 1%, provided that the allowance shall not exceed $7,500. If, however, application of the formula prescribed by this rule results in a sum in excess of $7,500, the court may award an

additional fee not greater than the amount of such excess on application supported by affidavit of services. In no case shall the fee allowance exceed the limitations of this rule.

(5) In an action to foreclose a tax certificate or certificates, the court may award a counsel fee not exceeding $500 per tax sale certificate in any in rem or in personam proceeding except for special cause shown by affidavit. If the plaintiff is other than a municipality no counsel fee shall be allowed unless prior to the filing of the complaint the plaintiff shall have given not more than 120 nor fewer than 30 days' written notice to all parties entitled to redeem whose interests appear of record at the time of the tax sale, by registered or certified mail with postage prepaid thereon addressed to their last known addresses, of intention to file such complaint. The notice shall also contain the amount due on the tax lien as of the day of the notice. A copy of the notice shall be filed in the office of the municipal tax collector.

(6) In an action upon a liability or indemnity policy of insurance, in favor of a successful claimant.

(7) As expressly provided by these rules with respect to any action, whether or not there is a fund in court.

(8) In all cases where counsel fees are permitted by statute.

(b) …no change.

(c) …no change.

(d) …no change.

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

amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(5) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a)(1)(2) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(5) amended June 28, 1996 to be effective September 1, 1996; paragraph (a)(1) amended January 21, 1999 to be effective April 5, 1999; paragraph (a)(5) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(3) amended to be effective .

4:86-4. Order for Hearing

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) Compensation. The compensation of the attorney for the plaintiff seeking guardianship, appointed counsel, and of the guardian *ad litem,* if any, may be fixed by the court to be paid out of the estate of the alleged mentally incapacitated person or in such other manner as the court shall direct.

Note: Source — *R.R.* 4:102-4(a)(b). Paragraph (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; caption of former *R.* 4:83-4 amended, caption and text of paragraph (a) amended and in part redesignated as paragraph (b) and former paragraph (b) redesignated as paragraph (c) and amended, and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended and paragraphs (d) and (e) added June 28, 1996 to be effective September 1, 1996; paragraphs (a), (b), (c), (d), and (e) amended July 12, 2002 to be effective September 3, 2002; paragraph (e) amended to be effective .

K. Proposed Amendments to *R.* 4:43-2 — Final Judgment by Default

An Assignment Judge observed that the language in *R.* 4:43-2(b) states that the court may conduct a hearing prior to entering a judgment by default and, in that event, "…if the defendant was originally served with process either personally or by certified or ordinary mail, the attorney for the claimant shall give notice of the proof hearing to the defaulting defendant by ordinary mail addressed to the same address at which process was served." He suggested that the rule simply require notice of the hearing to be given in all cases, reasoning that unless the defendant were originally served with process, however done, there would be no entitlement to a judgment by default at all. He further noted that requiring notice to be given in all situations would probably eliminate the need for paragraph (d) of the rule. The Committee endorsed his suggestion that the rule should simply require notice of the hearing to be given in all cases, and that this eliminates the need for the last sentence of paragraph (d) of the rule.

The proposed amendments to *R.* 4:43-2 follow.

4:43-2. Final Judgment by Default

After a default has been entered in accordance with *R.* 4:43-1, except as otherwise provided by *R.* 4:64 (foreclosures), but not simultaneously therewith, a final judgment may be entered in the action as follows:

(a) …no change.

(b) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefore [; but] by notice of motion pursuant to *R.* 1:6, served on all parties to the action including the defaulting defendant or representative who appeared for the defaulting defendant. [n]No judgment by default shall be entered against a minor or mentally incapacitated person unless that person is represented in the action by a guardian or guardian *ad litem* who has appeared therein. [If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with notice of the motion for judgment filed and served in accordance with *R.* 1:6.] If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any allegation by evidence or to make an investigation of any other matter, the court may, on notice to the defaulting defendant or representative, conduct such proof hearings with or without a jury or take such proceedings as it deems appropriate[, and in that event, if the defendant was originally served with process either personally or by certified or ordinary mail, the attorney for the claimant shall give notice of the proof hearing to the defaulting defendant by ordinary mail addressed to the same address at which process was served]. The notice of proof hearing shall be by ordinary mail addressed to the same address at which process was served unless the party entitled to judgment has actual knowledge of a different current address for the defaulting defendant. Proof of service of the

notice of motion and notice of proof hearing, if any, shall certify that the plaintiff has no actual knowledge that the defaulting defendant's address has changed after service of original process or, if the plaintiff has such knowledge, the proof shall certify the underlying facts. In tort actions involving multiple defendants whose percentage of liability is subject to comparison and actions in which fewer than all defendants have defaulted, default judgment of liability may be entered against the defaulting defendants but such questions as defendants' respective percentages of liability and total damages due plaintiff shall be reserved for trial or other final disposition of the action. If application is made for the entry of judgment by default in deficiency suits or claims based directly or indirectly upon the sale of a chattel which has been repossessed, the plaintiff shall prove before the court the description of the property, the amount realized at the sale or credited to the defendant and the costs of the sale. In actions for possession of land, however, the court need not require proof of title by the plaintiff. If application is made for the entry of judgment by default in negligence actions involving property damage only, proof shall be made as provided by *R.* 6:6-3(c).

(c) …no change.

(d) Failure to Apply for Judgment Within [Six] Four Months. If a party entitled to a judgment by default fails to apply therefor within four months after the entry of the default, the court shall issue a written notice in accordance with *R.* 1:13-7(a). [An application for entry of default judgment made after the expiration of six months following the entry of default shall not be granted except on notice of motion filed and served in accordance with *R.* 1:6.]

Note: Source — *R.R.* 4:55-4 (first sentence), 4:56-2(a) (b) (first three sentences) (c), 4:79-4. Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; text and paragraph (a) amended

January 19, 1989 to be effective February 1, 1989; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (b) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraphs (b) and (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (d) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a) and (b) amended July 12, 2002 to be effective September 3, 2002; introductory text and paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (b) and (d) amended to be effective .

L. Proposed Amendments to *R.* 4:57 — Deposits in Court; Deposits in Lieu of Bond; Withdrawals

By Order dated December 6, 2005, the Supreme Court relaxed and supplemented the provisions of *Rules* 4:57-1 and 4:57-2 to permit all moneys submitted to the Clerk of the Superior Court under the Construction Lien Law, *N.J.S.A.* 2A:44A-31, to be deposited into the Superior Court Trust Fund and to authorize the Clerk of the Superior Court to accept such deposits and to authorize withdrawal or disbursement of such funds. Prior to the relaxation and supplementation Order, moneys received for construction liens that were not associated with litigation were deposited in a non-interest bearing account. The Clerk of the Superior Court requested this change not only to have all payments generate interest but also to implement a fiscal or accounting need to segregate Superior Court Clerk's Office accounts between those used for fees received from court filings (a non-interest bearing account) and those held for security purposes (which construction liens are). The court rules as presently written require a court order for moneys to be paid into and/or disbursed from the Superior Court Trust Fund. With no pending case for non-litigation-related construction lien payments, there would be no judge to sign any orders for payment into or out of the Trust Fund. Accordingly, the Court authorized the Clerk of the Superior Court to accept the non-litigation-related deposits into the Trust Fund and to approve any disbursements. The Clerk of the Superior Court requested the Committee to review the provisions of *R.* 4:57 and to recommend amendments to effectuate the Court's relaxation and supplementation Order. The Committee acceded to this request.

The proposed amendments to *Rules* 4:57-1 and 4:57-2 follow.

4:57-1. Deposit in Court

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money, a party, upon notice to every other party, and by leave of court, may deposit with the [court] Superior Court Trust Fund all or any part of the sum. The Clerk of the Superior Court may, however, accept money submitted under the Construction Lien Law, *N.J.S.A.* 2A:44A-31, whether or not there is litigation pending with respect thereto.

Note: Source — *R.R.* 4:72-1; amended to be effective .

4:57-2. Procedure for Deposit and Withdrawal of Moneys

(a) …no change.

(b) …no change.

(c) Construction Lien Law Deposits. If a deposit of Construction Lien Law funds has been accepted by the Clerk, where no litigation was pending, the Clerk is authorized, without court order, to withdraw or disburse such funds, pursuant to the conditions stated in N.J.S.A. 2A:44A-31.

Note: Source — *R.R.* 4:72-3, 4:72-5 (first sentence), 5:5-5(a) (b) (c) (e); paragraph (a) amended July 17, 1975 to be effective September 8, 1975; paragraph (b) amended December 26, 1979 to be effective January 1, 1980; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended June 28, 1996 to be effective September 1, 1996; new paragraph (c) added to be effective .

M. Proposed Amendments to *R.* 4:58 — Offer of Judgment

An *ad hoc* subcommittee, chaired by the Hon. Jack Sabatino, was established in the 2000-2002 term to study the Offer of Judgment rule. In the 2002-2004 term, the subcommittee recommended, the Committee endorsed, and the Supreme Court ordered amendments to *R*. 4:58 to eliminate the distinction between liquidated and unliquidated damages while retaining the 20% margin of error, and to include a per quod claim. A number of issues, however, were left unresolved and the subcommittee continued to work through the current term.

The threshold question that the subcommittee considered was whether the rule should be retained or eliminated. A majority of the subcommittee members favored retention and viewed their charge as making the rule easier to understand and apply. The argument against retaining the rule is set forth in a minority report. Both the majority and minority reports of the Offer of Judgment Subcommittee can be found as an appendix to this Report.

Voting on the threshold issue, 22 Committee members favored retaining the rule, while 13 members favored its elimination. The Committee's concerns centered on the equitable application of the rule, especially in cases involving statutory fee shifting. The amendments proposed herein represent only those discrete issues on which the Committee was able to reach a determination. By a vote of 21 for and 6 against, the Committee agreed that application of the offer of judgment rule should be limited to cases in which the remedial claims left in the case at the time the offer is made are exclusively monetary in nature. The Committee further agreed by a vote of 20 for and 7 against to provide an "escape hatch" so that the court may disallow or reduce a fee allowance if it may impose undue hardship or if it conflicts with the policies underlying a fee shifting statute or a rule of court. The Committee rejected, by a vote of 9 in favor and 17 opposed, a suggestion that the "escape hatch" be available if the rejection of the

claimant's offer were reasonable, noting that the margin of error already present in the rule addresses the reasonableness concern. Finally, the Committee overwhelmingly supported the provision that no duplicative recoveries may be allowed.

The proposed amendments to *R*. 4:58 follow.

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

(a) Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve upon any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein [or for property or to the effect specified in the offer] (including costs). The offer shall not be effective unless, at time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.

(b) …no change.

Note: Source — *R.R.* 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended to be effective .

4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) If the offer of a claimant is not accepted and the claimant obtains a [verdict or determination at least as favorable as the rejected offer or, if a] money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: [(a)] (1) all reasonable litigation expenses incurred following non-acceptance; [(b)] (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by *R*. 4:42-11(b), which also shall be allowable; and [(c)] (3) a reasonable attorney's fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance, [such fee to be applied for within 20 days following entry of final judgment and in accordance with *R*. 4:42-9(b).]

(b) No allowances shall be granted, however, if they would impose undue hardship. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; amended and new paragraph (b) added _____ to be effective _____.

4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and [the determination] the claimant obtains a monetary judgment that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by *R*. 4:58-2, which shall constitute a prior charge on the judgment.

(b) A favorable determination qualifying for allowances under this rule is a [verdict or determination at least as favorable to the offeror as the offer or, if a] money judgment[, is] in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted[, however,] if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, [or] (3) only nominal damages are awarded, [or] (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Source — *R.R.* 4:73; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; rule divided into paragraphs and amended _____ to be effective _____.

4:58-5 Application for Fee; Limitations

Allowances pursuant to this rule shall be applied for in accordance with *R.* 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs or interest under this rule.

Note: New rule adopted to be effective .

N. Proposed Forms for Inclusion in the Appendix — re: Uniform Disclosure Methodology for Calculation of Interest and Credit for Partial Payments

Supplementing, and in furtherance of, the rule amendments proposed to *R*. 4:59-1 in Section I.N. of the Committee's 2004-2006 Report, the Clerk of the Superior Court drafted forms for a Writ of Execution and Writ of Wage Execution for inclusion in the Appendix to ensure a uniform disclosure methodology for the calculation of interest and credit for partial payments in the endorsement to an application for a writ. The Committee recommends that these forms be included in the Appendix to the rules.

The proposed forms for inclusion as Appendices XI-X and XI-Y follow.

NEW APPENDIX XI-X
WRIT OF EXECUTION

Attorney for Plaintiff
_____

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: COUNTY

Plaintiff **DOCKET NO.**

vs. **WRIT OF EXECUTION**

Defendant

_____

THE STATE OF NEW JERSEY

TO THE SHERIFF OF

WHEREAS, on the _____ day of _____ judgment was recovered by Plaintiff, _____ in an Action in the SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, _____ COUNTY, against Defendant, for damages of $ _____ and costs of $ _____ ; and

WHEREAS, on _____ , the judgment was entered in the civil docket of the Clerk of the Superior Court, and there remains due thereon $_____.

THEREFORE, WE COMMAND YOU that you satisfy the said Judgment out of the personal property of the said Judgment debtor within your County; and if sufficient personal property cannot be found then out of the real property in your County belonging to the judgment debtor (s) at the time when the judgment was entered or docketed in the office of the Clerk of this Court or at any time thereafter, in whosesoever hands the same may be, and you do not pay the said monies realized by you from such property to _____, Esq., attorney in this action; and that within twenty-four months after the date of its issuance you return this execution and your proceedings thereon to the Clerk of the Superior Court of New Jersey at Trenton.

WE FURTHER COMMAND YOU, that in case of a sale, you make your return of this Writ with your proceedings thereon before this Court and you pay to the Clerk thereof any surplus in your hands within thirty days after the sale.

WITNESS, HONORABLE _____ a Judge of the Superior Court, at ___ _____ this _____ day of _____ , 200__

_____,CLERK

ENDORSEMENT

Levy Damages:	$_____
Additional Costs:	$_____
Costs:	$_____
Interest thereon:	$_____
Credits:	$_____
Sheriff's Fees:	$_____
Sheriff's Commissions:	$_____
TOTAL	$_____

Post Judgment Interest applied pursuant to CR 4:42-11 must be calculated as ***simple interest***. As required by CR 4:59-1, explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant.

_____

Attorney for Plaintiff

Dated:

NEW APPENDIX XI-Y
WRIT OF WAGE EXECUTION

Attorneys for Plaintiff

_____

SUPERIOR COURT OF NEW JERSEY
DIVISION, COUNTY

Plaintiff,

DOCKET NO:

vs.

WRIT OF WAGE EXECUTION

Defendant.

_____

THE STATE OF NEW JERSEY

TO THE SHERIFF OF _____COUNTY

YOU ARE HEREBY COMMANDED that of the weekly earnings which the Defendant _____ receives from employer _____ whose address is _____ _____ , you take the sum of 10% of the gross weekly pay or 25% of disposable earnings for that week or the amount by which the designated Defendant's disposable weekly earnings exceed $154.50 per week, pursuant to the Order for Wage Execution entered with this Court on , a copy of which is attached hereto and Certification of the Court entered in the sum of $____plus interest and fees until $ _____ plus interest and fees is paid and satisfied, and that you pay weekly to the Plaintiff's duly authorized attorney said amount of reservation of salary:

YOU ARE HEREBY FURTHER COMMANDED that upon satisfaction of Plaintiff's damages, costs and interests, plus subsequent costs, or upon termination of the Defendant's salary, you will immediately thereafter return this Writ to the Court with a statement as to the execution annexed.

WITNESS, the Honorable _____, Judge of the Superior Court, this ____ day of , 200 .

_____, CLERK

ENDORSEMENT

Levy Damages ……..$
Additional Costs ……$
Interest thereon …… ……$
Credits…….....$
Sheriff's Fees ……$
Sheriff's Commissions ……..$

TOTAL: $

Post Judgment Interest applied pursuant to CR 4:42-11 must be calculated as ***simple interest***. As required by CR 4:59-1, explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant

_____
Attorney for Plaintiff
Dated: , 200

O. Proposed Amendments to *Rules* 4:64-1 and 1:5-6 — re: Title Search, Certification, and Complaint Requirements for Foreclosures Other Than In Rem Tax Foreclosures

In an effort to reduce the number of deficient foreclosure complaints being filed, the Conference of General Equity Presiding Judges suggested that *R*. 4:64-1 be amended to require a pre-filing title search and to detail the essential allegations of a mortgage foreclosure complaint. It further proposed that *R*. 4:5-1 be amended to require a certification that the pre-filing title search was received and reviewed. The Committee endorsed these proposals, but determined it would be better to include the certification requirement with the material in *R*. 4:64-1. It also determined that a reference to the title search requirement should be included in *R*. 1:5-6.

The proposed amendments to *Rules* 4:64-1 and 1:5-6 follow.

4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

(a) Title Search. Prior to filing an action to foreclose a mortgage or condominium lien or a tax lien to which *R.* 4:64-7 does not apply, the plaintiff shall receive and review a title search of the public record for the purpose of identifying any lienholder or other persons and entities with an interest in the property which is subject to foreclosure and shall annex to the complaint a certification of compliance with the title search requirements of this rule.

(b) Contents of Foreclosure Complaint. In an action in the Superior Court to foreclose a lien described in paragraph (a) of this rule, the complaint shall state:

(1) the name of the obligor, mortgagor, obligee and mortgagee;

(2) the amount of the debt secured by the mortgage;

(3) the dates of execution of the debt instrument and the mortgage;

(4) the recording date, county recording office, and book and page recording reference of the mortgage securing the debt;

(5) whether the mortgage is a purchase money mortgage;

(6) a description of the pertinent terms or conditions of the debt instrument or mortgage and the facts establishing the default;

(7) the default date;

(8) if applicable, the acceleration of the debts' maturity date;

(9) if applicable, any prepayment penalty;

(10) if the plaintiff is not the original mortgagee or original nominee mortgagee, the names of the original mortgagee and a recital of all assignments in the plaintiff's chain of title;

(11) the names of all parties in interest whose interest is subordinate or affected by the mortgage foreclosure action and, as to each party, a description of the nature of the interest, with sufficient particularity to give the court and parties notice of the transaction or occurrence upon which the interest is based including recording date of the lien, encumbrance or instrument creating the interest;

(12) a description of the subject property by street address, block and lot as shown on the municipal tax map and a metes and bounds description stating whether the recorded mortgage instrument includes that description; and

(13) if applicable, whether the plaintiff has complied with the pre-filing notice requirements of the Fair Foreclosure Act or other notices required by law.

When a married person who has not executed the mortgage is made a party defendant, the plaintiff shall set out the particular facts relied upon to bar a married person's rights and interest in the subject property, including whether the married person's rights and interest in the property were acquired before or after the date of the mortgage.

[(a)](c) …no change.

[(b)](d)…no change.

[(c)](e) …no change.

[(d)](f) …no change.

[(e)](g)…no change.

[(f)](h) …no change.

[(g)](i) …no change.

[(h)](j) …no change.

Note: Source — *R.R.* 4:82-1, 4:82-2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; new paragraphs (a) and (b) added, former paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) redesignated as paragraphs (c), (d), (e), (f), (g), (h), (i), and (j) to be effective .

1:5-6. Filing

(a) …no change

(b) …no change

(c) Nonconforming Papers. The clerk shall file all papers presented for filing and may notify the person filing if such papers do not conform to these rules, except that

(1) the paper shall be returned stamped "Received but not Filed (date)" if it is presented for filing unaccompanied by any of the following:

(A) the required filing fee; or

(B) a completed Case Information Statement as required by *R.* 4:5-1 in the form set forth in Appendix XII to these rules; or

(C) in Family Part actions, the affidavit of insurance coverage required by *R.* 5:4-2(f), the Parents Education Program registration fee required by *N.J.S.A.* 2A:34-12.2, or the Confidential Litigant Information Sheet as required by *R.* 5:4-2(g) in the form prescribed in Appendix XXIV; or

(D) the signature of an attorney permitted to practice law in this State pursuant to *R.* 1:21-1 or the signature of a party appearing *pro se*, provided, however, that a *pro se* appearance is provided for by these rules.

(E) a certification of title search as required by *R.* 4:64-1(a).

If a paper is returned under this rule, it shall be accompanied by a notice advising that if the paper is retransmitted together with the required signature, document or fee, as appropriate, within ten days after the date of the clerk's notice, filing will be deemed to have been made on the stamped receipt date.

(2) Except in mortgage and tax foreclosure actions, if an answer is presented by a defendant against whom default has been entered, the clerk shall return the same stamped "Received but not Filed (date)" with notice that the defendant may move to vacate the default.

(3) A demand for trial de novo may be rejected and returned if not filed within the time prescribed in *R.* 4:21A-6 or if it is submitted for filing by a party in default or whose answer has been suppressed.

(d) …no change.

(e) …no change.

Note: Source — *R.R.* 1:7-11, 1:12-3(b), 2:10, 3:11-4(d), 4:5-5(a), 4:5-6(a) (first and second sentence), 4:5-7 (first sentence), 5:5-1(a). Paragraphs (b) and (c) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended November 26, 1990 to be effective April 1, 1991; paragraphs (b) and (c) amended, new text substituted for paragraph (d) and former paragraph (d) redesignated paragraph (e) July 13, 1994 to be effective September 1, 1994; paragraph (b)(1) amended, new paragraph (b)(2), adopted, paragraphs (b)(2), (3), (4), (5) and (6) redesignated paragraphs (b)(3), (4), (5), (6) and (7), and newly designated paragraph (b)(4) amended July 13, 1994 to be effective January 1, 1995; paragraphs (b)(1),(3) and (4) amended June 28, 1996 to be effective September 1, 1996; paragraph (b)(4) amended July 10, 1998 to be effective September 1, 1998; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraphs (c)(1) and (c)(3) amended July 28, 2004 to be effective September 1, 2004; new subparagraph (c)(1)(E) adopted to become effective .

P. Proposed Amendments to *Rules* 4:80-8, 4:91-1, 4:91-2, and 4:91-5 — re: Changes in Probate Practice

The statutory revision to *N.J.S.A.* 3B:22-4, approved August 31, 2004, to be effective 180 days after enactment, eliminated the provision that the Superior Court or Surrogate may order the personal representative to give public notice to creditors, by newspaper advertisement, commonly known as the Rule to Bar Creditors. The amended statute now requires creditors seeking priority to present claims within nine months of the decedent's death. A Committee member suggested that *R*. 4:80-8, Notice to Creditors to Present Claims, be eliminated in its entirety because its retention would be at cross purposes with the new legislation, which eliminated the public notice requirement. He also suggested that *Rules* 4:91-1, 4:91-2 and 4:91-5, dealing with insolvent estates be amended as well to comport with the new legislation, noting that many of the provisions would become either inaccurate or unworkable once *R*. 4:80-8 were deleted. It was further proposed that the former two-step procedure of obtaining a declaration of insolvency followed by a separate final accounting be consolidated into one action in which the accounting would be settled and the court would adjudicate the priority of claims. The Committee agreed and endorsed the proposed amendments that delete outdated references, include language to implement the statutory provisions, and streamline the process where an estate is insolvent.

The proposed amendments to *Rules* 4:80-8, 4:91-1, 4:91-2, and 4:91-5 follow.

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

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

Note: Source — *R.R.* 4:114-1 (first and second sentence). Amended July 7, 1971 to be effective September 13, 1971; amended July 22, 1983 to be effective September 12, 1983; former *R.* 4:96-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; rule deleted to be effective .

4:91-1. Proceedings [as to Insolvency on or After Obtaining Order to Limit Creditors] Where Estate is Insolvent

(a) [Time;] Complaint; Order to Show Cause. [The executor or administrator may, if the estate is deemed insolvent, at the time of obtaining an order to limit creditors under *N.J.S.A.* 3B:22-4 or at any time thereafter, commence an action to have the estate adjudged insolvent by filing a complaint stating that to the best of his or her knowledge and belief the real and personal estate of the decedent is insufficient to pay debts.] At any time after nine months following the date of decedent's death, the executor or administrator may commence an action in the Chancery Division, Probate Part, by a complaint stating that to the best of the executor or administrator's knowledge and belief, the real and personal estate of the decedent is insufficient to pay debts. The action shall proceed by order to show cause, which shall require the executor or administrator to give notice of the proceedings to the persons specified by *R.* 4:91-2 and shall set the date by which answers to the complaint or exceptions pursuant to *R.* 4:91-3 must be filed.

(b) Report of Claims; Account [of Personal Estate and Inventory of Real Estate]. The executor or administrator shall file [his or her report of claims, inventory and account under oath with the court at least one month before the hearing in the action. The report shall state such claims as were duly presented, particularly specifying the demand and the amount thereof at the time of the report, and whether it was based on judgment, bond, note, book account or otherwise. The account shall state the personal estate of the decedent which has come to the knowledge or possession of the executor or administrator, and the inventory shall state the real estate of the decedent of which the executor or administrator has knowledge, and the value thereof, as near as may be.] with the complaint a list of creditors who have presented claims within nine months following the date of decedent's death, or which the executor or administrator intends to allow

without requiring the submission of a formal claim, stating the amount of each claim, whether it has been allowed or rejected, whether it is entitled to a statutory priority, and whether the claim is based on judgment, bond, note, book account, or otherwise. The executor or administrator shall also file with the complaint an account in the form required by *R*. 4:87-3.

(c) Judgment. The court may, on the presentation of the report of claims and the presentation of the [inventory and] account, adjudge the estate to be insolvent and determine the amount of each claim and its priority for payment.

Note: Source — *R.R.* 4:110-1, 4:110-2(a)(b). Paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a) and (b) amended June 29, 1990 to be effective September 4, 1990; amended to be effective .

4:91-2. [Notice to Creditors of Insolvent Estate] Service upon Creditors and Other Interested Persons of Insolvent Estate

[After the time specified by the order barring creditors has expired and after the account, inventory and report of claims have been filed, the executor or administrator shall give all creditors who have presented claims, each other creditor of the estate of which the personal representative is aware or should upon reasonable inquiry be deemed aware, and except as otherwise provided by *R.* 4:26-3 (virtual representation), all other interested persons, notice of the filing of the account, inventory and report and of the time and place of the hearing in the action. The notice shall be given not less than one month before the hearing in the action and may be sent by registered or certified mail, return receipt requested, to the last known address of each such creditor or person, whether residing within or outside this State. The notice shall state that such creditors and persons shall file their exceptions to the account, inventory and report before the time of the hearing or within such time as the court may allow.] Service of the complaint together with the report of claims and account and order to show cause on creditors who have presented claims within nine moths of the decedent's death and other interested persons shall be made in accordance with *R.* 4:87-4.

Note: Source — *R.R.* 4:110-3 (first, second and third sentences); amended June 29, 1990 to be effective September 4, 1990; amended to be effective .

4:91-5. Actions Pending May Proceed to Judgment

If an action by a creditor or other interested party is pending against the executor or administrator on the date of the filing of the complaint to adjudge the estate insolvent, [order limiting creditors, or is thereafter brought, the plaintiff in such] the action may proceed to final judgment [therein], but no execution shall issue until final judgment is entered in the insolvency proceeding [in any case after the filing of the complaint. The amount of the judgment, when recovered, shall be the sum on which the creditor shall receive a ratable proportion.] If the estate is adjudicated insolvent, the judgment creditor shall be entitled to receive the ratable portion determined by such final judgment.

Note: Source — *R.R.* 4:110-6; amended June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

Q. Proposed Amendments to Appendix I — Life Expectancy Tables

The Committee notes that Appendix I, Life Expectancy Tables, have not been updated since 1992 and recommends that an updated table based on 2004 statistics replace the current Appendix I.

The proposed amendments to Appendix I follow.

APPENDIX I

Life Expectancies for All Races and Both Sexes[1]

Age	Expectancy	Age	Expectancy	Age	Expectancy
0-1	77.2	34-35	44.8	68-69	16.0
1-2	76.7	35-36	43.9	69-70	15.3
2-3	75.5	36-37	43.0	70-71	14.6
3-4	74.8	37-38	42.0	71-72	14.0
4-5	73.8	38-39	41.1	72-73	13.3
5-6	72.8	39-40	40.2	73-74	12.7
6-7	71.8	40-41	39.2	74-75	12.1
7-8	70.8	41-42	38.3	75-76	11.5
8-9	69.8	42-43	37.4	76-77	10.9
9-10	68.8	43-44	36.5	77-78	10.3
10-11	67.9	44-45	35.6	78-79	9.8
11-12	66.9	45-46	34.7	79-80	9.3
12-13	65.9	46-47	33.8	80-81	8.8
13-14	64.9	47-48	32.9	81-82	8.3
14-15	63.9	48-49	32.0	82-83	7.8
15-16	62.9	49-50	31.1	83-84	7.3
16-17	61.9	50-51	30.3	84-85	6.9
17-18	61.0	51-52	29.4	85-86	6.5
18-19	60.0	52-53	28.5	86-87	6.1
19-20	59.1	53-54	27.7	87-88	5.8
20-21	58.1	54-55	26.8	88-89	5.4
21-22	57.2	55-56	26.0	89-90	5.1
22-23	56.2	56-57	25.1	90-91	4.8
23-24	55.3	57-58	24.3	91-92	4.5
24-25	54.3	58-59	23.5	92-93	4.3
25-26	53.4	59-60	22.7	93-94	4.0
26-27	52.4	60-61	21.9	94-95	3.8
27-28	51.5	61-62	21.1	95-96	3.6
28-29	50.5	62-63	20.3	96-97	3.4
29-30	49.6	63-64	19.6	97-98	3.2
30-31	48.6	64-65	18.8	98-99	3.0
31-32	47.7	65-66	18.1	99-100	2.8
32-33	46.7	66-67	17.4	100+	2.7
33-34	45.8	67-68	16.7		

[1] Source: National Vital Statistics Reports, Vol. 52, No. 14, February 18, 2004. Previous table deleted and new table adopted November 7, 1988, to be effective January 2, 1989. Previous table deleted and new table adopted July 14, 1992 to be effective September 1, 1992. Previous table deleted and new table adopted _____ to be effective _____ .

R. Proposed Amendments to Appendix II Form C. — Uniform Interrogatories to be Answered by Defendant in All Personal Injury Cases: Superior Court

An attorney requested that question #3 in the Uniform Interrogatory Form C in Appendix II be amended to include crossclaims in the potential actions to be taken by a defendant. The Committee agreed that crossclaims should be included; their omission was a remediable oversight.

The proposed amendments to Appendix II, Form C, question #3 follow.

Form C. Uniform Interrogatories to be Answered by Defendant in All Personal Injury Cases: Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with *R.* 4:17-1(b)(3).

(Caption)

1. …no change.

2. …no change.

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

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

For Automobile Cases, Also Answer Form C(1)

For Falldown Cases, Also Answer Form C(2)

For Medical Malpractice Cases, Also Answer Form C(3)

For Product Liability Cases (Other Than Pharmaceutical and Toxic Tort Cases), Also Answer Form C(4)

Certification

…no change.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; entire text deleted and new text added June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 10 and certification amended July 28, 2004 to be effective September 1, 2004; interrogatory 3 amended _____ to be effective _____.

S. Proposed amendments to Appendix II, Form C(3)

The Committee recommends a housekeeping amendment to Appendix II, Form C(3), Interrogatory #15 (c) to eliminate the phrase "set forth the contents in detail" which originally modified a now deleted reference to oral expert reports and which now makes no sense.

The proposed amendments to Appendix II, Form C(3) follow.

Form C(3). Uniform Interrogatories to be Answered by Defendant Physicians in Medical Malpractice Cases Only: Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with *R.* 4:17-1(b)(3).

(Caption)

1. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. State the names and addresses of all consultants or other physicians who saw, examined and treated plaintiff at your request for the condition forming the basis of the complaint, and in relation to all such consultations or examinations by other physicians indicate:

    (a) the reason you requested consultations or further examination;

    (b) when the consultation or examination took place; and

    (c) all opinions or reports rendered to you by the consultant or examining physician [set forth the contents in detail].

16. …no change.

Certification

…no change.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 15(c) and certification amended July 28, 2004 to be effective September 1, 2004; interrogatory 15 (c) amended to be effective .

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to *R.* 2:5-3 — Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

The Criminal Practice Committee proposed an amendment to *R.* 2:5-3 that would limit the production of transcript requirement to a discrete pretrial motion when a defendant makes clear that the denial of a pretrial motion is the only issue being raised on appeal. After a discussion of whether this proposed rule amendment would affect civil matters or whether, in fact, it was necessary at all, the Committee agreed that the rules already provide for the abbreviation of a transcript on appeal and that the proposed rule amendment may create more problems than it would solve. Accordingly, the Committee determined that there was no need for the proposed rule change.

See Section I.P. of the 2006 Report of the Supreme Court Civil Practice Committee for proposed amendments to *R.* 2:5-3 that the Committee recommends, and Section II.D. for proposed amendments that the Committee does not recommend, and Section IV.A for a discussion of proposed amendments that were initially recommended and later withdrawn from consideration.

See also Section I.E. of this Report for a proposed rule amendment, which the Committee recommends.

B. Proposed Amendments to *R.* 2:6-11 —- Time for Serving and Filing Briefs; Appendices; Transcript; Notice of Custodial Status

An attorney noted that when the Supreme Court or the Appellate Division issues a briefing schedule specifying the dates on which briefs must be filed and served, the routine practice is to deliver the brief to the court on the appointed day but to mail same to the adversary by regular mail. Because *R.* 1:3-3 does not provide for an automatic three-day extension of time in these cases, a party may be placed under unnecessary time constraints, especially where the schedule has been expedited. To solve this problem, the attorney suggests that *R.* 2:6-11 be amended to clarify that filing and service must occur simultaneously and that mail service is unacceptable. In the alternative, orders containing the briefing schedule could contain similar language. The Committee noted that as a practical matter such an amendment was not necessary because case managers in the Appellate Division clerk's office routinely grant the three-day extension of time necessitated when the papers have been mailed. It was suggested and agreed to by the Committee that, in lieu of a rule amendment, a sentence should be added to the scheduling order stating that the time period begins to run from the date of service, not from the date of filing. Judge Pressler has notified the Acting Appellate Division Clerk of the Committee's suggestion.

III. MISCELLANEOUS MATTERS

A. Amendments to *R.* 4:24-2 — Motions Required to be Made During Discovery Period

The Conference of Civil Presiding Judges proposed amendments to *R.* 4:24-2 that would require motions to compel discovery or to impose or enforce sanctions for failure to provide discovery to be made returnable prior to the discovery end date. The rationale for the amendment was to preserve the discovery end date as the cut-off for the pre-trial preparation of civil case. The proposals were sent to the State Bar for review and comment. The State Bar opposed the amendments, taking the position that the motions should merely be required to be filed prior to the discovery end date. The Judicial Council and, subsequently, the Supreme Court approved the amendments as written; the Civil Practice Committee had not had the opportunity to review the proposed amendments prior to their being approved by the Court. When the amendments were presented to the Committee, some members agreed with the position taken by the State Bar, reasoning that attorneys may be relying on an adversary's promise to get discovery materials to them before the expiration of the discovery period and then are in a bad position if the adversary fails to do so. A compromise was suggested that would require such motions to be filed and served on or before the last day of the discovery period and be made returnable on the first motion day following the discovery end date. The Committee voted overwhelmingly in favor of this approach. Judge Pressler forwarded a proposed amendment incorporating the Committee's views to the Supreme Court.

IV. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to *R.* 1:2-1 — Proceedings in Open Court; Robes

A Superior Court judge had suggested that the following sentence be added after the next to last sentence of *R.* 1:2-1: "The terms of settlements shall not be sealed unless, for exceptional circumstance shown, the party seeking non-disclosure proves, by a preponderance of the evidence, that the interest in secrecy outweighs the presumption in favor of disclosure." The suggestion was prompted by an article in the New Jersey Law Journal on secret settlements. Because the issue of sealed settlements implicates the same policy concerns as that of protective orders, this matter was referred to the Protective Order subcommittee and will be considered by the subcommittee in the next term.

B. Proposed Amendments to *R.* 4:23-5 or *R.* 4:24-1 — re: Protection for the Non-Delinquent Party

A Committee member had noted that a delinquent party is permitted to vacate a dismissal without prejudice at any time before the entry of an order of dismissal with prejudice pursuant to *R.* 4:23-5(a). If the dismissal is vacated at or even after the end of the discovery period set by *R.* 4:24-1, the non-delinquent party has inadequate time in which to complete discovery and may even have insufficient time to make a motion for the extension of time. If the dismissal is vacated after an arbitration or trial date is fixed, it is questionable whether the failure of one party to fulfill discovery obligations in timely manner would constitute "exceptional circumstances" warranting an extension of time. The Committee member suggested that the non-delinquent party should be afforded some protection either by amending *R.* 4:23-5(a) to require the filing of a motion to vacate dismissal or suppression within a reasonable time period before the discovery end date or by amending *R.* 4:24 to afford the non-delinquent party a reasonable amount of time to conclude discovery when the discovery period has been substantially reduced as a result of the delinquency of the other party. This issue was referred to the Discovery Subcommittee to draft proposed amendments to both rules for consideration by the full Committee. The work of the subcommittee will be carried over to the next term.

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

An attorney who represents plaintiffs in medical malpractice and other complex personal injury cases requested that the Committee consider adding the alternative of videoconferencing for taking the deposition of out-of-state experts. He asserted that both alternatives presented in *R.* 4:14-7(b)(2) — paying the expert's expenses to appear in New Jersey or paying the expenses of defense attorneys to depose the witness out-of-state — are expensive and unnecessary, given the technology currently available. He suggested that the expert deposition set-up would include videoconference centers in New Jersey and at the expert's location, a court reporter at the expert's location, and document viewers in each conference center. He noted that he has used this method successfully, and cited the court's opinion in *Haynes v. Ethicon*, 315 *N.J.Super*. 338 (L.Div. 1998) as support for deposing an expert via videoconferencing. However, he claimed that even though the current rule grants the trial judge discretion to allow this approach, judges have generally rejected his proposal when the defense attorneys object. He urged the specific inclusion of the videoconferencing option as a means of saving time and money and increasing productivity.

The Committee considered this proposal and raised a number of issues, *e.g.* how to deal with documents, who should pay the expert's expenses if a party objects to videoconferencing, does videoconferencing an out-of-state expert subvert the policy of using in-state experts? It was decided to refer this issue to the Discovery Subcommittee in the next term to consider all the issues and develop a recommendation for the full Committee to consider.

D. Model Forms of Orders to Show Cause as Initial Process

The 2002 Report of the Conference of General Equity Presiding Judges on General Equity Standardization called for the development of standard provisions to be included in all orders to show cause used as original process. At the direction of the Judicial Council, the Conference of General Equity Presiding Judges conferred with other Presiding Judge Conferences and developed model orders to show cause for use in those divisions in which orders to show cause are used as original process. The Judicial Council has approved these forms for immediate use. The Supreme Court asked the Committee to draft and submit proposed amendments to the rules of the Court so as to include these forms in the Appendices to the Rules and to provide the necessary references to the existence of the forms in the relevant rules. While it was stressed that these are model forms setting forth the elements that must be included in any Order to Show Cause, some members of the Committee objected to the form and the language. There was specific concern with the use of these forms in probate matters. A Committee member volunteered to draft a more generic form that could be used across the Law and Chancery Divisions. The Committee was of the view, however, that there should be a separate form for probate matters. Accordingly, the drafting of new model forms for inclusion in the appendices to the rules will be carried over to the next term.

V. APPELLATE DIVISION RULES COMMITTEE REPORT ON PROPOSED AMENDMENT TO *R.* 2:8-1

REPORT OF APPELLATE DIVISION RULES COMMITTEE

The Appellate Division Rules Committee has not submitted a separate report regarding the proposed amendments to the appellate rules in prior years because its recommendations have been the same as those of the Civil Practice Committee. However, the Appellate Division Rules Committee disagrees with the recommendation in this year's Civil Practice Committee report that appellate courts should be required to issue a statement of reasons when deciding certain categories of motions. Therefore, the Committee is submitting a separate report setting forth its reasons for opposing this proposed rule amendment.

The Civil Practice Committee's proposed amendment to *Rule* 2:8-1(d) would require the Appellate Division and Supreme Court to issue a "statement of reasons" with respect to any determination of a motion seeking "(1) emergent or injunctive relief; (2) summary disposition; [or] (3) relief based on the Rules of Professional Conduct."

In opposing this proposed amendment, the Appellate Division Rules Committee notes initially that the Civil Practice Committee has not identified any other state or federal appellate court that is required to provide a statement of reasons in deciding certain categories of motions, and we are unaware of any jurisdiction that has adopted such a requirement. The Appellate Division decided approximately 514 applications for emergent relief and 177 motions for summary disposition last year. Assuming that the term "injunctive relief" in the rule proposal encompasses any application for a stay pending appeal, other than a stay of a money judgment,

the Appellate Division decided approximately 300 such motions last year. Therefore, the adoption of this rule proposal would impose a significant burden upon the court.

The Appellate Division Committee recognizes that some motion orders should be accompanied by a short statement of reasons for the ruling. However, a typical motion can be decided without such an explanation, and the unusual motions that require some explanation are not limited to the three categories identified in this rule proposal. For example, some applications for counsel fees for services rendered on appeal may present contested legal or factual issues that should be the subject of brief discussion. Therefore, the Committee believes that the determination whether an order disposing of an appellate motion should be accompanied by a statement of reasons should continue to be left to the court's sound discretion.

The Committee also considers it appropriate to comment upon the three categories of motions in which statements of reasons would be required under the Civil Practice Committee's rule proposal. Applications for emergent relief are made in a great variety of circumstances, including not only motions for stay or bail pending appeal, but also motions to secure interlocutory review of the grant or denial of injunctive relief, the denial of applications for adjournments of trials, evidence rulings during trial and similar pre-trial matters. The most common form of disposition of an application for emergent relief is simply denial of a motion for leave to appeal, which reflects the court's conclusion that, in the words of the court rule, "the interest[s] of justice" do not require interlocutory review. *R.* 2:2-4. It is difficult to envision what additional reasons the court could provide for the denial of a motion for leave to appeal.

If the term injunctive relief in the proposed new rule encompasses stays pending the outcome of an appeal, other than stays of money judgments, the standards that govern such a motion "are the same as those applicable to the trial court, requiring a balancing of the equities

including the factors of irreparable harm, existence of a meritorious issue and the likelihood of success." Pressler, Current N.J. Court Rules comment 1 on R. 2:9-5 (2006). Therefore, a statement of reasons for granting or denying a stay pending appeal would necessarily include discussion of the merits of the appeal, which would impose a significant burden upon the court. We also note that the members of an appellate court may not vote to grant or deny a stay for the same reasons. Therefore, if this requirement were imposed, there could be a need in some cases for separate statements of reasons by different members of the court.

The summary disposition rule (*R*. 2:8-3(b)) "is intended to provide a pre-transcript, pre-argument opportunity for the screening out of appeals whose ultimate outcome is so clear as not to require full perfection and hearing for decision." Pressler, *supra*, comment 2 on *R*. 2:8-3. Therefore, the denial of a motion for summary disposition simply indicates that the questions presented are not so patently insubstantial that disposition under this rule would be appropriate. The grant of such a motion and summary affirmance is ordinarily limited to cases that otherwise would be suitable for disposition under *R*. 2:11-3(e)(1)(E), which provides that if "the arguments made are without sufficient merit to warrant discussion in a written opinion; … the judgment or order under appeal may be affirmed without opinion." Summary reversals under the rule are relatively unusual and would be accompanied by a brief statement of reasons under current practice.

The third category of motion for which the court would be required to provide a statement of reasons under the rule proposal — motions for "relief based upon the Rules of Professional Conduct" — appears to be directed at motions relating to disqualification of counsel. Such matters are ordinarily presented to the Appellate Division by a motion for leave to appeal a trial court order granting or denying a motion to disqualify opposing counsel. If leave

to appeal is denied, this disposition simply reflects the court's determination that "the interest[s] of justice" do not require interlocutory review. *R*. 2:2-4. If leave to appeal is granted, the case will be calendared and eventually decided by an opinion that includes a statement of the reasons for affirming or reversing the trial court's order.

In sum, there is no need for a statement of reasons to accompany every order disposing of the categories of motions identified in the rule proposal, and such a requirement would impose a significant burden upon the appellate courts. Therefore, the Committee believes that the determination whether a motion order should be accompanied by a statement of reasons should continue to be left to the sound discretion of the court.

The Appellate Division Rules Committee concurs with the Civil Practice Committee's other recommendations relating to amendments to the appellate rules.

Respectfully submitted,
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Hon. Erminie L. Conley, P.J.A.D.
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Dated: March 7, 2006

Respectfully submitted,

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APPENDIX A

Attachment I.C.3
1/9/06

REPORT OF THE DISCOVERY SUBCOMMITTEE ON PROPOSED RULE CHANGES REGARDING ELECTRONICALLY STORED INFORMATION

November 2005

A. Background.

The Subcommittee was asked whether New Jersey should amend its Rules to include some or all of the proposed changes to the Federal Rules of Civil Procedure regarding discovery of electronically stored information ("ESI"). The Federal Rule revisions will likely become effective on December 1, 2006 and are annexed hereto. The Subcommittee met twice. It reviewed the Report of the Civil Rules Advisory Committee dated May 19, 2004, revised and published August 2004, and the post-publication revisions of May 27, 2005 (revised July 25, 2005). It engaged in discussions about the Federal rule revisions and about Federal case law, particularly the series of opinions in Zubulake v. UBS Warburg, LLC[1] in which the District Court held that electronic data in the form of deleted emails residing in backup disks were discoverable as a "document" under FRCP 34 and ultimately imposed an adverse inference instruction as a sanction for spoliation of ESI. The Zubulake opinions are informative on the issues, costs, and practical problems arising out of discovery of ESI.

The Subcommittee discussed whether New Jersey should engraft the language of the proposed Federal Rules onto its Rules now or wait and see what the Federal experience is. The Subcommittee recommends that the New Jersey Rules be amended to parallel the Federal Rules regarding discovery of ESI.

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[1] Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 2003 U.S. Dist. LEXIS 7939, 2003 (S.D.N.Y. 2003) ("Zubulake I") (addressing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); Zubulake v. UBS Warburg, LLC, 2003 U.S. Dist. LEXIS 7940, No. 02 Civ. 1243 (S.D.N.Y. May 13, 2003) ("Zubulake II") (addressing Zubulake's reporting obligations); Zubulake v. UBS Warburg LLC, 216 F.R.D. 280 (S.D.N.Y. 2003) ("Zubulake III") (allocating backup tape restoration costs between Zubulake and UBS); Zubulake v. UBS Warburg, LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) ("Zubulake IV") (addressing duty to preserve, spoliation, and remedies or sanctions for spoliation); Zubulake v. UBS Warburg LLC, 2004 U.S. Dist. LEXIS 13574, No. 02 Civ. 1243 (S.D.N.Y. July 20, 2004) ("Zubulake V") (holding that an adverse inference instruction is appropriate remedy for the willful destruction of potentially relevant e-mails).

B. ESI is unique.

Increasingly, businesses, governments, and individuals create, store, view, review, and dispose of information in electronic form. The Internet enables information to be transmitted world-wide in seconds. Electronic discovery is the collection, preparation, review, and production for litigation purposes of ESI. ESI is any material that is stored in an electronic format, including, but not limited to, word processing documents, video and audio files, spreadsheets, presentations, email, web pages, voicemail, and text messages. ESI may be stored on a computer, a computer network, a backup tape or disk, a hard drive, flash drive, or other electronic media storage device.

ESI is dynamic: it can be changed, deleted, or corrupted in the process of retrieving it. ESI can contain metadata, which gives information about the creation, revision, distribution, and structure of the document, and can contain embedded information which shows prior drafts. ESI is stored in a variety of formats and is often unorganized with no standards or uniformity among employees, departments, or locations within a business or organization. Record retention systems regularly record over digital information. Record retention policies applicable to paper documents do not work for ESI because of the duplication of ESI in a number of storage devices and/or locations and because ESI that is thought to be deleted or destroyed sometimes can be recovered, albeit at substantial cost.

ESI is voluminous and expensive to review. The Manual for Complex Litigation (4^{th}) §. 11.446 ("Manual") is cited in the Committee Note to the proposed amendment to Federal Rule 26(b)(2):

> The sheer volume of such data, when compared with conventional paper documentation, can be staggering. A floppy disk, with 1.44 megabytes, is the equivalent of 20 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in

terabytes, or 1,000,000 megabytes: each terabyte represents the equivalent of 500 billion typewritten pages of plain text.

The volume of ESI significantly impacts the cost of discovery. The time and cost of document review can be controlled by narrowing the scope of the request by date, time or time window, person, department, document type and by agreement between the parties on search terms. The assistance of those familiar with the client's technology systems is essential to a meaningful conference on ESI production or disclosure.

Relevant ESI, like documents, must be preserved when a specific litigation is commenced or anticipated. Zubulake IV addressed a party's duty to preserve:

> Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (e.g., those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (i.e., actively used for information retrieval), then such tapes would likely be subject to the litigation hold. . . . [O]ne exception to this general rule [is,] if a company can identify where particular employee documents are stored on backup tapes, then the tapes storing the documents of "key players" to the existing or threatened litigation should be preserved if the information contained on those tapes is not otherwise available. This exception applies to all backup tapes.

[Id. at 218].

C. Proposed Changes in Federal Rules regarding ESI.

1. Early Attention to Electronic Discovery issues:

Rule 16(b), Rule 26(a)(1)(B), Rule 26(f), and Form 35.

The Federal rule changes add to the early 'meet and confer' requirement of **Rule 26(f)** that counsel address issues regarding discovery of ESI early in the litigation and clarify a party's duty to include ESI in initial disclosures. The subjects to be discussed by counsel at the **Rule 26(f)** conference include the form(s) of production of ESI, the preservation of discoverable information, and consideration of an agreement regarding the assertion of privilege or work-product protection for documents inadvertently produced or produced prior to a complete privilege review ("claw back" or "quick peek" arrangements). Agreements reached by counsel are reported to the court at the initial **Rule 16** Conference and may, at the request of the parties, be incorporated into a court order. The language of **Rule 26(f)(4)** was revised due to concern that parties might be misled over the effectiveness of protective orders with respect to claims of waiver by third parties, which claims are governed by the substantive law in the relevant jurisdiction.

The Committee Note to **Rule 26** has been revised to address the concern that the early discussion of preservation issues may provoke requests for the court to issue early preservation orders which, if broadly issued, could lead to excessive jockeying for later sanctions applications. The revised Note states "The requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in extraordinary circumstances."

2. Two Tiered Discovery Based on Accessibility: Rule 26(b)(2).

Rule 26(b)(2) is supplemented to designate existing paragraphs as **(b)(2)(A)** and **(C)** and to create a new section **(b)(2)(B). Rule 26(b)(2)(B)** allows a responding party to withhold ESI from sources that it identifies as not reasonably accessible because of undue burden or expense. Examples of inaccessible ESI include deleted information capable of restoration through forensics; backup tape systems intended for disaster recovery; legacy data contained within systems no longer in use.

The Committee Note states that "the responding party must identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide

enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources." If a requesting party files a motion to compel the production of information withheld as not reasonably accessible, the burden is on the responding party to demonstrate to the court that production of the identified ESI is burdensome, i.e. expensive or difficult to access and retrieve. The rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems.

Rule 26(b)(2)(B) incorporates the limitations of **26(b)(2)(C)** which call for a balancing of the burden and cost against the availability of other sources and the importance of the information sought.

3. Procedure for Asserting Claims of Privilege and Work Product Protection After Production of ESI - Rule 26(b)(5).

Privilege review of ESI is time-consuming and difficult because of its sources, volume, and disorganization. **Rule 26(b)(5)** is amended to include a new subsection **(B)** which provides a procedure for asserting claims of privilege and work product protection after ESI or any documents have been produced. The existing Rule contains a procedure, now designated subsection **(A)**, for a party who has withheld production of information to assert a claim on the basis of privilege or work-product protection. The revised Rule provides a procedure, designated subsection **(B)**, for a party who has already produced information to assert a claim on the basis of privilege or work-product protection and to obtain a freeze of the status quo until the court can review the claim. Pursuant to subsection **(B)**, a party asserting a claim of privilege or protection after production must give written notice to the receiving party of the claim and its basis. The receiving party must promptly return, sequester, or destroy the specified information. If the information has been disseminated, the receiving party must make reasonable efforts to retrieve it. The receiving party may present the information to the court under seal and seek a determination of the claim of privilege or protection.

4. Interrogatories and Requests for Production Involving ESI:

Rule 33 and Rule 34(a) and (b)

a. Definition of Business Records Includes ESI – Rule 33

Revised **Rule 33, Interrogatories to Parties,** adds ESI to the business records which must be produced or made available to the requesting party.

b. Definition of ESI Separate from Documents – Rule 34(a)

The Advisory Committee recognized the sound bases for two different ways of treating ESI: first, that ESI is a subset of documents and, second, that ESI is dynamic and different from a document. The Advisory Committee considered input from experts and determined to be technologically progressive in distinguishing documents from ESI in **Rule 34(a).**

Revised **Rule 34**, Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes, adds ESI to the documents and things which must be produced by a party. The subsection **(a)** amendment establishes a requesting party's right to test and sample ESI. The subsection **(b)** amendment sets forth the requesting party's right to request the form(s) in which ESI is produced. If the responding party objects to the requested form, or if no form was specified in the request, the responding party must state the form(s) it intends to use. An objection to the form(s) may be the subject of motion practice under **Rule 37(a).** Proposed subsection **(b)(ii)** provides that, unless the parties otherwise agree or the court otherwise orders, if the request does not specify the form(s) in which ESI is to be produced, the responding party must produce it in a form(s) in which it is ordinarily maintained or reasonably usable. Subsection **(iii)** makes clear that a party need not produce the same ESI in more than one form.

5. Safe Harbor: Sanctions for Certain Types of Lost ESI: Rule 37(f).

This rule addresses the loss of information due to the routine operation of electronic information systems. The rule provides a safe harbor protection against sanctions when ESI cannot be produced because the information is lost as a result of the routine operation of an ESI system, as long as the operation is in good faith. The rule

allows for sanctions for loss of information in good faith, routine operation in "exceptional circumstances."

D. Treatment of ESI by Other States.

Texas, California, and Mississippi have state court rules regarding electronic discovery. The Texas rule refers to "electronic or magnetic data." The rule makes clear that the burden is on the requesting party to specify the information sought and the form of production. The responding party must produce responsive data that is "reasonably available" in the ordinary course of its business. If the responding party cannot retrieve the data through "reasonable efforts" or cannot produce the data in the form requested, the responding party must state an objection. If the court orders the responding party to comply with the request, "the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information."

Mississippi's Rule 26, General Provisions Governing Discovery, is similar to NJ Rule 4:10-2, Scope of Discovery. In 2003, Mississippi amended this rule to add a new subsection (5) Electronic Data. The language of the rule is similar to that of Texas, except that the Mississippi rule is permissive rather than mandatory regarding the requesting party's payment of reasonable expenses of extraordinary steps required to retrieve and produce the information.

The California Code Section 2017.710 provides for discovery of "technology" in complex cases. The term "technology" includes, but is not limited to, "telephone, e-mail, CD-ROM, Internet Web sites, electronic documents, electronic document depositories, Internet depositions and storage, videoconferencing, and other electronic technology that may be used to improve communication and the discovery process." Section 2017.730 limits the cases in which an order for technology discovery may be entered. The rule does allow parties in an otherwise unauthorized case to stipulate to the entry of a technology discovery order. The order may be entered only upon the express findings of the court or stipulation of the parties that the procedures adopted in the order for technology discovery meet all of the following criteria:

(1) They promote cost-effective and efficient discovery or motions relating thereto.
(2) They do not impose or require an undue expenditure of time or money.
(3) They do not create an undue economic burden or hardship on any person.
(4) They promote open competition among vendors and providers of services in order to facilitate the highest quality service at the lowest reasonable cost to all litigants.
(5) They do not require the parties or counsel to purchase exceptional or unnecessary services, hardware, or software.

E. New Jersey Court Rules.

1. New Jersey Rules Do Not Provide Mandatory Early Attention to Discovery in All Cases.

The Federal Rules provide for mandated court-supervised discovery with the early meet and confer required under **Rule 26(f)** and the initial court conference under **Rule 16.** New Jersey **R. 4:5B, Case Management; Conferences,** provides for a designated managing judge in all Track I, II, III, and IV cases. Case management conferences ("CMC") occur as follows:

Track I, II, III cases	CMC may be conducted at the discretion of the managing judge or at the request of a party.
Track IV (except for actions in lieu of Prerogative Writs, probate, and general equity)	CMC is mandatory. **R.4:5B-2** requires an initial management conference as soon as practicable after joinder and, absent exceptional circumstances, within 60 days thereafter.
Actions in lieu of Prerogative Writs	CMC is mandatory. **R.69-4** requires an initial management conference within 30 days of joinder.
Probate	CMC may be conducted at the discretion of the judge. **R. 4:5B-2**
General Equity	CMC is mandatory. **R.4:5B-2** requires An initial management conference within 30 days of joinder.
Professional Malpractice Cases	A special CMC to review Affidavit of Merit issues is mandatory. It must be held within

90 days of the filing and service of answer. Ferreira v. Rancocas Orthopedic, 178 N.J. 144 (2003)

Except in those cases in which CMC are mandatory, it is difficult to address ESI preservation and production issues at an early stage. The discovery of ESI should be addressed early on in those cases in which a judge conducts either mandatory or discretionary management conferences. **R. 4:5B2** allows a designated pretrial judge sua sponte or on a party's request to "conduct a case management conference if it appears that such a conference will assist discovery, or otherwise promote the orderly and expeditious progress of the case." As set forth below, **R. 4:5B-2** should be amended to include discovery of ESI as a reason to conduct an early Case Management Conference, consistent with proposed **Federal Rule 26,**

2. New Jersey R. 4:18-1

R.4:18-1, Production of Documents and Things, includes within its scope "writings, drawings, graphs, charts, photographs, phono-records, and other data compilation from which information can be obtained and translated, if necessary, by the respondent through electronic devices into reasonably usable form....

The term 'phono-records' is a dated term. As set forth below, **R.4:18-1** should be redrafted to utilize the term ESI and to follow the carefully drafted revision to **Federal Rule 34**

E. Recommendations.

1. The Subcommittee recommends amending the New Jersey Rules to adopt the language and structure of the proposed Federal Rules: the term "electronically stored information;" the two-tier plan for production of ESI depending on its accessibility; the form of production of ESI; a procedure for protection of privileged and protected material produced either inadvertently or prior to review; and safe harbor from sanctions for ESI lost in the routine and good faith operation of the system. The proposed Federal Rules are well-researched and clearly written. The New Jersey Rules should parallel the Federal Rules and tap into the experience and case law available at the Federal level.

2. The Subcommittee recommends that **R. 4:5B-2** be amended to include discovery of electronically stored information as a reason to conduct an early Case Management Conference.

3. The Subcommittee recommends that **R. 4:10-2(a)** be amended to add the term "electronically stored information" to the list of things generally discoverable.

4. The Subcommittee recommends that **R. 4:18-1** be amended to add the term "electronically stored information" to the list of documents and things subject to production.

Attached:

Federal Rule Amendments

PROPOSED AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION

Civil Rule 16 (Pretrial Conferences; Scheduling; Management) (establishes process for the parties and court to address early issues pertaining to the disclosure and discovery of electronic information)

Civil Rule 26 (General Provisions Governing Discovery; Duty of Disclosure) (requires parties to discuss during the discovery-planning conference issues relating to the disclosure and discovery of electronically stored information)

Civil Rule 33 (Interrogatories to Parties) (expressly provides that an answer to an interrogatory involving review of business records should involve a search of electronically stored information)

Civil Rule 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes) (distinguishes between electronically stored information and "documents")

Civil Rule 37 (Failure to Make Disclosure or Cooperate in Discovery; Sanctions) (creates a "safe harbor" that protects a party from sanctions for failing to provide electronically stored information lost because of the routine operation of the party's computer system)

Civil Rule 45 (Subpoena) (technical amendments that conform to other proposed amendments regarding discovery of electronically stored information)

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) Scheduling and Planning. Except in categories of actions exempted by district court rule as inappropriate, the district judge, or a magistrate judge when authorized by district court rule, shall, after receiving the report from the parties under Rule 26(f) or after consulting with the attorneys for the parties and any unrepresented parties by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file motions; and

(3) to complete discovery.

The scheduling order also may include

(4) modifications of the times for disclosures under Rules 26(a) and 26(e)(1) and of the extent of discovery to be permitted;

(5) provisions for disclosure or discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production;

(75) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(86) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in any event within 90 days after the appearance of a defendant and within 120 days after the complaint has been served on a defendant. A schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge.

Rule 26(a)

The Committee recommends approval of the following amendment:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) ***Initial Disclosures.*** Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise

*Changes from the proposal published for public comment shown by double-underlining new material and striking through omitted matter.

stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, electronically stored information, ~~data compilations~~, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

Rule 26(f)

The Committee recommends approval of the following amendments to Rule 26(f).

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(f) **Conference of Parties; Planning for Discovery.** Except in categories of proceedings exempted from initial disclosure under Rule 26(a)(1)(E) or when otherwise ordered, the parties must, as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b), confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, to make or arrange for the disclosures required by Rule 26(a)(1), to discuss any issues relating to preserving discoverable information, and to develop a proposed

discovery plan that indicates the parties' views and proposals concerning:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement as to when disclosures under Rule 26(a)(1) were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused upon particular issues;

(3) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues relating to claims of privilege or of protection as trial-preparation material, including — if the parties agree on a procedure to assert such claims after production — whether to ask the court to include their agreement in an order;

(53) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(64) any other orders that should be entered by the court under Rule 26(c) or under Rule 16(b) and (c).

Form 35

The Committee recommends conforming changes in Form 35, the parties' report to the court of their discovery plan.

Form 35. Report of Parties' Planning Meeting

* * * * *

3. Discovery Plan. The parties jointly propose to the court the following discovery plan: [Use separate paragraphs or subparagraphs as necessary if parties disagree.]

38 FEDERAL RULES OF CIVIL PROCEDURE

Discovery will be needed on the following subjects: _____ (brief description of subjects on which discovery will be needed)_____

Disclosure or discovery of electronically stored information should be handled as follows: _____(brief description of parties' proposals)_____

The parties have agreed to an order regarding claims of privilege or of protection as trial-preparation material asserted after production, as follows: (brief description of provisions of proposed order)

All discovery commenced in time to be completed by _____(date)_____. [Discovery on _____(issue for early discovery)_____to be completed by _____(date)_____.]

Rule 26(b)(2)

The Committee recommends approval of the following amendment:

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(2) Limitations.

(A) By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) A party need not provide discovery of electronically stored information from sources that the party identifies

as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the

amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

Rule 26(b)(5)(B)

The Committee recommends approval of the following proposed amendment.

Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

* * * * *

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by

claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(B) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must

take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Rule 33

The Committee recommends approval of the following amendment:

Rule 33. Interrogatories to Parties

* * * * *

(d) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, <u>including electronically stored information,</u> of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries. A

specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34

The Committee recommends the following rule amendment and accompanying Committee Note:

Rule 34. Production of Documents, Electronically Stored Information, and Things and Entry Upon Land for Inspection and Other Purposes

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, and copy, test, or sample any designated documents or electronically stored information — (including writings, drawings, graphs, charts, photographs, sound recordings, images phonorecords, and other data or data compilations stored in any medium from which information can be obtained; — translated, if necessary, by the

respondent ~~through detection devices~~ into reasonably usable form), or to inspect, and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) **Procedure.** The request shall set forth, either by individual item or by category, the items to be inspected, and describe each with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced. Without leave of court or written stipulation, a request may not be served before the time specified in Rule 26(d).

The party upon whom the request is served shall serve a written response within 30 days after the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, ~~in which event~~ stating the reasons for the objection ~~shall be stated~~. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information – or if no form was specified in the request – the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) ~~A~~a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(iii) a party need not produce the same electronically stored information in more than one form.

The Proposed Rule and Committee Note

Rule 37(f)

The Committee recommends approval of the following proposed amendment:

Rule 37. Failure to Make Disclosures or Cooperate in Discovery; Sanctions

* * * * *

(f) **Electronically stored information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The Proposed Rule and Committee Note

Rule 45

The Committee recommends approval of amendments to Rule 45 that incorporate the corresponding changes made to the discovery rules.

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, and copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(2)* A subpoena must issue as follows:

* * * * *

(C) for production, and inspection, copying, testing, or sampling, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

*Amendments to subdivision (a)(2) are due to take effect on December 1, 2005.

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any

place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection, copying, testing, or sampling specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection, copying, testing, or sampling specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in Title 28, U.S.C. § 1783.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection, and copying, testing, or sampling of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection, and copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for

compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing ~~inspection or copying~~ of any or all of the designated materials or inspection of the premises ~~—~~ or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, and copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel ~~production~~ shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and, copying, testing, or sampling commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; ;or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies;; or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) (A) A person responding to a subpoena to produce documents shall produce them as they are kept in the

usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the

requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) (A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving

party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

(e) **Contempt.** Failure by of any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a ~~non-party~~ nonparty to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

APPENDIX B

September 2, 2005

REPORT OF THE CLASS ACTION SUBCOMMITTEE OF THE CIVIL PRACTICE COMMITTEE ON PROPOSED CHANGES TO THE CLASS ACTION RULE

INTRODUCTION

This Subcommittee was created in early 2004, immediately after the December 2003 amendments to Rule 23 of the Federal Rules of Civil Procedure. It was charged with recommending whether parallel changes should be made to New Jersey's largely parallel class action rule, R. 4-32. Although it was too late in the Civil Practice Committee's two-year cycle for the Subcommittee to complete its work in time for a Spring 2004 report, the Subcommittee was asked to begin its work with the recognition that its work would span two separate Civil Practice Committee two-year cycles.

The Subcommittee sought and obtained the input of the New Jersey State Bar Association ("NJSBA") Class Action Committee, a group of experienced class action practitioners representing both the plaintiff and defense side of the class action field. After the NJSBA Committee deliberated on the proposed changes and held a program at the May 2004 NJSBA Annual Meeting on the proposed changes, the bar committee members were invited to a meeting with the Subcommittee held on June 30, 2004 in the courtroom of then Judge Marina Corodemus, who also provided input based upon her considerable class action experience. The state bar committee thereafter submitted a formal report to the Subcommittee on January 4, 2005, a copy of which is attached hereto as Exhibit A.

The Subcommittee was reconstituted in the fall of 2004 in light of the new composition of the Civil Practice Committee and it continued its deliberations. In light of a perceived

deficiency on the Subcommittee of an experienced practitioner on the plaintiff's side, the Subcommittee membership was supplemented by the addition of a leading plaintiff's class action practitioner. Throughout its deliberations, the Subcommittee also had the benefit of a member who closely monitored the process by which Fed. R. Civ. P. 23 came to be amended on behalf of the ABA Section of Litigation's Class Actions and Derivative Suits Committee. That member currently serves as the ABA Section of Litigation's liaison to the U.S. Judicial Conference Advisory Committee on Civil Rules. The Subcommittee also received the input of the full Civil Practice Committee throughout its deliberations.

An additional comment should be made about the important role in these recommendations played by the Subcommittee's very able chair, the Honorable Charles J. Walsh, whose untimely death did not permit him to see this final report. He strongly supported the views expressed herein and was instrumental in guiding the Subcommittee through the completion of its work. This report is a small tribute to his leadership and his loss will be felt by all those involved in the Rules evaluation process.

SUMMARY OF RECOMMENDATIONS

The Subcommittee considered not only the December 1, 2003 changes to Rule 23, but also discussed the 1998 amendment adding Rule 23(f) regarding interlocutory appeals.[1] The Subcommittee recommends the adoption of all of these changes as part of Rule 4:32. Together, these rule changes consist of the only substantive changes to Rule 23 made in 40 years since Rule 23 was adopted in its current form in 1966. These federal changes were the subject of exhaustive study and public comment. They were the subject of voluminous public written submissions and numerous public hearings.

[1] Attached as Exhibit B is a copy of the December 2003 changes to Rule 23. The text of Rule 23(f) appears later in this Report.

The federal rule changes were designed to be primarily procedural in nature and provide greater support to litigators and judges engaged in the process of litigating and presiding over class actions. Many do not change existing practice, but set forth "best practices" already followed by judges with extensive experience with class action cases. In many instances they contain more detail than is currently contained in the existing rule and provide useful guidance to those less experienced in the class action area.

Most of the changes were not controversial. Two were more controversial and were not supported by the NJSBA Committee, one described as the opportunity for a second opt-out and the other providing for discretionary interlocutory appeals of the class certification decision. As to the former, the NJSBA Committee believed that the second opt-out opportunity, which could be required in the discretion of the trial judge, could potentially lead to greater difficulties in achieving settlements and allow greater opportunity for the settlement process to be manipulated by potential objectors. In contrast, this Subcommittee believes that the opportunity for a second opt-out is merely an additional discretionary tool for use by the trial court to insure fairness in class action settlements, that it will not cause problems in most cases and that benefits are achieved by paralleling the federal rule structure.

With respect to discretionary interlocutory appeals of the class certification decision, the NJSBA Committee was split on the adoption of a parallel to Rule 23(f), not because it was not deemed important to have early appellate review of class certification decisions, but because there was uncertainty as to whether it was needed in New Jersey in view of the existing Rule provisions providing for motions for leave to appeal. The Subcommittee believes a parallel to Rule 23(f) should be adopted to recognize the unique and critical nature of the class certification

decision in the life of a class action and to also permit citation to the developing body of federal law on when such appeals should be allowed.

DISCUSSION OF SPECIFIC CHANGES

The specific changes are cogently summarized in the attached NJSBA Class Action Committee Report and, with the exception of the two provisions over which there are differences of opinion, the Subcommittee agrees with the evaluations contained therein and sees no need to repeat that discussion. A more detailed discussion of the two changes over which there is some difference of opinion follows:

Second Opt-Out

The proposed change would add the following language to Rule 4:32-4:

> (3) In an action previously certified as a class action under Rule 4:32-1(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

This language would give the trial court discretion, in appropriate circumstances, to condition the approval of a settlement on requiring a notice of the settlement terms, along with the right to opt out of the class, to be sent to the class even when the class has been previously certified and the class members had been given a prior right to opt out. The proposed change provides the court discretion to address the dichotomy between class members' rights when settlement occurs after or before class certification.

Under existing practice, when a (b)(3) damage class is certified during a litigation, potential class members are given notice of the pendency of the action and provided an opportunity to opt out of the class. They must make the decision before they know how the case will turn out. If they do nothing, they are included in the class and bound by the ultimate

resolution of the action, whether it be a dismissal of the claims, judgment against the defendant or a settlement. If the case is resolved through a settlement subsequent to the class certification notice, those who did not previously opt out and become part of the class receive notice of the settlement and may object to the fairness of the settlement. But they have no right to opt out.

Many cases are settled however before the class certification decision and the parties jointly ask the court to certify a class for settlement purposes and approve the settlement. In such instances if the court certifies the class, the notice of the pendency of the class action is combined with the notice of the settlement. The potential class members have the opportunity to opt out after seeing the terms of the settlement. The proposed rule change gives the trial court discretion to put all class members on an equal footing by permitting them the opportunity to see the terms of a settlement before they determine whether to opt out of its terms, regardless of whether notice was previously given of the pendency of the class. The federal proposal at first required the second opt out opportunity whenever a settlement was reached after a notice of pendency had been issued but as a result of objections received, the final rule change provides discretion with the trial court to condition a settlement approval on providing a second opt out opportunity.

The NJSBA Class Action Committee, like many bar groups that addressed the federal rule change during the public comment period, opposed the change. The expressed concern was that if courts were to routinely grant class members this right for a second opt-out, it would make cases harder to settle and make the settlement process subject to manipulation by objector's counsel who might be seeking to be bought off by making trouble. The provision was criticized as adding uncertainty, potentially increasing cost and emboldening objectors.

While the Subcommittee members initially had differing views on this provision, it believes that on the whole, the change is worth making. Another change gives the courts greater power to deal with unscrupulous objectors by requiring court approval of the withdrawal of objections. Settling parties still have a right to protect proposed settlements from excessive opt-outs by agreeing to a confidential "blow provision" which allows a defendant to cancel a settlement if a pre-agreed threshold of opt-outs is reached. The proposed addition to the rule gives the trial court an added tool to exercise in its discretion to insure the fairness of a settlement by providing class members an opportunity to opt out when they see the terms of the proposed settlement. We doubt this provision will be frequently used and have been presented with no horror stories that have occurred by its use since the enactment of the federal rule changes. However, now that the federal provisions have gone into effect, we see no reason to afford New Jersey judges fewer tools to insure the fairness of class action settlements. Uniformity between the federal and state systems of course provides the additional advantage of making federal caselaw available for guidance.

Interlocutory Appeals Of The Class Certification Decision

After years of study and a public comment period that resulted in the rejection of most of the proposed changes to the federal class action rule then being considered, in 1998 the federal courts adopted Rule 23(f) providing for discretionary interlocutory appeals of the decision granting or denying class certification at the discretion of the court of appeals. Rule 23(f) provides:

> A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The rationale behind the rule is that the class certification decision is clearly the most critical decision in a class action, and without the opportunity to have prompt review, the losing party may be forced to either settle the case or abandon the claims. From the plaintiff's perspective, without class certification there may not be enough at stake to justify proceeding to trial, just in the hope of getting the class certification decision reversed upon appeal after entry of final judgment. Similarly, from the defendant's perspective, particularly with the stakes of potential ruinous or bet-the-company exposures, unless the class certification decision can be promptly addressed upon appeal, a company may be forced to settle relatively weak claims simply to avoid subjecting the company to the risk of a huge adverse judgment. Under Rule 23(f), leave to appeal is completely discretionary with the court of appeals, a motion for leave to appeal the grant or denial of the class certification decision must be filed promptly (within 10 days), and there is no stay in the trial court unless otherwise ordered.

Since the enactment of Rule 23(f), a number of circuit courts have established standards for when they will grant leave for interlocutory appeal under Rule 23(f). *See, e.g., Blair v. Equifax*, 181 F.3d 832 (7th Cir. 1999) (while neither bright-line approach nor catalog of factors would serve well, appeals ordinarily permitted when (1) denial of class status effectively ends case; (2) grant of class status raises stakes so substantially that defendant likely will feel irresistible pressure to settle; and (3) it will lead to clarification of fundamental issue of law); *Hevisi v. Citigroup*, 366 F.3d (2d Cir. 2004) (petitioner must demonstrate either (1) that certification order will effectively terminate litigation and district court's decision is questionable or (2) that order implicates legal question about which there is a compelling need for immediate resolution); *In re Sumitomo Copper Litig.*, 262 F.3d 134, 140 (2d Cir. 2001) (same); *Newton v. Merrill Lynch*, 259 F.3d 154, 165 (3d Cir. 2001) (appeal granted if it would allow court to

address (1) possible case-ending effect of imprudent class certification decision; (2) an erroneous ruling, or (3) facilitate development of the law on class certification). *See also In re Delta Airlines*, 310 F.3d 953 (6th Cir. 2002); *Lorazepam & Clorazepate Antirust Litigation*, 289 F.3d 98, 100 (D.C. Cir. 2002); *Lienhart v. Dryrit Systems. Inc.*, 255 F.3d 138 (4th Cir. 2001); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1274-76 (11th Cir. 2000); *Waste Management Holdings v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000).

The question before the Subcommittee is not whether providing the opportunity for discretionary interlocutory appeals of the class certification decision is desirable, which it clearly is, but whether it is necessary in our system in view of our existing rules permitting discretionary interlocutory appeals. The NJSBA Class Action Committee was divided on the issue. It is the Subcommittee's view that a state equivalent of Rule 23(f) should be added (adjusting the time period to 15 days to conform to existing practice). Such a change would recognize the unique nature of the class action decision, would make available the substantial body of developing federal law on when to grant such applications and would foster the development of New Jersey caselaw on when to grant interlocutory appeals of the class certification decision. New Jersey has long maintained a parallel structure between its class action rule and the federal rule and the subject of when to grant interlocutory appeals of class certification decisions is too important to be left out of the parallel structure.

CONCLUSION

For the reasons stated above and for the additional reasons contained in the attached NJSBA Class Action Committee Report as to the subjects not specifically addressed above, we recommend that the Civil Practice Committee suggest revisions to Rule 4:32 to adopt all of the 2003 amendments to Rule 23 as well as the 1998 amendment that added Rule 23(f) regarding

interlocutory appeals. They reflect best practices utilized by the most experienced courts and will better inform practitioners and courts of what is expected in addressing class actions. They formalize procedures for approving class action settlements, addressing class certification issues, notice issues, dealing with objectors, appointing class counsel and approving attorney fee awards. Parallel changes will also make available the fulsome Advisory Committee Notes and the federal case law to serve as additional guidance. Adopting these changes will also provide for greater consistency in procedures regardless of whether a class action proceeds in state court or is brought in or removed to federal court under the Class Action Fairness Act of 2005 or other federal statutes.

Respectfully submitted,

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January 4, 2005

REPORT OF THE NJSBA CLASS ACTION COMMITTEE ON PROPOSED CHANGES TO THE CLASS ACTION RULE

INTRODUCTION

The New Jersey State Bar Association ("NJSBA") Class Action Committee (the "Committee") was asked by the Class Action Subcommittee of the Supreme Court of New Jersey's Civil Practice Committee to provide its views on whether New Jersey should amend its class action rule, R. 4-32, to adopt some or all of the recently enacted changes to Rule 23 of the Federal Rules of Civil Procedure, the federal class action rule. The Committee consists of experienced practitioners who regularly prosecute and defend class actions; it is composed of those who regularly practice on the plaintiff's side and those who regularly practice on the defense side.

The Committee met to discuss the changes and thereafter sponsored a program at the NJSBA Annual Meeting in May 2004 to further discuss the proposed rule changes. The Committee was thereafter invited to a joint meeting with the Class Action Subcommittee of the Civil Practice Committee held on June 30, 2004 in the courtroom of Judge Marina Corodemus. The Committee discussed not only each of the recent changes to Federal Rule 23, which changes became effective December 1, 2003, but also discussed the 1998 amendment adding Rule 23(f) regarding interlocutory appeals. The results of those discussions are set forth below.

SUMMARY

As a general matter, the Committee was supportive of the rule changes. The rule changes were adopted after many years of study, and a public comment period during which the U.S. Judicial Conference Advisory Committee on Civil Rules ("Advisory Committee") received

EXHIBIT A

voluminous written submissions and conducted three days of public hearings. The rule changes were designed to be primarily procedural in nature and provide greater support to litigators and judges engaged in the process of litigating and presiding over class actions. Many do not change existing practice, but set forth "best practices" already followed by judges with extensive experience with class action cases. In many instances they contain more detail than is currently contained in the existing rule and will provide useful guidance to those less experienced in the class action area.

The Committee supports each of the specific changes but two, one described as the opportunity for a second opt-out and the other providing for discretionary interlocutory appeals. As to the former, the second opt-out, the Committee does not believe New Jersey should make the change because it will potentially lead to greater difficulties in achieving settlements and allow a greater opportunity for the settlement process to be manipulated by potential objectors.

With respect to discretionary interlocutory appeals of the class certification decision, the Committee was split as to whether this was a good change in view of New Jersey's existing rule permitting motions for leave to appeal interlocutory orders. Those in favor argue that a specific rule with respect to interlocutory appeals of class certification decisions would appropriately recognize the unique and critical nature of these decisions in the life of a class action and permit citation to the developing body of federal law on when such appeals should be granted. Those opposed argue that New Jersey already has a well developed body of case law on when such appeals should be granted and that class certification decisions are already frequently reviewed pursuant to motions for leave to appeal.

DISCUSSION OF SPECIFIC CHANGES

I. Time for Deciding Class Certification: Rule 23(c)(1)(A)[1]

The old federal rule required the class certification decision to be made "as soon as practicable after the commencement of an action . . .." The amendment requires the decision to be made "at an early practicable time." The purpose of this change is to reflect existing practice in which judges permit some discovery on class certification issues, and may decide certain motions prior to determining class certification. While the language change is subtle, the Committee believes that the change to reflect existing practice is a good idea and gives the court desirable additional flexibility in managing class actions. The Committee also notes the desirability of being consistent with federal practice, including the ability to cite federal cases for a parallel rule.

II. The Order Certifying the Class: Rule 23(c)(1)(B) and (C)

A. Appointment of Class Counsel. This change requires the court to appoint class counsel at the time the court enters an order certifying a class. The Committee believes the requirement is sound. When there is only one applicant for class counsel, the court will be required to determine the adequacy of that counsel as part of the class certification decision and it is logical to take the next step by formally appointing that counsel as class counsel. When there is more than one counsel seeking the position, it is critical for the court to resolve the conflict so that all parties will know who will be officially representing the class. The procedure for the court to make that appointment is set forth in a newly created rule, Rule 23(g), discussed below.

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[1] To avoid confusion, all references to the changes will be to the language of the federal rule, without cross-referencing the corresponding subpart of Rule 4:32.

B. Conditional Nature of Class Certification. The rule is amended to eliminate language stating that a certification order "may be conditional" to remove the suggestion that courts should certify doubtful cases because the determination is "conditional" and can be corrected later. Instead, the rule states that the order may be "altered or amended before final judgment." The change also alters the cut off point for amendments to a class certification order from a "decision on the merits" to "final judgment." The Committee was in favor of this change as consistent with current practice.

III. Notice in (b)(1) and (b)(2) Class Actions: Rule 23(c)(2)

Under the prior rule, notice to the class was required in all cases certified under (b)(3), for which a right to opt out exists, but was not required in (b)(1) and (b)(2) cases, where there is no right to opt out. The Advisory Committee explored requiring notice in all certified classes so that class members would know that their rights were being affected and so that they could monitor the litigation and class counsel. After objections were made to the extent that in the civil rights context, the cost of any mandatory notice, no matter how slight, could deter even the filing of cases, the Advisory Committee adopted a more limited approach. The amendment reminds the court that it has discretion in (b)(1) and (b)(2) cases to require notice, and that it has more flexibility in fashioning the nature of the notice. The Committee was in agreement with the changes finally adopted. With regard to the costs of notice, the New Jersey rule currently gives the court discretion to allocate the costs of notice among the parties. Those practicing on the plaintiff's side urged that New Jersey maintain the distinction it currently has from the federal rule, which states that plaintiffs must provide the costs of notice.

IV. Plain Language Notice and Other Notice Issues: Rule 23(c)(1) and (2)

This rule change is not controversial. It requires class notices to use "plain, easily understood language." It also sets forth what must be contained in the class notice. With the

complexity of class action notices, no one can disagree with the importance in making class notices concise and making them easily understood. To assist in the process of simplifying class action notices, the Federal Judicial Center has prepared model notices for various types of cases and has posted them on its website.

V. Settlement Review: Rule 23(e)

A. No Court Approval Needed to Drop Class Allegations Pre-Certification. The prior rule provided that a class action should not be dismissed or compromised without court approval and notice of the proposed dismissal or compromise was to be given to all members of the class in such manner as the court directs. The prior rule resulted in much confusion as to whether it applied only to certified classes or applied to all actions filed as a class action. For example, was court approval required if a plaintiff wanted to voluntarily dismiss the action without prejudice before class certification? If a class was not going to be bound by a dismissal, would notice to the class be required? The new rule clarifies all these issues by making clear that neither court approval nor notice to the class is required when a dismissal or settlement will not bind the class. On the other hand, when the dismissal or settlement will bind the class, the rule requires court approval and notice to the class. The Committee was in agreement that the rule change reflects a good and needed clarification.

B. Class Settlement Review Procedures. While the prior rule required court approval of any class settlement, the rule did not set forth what a court must do to approve a settlement. The new rule requires that the court approve a settlement only after a hearing, that the court is required to make findings, and it sets forth the required standard that the settlement be "fair, reasonable and adequate." The Committee again agrees that this change is very helpful in setting forth what a court must do to approve a class settlement and reflects the adoption of best practices of what is being done today by courts with experience in handling class actions.

C. Side Agreements. This change is directed at making sure the court is aware of the full parameters of any settlement it is being asked to approve. From time to time, settling parties enter into certain side agreements which are not formally filed with the court and are required in part to remain confidential. For example, it is not uncommon to have a "blow" provision in which the parties agree that if more than a certain percent of the class opt out, a defendant has a right to cancel the settlement. It is important to keep this provision confidential so that an objector's counsel cannot seek to manipulate the settlement process by soliciting opt-outs to exceed this threshold. The rule amendment balances these competing interests by requiring the parties to "file a statement identifying any agreement" made in connection with the settlement. It would then be left to the court to determine whether to require disclosure of all of the agreements identified and to what extent confidential information that may be contained in such agreements should be protected against unlimited disclosure. The Committee believes that the change is sound and agrees with the balance struck by the Advisory Committee.

D. Second Opt-Out. This rule change addresses the dichotomy between settlement practices when a class action is settled after class certification and when a class action is settled before class certification. In the former, a settlement reached after class certification, the class previously has been notified of the court's determination to certify the class and already has had the opportunity to opt out. Those who did not opt out are bound by the results of the litigation, including the terms of any settlement approved by the court. Under existing practice, those class members would not have a second opportunity to opt out once they learn the terms of the settlement. In the latter situation, a settlement reached before class certification, the court is asked to approve a settlement and certify a class simultaneously. In those cases, the class will first learn of the court's class certification at the same time it learns of the settlement. It will

learn of the terms of the settlement before decisions are made as to whether to opt out. To address this dichotomy, the Advisory Committee sought to provide a second opportunity to opt out of a settlement to those persons who are already members of an already certified class. As a result of objections received, courts were given discretion to require a second opt out. The court could refuse to approve a settlement unless individual class members were afforded a new opportunity to request exclusion, even though they had not requested exclusion at the time the class was certified.

The Committee was virtually uniformly against this rule change and echoed the views presented to the Advisory Committee by many practicing lawyers. The concern was that if courts were to allow class members to routinely have this right for a second opt-out, it would make cases harder to settle and make the settlement process subject to manipulation by objectors' counsel who might be seeking to be bought off by making trouble. The provision was criticized as adding uncertainty, potentially increasing cost and emboldening objectors.

At the joint meeting of the NJSBA Class Action Committee and the Class Action Subcommittee of the Civil Practice Committee, the judges in attendance were divided on the wisdom of this provision. Judge Corodemus was against it on the grounds that it would make it harder to settle cases and hinder federal-state cooperation. She pointed out that the increased opportunity for a state class action to have additional opt-outs will increase uncertainty and create a greater opportunity for chaos. Judge Walsh, however, was in favor of the provision, citing the importance of uniformity between the federal and state systems and the advantage of looking to federal caselaw for guidance. He also believed that many judges would not require this second opt-out when all the parties were not asking for it but he nevertheless wanted to retain that discretion for the trial judge.

E. Objectors. The rule change sets forth the existing right of a class member to object to a proposed settlement but does not permit withdrawal of an objection without court approval. This rule change deals with the problem presented by objectors who seek to object to a settlement solely to be bought off to permit the settlement to go forward. By requiring the court to approve any withdrawal of an objection, the court can examine the reasons for the withdrawal or abandonment of an objection, determine whether it is on a ground generally attributable to the class, or whether it was based on unfair treatment of the individual objector. The Committee thought this was a desirable change. Any agreements with objectors would be required to be put on the record and would accordingly need to be able to be defended. The knowledge that any agreement would be required to be made public would strengthen the parties' abilities to resist untoward requests.

VI. Attorney Appointment: Rule 23(g)

This new rule provides a comprehensive procedure for the court to follow in appointing class counsel. It requires class counsel to be appointed at the time of class certification and sets forth the requirement that the appointed counsel must fairly and adequately represent the interests of the class. The rule contains a list of the factors for the court to consider in appointing class counsel. The Committee was in agreement with this rule change. From the plaintiff's standpoint, it was viewed as important to have consistency in the factors to which a court looked in deciding to appoint class counsel and in the standards an applicant would be required to meet. It will also eliminate the race to the courthouse by having the court look at the qualifications of counsel rather than who was the first to file. From the defense perspective, the selection by the court of class counsel would simplify the number of parties with whom defense counsel were expected to deal. Also, defense counsel believed that case management would be made easier by the appointment of the most qualified plaintiff's counsel.

VII. Attorney Fees Award: Rule 23(h)

This is also a new rule and sets forth the procedures to govern applications for attorneys' fees in class actions. Among other things, the rule requires that the class be given notice of the fee application, although unnecessary costs will normally be avoided by giving notice of class counsel's fee motion along with the settlement notice when there is a settlement. The rule does not select a substantive basis for the fee award, for example, as to whether the award should be made on a percentage of recovery method, or lodestar method, or a method that employs both methods. The Committee supports this rule as clarifying the practice to be followed in applying for an award of attorneys' fees.

VIII. Interlocutory Appeals of the Class Certification Decision: Rule 23(f)

In 1998, the federal courts adopted Rule 23(f), which provides for interlocutory appeals of the class certification decision (granting or denying) at the discretion of the court of appeals. The rationale behind the rule is that the class certification decision is the most critical decision in the case. Without the opportunity to have prompt review, the losing party may be forced to either settle the case or abandon the claims. Leave to appeal is completely discretionary with the court of appeals, a motion for leave to appeal must be filed promptly (within 10 days) and there is no stay in the trial court unless otherwise ordered. Since the enactment of Rule 23(f), a number of circuit courts have established standards for when they will grant leave for interlocutory appeal under Rule 23(f).

The Committee was divided on whether New Jersey should adopt a rule similar to Rule 23(f) in view of New Jersey's existing rule with respect to interlocutory appeals. Those who disfavor the rule point out that there are already numerous decisions granting interlocutory appeal of class certification decisions and that it is superfluous to add a separate provision with respect to class certification decisions when those decisions are already subsumed in New Jersey

rules on interlocutory review. Those who support such an addition argue that the rule recognizes the critical nature of the class certification decision and in arguing whether to grant or oppose interlocutory appeal, the parties are already citing to the appellate division the cases under Rule 23(f) which set forth such standards, in addition to citing New Jersey's generalized standards for interlocutory appeal. They argue it is important to maintain the parallel structure between the two rules and to foster a separate body of New Jersey case law applicable to interlocutory appeals of the class certification decision.

CONCLUSION

Except for the two provisions specifically identified, the Committee believes that the recently enacted changes to the federal class action rule should be adopted by New Jersey in its class action rule. They reflect best practices and will serve as useful additional guidance as to the procedures that should be followed by courts and practitioners when handling class actions. The Committee does not support adoption of the second opt-out and is divided as to whether New Jersey should adopt a separate rule providing for interlocutory appeals for class actions in view of New Jersey's existing rule providing for motions for leave to appeal.

The Committee remains available to work with the Civil Practice Committee to provide whatever additional input it deems appropriate.

Proposed Amendment of Subdivision (e)

Effective December 1, 2003, absent contrary Congressional action, subdivision (e) of this rule is amended to read as follows:

*(e) **Settlement, Voluntary Dismissal, or Compromise.***

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

Proposed Addition of Subdivisions (g), (h)

Effective December 1, 2003, absent contrary Congressional action, subdivisions (g), (h) of this rule are added to read as follows:

*(g) **Class Counsel.***

*(1) **Appointing Class Counsel.***

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- *the work counsel has done in identifying or investigating potential claims in the action,*
- *counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,*
- *counsel's knowledge of the applicable law, and*
- *the resources counsel will commit to representing the class;*

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

*(2) **Appointment Procedure.***

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

*(h) **Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:*

*(1) **Motion for Award of Attorney Fees.** A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.*

*(2) **Objections to Motion.** A class member, or a party from whom payment is sought, may object to the motion.*

*(3) **Hearing and Findings.** The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).*

*(4) **Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).*

EXHIBIT B

1998 Amendments

Subdivision (f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. The court of appeals is given unfettered discretion whether to permit the appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari. This discretion suggests an analogy to the provision in 28 U.S.C. § 1292(b) for permissive appeal on certification by a district court. Subdivision (f), however, departs from the § 1291(b) model in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

The courts of appeals will develop standards for granting review that reflect the changing areas of uncertainty in class litigation. The Federal Judicial Center study supports the view that many suits with class-action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision on certification is likely dispositive of the litigation.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probably benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10–day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Appellate Rule 5 has been modified to establish the procedure for petitioning for leave to appeal under subdivision (f).

2003 Amendments

[Effective December 1, 2003, absent contrary Congressional action.]

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflect s prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26–36* (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protract ed litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, how-

ever, may show a need to amend the class definition. Decertification may be warranted after further proceedings.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice—including an opportunity to request exclusion—must be directed to the new class members under Rule 23(c)(2)(B).

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority—already established in part by Rule 23(d)(2)—to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(B) notice requirements must be satisfied as to the (b)(3) class.

The direction that class certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval are essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be—and at times was—read to require court approval of settlements with putative class representatives that resolved only individual claims. *See* Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion. Notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action—such as filing claims—to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(5).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. American Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316–324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). *See* Rule 23(c)(1)(C).

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or

copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work product or other protections.

Paragraph (3). Subdivision (e)(4) authorizes the court to refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms t he right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that provisions of the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain directives that bear on selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede or to affect the interpretation of those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes t hat t he primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with t he action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration t o lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

In a plaintiff class action the court usually would appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other

attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation—that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's existing attorney-client relationship with the proposed class representative.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement, even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. This rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6), 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 96 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litiga-

tion" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of t his subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under t his subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties—for example, nonsettling defendants—may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

APPENDIX C

Report of the Offer of Judgment Subcommittee - 2005

I. Background

The Subcommittee was established in the 2000-2002 rules cycle to study New Jersey's version of the Offer of Judgment rule, codified at R. 4:58-1 through R. 4:58-4, and to recommend ways to simplify the rule, to clarify its application, and to make it generally more useful. The work of the Subcommittee was carried over to the 2002-2004 rules cycle.

Various suggestions, including the total abolition of the rule, were presented to the Committee. After much discussion and debate over a series of Committee meetings, a majority of the members of the full Committee voted in favor of retaining the Rule and recommended certain amendments directed toward making the Rule easier to understand and apply. That recommendation, along with a minority report advocating elimination of the Rule in its entirety, was presented to the Supreme Court at the end of the 2002-04 rules cycle. The Court accepted the Committee's recommendations and implemented the amendments which became effective in September 2004.

Specifically, the Court approved in 2004 the Committee's recommendation to eliminate the Rule's distinction between liquidated and unliquidated damage cases for purposes of determining an offeror's entitlement to an award of fees. The Court also adopted the Committee's suggestion that the 20% "miscalculation factor," previously set forth in the Rule only for unliquidated damages cases, be applied across the board to all cases. The Court also codified the Committee's recommendation to add a provision allowing the Rule to be invoked for offers to settle *per quod* claims.

At the outset of the 2004-06 rules cycle, the Committee determined that the Subcommittee should continue its study of the Rule, especially in light of several recent court opinions addressing the application of the Rule to different situations. As part of its charge, the Subcommittee also was asked to renew consideration of whether the Rule should be eliminated.

The Subcommittee held two meetings and had several conference calls prior to the submission of this report.

II. Issues

A. Retention/Elimination of the Rule (Reprise)

On the threshold issue of whether the Rule should be eliminated, the Subcommittee members were almost unanimous in their belief that the Rule should be retained. The Subcommittee majority is of the view that the Rule can serve as a useful settlement tool, despite the substantive and procedural difficulties that it sometimes poses.[1]

However, the Subcommittee agreed that the extensively-researched minority report of Professor Goldberg advocating the Rule's eradication should be transmitted to the full Committee for its consideration. Among other things, Professor Goldberg posits that the Rule exacerbates informational disparities between plaintiffs and defendants. She also contends that the Rule unduly promotes settlement, reducing the incentive of plaintiffs to vindicate protected rights and thereby causing society to lose information about public harms that would have been spotlighted in court proceedings. Although other Subcommittee members did not share those negative perceptions, it was felt that Professor Goldberg's detailed critique of the Rule deserves the full Committee's attention.

If the Rule is retained, Professor Goldberg offers several suggestions for revising it to abate these alleged negative consequences. The Subcommittee's considered those suggestions as part of its evaluation of further amendments to the Rule. Professor Goldberg's report is included herewith as Attachment II.[2]

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[1] For additional background, the Subcommittee refers to the detailed "Majority Report" (favoring the Rule's elimination) and "Minority Report" (favoring the Rule's retention) generated in the 2002-04 rules cycle. The competing reports identify a host of policy and practical arguments for and against the Rule, which are not repeated at length here, but are attached to this report for easy reference as Attachment I. As noted, a majority of the Committee reversed its position and presented its recommendation for retention of the Rule to the Supreme Court in the 2004 cycle.

[2] The Subcommittee also was furnished with a draft article recently prepared by two law professors who conducted an empirical study of New Jersey's offer-of-judgment rule. The researchers, using data from a large national insurer, examined third-party civil

Assuming, once again, that the Rule is retained, the Subcommittee identified the following specific issues for potential revision: (1) the applicability of the Rule to cases involving claims that, by virtue of statute or otherwise, are subject to mandatory or discretionary fee shifting, (2) the operation of an offer of judgment in cases with multiple defendants, (3) the applicability of the Rule to cases where injunctive relief as well as money damages are sought, and (4) the time frame for tendering an offer. Those discrete issues are discussed below.

B. Fee Shifting Cases

The Subcommittee recognized that, independent of any fee shifting triggered under Rule 4:58, a prevailing party in a given case may be entitled to recover counsel fees under statutory provisions (*e.g.*, the Consumer Fraud Act; the Law Against Discrimination; CEPA; federal Section 1983), court rules (*e.g.*, frivolous litigation; first-party claims against insurers), case law (*e.g.*, legal malpractice; bad faith claims against insurers) and/or "loser-pays" contractual agreements between the parties. The presence of one or more of these substantive bases for fee-shifting may complicate the application of Rule 4:58.

As an initial matter, the Subcommittee recommends that the Offer of Judgment Rule should not authorize a duplicative award of fees to a litigant independently entitled to counsel fees by operation of statute, contract, court rule or some other substantive provision. For example, if a Consumer Fraud Act plaintiff makes a pretrial offer under Rule 4:58 which is rejected by the defendant, and then obtains a

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actions filed in New Jersey between 1992 and 1997, tracking the outcomes and defense costs in those cases through 2004. Their study found that after the Court amended Rule 4:58 in 1994 to remove the former $750 cap on recoverable attorney's fees, New Jersey experienced statistically-significant reductions in the length of and the defense costs expended in such cases. In particular, the duration of the sampled cases filed after 1994 declined by 7% and the insurer's defense costs dropped by 20%--reductions not matched by data from neighboring states lacking an offer-of-judgment rule as rigorous as New Jersey's. The authors praise New Jersey's present version of the Rule as a useful device to resolve lawsuits sooner with less transactions costs. The full report may be accessed at hal-law.usc.edu/cleo/workshops/04-05/documents/yoon.pdf.

Although the Subcommittee members appreciate this unprecedented effort to develop empirical data about the Rule, they suggest that the authors' causal conclusions be approached with caution. The study did not track or otherwise identify cases in which an offer of judgment under the Rule was actually tendered. In addition, the recent decline in the disposition times of civil cases in New Jersey may be attributed to other causes, such as the state judiciary's increased case management efforts and the enactment of other Rule changes, including the various "Best Practices" reforms adopted in 2001. With those caveats in mind, the Subcommittee does recommend that the draft article be presented to the Supreme Court upon securing the permission of the authors.

verdict that exceeds 120% of that offer, the plaintiff's counsel-fee recovery should be confined to the fees awarded by the court under the Act. The Subcommittee sees no reason to provide a windfall of "double counsel fees" through the mechanism of the Offer of Judgment Rule. Indeed, under the LAD and various other fee-shifting statutes, a trial court already may be enhancing the fee award to a prevailing plaintiff by a "multiplier" factor, see Rendine v. Pantzer, 141 N.J. 292 (1995), making any further enlargement of the fee under Rule 4:58 unnecessary and potentially punitive. The Subcommittee suggests that an explicit provision be added to Rule 4:58 to prohibit such duplicative fees.

The more difficult scenario arises where a party bringing a claim that may substantively entitle that party to counsel fees declines an offer of judgment tendered under Rule 4:58, and thereafter prevails at trial but fails to obtain a verdict that reaches 80% of the rejected offer. In that scenario, any fees awarded to the defendant under Rule 4:58 might offset in full or in part--or surpass--the counsel fees independently recoverable by the prevailing plaintiff. In certain contexts such an offsetting fee award may interfere with public policy considerations underlying the substantive fee-shifting claim.

The Subcommittee unanimously agrees that the provisions of Rule 4:58 should be applied in the ordinary course where the settlement offeree's substantive basis for fee-shifting against the settlement offeror arises under an enforceable, arms-length contractual provision. For example, if a valid commercial contract has a "loser-pays" fee-shifting provision, the Subcommittee finds no reason to protect the litigant who prevails on that contract at trial from sustaining an offset of its recoverable counsel fees under Rule 4:58. Thus, if the plaintiff suing under such a contract rejected an offer of judgment and ultimately obtained a verdict that was less than 80% of the offer, the prevailing plaintiff's counsel fees should be offset by the defendant's post-offer counsel fees. This possible "netting" effect on the winner's fees might encourage the settlement of such commercial lawsuits, and would not manifestly conflict with any established legislative or judicial policies.

The Subcommittee does have concerns, however, about the impact of such "netting" upon claimants who seek to vindicate their rights under statutes and court rules that include counsel fees as a form of remedial relief. In such settings, the defendant's recovery of an offsetting fee under Rule 4:58 arguably dilutes the public policy imperatives that underlie the claimant's cause of action.

On the other hand, some members of the Subcommittee believe that the offer-of-judgment rule may have desirable effects in curbing excessive litigiousness by lawyers who bring (or who unduly prolong) fee-shifting cases, and in promoting the earlier settlement of such cases. At times the plaintiff's lawyer's motive to accumulate recoverable billable hours in a fee-shifting case may be driving the litigation; in such contexts the potential adverse consequences under Rule 4:58 of rejecting a defendant's reasonable offer of judgment could serve as an appropriate counter-incentive.

With these competing concerns in mind, the Subcommittee members identified six possible options for the application of Rule 4:58 to cases involving a fee-shifting claim grounded upon a legal basis *other than* a contractual fee-shifting provision[3]:

1. **Mechanical implementation** of Rule 4:58, resulting in the "netting" of competing fee awards to each side;

2. A **carve-out**, declaring Rule 4:58 inapplicable to all statutory fee-shifting cases;

3. Affording **discretion** to the trial judge to weigh numerous factors, and determine a net equitable award of attorneys' fees to either the plaintiff or the defendant;

[3] For ease of expression, this Report shall use the phrase "statutory fee-shifting" to encompass all cases in which attorney's fees are recoverable by a prevailing party on a substantive basis other than those arising under the terms of a contract. At least one Subcommittee member would include only fee-shifting enactments of the Legislature within this category, and would let the Offer of Judgment Rule freely operate in other fee-shifting cases. That viewpoint was not shared by a majority of the Subcommittee, given the assorted public policy considerations at stake.

4. In lieu of netting fees, imposing a **temporal cut-off** upon a claimant's recovery of statutory attorneys' fees for services incurred after the claimant was served with a reasonable offer of judgment, effectively capping the amount of fees recoverable by the claimant if the verdict proves to be less than 80% of the rejected offer; and

5. A **"safety net,"** allowing for the reciprocal implementation of fee shifting to both parties, with the proviso that under no circumstances would the prevailing claimant on a statutory fee claim be required to pay any net fees to the opposing party.

6. A **"compromise blend" of options (3) and (5)**, creating a rebuttable presumption that a claimant prevailing on a statutory claim would not have to pay net fees to the other side unless the trial judge determines in his or her discretion that the presumption should be overcome.

Of these possibilities, Option 1 (mechanical implementation) and Option 2 (the carve-out) represent the most extreme alternatives. By comparison, Options 3, 4, 5 and 6 provide intermediate methods for abating the impact of the consequences of Rule 4:58 upon claimants in statutory fee cases.

Most of the Subcommittee members preferred such an intermediate approach, leaning against both Options 1 and 2. However, there were no dominant preferences within the Subcommittee concerning Options 3, 4, 5 and 6.

Some members of the Subcommittee feel that the competing equities raised by offsetting fee claims are best sorted out by the trial judge in his or her discretion (Option 3). Having presumably gained "a feel for the case," the trial judge can make a contextualized assessment of whether it is fair,

both procedurally and substantively, to impose upon a plaintiff the full brunt of the fee-shifting consequences of the Offer of Judgment Rule. To guide that discretion, the Subcommittee chair developed a proposed list of factors (see Attachment III) for the trial judge to weigh and apply. Those Subcommittee members who favored Option 3 generally supported that proposed recitation of factors.

Conversely, a slight majority of the Subcommittee expressed concerns that a discretionary Rule would lead to unpredictable and inconsistent results, varying from judge to judge and from case to case. They suggested that the mandatory nature of fee-shifting under the present Rule is a virtue, not a vice, one that makes the offer-of-judgment device more attractive to use and more understandable to clients.

As alternatives to judicial discretion, Option 4 (the temporal cut-off) and Option 5 (the safety net) provide bright-line methods to temper the possible harsh impact of Rule 4:58 fee-shifting upon a prevailing statutory claimant. Option 6 (the compromise blend) is based on the bright-line of Option 5 tempered by judicial discretion. However, neither of these options garnered a majority endorsement from the Subcommittee.

There was also a concern expressed that Option 4 may transgress legislative prerogatives, insofar as it curtails a statutory remedy to claimants under fee-shifting statutes.

If Option 3 (judicial discretion) is approved by the full Committee, the Subcommittee believes that the Rule should express a rebuttable presumption about whether any offsetting fees triggered by the Offer of Judgment procedure should be waived or abated. Accordingly, Attachment IV sets forth such a presumption. Specifically, it presumes that a court should approve a discretionary waiver or abatement of fees recoverable under the Rule only in circumstances where the imposition of an offsetting fee is "contrary to the interest of justice."

After much discussion, four Subcommittee members voted in favor of Option 3 (judicial discretion), but the remaining five votes were divided among the other four options (4, 5 and 6). Hence,

a slight majority of the subcommittee prefers a bright-line test to judicial discretion, but the Subcommittee reached no consensus as to which bright-line test to recommend to the full Committee. In fairness, all six options are presented to the full Committee for its consideration.

C. Multiple Defendant Cases.

After Schettino v. Roizman, 158 N.J. 476 (1999), in which the Court pointed out the need for R. 4:58 to clarify its application to multi-defendant cases, subsection R. 4:58-4 was added to the Rule. That provision delineates the standards and procedures for situations in which one of several defendants singularly tenders an offer of judgment.

1. Joint Offers by Multiple Defendants

The Rule still lacks, however, a mechanism to enable multiple defendants to make jointly an aggregated offer to the plaintiff. Such a mechanism was proposed by the late Judge Walsh and endorsed by the then-existing Offer of Judgment Subcommittee in a prior rules cycle.

The Walsh Proposal would allow a joint offer of judgment to be made by defendants, provided that the defendants agree upon their respective shares of contributions to the offer or, alternatively, agree to a procedure for the prompt resolution of their respective shares of responsibility. If the defendants do not agree on such an allocation procedure, the provisions of the Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-1 *et seq*. would be implemented by default. See Attachment V. For reasons that are unclear to the present Subcommittee, the proposal was never adopted.

A majority of the present Subcommittee members favor the revival and adoption of Judge Walsh's proposal. If that concept is approved by the present full Committee, the specific language proposed by Judge Walsh might be redrafted to make more explicit in the Rule the time frames for the defendants to begin and complete the allocation process.

2. "Package" Offers by a Plaintiff to Multiple Defendants

As a related item, the Subcommittee also considered the observation by Judge Ciancia in Gonzalez v. Safe and Sound Security Corp., 368 N.J. Super. 203, 214 n.1 (App. Div. 2004), where he noted that the present Rule lacks a mechanism for a plaintiff to make a "package" offer of judgment to multiple defendants. Although nothing in the text of the present Rule precludes such an offer, the Subcommittee recognizes inherent problems in determining when the Rule would be triggered, and how to allocate fees among the group of defendants who fail to accept the package offer.

If, hypothetically, one or more of the defendants were "holdouts" and refused to contribute to the proposed settlement package, it might be unfair to the other defendants to be saddled with the fee-shifting consequences of that offer's rejection. Also, if the package offer from the plaintiff were tendered to less than all of the defendants, the verdict sheet would need to allocate the percentage shares of liability for each defendant, so that the "success" of the plaintiff against the defendants who rejected the pretrial offer can be measured.

Given these potential complications, the Subcommittee declines to draft a specific provision addressing a plaintiff's offer to multiple defendants. Instead, the Subcommittee suggests that this scenario, and any problems that may ensue, be left to case law developments.

3. Plaintiff Offers to Single Defendant in Multi-Defendant Case

The Subcommittee did agree, however, that a plaintiff should be able to tender an offer of judgment to a single defendant in a multi-defendant case, so long as the verdict sheet allocates fault so that single defendant's liability can be fixed and compared with the pretrial offer. A simple amendment to the Rule authorizing such one-defendant-at-a-time offers could be beneficial.

D. Non-Monetary Relief.

The Subcommittee discussed the feasibility of applying the Rule to cases where injunctive or other non-monetary relief, as well as money damages, is sought.

Some of the Subcommittee members felt that the Rule would be too difficult, if not impossible, to administer when the offer of judgment or the verdict contains a mixture of non-monetary and monetary remedies. In particular, measuring degrees of "success" in injunctive cases may be highly complicated and subjective. The 20% miscalculation factor ("fudge factor") may be very difficult to apply if a party's "victory" or "loss" in the case embraces both monetary and non-monetary components. (For example, if plaintiff wins an injunction, but recovers modest damages that are only 60% of the defendant's pretrial offer of a cash-only judgment, did the plaintiff fail to attain 80% of what had been offered? What if the injunction was very important to the plaintiff, and his or her quest for damages only a secondary goal?) Others felt that the trial judge was in the best position to confront these issues.

Accordingly, the Subcommittee could not formulate a specific proposal to address all the variables inherent in "mixed" damages-plus-other-relief cases. Instead, the Subcommittee recommends leaving the non-monetary relief scenario to be handled on a case-by-case basis in the courts.

E. The Time for Making an Offer

The Subcommittee discussed whether it should propose a time interval before which an offer of judgment could be made. It was proposed and agreed that R. 4:58-1 should be amended to provide that an offer of judgment should not be tendered any earlier than 60 days after the filing of the last responsive pleading of the original parties. This addresses, at least to some degree, the concern that the recipient of an offer of judgment may not have sufficient information to evaluate the merits of an offer of judgment in the earliest stages of a case. The proposed amendment is included as Attachment VI.

III. Conclusion

From the time that this Subcommittee was originally formed to study the Offer of Judgment Rule and its applicability, the New Jersey appellate courts have issued a number of opinions addressing the rule in specific contexts. This increased attention to the Rule has demonstrated both its more frequent use but also its complexity, and thus provides support for the charge to the Subcommittee to improve and clarify the rule for general practice. Accordingly, the Subcommittee proposes these amendments in furtherance of those goals.

Respectfully submitted,

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Hon. Claude M. Coleman, J.S.C.

Hon. Marianne Espinosa, J.S.C.

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Attachments:

I. Majority and minority reports from 2002-2004 rules cycle

II. Minority report authored by Professor Goldberg

III. Proposed *R.* 4:58-5

IV. Proposed *R.* 4:58-5 alternate

V. Proposed *R.* 4:58-4

VI. Proposed amendments to *R.* 4:58-1

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Item I. G.
1/12/04

MAJORITY REPORT OF THE CIVIL PRACTICE COMMITTEE RECOMMENDING DELETION OF R. 4:58, OFFER OF JUDGMENT

The Civil Practice Committee, by a majority, recommends to the Supreme Court that R. 4:58, the offer of judgment rule, be deleted.

The Committee's basic reason for making this recommendation is that as a result of the 1994 amendment eliminating the $750 cap on counsel fees, the rule is apparently being used primarily as a fee-shifting device in contravention of the American rule, to which our Court has remained stalwartly committed, rather than for its intended purpose as a settlement mechanism. At the same time the utility of the rule as a settlement device has been substantially diminished by other developments which have occurred since its original adoption in 1969. These include the prejudgment interest rule, R. 4:42-11(b), adopted in 1972, applicable to tort actions, and the Supreme Court's decision in Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123, 131 (1976), affirming the court's authority to award prejudgment interest in contract cases as an equitable matter. Moreover, costs exclusive of counsel fees are routinely awarded to the prevailing party. Furthermore, since the adoption of the offer of judgment rule in 1969 we have instituted a number of early settlement procedures including mandatory non-binding arbitration pursuant to R. 4:21A, all of the complementary dispute resolution techniques provided for by R. 1:40, and other court-initiated settlement events. Finally the 1996 amendment of R. 1:4-8, the frivolous-suit rule, is also designed to weed out unmeritorious litigation. There is thus substantially less need for the offer of judgment as a settlement technique now than there was when the rule was originally adopted, and its conversion from a settlement technique to a fee-shifting device has, in the Committee's view, made the rule counterproductive. These considerations are significantly compounded by the complex manner in which the rule is drawn, resulting in difficulty and uncertainty of application. Prior to the 2000 amendment eliminating the counsel fee cap, the rule was rarely used. Elimination of the cap has resulted in its vastly increased use, and questions are now continually

arising regarding its construction and interpretation. The Appellate Division has had more litigation involving the rule since the 2000 amendments than in the preceding three decades put together.

First, by way of briefest background, R. 4:58 was only roughly patterned on the cognate federal rule, Fed. R. Civ. Proc. 68, which limits the consequences of failure to accept an offer of judgment to costs (although in recent years costs have been deemed to include counsel fees allowed by fee-shifting statutes). The states following the federal rules incorporated that limitation as well. When our rules were comprehensively revised in 1969, we made a major departure from the federal rule by envisioning offer of judgment as a potentially useful settlement technique only if it offered a real incentive to settlement. We hoped to do so at that time by including an award of interest as well as a counsel fee capped at $750. At the same time, in order to avoid the problems in accurately predicting the value of an unliquidated damages case and to protect the no-caused plaintiff, we provided for a twenty percent miscalculation, up or down, before the consequences of non-acceptance would apply and required that a claimant obtain a recovery of at least $750, not coincidentally the amount of the cap.

There is another significant distinction between the New Jersey rule and the federal rule. The New Jersey rule was expressly drawn so that offers of judgment could be made not only by claimants but also by parties against whom claims are made. The federal rule, however, has been construed by the United States Supreme Court in Delta Airlines, Inc. v. August, 450 U.S. 346, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981), as applying only to settlement offers made by the non-claimant defendant and only where the claimant has obtained a favorable judgment, a construction also protective of the no-caused plaintiff. Thus the mechanism of the federal rule is triggered only by a defendant's offer combined with an ultimate judgment in favor of plaintiff.

In all of these respects, our offer of judgment rule, as originally adopted in 1969, was, from the outset, unique among the states. As it turned out, however, the original fee cap of $750 did not

provide sufficient incentive or disincentive to settlement. Beyond that, we thereafter provided for a more expansive prejudgment interest mechanism by adopting R. 4:42-11(b). Moreover, the award of costs to the prevailing party is routine. Consequently, the rule was largely disregarded for the next three decades.

In 1999, as a result of the Supreme Court's decision in Schettino v. Roizman Development, 158 N.J. 476 (1999), which primarily addressed the multiple-defendant problem, the Civil Practice Committee again studied R. 4:58. We recommended the adoption of R. 4:58-4 to deal with multiple defendants and, in an effort to rehabilitate the rule and encourage its use for settlement purposes, we recommended elimination of the $750 counsel fee cap as well as the inclusion of all litigation expenses in the award. Our recommendations were accepted, and the rule was so revised in 2000.

As noted, in the two or so years since the 2000 amendment, there has been more offer-of-judgment litigation than in all the three prior decades. It is now the perception of a majority of the Committee that the rule is not being used primarily as a settlement technique but rather as a fee-shifting device that imperils our frequently expressed continued commitment to the American rule except in specifically stated rule and statutory exceptions, all of which are based on discrete considerations of public policy. By the same token, when the rule was originally conceived of in 1969 as a settlement technique, there were then very few institutionalized settlement opportunities and no other codified prejudgment interest mechanism. As pointed out, there have been dramatic changes in these areas since 1961.

There are some lawyers on the Committee who believe that judicious and prudent use of the rule in making offers of judgment does assist in achieving settlements. The Committee as a whole concluded, however, that the widespread fee-shifting motivation in the current use of the rule coupled with its real problems of application outweigh the occasional benefit that some responsible practitioners believe they obtain from the rule.

As to the unresolved problems, it is first clear that the complicated formulas of the rule as well as the distinctions it makes between liquidated and unliquidated damages are intimidating and inhibitive. The line between liquidated and unliquidated is often blurred. Moreover, an offer is conceived of as a unitary lump sum B it is supposed to settle the whole case. But that lump sum often has both liquidated and unliquidated components making it virtually impossible to determine how the offeree should weigh the offer and calculate, if at all, the twenty percent grace figure. There is also a substantial question as to the viability of the decision to distinguish between liquidated and unliquidated damages. Indeed in its initial consideration of the rule during this cycle, the Committee as a whole, working from its subcommittee's report, voted to recommend, if the rule were to be retained, the elimination of the liquidated-unliquidated distinction and application of the twenty percent up and down margin across the board.

As to other problems, there is first the question of whether a nominal offer, which would certainly have the effect of fee shifting without the slightest potential for settlement, should qualify for the consequences of the rule. The Appellate Division, in Frigon v. DBA Holdings, Inc., 346 N.J. Super. 352 (App. Div. 2002), which also reviewed the history of the rule and its application in the federal context, held that it does not. The Committee did not think, in view of Frigon, that a rule change was necessary, but that is debatable. We further note that the federal courts, as discussed in Frigon, do not regard a nominal offer as triggering Fed. R. Civ. Proc. 68, and there is also some federal authority suggesting that the offer must not only not be nominal but that it must also be reasonable under the circumstances. See Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1074, 1083 (10th Cir. 1998). More as to Gudenkauf hereafter.

Another serious issue with which the Committee would have to grapple was suggested but not decided by Sferlazza v. Washington Township School District, et al., Docket No. A-4351-01T1, decided April 7, 2003, and that concerns LAD, CEPA, and other statutory fee-shifting cases in which

the fee-shifting is intended to vindicate public policy. The scenario is simply stated. Defendant makes an offer of judgment to plaintiff, who rejects it. Plaintiff recovers a verdict for unliquidated damages in an amount less than eighty percent of the offer. Plaintiff is entitled to counsel fees as the prevailing party. Is the defendant also entitled to a counsel fee under the offer of judgment rule? How would this impact on the whole prevailing-party scheme? Should plaintiff's award include the shifted fees obtained as the prevailing party although the rule now excludes counsel fees from the calculation? Do we think we can encourage LAD and CEPA plaintiffs to accept offers by reducing or eliminating their counsel-fee expectations? Do we want to? Is whatever decision is made respecting LAD and CEPA plaintiffs applicable as well to the whole panoply of other rule and statutory fee-shifting provisions which may have a less compelling public-interest basis?

The federal approach to offers of judgment in statutory fee-shifting situations is, at present, a bit murky. In Marek v. Chesny, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985), the United States Supreme Court first addressed the issue of the effect of a defendant's offer of judgment in a section 1983 case in which the plaintiff obtained a judgment in an amount less than the offer. The Court held first that an offer is valid unless it expressly excludes costs. Thus if the offer expressly includes damages and costs (including counsel fees) both are included in the judgment. If the offer refers to damages but is silent as to costs, then the Court adds costs to the judgment. Only if the judgment attempts to exclude costs does the offer fail. The second and more significant holding of Marek is that in a civil rights fee-shifting case in which the plaintiff's judgment is less than the offer, the penalty to plaintiff is the deduction from the fees allowed plaintiff as the prevailing party of the counsel fees and costs plaintiff incurred after the date of the offer. That is to say, plaintiff does not pay defendant counsel fees but has his own counsel fee, otherwise allowable, reduced by the value of the services performed after the rejection of the offer. While this would appear to be fairly straightforward (although there are evident calculation problems in terms of lodestar, contingencies

arrangements, etc.), the circuit courts have regarded the Marek holding as substantially undermined by the Civil Rights Act of 1991. The Court's discussion in Gudenkauf, supra, 158 F.3d at 1083-1084 is as follows:

> The legislative history of the 1991 Act indicates that Congress' decision to separate costs and fees was deliberate and intended to further its title VII goals. As the legislative history points out, "statutes which refer to fees as part of costs have been interpreted to deprive many successful plaintiffs of such fees incurred after rejecting a pretrial offer of judgment made by the defendant. In contrast, statutes which provide for fees separate from costs have been interpreted to allow plaintiffs to recover such fees." H.R.REP. NO. 102-40(I) at 82, 1991 U.S.C.C.A.N. at 620. In fact, the Supreme Court held in Marek v. Chesny, 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed. 2d 1 (1985), that under Rule 68, a successful civil rights plaintiff could be denied attorney's fees otherwise available under subsection (k). The legislative history of the 1991 Act specifically disapproved of the Marek decision and proposed to amend subsection (k) to avoid its application. "Marek is particularly problematic in the context of Title VII, because it may impede private actions, which Congress has relied upon for enforcement of the statute's guarantees and advancement of the public's interest." H.R.REP. NO. 102-40(I) at 82, 1991 U.S.C.C.A.N. at 620. Although subsection (k) ultimately remained unchanged in this regard, the proposed amendment was adopted in the language of subsection (g)(2)(B). Congress therefore clearly did not intend a district court to reduce a mixed motives plaintiff's fee award on the basis of a rejected pretrial settlement.

The Gudenkauf Court's view of the effect of the 1991 Civil Rights Act was thereafter echoed by Dalal v. Alliant Techsystems, Inc., 182 F.3d 757, 760, n. 3 (10th Cir. 1999), noting that "Alliant's reliance on Marek v. Chesny [citation omitted] to the contrary has been undermined by the passage of the Civil Rights Act of 1991 and this court's opinion in Gudenkauf [citation omitted]." It is therefore not at all clear that there is continued viability of Marek's holding respecting the consequences of offer of judgment in a civil rights case. We also note that both Gudenkauf and Dalal relied expressly on public policy grounds in declining to apply Fed. R. Civ. Proc. 68 to civil rights fee-shifting cases.

There are other serious constructional problems presented by the rule. Illustratively, should we and if so how should we apply the rule where non-monetary objectives are sought C i.e., probate, injunction applications, and, indeed, the whole range of equitable relief. The rule at present is not

limited to monetary damages but speaks only in terms of a "result as or more favorable." Can non-monetary proposals be so compared? Moreover, the Committee is not yet convinced that only monetary damages should be included if the rule is retained. At present the twenty percent window applies only to unliquidated damages. But if it were to apply to everything, what do we do about equitable forms of relief and how could we determine if the judgment is at least as favorable within that window?

The rule excepts matrimonial actions. Does that exception apply to marital torts? A recent opinion of the Chancery Division said no. See Borchert v. Borchert, 361 N.J.Super. 175 (Ch. Div. 2002). Does the one-offer-per-party rule preclude a single offer to plaintiffs when the claim of one of them is only per quod? A recent opinion of the Appellate Division said yes. See Wiese v. Dedhia, 354 N.J.Super. 256 (App. Div. 2002).

With respect to multiple defendants, although the 2000 amendment of the rule was intended to definitively address that problem, a recent opinion of the Appellate division, Cripps v. DiGregorio, 361 N.J. Super. 190 (App. Div. 2003), noted that at least in the case before the court the rule was not readily applied to the situation before it. The opinion further noted that "[d]espite the rule change in 2000, the facts in this case suggest that application of the rule may continue to be problematic." Id. at 198.

There is another case before the Appellate Division, not yet decided, which raises the issue of counsel fees provided for by contract where the amount thereof is subject to the court's reasonableness determination and award. Does the amount of that award, if plaintiff prevails, get added to the damages verdict in determining whether the plaintiff has made the twenty percent margin of error threshold?

By way of summary, it is the Committee's view that whatever potential but unproved utility R. 4:58 may have as a settlement technique is far outweighed by its propensity for perversion as a

general and unintended fee-shifting rule and by the continuing difficulties in its application. At the same time, the prejudgment interest rule and the plethora of settlement devices incorporated into our trial practice since R. 4:58 was adopted has resulted in significant diminution of the need and utility of the rule as a settlement technique.

MINORITY REPORT OF THE CIVIL PRACTICE COMMITTEE RECOMMENDING RETENTION OF R. 4:58, OFFER OF JUDGMENT RULE

The Civil Practice Committee submits this Minority Report in opposition to the report submitted by the majority (the "Majority Report") recommending the deletion of the Offer of Judgment Rule. The Minority recommends that the Offer of Judgment Rule, R. 4:58 (the "Rule"), be retained, and that the Offer of Judgment Subcommittee continue its work to attempt to simplify the application of the Rule.

OVERVIEW

The Offer of Judgment Rule should be retained for a number of reasons. First and foremost, the Rule offers a distinctive and important settlement tool, one that the Minority believes would be sorely missed should it be abandoned. Many experienced practitioners, including some of the authors of this Minority Report, have incorporated the Rule into their practices and have found it to be uniquely effective to achieve settlements, especially when confronted with an unreasonable adversary or one with unrealistic expectations.

Second, the Majority's deletion recommendation simply is premature. Before the 1994 amendment, which removed the $750 cap on attorneys' fees, the Rule was rarely used. A further amendment was made in 2000 to allow for the recovery of litigation expenses. With these amendments, the Rule is finally starting to get the attention of the trial bar, which is precisely one of the things that the 1994 and 2000 amendments were designed to accomplish. Without further analysis or some evidential support for the Majority's contentions, the Minority submits that the Court should not entertain abandonment of the Rule now, so soon after it made a policy decision not only to retain the Rule but to substantially strengthen it by passing the 1994 and 2000 amendments.

Third, there is no evidence to support the Majority's contention that the Rule is being used in bad faith as a fee shifting device. In fact, the experience of many practicing lawyers on the Committee is that it effectively can be used to settle cases, both through acceptances of offers formally made under the Rule and through negotiated settlements occurring after a formal offer under the Rule is made.

Fourth, the fairly recent advent of other settlement techniques has in no way diminished the utility of the Rule. For example, the Rule can be uniquely effective when dealing with the "unreasonable adversary," when all other settlement techniques, including mediation, arbitration and the possibility of an award of costs otherwise fail. Contrary to the Majority's suggestion, those other settlement facilitators are simply not an effective substitute in these situations.

Finally, while the Minority acknowledges that there are complexities in the Rule that need to be addressed, those complexities do not warrant the Rule's abandonment. In short, the Minority believes that the complexities in the Rule can be remedied by both development of common law and the Committee's continued commitment to evaluating and considering possible modifications that would make the Rule simpler and, therefore, more effective.

BACKGROUND

From its inception, the Rule was always intended as a procedural mechanism to facilitate the settlement of cases. Inducement to settlement has remained the fundamental purpose of the Rule as it has evolved. See, e.g., Fire Freeze v. Brennan & Assoc., 347 N.J. Super 435, 441 (App. Div. 2002); Sovereign Bank v. United Nat. Bank, 359 N.J. Super. 534, 542 (App. Div. 2003). The Rule was initially modeled on Rule 68 of the Federal Rules of Civil Procedure ("Federal Rule 68"), but since 1969, has been amended to correct several perceived deficiencies. PRESSLER, Current N.J. COURT RULES, Comment R. 4:58, (GANN 2003) (recognizing

certain defects in New Jersey's old offer of judgment rule (R.R. 4:73), that was modeled on Federal Rule 68).[1] New Jersey's offer of judgment rule is now one of the most progressive in the United States.[2]

The Rule now substantially differs from Federal Rule 68 in several key respects. For instance, under the Rule, either party can make an offer of judgment, while under the federal rule, only a defendant can make such an offer. PRESSLER, Current N.J. COURT RULES, Comment R. 4:58, (GANN 2003). Additionally, under the Rule the prevailing party is entitled to reasonable attorney's fees and litigation expenses, as well as costs, while the prevailing party, under the federal rule, is limited to costs. Id. Other state rule making bodies have similarly acted to fashion offer of judgment rules with provisions similar to those adopted in New Jersey.[3]

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[1] In fact, since its enactment and adoption on an experimental basis in 1969, and official state-wide adoption by amendment on July 7, 1971, the Rule has been amended six times (July 14, 1972; July 17, 1973; July 13, 1994; June 28, 1996; July 10, 1998; and July 5, 2000).

[2] Of the forty-one states that have an offer of judgment rule, thirteen have rules that differ significantly from Federal Rule 68 because of perceived deficiencies in the federal rule as a settlement tool. Michael E. Solimone & Bryan Pacheco, State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice, 13 Ohio St. J. on Disp. Resol. 51, 64 (1997).

[3] More specifically, thirteen states have amended their offer of judgment rules to allow both plaintiffs and defendants to make offers of judgment, including: Alaska, Arizona, California, Colorado, Connecticut, Florida, Michigan, Minnesota, Nevada, New Jersey, North Dakota, Wisconsin and Wyoming. Russell C. Fagg, Montana Offer of Judgment Rule: Let's Provide Bona Fide Settlement Incentives, 60 Mont. L. Rev. 39, 58 (1999). Additionally, seven of these states permit an award of attorney's fees. Id. at 59 (these states are Connecticut, Florida, Idaho, Michigan, Minnesota, New Jersey and Nevada). The commentator notes that there is apparently a growing trend throughout the country in support of similar changes in state rules. Id. at 58-59.

One of the most significant changes to the Rule was the July 1994 amendment that eliminated the $750 cap on attorney's fees.[4] PRESSLER, Current N.J. COURT RULES, Comment 4:58, (GANN 2003). With this amendment, along with the 2000 amendment that allowed for recovery of litigation expenses, the Rule arguably became one of the most powerful settlement tools available to litigants in New Jersey.

As a consequence of the added strength to the Rule provided by the 1994 and 2000 amendments, the Rule recently has been used with more frequency then it had been in the past. That, in turn, has led to an increase in litigation aimed at resolving issues concerning the Rule's application and construction. In 2002, as a consequence of recent court opinions interpreting the Rule, the Committee formed an Offer of Judgment Subcommittee charged with studying the Rule and considering whether those recent opinions warranted additional amendments to the Rule. That Subcommittee looked at ways to simplify the Rule, to clarify its application and to make other useful reforms. The Subcommittee issued a Report and Recommendation in January 2003 (attached as Exhibit A) that recommended several revisions to the Rule, and also recommended that the judiciary undertake a statewide empirical study of the Rule's use.

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[4] The Majority report incorrectly states that the $750 cap on attorney's fees was eliminated by the 2000 amendments to the Rule. See, e.g., Majority Report at p. 1. The 2000 amendments were precipitated by questions raised by the Appellate Division's decision in Schettino v. Roizman Development, 310 N.J. Super. 159 (App. Div. 1998), aff'd 158 N.J. 476 (1999) that affected the Rule's application in multi-defendant cases. The 2000 amendments, however, did permit the recovery of litigation expenses for the first time.

It was during debate of the Subcommittee's January 2003 Report by the Committee at large that a motion was made simply to abandon the Rule altogether rather than find ways to simplify and clarify its application. The Committee was substantially divided on the issue and the motion passed by only the slimmest of margins. In the Minority's view, the Committee's decision to recommend abandonment of the Rule was predicated more on the frustrations attendant with resolving the many issues raised by the Subcommittee and less on any substantive analysis of whether the Rule provides a useful or important tool for settlement.

THE RULE SHOULD BE RETAINED AND THE COMMITTEE'S EFFORTS TO SIMPLIFY IT SHOULD CONTINUE

A. The Rule is an Important Settlement Tool

Practitioners on the Committee have found the Rule to be particularly effective to achieve settlements when other tools are not available or are ineffective. This has been true for plaintiffs as well as defendants. Moreover, the Rule is uniquely effective as a settlement device when confronted with an adversary who has unreasonable expectations or who refuses to proffer or respond to a reasonable offer or demand, or whose strategy appears to be to win a war of attrition. Most particularly, in the area of complex commercial litigation, cost can be prohibitive. By providing the potential for a fee and expense shift on rejection of an offer, the Rule, unlike any other settlement device or procedure, enables litigants to "level the playing field" and helps achieve settlement by requiring adversaries to rethink their settlement positions in light of the potential financial consequences for their continued refusal to settle. It also acts as a deterrent to a party who might otherwise engage in unnecessary or questionable motion or discovery practice with the hope of extinguishing the economic viability of the case to the other side.

The Rule has been successfully used on numerous occasions by the authors of this report. Under certain situations, the Rule has enabled litigants to "level the playing field" where they

would otherwise be unable to continue the litigation due to cost as is demonstrated by the following example. One author to the Minority Report recalls that his firm commenced litigation on behalf of a small company to enforce a buy-out clause in a joint venture agreement. The defendant, a large bank, counterclaimed and commenced a war of attrition. The Plaintiff served and filed an Offer of Judgment. The potential for a shift in fees allowed plaintiff's counsel to continue the case on a contingency fee arrangement when the company otherwise was unable to continue paying fees to obtain its day in court.

Another example of the Rule's effectiveness is where it has allowed the parties to reach settlement after other settlement techniques have proved ineffective. After a mediation of several overlapping lawsuits proved unsuccessful, the defendant made an offer of judgment in an amount it believed reflected its liability on a contractual claim for which it did not have a valid defense. The offer was accepted and the one lawsuit was resolved.

Another author has used the Rule on numerous occasions at an early stage of litigation in an attempt to settle employment discrimination claims brought against the State of New Jersey when the attorney believed the plaintiff's costs of litigation (which could ultimately be borne by taxpayers under statutory fee-shift provisions) would greatly exceed the potential recovery of the plaintiff. In fact, all of the practitioners that have contributed to this Report can recall instances where they have successfully utilized the Rule to facilitate settlement. Furthermore, none of these practitioners have experienced an instance where they believe that the Rule was being used in bad faith or for an improper purpose.

B. <u>The Recommendation To Eliminate The Rule Is Premature</u>

The Majority offers three essential bases to support its recommendation that the Rule be deleted. First, the Majority contends that the Rule is being used primarily as a fee shifting device rather than for settlement purposes in contravention of the American Rule. Second, the Majority

contends that the utility of the Rule as a settlement device has been substantially diminished by other developments in the law that post-date the Rule's original adoption in 1969. And third, the Majority contends that the Rule is extremely complex resulting in difficulty and uncertainty in its application.

The Minority, however, is not persuaded by either of the Majority's first two contentions and the Majority has provided no empirical support for them. Without such support, the Minority believes it would be rash, illogical and counterproductive to abandon the Rule at this time, just nine years after the Supreme Court made a major policy decision not only to retain the Rule but to substantially strengthen it by eliminating the counsel fee cap and after six years later affirming its support for the Rule by adopting the changes recommended by the Appellate Division's decision in Schettino and allowing the recovery of litigation expenses for the first time. And although the Minority acknowledges that the Rule's complexities will need to be addressed, it does not believe that such complexities warrant the elimination of the Rule in its entirety. The Minority believes that these issues can be addressed adequately by the Civil Practice Committee and the courts of this state as they continue to define the proper scope and application of the Rule.

C. The Majority's "Perception" That R. 4:58 Is Being Used For Fee Shifting And Not Settlement Is Unsupported

Turning now to the Majority's bases for abandoning the Rule, we will first address the Majority's contention that the Rule is being used as a fee shifting device rather than as a settlement device. The Majority relies heavily on this rationale in recommending that the Rule be deleted, referring to it in at least three different places in its report. For example, the Majority states:

- The "basic reason for making this [abandonment] recommendation is that as a result of the 2000 amendment eliminating the $750 cap on counsel fees, the Rule

is apparently being used primarily as a fee shifting device in contravention of the American Rule, to which our court has remained stalwartly committed, rather than for its intended purpose as a settlement mechanism." Majority Report at p. 1 (emphasis added).

- "[I]t is now the perception of a majority of the Committee that the Rule is not being used primarily as a settlement technique but rather as a fee shifting device that imperils our frequently expressed continued commitment to the American Rule . . . ." Majority Report at p. 4 (emphasis added).

- "[W]hatever potential but unproved utility Rule 4:58 may have as a settlement technique is far outweighed by its propensity for perversion as a general and unintended fee shifting rule . . . ." Majority Report at p. 11 (emphasis added).

The conclusion that the Rule is being improperly used as a fee shifting device, which is peppered throughout the Majority's report, is conclusory, and is set forth without any support whatsoever, empirical or otherwise. The majority's conclusion is especially puzzling in light of R. 4:58-3 which shields plaintiffs suffering a no-cause judgment from the consequences of the Rule and the Appellate Division's decision in Frigon v. DBA Holdings, Inc., 346 N.J. Super. 352 (App. Div. 2002). holding that a defendant making a nominal or token offer is not entitled to the benefits of the Rule precisely because doing so would convert the Rule into an impermissible fee-shifting device. It is also contrary to the perceptions of practitioners in the Minority who have not seen abuse of the Rule and have found it effective in achieving settlements for both plaintiffs and defendants.

In fact, the question of whether the Rule is being used with the intent to subvert the American Rule – rather than for the purpose of promoting settlement – has not in any way been analyzed by the Committee. At most, some members of the Committee, but perhaps not even a majority, have claimed a perception that the Rule potentially is subject to abuse. That is hardly enough to support deletion of a rule that has been in existence in New Jersey for over thirty years and has been strengthened only recently in an effort to enhance its utility.

This is particularly so when some forty-one states have adopted some form of an offer of judgment rule and thirteen of them have taken steps to strengthen it. Michael E. Solimone & Bryan Pacheco, State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice, 13 Ohio St. J. on Disp. Resol. 51, 64 (1997). In an empirical survey of attorneys conducted with regard to an offer of judgment rule similar to New Jersey's, attorneys in Alaska concluded that Alaska's offer of judgment rule did encourage parties to settle, particularly plaintiffs. Id. at 70 n.103.

D. The Offer Of Judgment Rule's Utility Has Not Been Diminished By The Adoption Of Subsequent Settlement Techniques

The Majority's second contention – that the utility of the Rule as a settlement device has been substantially diminished by the implementation of alternative settlement techniques – is equally unsupportable. The Majority points to: (1) the adoption in 1971 of R. 4:42-11(b) providing for prejudgment interest in tort cases; (2) the 1976 Bak-A-Lum Corp. v. Alcoa Building Products decision allowing for the award of pre-judgment interest in contract cases; (3) the routine award of costs to the prevailing party; (4) the institution of early settlement procedures and complimentary dispute resolution techniques pursuant to R. 4:21A and R. 1:40; and (5) the September 1996 amendment to R. 1:4-8 providing for sanctions in the form of attorney's fees for commencing frivolous litigation, as having the combined effect of diminishing the need for the Rule.

Significantly, each of those developments substantially pre-dates the 1994 and 2000 amendments to the Rule (with the exception of the amendments to R. 1:4-8) wherein the Court, far from concluding that the utility of the Rule had been diminished, determined that it would be useful to strengthen the Rule dramatically by removing the $750 cap on attorney's fees and by further refining the Rules' application in multi-defendant cases. We would suggest that it is

difficult to reconcile these recent determinations by the Court, made over the last several years, with the Majority's contention that the utility of the Rule has been diminished by developments that long pre-date the 1994 and 2000 amendments. In addition, it is our view that the Majority's position here – like its perception that the Rule is being used primarily as a fee shifting device – is conclusory and is without any empirical support.

In fact, the Minority submits that the Rule is a settlement tool that is materially different from all the devices referred to by the Majority. For instance, the Prejudgment Interest Rule (R. 4:42-11(b)), which has the dual purpose of promoting settlement and making a party whole, offers a much smaller settlement incentive than the Rule, which not only calls for prejudgment interest, but also awards attorney's fees, litigation expenses and costs. Obviously, the prospect of the shifting of fees and litigation expenses upon rejection of a reasonable offer provides a far greater incentive to settle than does the relatively small threat of exposure to prejudgment interest.

The Majority's argument regarding the routine award of costs to a prevailing party is likewise unpersuasive. Costs are usually an insignificant portion of the total amount expended in litigation and, therefore, are a minor incentive to settle. A far higher percentage of expenses are allocated as attorney's fees and litigation expenses which are normally only recoverable under R. 4:58. It is, therefore, difficult to understand the Majority's contention that the routine award of costs should significantly negate the utility of the Rule.

The advent of complimentary dispute resolution techniques (see R. 4-21A and R. 1:40) is a welcomed development that surely promotes settlement. Nevertheless, in the vast majority of cases, which are exempted from the mandatory arbitration and mediation procedures (or simply do not settle), the utility of the Rule is in no way diminished.

Finally, R. 1:4-8, the Frivolous Litigation Rule, has no bearing whatsoever. The Frivolous Litigation Rule, by amendment effective September 1996, for the first time permitted sanctions in the form of attorney's fees for the filing of a frivolous lawsuit. PRESSLER, Current N.J. COURT RULES, Comment R. 1:4-8, (GANN 2003). It should be noted that R. 1:4-8 is not the only rule allowing for the imposition of sanctions in the form of attorney's fees. See, e.g., PRESSLER, Current N.J. COURT RULES, R. 4:46-6, (GANN 2003) (allowing for attorney's fees at the end of trial when it is learned that a party, in bringing a prior motion for summary judgment, raised a factual contention in bad faith). Provisions imposing sanctions for improper conduct in the form of attorney's fees are completely inapplicable to the Rule.

Frivolous litigation is not the issue. The Rule is uniquely effective with the "unreasonable adversary" whether that adversary is the party or its attorney. All other settlement techniques rely upon reasonable parties evaluating likely results. The Rule is the only device that adds additional consequences for unreasonable positions and causes parties to consider carefully the consequences of their decisions.

The Majority's argument that the utility of the Rule has somehow been preempted by the aforementioned developments and newly implemented settlement techniques is further belied by the reality of litigation in the United States, generally, and in New Jersey, specifically. For example, in 2001, 93 million cases were filed in state courts throughout the United States. B. Ostrom, N. Kauder & LaFountain, Examining the Work of State Courts: A National Perspective from the Court Statistics Project (National Center for State Courts), p. 10 (2003). In New Jersey, 2002 saw over one million cases filed. New Jersey Judiciary Superior Court Caseload Reference Guide 1998-2002, p. 1. Under these circumstances, it is hard to fathom how one of the many settlement devices utilized for the laudable goal of decreasing the amount of litigation in the

courts in New Jersey would purposefully be eliminated, especially when such elimination is based on conjecture and perception.

That the Rule has current utility is supported by the Majority's own acknowledgment that the Rule's recent amendments have resulted in the Rule's vastly increased use as proven by the increased amount of litigation regarding its construction and interpretation. Majority Report at p. 2. The Minority would like to see still more use of the Rule. For example, the Subcommittee on the Offer of Judgment Rule concluded at pages 3-4 of its Report that, in the anecdotal experience of its members, the Rule still was not being used all that frequently, notwithstanding the 1994 and 2000 amendments. In fact, one of the Subcommittee's charges was to determine why this recently strengthened Rule was still not garnering much attention from the bar. The Subcommittee's answer to that question was not only to make recommendations to simplify the Rule and clarify its application but also to unanimously endorse future empirical study.

The Majority apparently cites the increased litigation pertaining to the Rule as evidence that it is being improperly used as a fee shifting device. In fact, the increasing litigation pertaining to the Rule may support just the opposite conclusion; namely, that the Rule is finally being utilized as intended. As with any newly modified statutory provision, the courts must clarify the scope and proper application of a newly adopted rule. Thus, the Minority posits that the increased litigation relating to the Rule may well evidence its increased utilization as a settlement device. However, the Minority concedes that, without further study, no definitive statement can be made regarding how the Rule is currently being utilized by practitioners in New Jersey.

E. The Complexity Of The Offer Of Judgment Rule Should Be Addressed By The Committee And The Courts And Not Used As A Basis For Its Elimination

The Majority states that the present Rule is overly complex and offers various illustrations to demonstrate how these alleged complexities result in unresolved problems in application of the Rule. See Majority Report at pp. 6-9. More specifically, the Majority claims that (1) the distinction between liquidated and unliquidated damages is intimidating and inhibitive; (2) the issue of whether nominal or token offers of judgment should qualify for the consequences of the Rule is still unresolved; (3) the application of the Rule to LAD and CEPA statutory fee-shifting cases is unresolved; (4) how the Rule will be applied to cases seeking non-monetary relief remains unresolved; and (5) there are unresolved issues regarding how the Rule will be applied in multi-plaintiff and multi-defendant situations. Although a detailed analysis of each of these issues is beyond the scope of this report, the Minority would like to address several.

With regard to the issue of the complicated liquidated/unliquidated damages distinction, the Minority agrees that this provision is overly complex. To address its complexity, the Minority would recommend that the Subcommittee's Report to the Committee at large be adopted which recommended eliminating the liquidated-unliquidated damages distinction. Thus, this admitted difficulty with the Rule can be addressed by amendment to the Rule.

As to the question of whether a nominal or token offer should qualify for the consequences of the Rule, this issue has already been addressed and decided by the Appellate Division in Frigon v. DBA Holdings, Inc., 346 N.J. Super. 352 (App. Div. 2002). In Frigon, the Appellate Division held a nominal or token offer ($4,000 on a $1 million claim) as not entitled to the benefits of the Rule because to do so would convert the Rule into an impermissible fee-

shifting device. Thus, the Minority, based on Frigon, does not believe a rule change is necessary and believes that this is basically a non-issue.

With regard to the multi-defendant litigations, this issue has likewise been addressed and resolved. In Schettino v. Roizman Development, 310 N.J. Super. 159, 167-168 (App. Div. 1998) aff'd 158 N.J. 476 (1999), the court held that an offer made by a single defendant to pay a specific amount as his pro rata share could not be considered as an offer entitled to the benefits of the Rule. The Schettino holding was adopted by the August 5, 2000 amendment to the Rule except that the rule change further provided that a single defendant's offer, whether intended as its pro rata share or otherwise, would be entitled to the benefits of R. 4:58 if the total verdict was less then the offer. PRESSLER, Current N.J. COURT RULES, Comment R. 4:58, (GANN 2003).

With regard to the difficulties in applying the Rule in statutory fee cases and whatever other issues the Majority might raise, the Minority believes that before those issues should be used as a basis for abandoning the Rule, they should be evaluated and addressed by either the Committee or the courts. The courts have addressed and will continue to address situations where proper application of the Rule must be decided. See City of Cape May v. Coldren, 329 N.J. Super. 1 (App. Div. 2000) (holding that the Rule does apply to surviving claims after summary judgment but does not prevent an appeal of previously dismissed claims); Firefreeze Worldwide, Inc. v. Brennan & Assoc., 347 N.J. Super. 435 (App. Div. 2002) (finding that a single offer of judgment applies to both claims and counterclaims); Wiese v. Dedhia, 354 N.J. Super. 256 (App. Div. 2002) (permitting a single offer of judgment by multiple plaintiffs); Bandler v. Maurice, 352 N.J. Super. 158 (App. Div. 2002) (finding that the Rule cannot be

utilized in the Special Civil Part). Likewise, the Committee can and should continue to consider modifications aimed at reducing the Rule's complexities and clarifying its application.

In short, the Minority would agree with the Majority's conclusion that the Rule as presently formulated is too complex and in need of modification. The Minority believes, however, that the issues raised by the Majority either can be resolved by the courts or, by minor modifications to the Rule, can be addressed and resolved by recommendation of the Committee.

CONCLUSION

A policy decision was made nine years ago to substantially strengthen New Jersey's offer of judgment rule. That decision was affirmed only three years ago. The Minority acknowledges that the Rule may require additional review and modification necessitated by its renewed utilization. Nothing, however, has happened during recent years that would warrant eliminating the Rule. The Minority submits that the Majority Report's recommendation to eliminate R. 4:58, without further analysis, is premature and may disserve the interests of the courts, trial bar and the interests of justice.

SEPARATE REPORT
OF JUDGE SABATINO ON
THE OFFER OF JUDGMENT RULE

With all due respect to my Committee colleagues, I oppose the majority's recommendation to eliminate the Offer of Judgment Rule without first undertaking an empirical study of the Rule's present application.

This call for an empirical study is included in the general Minority Report, which I have not endorsed simply because I do not agree fully with all of the numerous points it makes. The Majority and Minority Reports, each of them eloquently written, have convinced me conceptually that the present Rule has many pros and cons. I propose that we enhance that conceptual debate with hard empirical data before we advocate any final measures to the Supreme Court.

The logistics of an empirical study are not insurmountable. I am told that the State's automated docket system for civil cases (ACMS) does not track matters in which an Offer of Judgment has been filed. That circumstance, however, can be overcome. Specifically, I suggest that we canvass a segment of civil litigators -- perhaps the roster of certified civil trial lawyers -- with a questionnaire that asks them about the frequency and nature of their experiences with the Rule. The survey might also ask the respondents to

identify, where feasible, the docket numbers of their recent cases in which the Rule was used. Based upon those responses, we could identify adversary counsel in those cases and send them equivalent questionnaires. The process could reveal whether the identified Offers of Judgment provoked fruitful settlement discussions or otherwise affected the path of the litigation. Perhaps some law student volunteers could be recruited to assist in compiling and analyzing the data, as was done in the past with the Juror Questions project.

The bottom line for me is that although the Rule in its present form undoubtedly has shortcomings, we should obtain some empirical insights before overhauling it or scrapping it altogether.

HON. JACK M. SABATINO, J.S.C.

Attachment II

Memorandum

To: **Offer of Judgment Subcommittee of the Civil Practice Committee**
From: **Suzanne Goldberg**
Re: **Comments on the Offer of Judgment Rule (R. 4:58)**
Date: **February 16, 2005 (revised October 27, 2005)**

Although R. 4:58, the Offer of Judgment Rule (the "Rule"), is sometimes described as a neutral rule for encouraging settlement and has occasionally facilitated settlements that benefit plaintiffs as well as defendants, it functions mainly as "a good weapon for defense counsel."[1] This memo addresses several ways in which the Rule distorts the litigation process and, in light of these harms, recommends its removal. In addition, at the Subcommittee's request, the memo also identifies several options for limiting, rather than eliminating, the inequity of the Offer of Judgment Rule.

I. The Offer of Judgment Rule Should Be Abandoned Entirely Because Its Negative Effects Far Outweigh Its Benefits.

While the terms of the Offer of Judgment Rule are relatively neutral as between plaintiffs and defendants, its implementation causes unwarranted distortion of the litigation playing field and, in doing so, undermines settled public policy. This section will address first the use of the rule as a fee-shifting device and then discuss several reasons that the costs of this settlement tool far outweigh its benefits. These include: 1) its exacerbation of the structural and resource imbalances that typically exist between plaintiffs and defendants; 2) its erosion of longstanding public policy values supporting access to justice that are reflected in the American rule and remedial fee-shifting rules; and 3) its categorical pressure for settlement that disregards important values of litigation.

A. The Rule Functions As a Fee-Shifting Device.

Three observations warrant our attention in connection with the Rule's use as a fee-shifting device.[2] First, and perhaps most obviously, the suggestion that the Rule would not (or should not) be used deliberately for the purpose of fee shifting runs directly contrary to the Rule's explicit provision *for* fee shifting. Nothing in the language of the Rule prevents either party from making an offer of judgment with the deliberate aim of obtaining a fee shift (or at least of forcing the adversary to worry about the possibility of a fee shift). Further, none of the three explicit exceptions to a fee shift (the 20% margin, the no-cause verdict, and nominal damages) undercut the Rule's vitality as a fee-shifting

[1] Georgia A. Staton, *Practitioner's Handy Guide to Rule 68 Offers of Judgment: Defense Counsel's Sword*, 67 Def. Couns. J. 366, 366 (2000). Because Rule 68 has been analyzed more extensively than the New Jersey Rule, this memo draws from cases and articles discussing the federal rule as well as the Rule under consideration here.

[2] In the Committee's 2004 Report on the Rule, the majority disagrees with the dissent's assertion that the Rule is being used as a fee-shifting device but does not contend that the Rule's use as a fee-shifting device would be proper.

device. As a result, intelligent, strategic lawyers would be remiss not to take advantage of its fee-shifting potential.

Second, although significant empirical challenges would make it difficult to determine how often the Rule is used for purposes of shifting fees rather than for its ostensible purpose of inducing an unreasonable adversary to cede ground and settle, case law demonstrates that, at times, parties have sought to use the Rule specifically to benefit from a fee shift.[3] We see this in the making of token offers. If the point of the Rule is to achieve early settlement of "worthy" cases, *McMahon v. New Jersey Mfrs. Ins. Co.*, 364 N.J. Super. 188, 192 (App. Div. 2003), then the making of a token offer cannot be understood to represent a reasonable settlement effort. Yet several cases evidence the making of token offers in exactly this manner. In *Frigon v. DBA Holdings*, Inc., 346 N.J. Super. 352, 353 (App. Div. 2002), a $4000 offer was made to settle a $1 million liquidated damages claim. Similarly, in *Elrac, Inc. v. Britto*, 341 N.J. Super. 400, 403 (App. Div. 2001), the offers of judgment on a claim and counterclaim were for $25 and $1 respectively. And in *DeBrango v. Summit Bancorp*, 328 N.J. Super. 219, 224 (App. Div. 2000), the offer to settle a claim related to a $90,000 alleged theft was for 5 cents. Given the disparity between the claims at issue and the offers made, it is difficult to understand the offers in these cases as made for anything other than the purpose of fee shifting. While the stark difference between the offers and the judgment originally sought made it easier for courts in these cases to reject application of the Rule, offers that are less glaringly token but still *de minimis* presumably can escape judicial invalidation.

Third, the use of the Rule as a fee-shifting device has been acknowledged by at least one court. In *City of Atlantic City v. Boardwalk Regency Corp.*, 20 N.J. Tax 21, 28-29 (2002), the court observed that "[t]he Offer of Judgment Rule, like the frivolous litigation rule, the frivolous claims statute, and the Taxpayer Bill of Rights, is a fee shifting rule which is an exception to the well-established American rule."

Because the overwhelming majority of cases settle without reported decisions, we cannot know precisely to what degree fee shifting is the motivator of parties that invoke the Rule's terms or, for that matter, the motivator of parties that accept offers. However, as these cases illustrate, the Rule is unquestionably, and reasonably, in light of its language, seen as a tool to enable fee shifts.[4]

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[3] The limited empirical study of New Jersey's rule did not attempt such a qualitative analysis of offers of judgment. *See* Albert Yoon and Tom Baker, *Offer of Judgment Rules and Civil Litigation: An Empirical Study of Insurance-Based Disputes* (at hal-law.usc.edu/cleo/workshops/04-05/documents/yoon.pdf). For that reason and for related methodological concerns, I concur with the majority's conclusion, Majority Report n. 2, that the Yoon and Albert study, while interesting, does not address the concerns about the Rule's use that have been the subcommittee's focus.

[4] Commenting on a Texas rule that has parallels to New Jersey's Rule, one scholar observed that

> [a]llowing the offeror of a bad faith offer, of which the sole purpose is to trigger the offer of judgment statute, to recover his post-offer costs, not only grants the offeror a windfall, but also effectively encourages such token offers. The potential award of all post-offer costs increases the incentive to make a token offer and consequently undermines the goal of encouraging settlement.

Craig Madison Patrick, *The Offer You Can't Refuse: Offers of Judgment in the Eastern District of Texas*, 46 Baylor L. Rev. 1075, 1086-87 (1994).

Although I address below the possibility that an amendment to the Rule codifying *Frigon*'s rejection of nominal offers for fee-shifting purposes would resolve this problem, it bears noting here that distinguishing between nominal and meaningful offers is not a simple task, particularly in light of the non-monetary litigation values addressed below.

B. The Rule Exacerbates the Disparity Between Plaintiffs and Defendants With Respect to Information Access and Resources.

The Rule exacerbates informational and resource differences between plaintiffs and defendants in two primary ways: it places undue pressure on plaintiffs, who already tend to be risk-averse, to settle in the absence of adequate information, and it intensifies the effects of resource differences between plaintiffs and defendants.

First, because plaintiffs' success in litigation frequently depends on information in defendants' possession, offers made prior to the close of discovery put plaintiffs in the untenable position of having to guess at how precisely defendants' documents and witnesses will support the claims at issue. Simply put, the early settlement offer pressures the plaintiff (and his or her lawyer, especially if that lawyer is working on a contingency basis) to settle in the absence of adequate information to evaluate the reasonableness of the offer.[5] Of course, this is true any time a defendant makes a settlement offer early in litigation. However, the problem here is that the State, through the Rule, has increased the pressure on plaintiffs to make decisions without sufficient information by adding to the costs of an incorrect decision.[6] This is especially of concern in light of empirical data showing that plaintiffs already tend to be risk-averse in litigation.[7] As one scholar concluded, "[s]ince plaintiffs are generally more risk averse

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[5] As Justice Brennan observed of the Supreme Court majority's decision to include attorneys' fees in the definition of "costs" for purposes of fee shifting under the federal rule:

> The Court's decision inevitably will encourage defendants who know they have violated the law to make "low-ball" offers immediately after suit is filed and before plaintiffs have been able to obtain the information they are entitled to by way of discovery to assess the strength of their claims and the reasonableness of the offers. The result will put severe pressure on plaintiffs to settle on the basis of inadequate information in order to avoid the risk of bearing all of their fees even if reasonable discovery might reveal that the defendants were subject to far greater liability. Indeed, because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery.

Marek v. Chesny, 473 U.S. 1, 31 (1985) (Brennan, J., dissenting). *See also* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 Geo Wash. L. Rev. 1, 8 (1985) (stating that "[t]he defendant's advantage can be especially damaging early in the case because the rule gives plaintiff only ten days to evaluate offers, a period that allows plaintiffs little opportunity to take any discovery necessary to evaluate an offer") (footnote omitted).

[6] In reference to the federal offer of judgment rule, Jenny Rubin confirmed that "at the early stages of litigation, it is extremely difficult for the plaintiff to adequately assess an offer of judgment and weigh the inherent risks of accepting or rejecting it." Jenny R. Rubin, *Rule 68: A Red Herring in Environmental Citizen Suits*, 12 Geo. J. Legal Ethics 849, 852 (1999).

[7] *See, e.g.*, Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich. L. Rev. 107, 129-37 (1994) (illustrating through studies that risk

than defendants, a 'loser pays' rule impacts disproportionately on plaintiffs' access to the courts."[8]

Second, because the Rule makes litigation more costly, it aggravates the already troublesome effects of resource differences between the parties. Since plaintiffs typically, though not always, have fewer resources than defendants, the Rule has a comparatively more burdensome effect on them, encourages acceptance of unreasonably low offers, and may chill litigation entirely.[9] When a proposal was put forward to implement an offer of judgment rule in Ohio, the Ohio Academy of Trial Lawyers made this very point.

> They argued that the proposal was unnecessary, since there was purportedly no evidence of "an overabundance of unnecessary trials." Moreover, they claimed, the proposal would have a chilling effect on plaintiffs, because "[n]o credible argument can be made . . . that personal injury or wrongful death plaintiffs are on an equal footing with corporate defendants or the insurance companies that insure tortfeasors. The economic leverage—and hence the ability to tolerate risk—clearly rests with the latter."[10]

Although resource disparities are inevitable, the use of the State's power to heighten the effects of those disparities through the Rule must be weighed against any positive effects the Rule has in facilitating settlement.[11]

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aversion, among other factors, encourages plaintiffs to accept settlement offers that are irrational from an economic standpoint); Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DePaul L. Rev. 363, 365 (1998) (observing that, in settlement negotiations, plaintiffs tend to be more risk averse than defendants); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. Cal. L. Rev. 113, 152, 162 (1996) (discussing risk aversion among plaintiffs).

[8] Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle With Access to Justice*, 76 Tex. L. Rev. 1863, 1864 (1998) (footnote omitted).

[9] In considering the effect of the federal offer of judgment rule on environmental litigation, one scholar observed that

> Many citizen plaintiffs argue that because they have limited funds, the ability of defendants to recover attorneys' fee shifts the balance of power in settlement negotiations in favor of defendants. Because accepting an offer of judgment is the only certain means of avoiding liability for the defendant's fees and costs, plaintiffs claim that they are coerced into accepting unfavorable settlements. This may occur even when the plaintiff is likely to succeed on the merits at trial or when the settlement offer is too low, because the benefits of continuing to judgment may not outweigh the potential risk of an assessment of attorneys' fees.

Rubin, *supra*, at 853-54 (footnotes omitted). See also Russell C. Fagg, Montana Offer of Judgment Rule: Let's Provide Bona Fide Settlement Incentives, 60 Mont. L. Rev. 39, 49 (1999) ("[A]ttorney's fees are also the hammer which could force potential litigants out of the litigation arena if faced with paying the opposing party's attorney's fees. Thus, those less fortunate may be further disenfranchised from litigation if attorney's fees are on the table. . . . When a party has to consider paying not only his own attorney's fees, but also his opponents attorney's fees, he may feel compelled to settle a case he would prefer to take to trial.").

[10] Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 Ohio St. J. on Disp. Resol. 51, 68-69 (1997).

[11] Indeed, the Rule's heightening of the resource mismatch may actually have an adverse effect on settlement. As one scholar observed, repeat player litigants have strong incentive to settle cases with "bad" facts and to litigate cases with "favorable" facts. "[R]epeat player litigants, particularly tort and product

C. The Rule Exacerbates the Public Welfare Losses Inherent in Settlement and Undermines Settled Public Policy Values Reflected in Myriad Statutes and Longstanding Traditions in American Litigation.

Although settlement is frequently desirable, the Rule's effect of heightening the already strong pressure on plaintiffs to settle has the effect of intensifying the negative aspects of settlement. Of these, two stand out particularly: the loss of information about public harms and the reduction in the incentive to vindicate protected rights.

First, the Offer of Judgment Rule casts a large shadow over the value of litigation in unearthing product defects, civil rights violations, environmental harms and other societal ills. Discovery and trial in these types of cases make possible exposure of product defects that would not otherwise come to light. Although risk-averse plaintiffs already have significant incentive to settle, the Rule uses the power of the state to magnify that incentive, arguably to the detriment of the public's health and well-being.

Second, the systemic aims to facilitate access to justice through notice pleading and the American Rule[12] and to empower private attorneys general to vindicate important rights through fee-shifting statutes are undermined by the Rule's added pressure on plaintiffs to settle. As noted above, plaintiffs face a "draconian choice"[13] when presented with an offer of judgment; a "loser pays" rule has a chilling effect on plaintiffs' willingness to file meritorious suits.

Moreover, the use of two-way fee shifting in cases where statutes authorize fees to prevailing plaintiffs runs directly contrary to the rationale underlying those statutes. In discussing the federal fee-shifting rule in civil rights litigation, the Supreme Court observed that this different treatment of plaintiffs and defendants was important for three reasons:

> the need to facilitate the enforcement of the civil rights laws through "private attorneys general;" the risk of creating a disincentive for plaintiffs to bring civil rights suits if prevailing defendants could obtain their attorney's fees as a matter of course; and lastly, "when a district court

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liability defendants, have a strong economic interest to engage in strategic precedent setting and reduce their potential liability in future cases. These repeat player litigants manipulate precedent by pursuing settlement in cases with unfriendly facts, while tenaciously litigating cases with favorable facts." Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 Cornell L. Rev. 1, 1 (2000). To the extent repeat litigants would be at all willing to make settlement offers in comparatively weak cases, the Rule may make them less likely to do so because its effect of heightening the stakes of non-acceptance may make it more likely for plaintiffs to accept.

[12] "[U]nderlying the American rule is a concern that a well-heeled defendant is less likely to be deterred from defending a weak suit by the threat of having to pay its opponent's attorneys' fees than a plaintiff from prosecuting a possibly meritorious suit." Sherman, *supra*, at 1864.

[13] *Butler v. Smithfield Foods, Inc.*, 179 F.R.D. 173, 175 (E.D.N.C. 1998) (discussing F.R.C.P. 68), *quoting Said v. Virginia Commonwealth Univ./Med. Coll.*, 130 F.R.D. 60, 63 (E.D. Va. 1990).

awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law."[14]

Further still, to the extent the Rule operates to reduce statutory fees that would be awarded to prevailing plaintiffs, the Rule functions as a disincentive to the plaintiffs' bar from taking and/or vigorously pursuing cases. The enhanced risks of a diminished recovery would lead any efficiency-minded lawyer to turn away borderline cases or to encourage acceptance of unreasonably low offers. As a result, civil rights, environmental, and other laws under which prevailing plaintiffs may obtain fees may be underenforced because the underlying cases tend to be difficult, injuries often receive minimal compensation, and individual plaintiffs tend to have limited resources that they are unlikely to expend absent sure recovery.

When supporters of the Rule might suggest that reduced filings and early settlements are beneficial because they clear courts' dockets and avoid unnecessary expenditures, they disregard not only the Rule's disproportionate chilling effect on plaintiffs but also overly discount the value of non-monetary values of litigation. Some courts have recognized that public values can be served even where plaintiffs receive a far smaller damage award than they had sought. In *Brandau v. Kansas*, 168 F.3d 1179, 1183 (10th Cir. 1999), for example, the court found that a sexual harassment plaintiff who received nominal damages was nonetheless entitled to attorneys' fees because she vindicated her own civil rights along with the rights of her coworkers. Under the Rule, however, the non-monetary value of the *Brandau* plaintiff's victory could not be acknowledged and fees and costs would shift.

In addition, because they frequently do not involve admissions of liability, settlements often disserve broader values for litigants and society at large. More broadly, litigated judgments have "obvious importance for guiding future behavior and imposing order and certainty on a transactional world" in a way that settlements do not.[15] Again, the point here is not to condemn settlement or to deny that the Rule has value in litigation against "unreasonable" adversaries[16] but rather to clarify that its value is far outweighed by the significant costs that flow from the intensified settlement pressure produced by the Rule.

II. If the Offer of Judgment Rule is Not Eliminated, It Should Be Significantly Restricted in its Scope and Effects.

In the event the Committee elects not to abolish the Rule, several potential mechanisms may cabin, though not eliminate, some of the harms just discussed. A final note in this section will address additional ambiguities in the Rule that warrant attention should the Rule be retained.

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[14] *See Payne v. Milwaukee County*, 288 F.3d 1021, 1026 (7th Cir. 2002) (discussing *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) and *Fogerty v. Fantasy Inc.*, 510 U.S. 517 (1994)).

[15] David Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2622-23 (1995).

[16] Majority Report at 11.

A. The Rule's Harmful Effects Can Be Limited, Though Not Eradicated, In Several Ways.

The first option for reducing the Rule's negative effects would be an amendment authorizing a court not to shift costs and fees if the prevailing party was reasonable in rejecting the offer of judgment. This possibility of a reasonable rejection has been recognized already in New Jersey. In *Brach, Eichler, et al. v. Ezekwo*, 345 N.J. Super 1, 18 (App. Div. 2001), for example, the court observed that "[o]ne may act in complete good faith and with sound reasons when rejecting a settlement offer, yet be surprised by a trial's outcome and subject to R. 4:58-2 sanctions."[17]

An analogous provision to accommodate reasonable rejection of a settlement offer already exists with respect to F.R.C.P. Rule 68. For litigants pursuing cases under the Individuals with Disabilities Education Act, the statute provides an exception to fee- and cost-shifting. Specifically, it states that notwithstanding the general applicability of Rule 68, "an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer." 20 U.S.C. § 1415(i)(3)(E). *See also R.N. v. Suffield Bd. of Educ.*, 194 F.R.D. 49, 52 (D. Conn. 2000) ("Unlike Rule 68, which is mandatory, the IDEA has a caveat – the parents may still recover attorneys' fees if their rejection of an offer is substantially justified.") (footnote omitted). A similar "substantial justification" exception might be added to the New Jersey Rule to lessen the burdens discussed above.

A second option might track a proposal made by Judge William W. Schwarzer to amend Rule 68.[18] As described by Edward Sherman, this proposal would not "allow[] recovery of all reasonable attorneys' fees incurred after the time of the offer" but instead "would limit recoverable costs to 'what is needed to make the offeror whole."[19] By "making the offeror whole," Schwarzer means that the offeree would have to reimburse only those post-offer costs that are greater than the offer (i.e. than the amount the offeror would have paid had the offer been accepted).[20] Sherman describes and analyzes the proposal at length. Rather than reproduce this analysis, I have attached it at the end of this memo. One significant problem with this approach, however, as Sherman explains, is that it incentivizes offerors to make lower offers – because the closer the offer comes to the judgment, the less the offeree will have to pay to "make the offeror whole."[21]

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[17] The court also thoughtfully distinguished between the relative importance of encouraging settlement and discouraging frivolous litigation. "The need for a forceful deterrent for declining a settlement offer, while considerable, is not as compelling" as in the context of frivolous lawsuits. *Id.* at 18.

[18] *See* Sherman, *supra*, discussing William W. Schwarzer, *Fee Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 Judicature 147, 153 (1992). While Schwarzer's proposal has not become part of the Rule, its innovative approach merits our attention here.

[19] *Id.* at 1883.

[20] To illustrate with Sherman's example, assume a defendant offers $25,000, the plaintiff obtains $20,000 at trial, and the defendant's post-offer costs are $10,000. Under Schwarzer's proposal, the plaintiff would have to pay the defendant $5000 – "the amount by which the offeror is actually better off after the trial than had his offer been accepted ($5000) should be deducted from the defendant's costs of $10,000." *Id.* at 1884.

[21] *Id.* at 1884.

A third set of changes that have the value of being both less confusing and less counterintuitive than Schwarzer's comes from a 1995 taskforce of the American Bar Association. These proposals, which would have brought Rule 68 closer to the New Jersey Rule by authorizing fee shifting and use by both parties, would impose several specific conditions to lessen some of the Rule's undesirable effects. Again, the Sherman article discusses this proposal in some detail, and I have attached relevant portions of the discussion to this memo. For purposes here, though, three possible provisions inspired by the ABA proposal warrant consideration.

- Raise the margin of error before the Rule's penalties are triggered. The current margin is 20%. We might consider changing this to 25% or 33%. The ABA proposal suggested a 25% margin.

- Modify the Rule so that its application is recommended rather than mandatory. Under the ABA proposal, a court could decide against shifting attorneys' fees "in case of undue hardship or for any other reason justifying the offeree's seeking judicial resolution of the suit." We might do the same.

- Delay the timing of offers and acceptance. For example, we might consider delaying the making of the first offer for 60 days after the service of the complaint and allowing the offeree 60 days in which to accept before the Rule's penalties are triggered. This, too, would parallel the ABA proposal, which was designed "to ensure that the offeree has a reasonable period of time to assess its case."[22] This would not, however, address the problem of information access discussed in Section IB of this memo.

In addition, we might codify the holding in *Frigon* to disallow cost- and fee-shifting in the case of nominal or token offers. However, it bears noting that a disallowance of token offers would not redress the other harms identified above, including the Rule's chilling effect on plaintiffs.

B. Even if the Rule is Modified, Serious Difficulties and Ambiguities Remain.

Even if some of the proposals above are adopted, the Rule remains fraught with ambiguities. In addition, as the Minority Report of the Committee observed last year, numerous other, more effective, provisions exist to encourage settlement and discourage frivolous litigation.

Among the ambiguities afflicting the Rule are:

- the effect of nominal offers, including the question whether *Frigon* should be codified in the Rule;

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[22] Sherman, *supra*, at 1886.

- the entitlement of defendants to attorneys' fees when prevailing plaintiffs are also entitled by statute to attorneys' fees;[23]
- the application of the Rule's provision regarding a "result as or more favorable" than the result originally sought where parties have sought equitable relief; and

- the application of the Rule to marital tort claims and cases brought jointly by married couples, given the Rule's exception for matrimonial actions.[24]

In addition, as last year's Minority Report observed, numerous other procedural devices cause far fewer harms while serving the same aim of encouraging reasonable settlements. These include, for example, 1) the prejudgment interest rule, R. 4:42-11(b), which is applicable to tort actions, and the Supreme Court's ruling in *Bak-A-Lum Corp. of America v. Alcoa Building Prod.*, 69 N.J. 123, 131 (1976), affirming the court's equitable authority to award prejudgment interest in contract cases; 2) mandatory non-binding arbitration per R. 4:21A; 3) complimentary dispute resolution techniques authorized by R. 1:40 as well as other court-initiated settlement efforts; and 4) penalties for frivolous litigation, as provided in R. 1:4-8. Even if these do not have precisely the same potential effect on unreasonable adversaries as the current Rule, they are important means for facilitating settlement.

Conclusion

Although the Rule no doubt brings to bear additional settlement pressure, its benefits come at the intolerably high price of exacerbating already-potent disparities between plaintiffs and defendants and undermining core commitments to accessible justice and vindication of basic rights reflected in the state's statutory framework. Given the availability of myriad other settlement devices, the Rule should be abandoned. If the Committee chooses to retain the Rule, notwithstanding its serious flaws, it should, at a minimum recommend some of the modifications suggested above to curb the Rule's harmful effects.

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[23] As the Civil Practice Committee's Minority Report framed the issue last year, "[h]ow would this impact on the whole prevailing-party scheme? Should plaintiff's award include the shifted fees obtained as the prevailing party although the rule now excludes counsel fees from the calculation? Do we think we can encourage LAD and CEPA plaintiffs to accept offers by reducing or eliminating their counsel-fee expectations? Do we want to? Is whatever decision is made respecting LAD and CEPA plaintiffs applicable as well to the whole panoply of other rule and statutory fee-shifting provisions which may have a less compelling public-interest basis?" Minority Report at 5.

As that report points out, the federal offer of judgment rule's interaction with civil rights fee-shifting statutes has also generated some confusion. For example, although *Marek v. Chesny*, 473 U.S. 1 (1985), held that a prevailing plaintiff was not entitled to post-offer fees as well as costs, later courts have viewed this holding as limited. *See, e.g., Dalal v. Alliant Techsystems, Inc.*, 182 F.3d 757, 760 n.3 (10th Cir. 1999) (declining to apply F.R.C.P. 68 to civil rights fee-shifting case); *Gudenkauf v. Stauffer Communications, Inc.*, 158 F.3d 1074, 1083 (10th Cir. 1998) (treating *Marek* as having been undermined by the Civil Rights Act of 1991).

[24] On these issues, a recent decision found that the Rule could apply to a marital tort claim, *see Borchert v. Borchert*, 361 N.J. Super. 175 (Ch. Div. 2002), while the Appellate Division found that the Rule did not preclude a single offer by married plaintiffs. *See Wiese v. Dedhia*, 354 N.J. Super. 256 (App. Div. 2002).

Appendix

The following excerpt from Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle With Access to Justice,* 76 Tex. L. Rev. 1863, 1882-96 (1998), provides an extended analysis of the Schwarzer and ABA proposals to modify F.R.C.P. R. 68 as discussed above.

C. The Schwarzer Proposal

The proposal by Judge William W. Schwarzer took a new and very different approach to the incentive structure underlying Rule 68. [FN112] It would require only modest amendments to the rule, making the right to invoke the rule bilateral so as to include plaintiffs and allowing the recovery of reasonable attorneys' fees as well as court costs. [FN113] The heart of ***1883** the proposal deals with which costs are recoverable if the offeree does not obtain a more favorable judgment. Instead of allowing recovery of all reasonable attorneys' fees incurred after the time of the offer, the Schwarzer proposal would limit recoverable costs to "what is needed to make the offeror whole." [FN114] Thus the costs "would be reduced by the amount by which the offeror benefits from paying or receiving the judgment compared with what it would have paid or received under its offer." [FN115]

The "benefit-of-the-judgment" approach taken by Judge Schwarzer would work like this: Assume a plaintiff refuses the defendant's offer to settle for $25,000 and obtains a judgment for $20,000. The defendant's reasonable post-offer costs are $10,000. Under the current rule, the plaintiff would have to pay the full $10,000 of the defendant's costs because it did not obtain a more favorable judgment than the offer. However, Judge Schwarzer notes that the defendant is actually $5,000 better off under the $20,000 judgment than had the plaintiff accepted his $25,000 offer. The offeree plaintiff should only have to pay such costs as would make the defendant offeror whole. Therefore, the amount by which the offeror is actually better off after the trial than had his offer been accepted ($5,000) should be deducted from the defendant's costs of $10,000. The defendant would be entitled to recover costs of $5,000, which would be set off against the plaintiff's judgment of $20,000, leaving the plaintiff with a net judgment of $15,000. The proposal would also limit recoverable costs to the amount of the judgment. If the defendant's costs had been $30,000, that amount would be reduced by the $5,000 benefit the defendant received by the jury's awarding a judgment of $5,000 less than the defendant had offered. This would leave costs of $25,000, but the defendant would only be entitled to recover $20,000, the amount of the judgment.

The Schwarzer proposal would operate in the same manner if the plaintiff had made the offer of judgment (let us say $25,000). Because the $20,000 judgment is not more favorable to the plaintiff than the offer, the plaintiff would not be entitled to recover costs. But assume instead that the plaintiff had made an offer of $15,000. The plaintiff received a benefit of $5,000, because the jury awarded him $20,000 while he had offered to settle for only $15,000. Therefore, the $5,000 benefit would be deducted from the plaintiff's post-offer costs, and assuming they were $10,000, the plaintiff would be

entitled to recover costs of $5,000, in addition to his $15,000 judgment.

The incentive structure intended by this proposal is "to encourage early offers, because the more fees that remain to be incurred, the greater the potential gains and risks." [FN116] Judge Schwarzer also sees the proposal ***1884** as preventing windfall recoveries under the offer of judgment law. [FN117] The proposal contains a number of features designed to lessen the strictness of fee shifting so as not to discourage access to the courts. Because costs are capped by the amount of judgment, plaintiffs are not threatened with out-of-pocket loss. Claims under fee shifting statutes, such as civil rights and antitrust laws, are excluded, thus superseding the effect of Marek v. Chesny. [FN118] Costs are limited to reasonable attorneys' fees, and "the court is the ultimate arbiter of the award." [FN119]

The most unsettling aspect of the Schwarzer proposal is that the greater the gap between the offer and the judgment (that is, the further the offeree misses in obtaining a judgment as favorable as the offer), the less the offeror is entitled to in costs. [FN120] If a defendant offers to settle for $35,000 and the jury awards the plaintiff a $5,000 judgment, the defendant is deemed to have received a benefit of $30,000 because the judgment is $30,000 lower than he would have paid had his offer been accepted. Therefore, $30,000 will be deducted from his costs; if his costs were $10,000, there would be no fee shifting. However, if the defendant had offered $10,000 and the judgment was for $5,000, his benefit would be only $5,000, which would be deducted from his costs ($10,000), leaving an award of $5,000 costs. So the closer the offeree comes to getting a judgment as favorable as the offer, the more costs he may have to pay. The rule would award more costs for a less generous offer, arguably reducing the offeree's incentive to settle. Judge Schwarzer justifies this as "a necessary corollary of the make-whole principle underlying the rule," arguing that "it does not significantly weaken the revised rule's incentives and is justifiable on the basis of the benefit derived by the offeror from the more favorable result obtained." [FN121]

The Schwarzer proposal is attractive for limiting cost shifting to the true loss that the offeror suffered from the offeree's refusal to settle, thus preventing windfalls through the offer of judgment device. It also imposes a number of limitations designed to assure access to courts, some of which would also be adopted by the ABA proposal. Just how the Schwarzer proposal's incentives cut is hard to fathom, however, and the counterintuitive quality of its awarding higher costs for larger disparities between the offer and the judgment obtained would seem to be a disincentive to settlement. [FN122]

***1885** D. The ABA Proposal [FN123]

As a response to the House's passage of the Contract with America's modified "loser pays" rule, the 1995 ABA task force's proposal would modify Rule 68 to make it available to both parties and to allow shifting of attorneys fees. [FN124] The drafting committee expressed concern that the rule not impede access to the courts and the right of citizens to a jury trial. Therefore, the proposal imposed a number of conditions, including a 25% margin of error for determining if a judgment is less favorable than the

offer [FN125] and an escape hatch that would permit the court not to shift attorneys' fees in cases of undue hardship or for any other reason justifying the offeree's seeking judicial resolution of the suit. [FN126] An earlier draft would also have altered the Marek effect of denying attorneys' fees to a successful civil-rights plaintiff in the event a judgment is less than an offer. [FN127] In such a case, attorneys' fees incurred before an offer was made would have remained recoverable. The proposal passed by the ABA House of Delegates, however, did "not address whether the interpretation of Rule 68 in Marek v. Chesny . . . should apply." [FN128] The proposal as passed would also not alter the Delta Air Lines interpretation that the rule does not apply to a judgment for a defendant. [FN129]

The proposal "requires that an offer must be to settle all of the monetary claims the offeror has against the adverse party in the suit." [FN130] Such ***1886** an imposition is "intended to prevent parties from making offers to settle as to less than all the monetary claims and thus to discourage piece-meal settlement . . . that may not expedite the ultimate resolution of the suit," [FN131] as well as strategic offers as to selective claims that cannot be adequately evaluated apart from the whole case. An offer may be made in suits in which the claims are for monetary damages or where any non-monetary claims are only ancillary and incidental to the monetary claims. [FN132]

The terms of the proposal were drawn in an attempt to incentivize offers to settle early in the suit and yet not unduly to coerce a party toward settlement.

1. Time for Making Offer [FN133]--The ABA proposal requires that the offer not be made before sixty days after the service of the complaint in order to ensure that the offeree has a reasonable period of time to assess its case.

The date of the service of the complaint is used to compute this time period, rather than the service of an answer, because a Rule 12(b) motion defers the time for filing an answer until after that motion is ruled on, which can sometimes be late in the progress of the case. This provision is intended to create incentives to settle early in the litigation, which would not occur if the answer were not filed until late in the litigation. The power of the court for good cause shown, to extend the time period during which an offer remains open insures against unfairness to a claimant offeree who cannot reasonably be expected to evaluate its case until an answer is filed or until equivalent information as to the opposing party's positions is provided.

The requirement that offers not be made later than 60 days before the date set for trial reflects the intent of this rule to encourage early settlements and not to allow parties to put off until just before trial invocation of an offer of judgment. Of course, parties can always make offers not under this rule within 60 days of trial.

***1887** 2. Time Period for Keeping the Offer Open-- [FN134]The requirement that offers must remain open at least 60 days is based on the conviction that an offeree should have sufficient time to evaluate its case and the offer. In addition, since an offeree must expend considerable time and possibly money in evaluating an offer, the offeror should

be required to keep it open for a set time period of 60 days or any further additional period specified in the offer. Offers that do not state a time limit are allowed (being deemed to remain open for 60 days and then indefinitely until 60 days before the date set for trial, unless withdrawn) in recognition of the fact that some offerors are content to let their offers remain open indefinitely and that such offers provide a useful incentive to settle, even though they may not be accepted until a later stage in the litigation.

Since one of the subjects for consideration at pretrial conferences under Rule 16(c)(9) is settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule, it is appropriate for judges to inquire at the initial scheduling conference as to whether the parties contemplate making a Rule 68 offer, and, if so, whether certain discovery or other pretrial procedures would be desirable for enabling the offeree to respond meaningfully to the offer.

A court is allowed on good cause shown, to extend the time period during which an offer is open. This is in recognition of the fact that sometimes an offeree cannot reasonably evaluate its case within a 60 day or other set time period. Two such situations might be when more discovery is needed or when an alternative dispute resolution procedure will take place which the offeree believes would provide a better basis to evaluate his case. If the court extends the time period, an offeror should be allowed to withdraw its offer because it could not reasonably have anticipated the length of the court's extension of time. Of course, there would be no need for an extension of time from the court if the offeror chose unilaterally to extend the time period and so notified the offeree or if the offeror and offeree entered a stipulation to extend the time period.

A provision in the proposal deems an offer to be refused if it is not accepted within the time period during which it remains open. This permits an offeror to force an offeree early in the litigation to respond to its offer and if it does not accept, the offeree will be locked in with possible sanctions if it does poorly in the final judgment. Without such a provision, there would be little incentive for offerees to take seriously offers made early in the litigation.

3. The Fee Shifting Formula-- [FN135] The 75%-125% percentages that trigger cost shifting were chosen in the belief that case evaluations by ***1888** parties and their attorneys often lack exact precision and that a margin of error should be accorded to offerees before imposing cost shifting. Offerees are given a 25% margin of error before they can be subjected to cost shifting.

The 25% margin-of-error approach is subject to the criticism that if the judgment is 25% less favorable to the offeree than the offer, the offeror is entitled to cost shifting even though he has already benefited by the fact that the offeree did less well than the offer at which the offeror had been willing to settle. The "benefit-of-the-judgment" approach proposed by Judge Schwarzer would avoid this anomaly by providing that the award of costs is reduced by the difference between the offer and the judgment, reflecting the benefit gained by the offeror. However, it is not clear that the Schwarzer rule would provide as effective an incentive to make and accept reasonable settlement offers as the

25% margin-of-error approach. Furthermore, because of the complexity of the formula used, the "benefit-of-the-judgment" rule places a high priority on complex strategizing that could undermine the incentive structure.

The costs shifted under the ABA proposal include attorneys' fees but not expert witness fees and expenses. This is in the belief that attorneys' fees are a more necessary, direct, and predictable consequence of refusing an offer to settle, while expert fees and expenses are more discretionary and unpredictable and therefore more subject to manipulation and unfairness in cost shifting.

To offset the potential for disparate impact of cost shifting on plaintiffs who might be more risk averse, the rule would also limit the offeror's recovery of costs, including attorneys' fees, to the total amount of the judgment. This is intended to prevent a plaintiff, or claimant, from having the amount of his judgment eaten up by cost shifting and from having to go into his own pocket to pay additional costs.

That cost shifting shall not apply if the claimant offeree receives a take-nothing judgment is consistent with the interpretation of Federal Rule 68 in Delta Air Lines, Inc. v. August. [FN136] Of course, the rule also does not apply when there is a defendant's verdict. These limitations are necessary as otherwise, a defendant's or take-nothing verdict would always impose cost shifting on a claimant if the offeror made even a nominal offer since a zero judgment would not be greater than 25% of the amount of the offer.

***1889** 4. Withdrawal of Offers and Subsequent Offers-- [FN137] Withdrawal is not permitted within the time period during which the offer stated that it would remain open, but the court may permit withdrawal for good cause shown and to prevent manifest injustice. Such a situation might arise where, after making an offer, the offeror discovers new information relating to liability or the amount of damages, which could not reasonably have been discovered previously by due diligence and which indicates that its first offer was too generous.

Subsequent offers are allowed in the belief that even if an offeror has locked in an offeree with an unaccepted offer, the offeror may want to improve its chances of recovery of its costs and attorneys' fees by improving the offer which thereby improves the chances of settlement, which is the objective of the rule.

If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee shifting as to any one of such offers. However, it would always seem to be to the offeror's advantage only to make a subsequent offer that is more favorable to the offeree and to invoke the more favorable subsequent offer in seeking cost shifting. For example, assume that a defendant makes plaintiff an offer of $60,000 which plaintiff does not accept within the period it remained open. Defendant will be entitled to fee shifting if plaintiff does not obtain a judgment that is greater than 75% of the offer, or $45,000. If defendant makes a subsequent offer of $80,000, it would improve its chances

of obtaining cost shifting because now plaintiff would have to obtain a judgment greater than $60,000 to avoid cost shifting. It would make no sense for defendant to make a subsequent offer under this rule that is less favorable to the plaintiff than the first offer. If, for example, defendant made a subsequent offer of $40,000, plaintiff would now only have to achieve a judgment greater than $30,000 to prevent defendant from being entitled to fee shifting. Defendant would obviously have a better chance of obtaining fee shifting under its original $60,000 offer as to which the plaintiff is locked in.

The same is true in reverse when the offeror is the plaintiff. If a plaintiff makes an offer of $100,000 which defendant does not accept within the period it remained open, plaintiff will be entitled to fee shifting if it obtains a judgment that is greater than 125% of the offer, or $125,000. If plaintiff makes a subsequent offer of $80,000, it would improve its chances of obtaining cost shifting because now it would only have to obtain a judgment greater than $100,000 to impose cost shifting on the defendant. It would make no sense for plaintiff to make a subsequent ***1890** offer under this rule that is less favorable to the defendant than the first offer, for example, an offer of $120,000, because plaintiff would then have to obtain a judgment greater than $150,000 in order to impose cost shifting.

Although it would serve no purpose for an offeror to make a subsequent offer under this rule that is less favorable to the offeree, it could serve the purpose of settlement for an offeror to make a subsequent less favorable offer not under this rule. For example either party, after making an initial offer that was deemed rejected, could now believe that its position is stronger than it thought and therefore that the case can be settled at an amount less favorable to the offeree than that stated in its initial offer. It could now make a less favorable offer not under this rule that would not impose the risk of cost shifting on the offeree. However, the fact that the offeror had "locked in" the offeree with a previous offer as to which cost shifting now seems highly likely could provide an incentive for the offeree to accept the less favorable subsequent offer. For example, if the plaintiff's original offer of $100,000 was rejected, plaintiff would be entitled to cost shifting if it obtained a verdict of more than $125,000. Plaintiff might now make a subsequent offer not under this rule to settle for $120,000 and to waive any right to cost shifting under its previous offer. This offer could be attractive to both parties: plaintiff would receive $20,000 more than his previous offer, and defendant would be relieved of the risk of cost shifting if plaintiff obtained a judgment of more than $125,000.

5. Court Discretion to Ensure "Access to Courts"-- [FN138] The ABA proposal contains a broad discretionary grant to the court to reduce or eliminate cost shifting to avoid undue hardship, in the interest of justice, or for other compelling reason to seek judicial resolution. [FN139] This recognizes that even a rule like this, which has been tailored to ameliorate the harshest effects of cost shifting, might result in unfairness in situations which cannot be generically described in advance. Examples of compelling reasons to seek judicial resolution might include that the suit involved the vindication of the constitutional rights of the offeree or presented a novel question of law as to which there was a genuine issue substantially affecting the rights of the offeree.

The proposal contains a second significant cap on fee shifting under this rule: the

offeror's recovery of attorneys' fees cannot exceed the *1891 offeree's attorneys' fees. This is intended to discourage offerors from escalating their own attorneys' fees in the belief that they will recover them from the offeree.

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***1892 Appendix: A.B.A. Report on Offer-of-Judgment Legislation** [FN140] §

1. Offer of Judgment

At any time in a suit in which the claims are for monetary damages, or where any non-monetary claims are ancillary and incidental to the monetary claims, but at least 60 days after the service of the complaint and not later than 60 days before the trial date, any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer.

When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless: 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

§ 2. Form of Offer of Judgment

An offer of judgment must be in writing and state that it is made under this rule; must be served upon the opposing party to whom the offer is made but not be filed with the court except under the conditions stated in § 11; must specify the total amount of money offered; and must state whether the total amount of money offered is inclusive or exclusive of costs, interest, attorney's fees and any other amount which the offeror may be awarded pursuant to statute or rule. Only items expressly referenced shall be deemed included in the offer.

§ 3. Determination of Applicability

At any time after the commencement of the action, any party may seek a ruling from the court that this rule shall not apply as between the moving party or parties and any opposing party or parties by reason of the fact that an exception to the rule exists or that one or more of the circumstances set forth in Section 11(e) for eliminating the application of the rule exists. The court, upon receiving and considering any such application, may grant the application, deny the application, or, in its discretion, defer a ruling on the application until a later time including a time after the entry of judgment. Any moving party obtaining the relief sought under such a motion prior to *1893 judgment may not, itself, use the rule as to any opposing party to which the motion is applied.

§ 4. Time Period During Which Offer Remains Open.

An offer may state the time period during which it remains open, which in no event may

be less than 60 days. An offer that states a time period of less than 60 days is an invalid offer. An offer that does not state the time period during which it remains open is deemed to remain open for 60 days, and thereafter indefinitely until 60 days before the date set for trial unless withdrawn pursuant to the provisions of § 8 in which case it shall have no further consequence under this rule.

§ 5. Extension of Time Period During Which Offer Remains Open

Upon the application of the offeree, the court may, for good cause shown, extend the time period during which an offer remains open. If the court extends the time period during which an offer may remain open, the offeror has the option of withdrawing the offer.

§ 6. Acceptance of Offer.

An offer is accepted when a party receiving an offer of judgment serves written notice on the offeror, within the time period during which the offer remains open, that the offer is accepted without qualification.

§ 7. Refusal of Offer.

An offer is deemed to be refused if it is not accepted within the time period during which the offer remains open.

§ 8. Withdrawal of Offer.

An offer may not be withdrawn, except with the consent of the court for good cause shown and to prevent manifest injustice, before the expiration of the time period during which the offer stated that it would remain open. An offer not made subject to an expressly stated time period may be withdrawn after 60 days by serving the offeree with written notice of the withdrawal and shall have no further consequence under this rule.

§ 9. Inadmissibility of An Offer Not Accepted.

Evidence of an offer not accepted is not admissible for any purpose except in a proceeding to determine costs and attorney's fees under a ***1894** statute or rule permitting recovery thereof or pursuant to an entry of judgment under § 11.

§ 10. Subsequent Offers.

The fact than an offer is made but not accepted does not preclude any party from making subsequent offers. If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee-shifting under § 11(a) or (b) as to any one of such offers.

§ 11. Effect of Rejection of an Offer.

If an offer made by a party is not accepted and is not withdrawn before final disposition of the claim that is the subject of the offer, the offeror may file with the clerk of the court, within 10 days after the final disposition is entered, the offer and proof of service thereof. A final disposition is a verdict, order on motion for summary judgment, or other final order on which a judgment can be entered, including a final judgment, but a judgment based on a settlement agreement will not result in cost-shifting unless the parties expressly agree to cost-shifting rights under this rule. The court, after due deliberation and after providing the parties to the offer an opportunity to submit proposed findings, will enter judgment as follows:

(a) If a final judgment obtained by a claimant who did not accept an offer from an adverse party is not greater than 75% of the amount of the offer, the claimant offeree shall pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorneys fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off. This subsection (a) shall not apply if the claimant offeree receives a take-nothing judgment.

(b) If a final judgment obtained by a claimant against an adverse party who did not accept an offer from such claimant is greater than 125% of the *1895 amount of the offer, the offeree shall pay the claimant offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the claimant offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorney fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off.

(c) In comparing the amount of a monetary offer with the final judgment, which shall take into account any additur or remittitur, the latter shall not include any amounts that are attributable to costs, interest, attorney's fees, and any other amount which the offeror may be awarded pursuant to statute to rule, unless the amount of the offer expressly included any such amount.

(d) If both the offeree and the offeror may be entitled to recovery of attorneys fees

under rules or contract, the court shall determine the amount of the recovery of such attorneys' fees by either side by the application of this rule, of such other rule as may apply to the recovery of fees, the language of any contract providing for fees and general principles of law.

(e) The court may reduce or eliminate the amounts to be paid under subsections (a) and (b) to avoid undue hardship, or in the interest of justice, or for any other compelling reason that justifies the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of judgment.

(f) The amount of any attorney's fees to be paid under subsections (a) and (b) shall be a reasonable attorney's fee for services incurred in the case as to the claims for monetary damages after the date the offer was made, calculated on the basis of an hourly rate which may not exceed as to the claims for monetary damages that which the court considers acceptable in the jurisdiction of final disposition of the action, taking into account the attorney's qualifications and experience and the complexity of the case, except that any attorney's fees to be paid by an offeree shall not:

(1) exceed the actual amount of the attorney's fees incurred by the offeree as to the claims for monetary damages after the date of the offer; or

***1896** (2) if the offeree had a contingency fee agreement with its attorney, exceed the amount of the reasonable attorney's fees that would have been incurred by the offeree as to the claims for monetary damages on an hourly basis for the services in connection with the case.

§ 12. Nonapplicability.

This provision does not apply to an offer made in an action certified as a class or derivative action, involving family law or divorce, between a landlord and a tenant as to a residence, or in which there are claims based on state or federal constitutional rights.

This provision for fee shifting also does not apply to any case in which attorneys fees are statutorily available to a prevailing party to insure the ability of claimants to prosecute a claim in implementation of the public policy of the statute.

Footnotes from section excerpted above:

[FN112]. See Schwarzer, supra note 35. [William W Schwarzer, Fee Shifting Offers of Judgment--An Approach to Reducing the Cost of Litigation, 76 Judicature 147, 153 (1992).]

[FN113]. It would also extend the period for acceptance of an offer to 21 days or such period as the court may allow. See id. at 149-51.

[FN114]. Id. at 149.

[FN115]. Id.

[FN116]. Id. at 150.

[FN117]. See id. at 152.

[FN118]. See supra text accompanying notes 79-94.

[FN119]. Schwarzer, supra note 35, at 152.

[FN120]. See id. at 153.

[FN121]. Id.

[FN122]. Based on the Schwarzer proposal, the Reporter of the Civil Rules Committee of the ALI [*note from Prof. Goldberg: Professor Cooper is actually the Reporter to the Advisory Committee on Civil Rules of the Judicial Conference*], Professor Edward H. Cooper, drafted a proposed new rule. It dealt with a wide range of administrative issues that have possible incentive effects: a right to withdraw an offer before acceptance; acceptance only during the period the offer remains open and is not withdrawn; expiration of offers not withdrawn or accepted; limitation of the "benefit of the judgment" provision to the amount of the judgment; alternatives for reducing the strictness of Marek; reduction of fee shifting to avoid undue hardship or unreasonable surprise; and provisions for multiparty offers. See Edward H. Cooper, Rule 68, Fee Shifting, and the Rulemaking Process, in Reforming the Civil Justice System 108, 135-37 (Larry Kramer ed., 1996).

[FN123]. The author of this Paper served as the Reporter to the ABA Task Force, formed by the Section of Torts and Insurance Practice, that produced the Report on Offer of Judgment Procedure, see A.B.A. Offer of Judgment Procedure, supra note 27.

[FN124]. The commentary, see A.B.A. Offer of Judgment Procedure, supra note 27, cmt., stated that the proposal was derived from a number of different sources, including a draft of proposed changes to Federal Rule of Civil Procedure 68 circulated by Professor Edward H. Cooper, Reporter to the Advisory Committee on Civil Rules. See Letter from Edward H. Cooper to Edward F. Sherman (Jan. 21, 1993) (on file with the Texas Law Review). Cooper's suggestions in turn were based on Judge Schwarzer's proposal, see Schwarzer, supra note 35, and a draft of a proposed new rule of Texas Civil Procedure, see Nancy Atlas & David Cohen, Proposed Offer of Judgment Rule,Alternative Resolutions, Winter 1992, at 10 (making it clear that take-nothing judgments would not trigger the rule). The Texas rule had been influenced by an offer of judgment proposal in the Civil Justice Expense and Delay Reduction Plan Pursuant to the Civil Justice Reform Act of 1990 of the U.S. District Court for the Eastern District of Texas. See supra notes 73-78 and accompanying text.

[FN125]. See A.B.A. Offer of Judgment Procedure, supra note 27, § 10(a)-(b).

[FN126]. See id. § 10(d).

[FN127]. See supra text accompanying notes 79-94.

[FN128]. A.B.A. Offer of Judgment Procedure, supra note 27, cmt. § 11.

[FN129]. See id. cmt. § 10(a) (clarifying that Section 10(a) is consistent with Delta Air Lines); see also supra notes 95-97 and accompanying text.

[FN130]. Id. cmt. § 1.

[FN131]. Id.

[FN132]. See Spencer v. General Elec. Co., 894 F.2d 651, 662-64 (4th Cir. 1990) (finding that Rule 68 precludes consideration of changes in personnel policies made by a defendant under threat of suit); cf. Leach v. Northern Telecom, Inc., 141 F.R.D. 420, 428 (E.D.N.C. 1991) ("If the monetary relief awarded falls short of that offered, but equitable relief is also awarded, the trial judge can then determine whether the relief awarded, as a package, is more or less favorable than that offered."); see also Thomas L. Cubbage III, Note, Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread, 70 Texas L. Rev. 465, 476-77 (1991) (noting that the criteria for determining prevailing party status differ from those used to define judgment under Rule 68).

[FN133]. The following five sections of this Paper discuss key provisions of the ABA proposal. The discussion is taken largely from the Commentary of the proposal, which explains the application of the particular provisions and policy justifications. This section is based on A.B.A. Offer of Judgment Procedure, supra note 27, cmt. § 1.

[FN134]. This section is based on id. cmt. § § 3-6.

[FN135]. This section is based on id. cmt. § 10.

[FN136]. See Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981), interpreted Rule 68 to be inapplicable where a defendant-offeror obtains a judgment against a plaintiff-offeree. See supra text acccompanying notes 95- 97.

[FN137]. This section is based on id. cmt. § 9.

[FN138]. This section is based on A.B.A. Offer of Judgment Procedure, supra note 27, cmt. § 10(d)-(e).

[FN139]. Judicial discretion to reduce or eliminate the amounts to be paid would obviously include ordering no cost shifting at all.

[FN140]. Proposed February 1995. Passed by the A.B.A. House of Delegates, 202-188. See Reske, supra note 28, at 34.

Attachment 11

JMS DRAFT 6/9/05

Offer of Judgment Rule Subcommittee:
Proposed JMS Language re Application of the Rule in Statutory Fee Cases

R. 4:58-5. Application of Offer of Judgment Rule to Statutory Fee Shifting

(a) If a party who fails to accept a offer tendered under this Rule prevails at trial against the offeror on a claim of a substantive nature which entitles the offeree, under a statute or other codified provision, to an award of attorneys fees from the offeror, and the monetary judgment in favor of the offeree, is less than 80% of the pretrial offer, exclusive of interest and counsel fees, then the Court shall have discretion to waive or abate the imposition of fees under this Rule against the offeree, where it finds that such waiver or abatement is in the interests of justice.

(b) In exercising its discretion under this subsection, the Court shall [may?] consider the following factors:

1. the amount of the fees sought under this Rule by the offeror as compared with the amount of fees to be awarded to the offeree as a prevailing party under the applicable statute or code;

2. the degree of success attained by the offeree at trial, including the extent of any non-monetary relief obtained;

3. the financial circumstances of the parties, and their respective abilities to pay the fees of the opposing party;

4. the timing of the offer, and the extent to which the litigation had progressed and counsel fees had been incurred when the offer was made;

5. the extent to which the litigation and its outcome would advance or negate the public policies associated with the applicable statute or code;

6. the reasonableness and good faith of the parties;

7. any other factors bearing upon the reasonableness of imposing fees under this Rule, in full or in part, upon the offeree.

Exhibit E

JMS DRAFT 7/7/05

Offer of Judgment Rule Subcommittee:
Proposed JMS Language re Application of the Rule in Statutory Fee Cases

R. 4:58-5. Application of Offer of Judgment Rule to Statutory Fee Shifting

(a) If a party who fails to accept a offer tendered under this Rule prevails at trial against the offeror on a claim of a substantive nature which entitles the offeree, under a statute or other codified provision, to an award of attorneys fees from the offeror, and the monetary judgment in favor of the offeree, is less than 80% of the pretrial offer, exclusive of interest and counsel fees, then the Court shall award such fees unless the Court finds that the imposition of fees against the offeree under this Rule is contrary to the interests of justice.

(b) In exercising its discretion under this subsection, the Court shall [may?] consider the following factors:

1. the amount of the fees sought under this Rule by the offeror as compared with the amount of fees to be awarded to the offeree as a prevailing party under the applicable statute or code;

2. the degree of success attained by the offeree at trial, including the extent of any non-monetary relief obtained;

3. the financial circumstances of the parties, and their respective abilities to pay the fees of the opposing party;

4. the timing of the offer, and the extent to which the litigation had progressed and counsel fees had been incurred when the offer was made;

5. the extent to which the litigation and its outcome would advance or negate the public policies associated with the applicable statute or code;

6. the reasonableness and good faith of the parties;

7. any other factors bearing upon the reasonableness of imposing fees under this Rule, in full or in part, upon the offeree.

Attachment V

4:58-4. Multiple Defendants

If there are multiple defendants against whom a joint and several judgment is sought, and one of the defendants offers in response less than a pro rata share, that defendant shall, for purposes of the allowances under *R.* 4:58-2 and B3, be deemed not to have accepted the claimant's offer. If, however, the offer of a single defendant, whether or not intended as the offer of a pro rated share, is at least as favorable to the offeree as the determination of total damages to which the offeree is entitled, the single offering defendant shall be entitled to the allowances prescribed in *R.* 4:58-3, provided, however, that in an action for unliquidated damages the offeree has received at least $750 and that single defendant's offer is at least 80% of the total damages determined. *Moreover, if there are multiple defendants against whom a joint and several judgment is sought, all defendants may make a single offer to take such a judgment against them in an amount subject to the right of the defendants to such apportionment between them. If not otherwise apportioned by unanimous agreement, multiple defendants shall have apportionment resolved through use of the alternative dispute resolution process provided for in N.J.S.A. 2A:23A-1 et seq. or other extra-judicial procedure agreed upon by all defendants, but only in accordance with the time periods set forth in N.J.S.A. 2A:23A-1. The defendants so agreeing shall be bound to the percentage amounts determined and each shall be entitled to the allowance prescribed in R. 4:58-3 should the offer not be accepted as aforesaid.*

Attachment VI

RULE 4:58. OFFER OF JUDGMENT

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

Except in a matrimonial action, any party may, [at any time] no earlier than 60 days after the filing of the last responsive pleading of the original parties but more than 20 days before the actual trial date, serve upon any adverse party, without prejudice, and file with the court, an offer to take judgment in the offerer's favor, or as the case may be, to allow judgment to be taken against the offerer, for a sum stated therein or for property or to the effect specified in the offer (including costs). If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve upon the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

Note: Source-R.R. 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998.

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Attachment I.C. 1
2/15/06

Supplemental Report of Offer of Judgment Subcommittee
January 25, 2006

After the last full Civil Practice Committee meeting, members of the subcommittee had a telephone conference to review and discuss draft rule proposals developed by Judges Skillman and Sabatino for *Rules* 4:58-1, 4:58-2 and 4:58-3.

Although the full Committee had agreed to present the deliberations of the subcommittee and the full Committee to the Supreme Court in conceptual form, Judge Skillman thereafter suggested that specific rule amendments be presented to the Court to address the areas where some consensus had been reached. Judge Skillman also suggested that the concerns of the substantial minority on the full Committee favoring abolition of the rule might be tempered if the rule contained one or more discretionary (escape hatch) provisions, as had been suggested in Professor Goldberg's earlier memorandum.

The proposed revisions address three areas:

1. Confining the Rule's application to cases where the remedial claims left in the case at the time the offer is made are solely monetary in nature. This reflects the 19 to 18 vote of the full Committee to limit the application of the rule to money damage cases. In discussing the proposed rule amendment to *R.* 4:58-1 drafted by Judges Skillman and Sabatino (attached hereto as Exhibit A), the majority of the subcommittee participating in the telephone conference preferred the use of the word "primarily" instead of "exclusively" to describe the monetary relief sought. Similarly, the majority favored deletion of the qualifying language that there be no unresolved equitable claims pending in the case, reasoning that the specific mention of unresolved equitable claims might invite the strategic evasion of the rule by the inclusion of such a claim. Accordingly, the subcommittee opted for a modified proposal (Exhibit B) and decided to present both versions of the proposed amendments to *R.* 4:58-1 to the Committee for its review.

2. Making it clear that a party cannot obtain duplicative fees under this Rule and under some other fee-shifting authority. This reflects the sentiment of the Committee and is not controversial. It does, however, require the restructuring of *R.* 4:58-2 for the inclusion of subparagraph (c). The subcommittee members participating in the telephone conference agreed that the proposed rule amendments (attached as Exhibit C) were non-controversial.

3. Inserting an "escape hatch" in *R.* 4:58-3 (attached as Exhibit D) for specified situations where fee-shifting should be disallowed or abated. Judge Skillman identified three categories to which this exception would

apply: (1) where an allowance would conflict with the policies underlying another fee-shifting statute of Rule; (2) where the allowance would impose undue hardship; and (3) where rejection of the offer was reasonable. The majority of the subcommittee members participating in the telephone conference were opposed to this proposal, although there was some support expressed for the "undue hardship" exception.

At the conclusion of the telephone conference, a vote was taken on whether any amendments to *R.* 4:58 should be proposed or whether the entire matter should be carried over to the next rules cycle. Four members voted in favor or making no revisions, while two members voted in favor of supporting the proposed amendments to *Rules* 4:58-1 (limiting the rule's application to money damage cases) and 4:58-2 (clarifying that no duplicative fee recovery would be allowed).

For ease of reference, also attached is attached at Exhibit E is Judge Sabatino's proposed rule amendments to *R.* 4:58-5.

Respectfully submitted,

Hon. Jack Sabatino, Chair
Jeffrey Greenbaum
Ralph Lamparello
Gary Potters
Michael Stein
Thomas Weidner

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Exhibit A

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

a. Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve ~~upon any adverse party, without prejudice, and file with~~ the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein ~~or for property or to the effect specified in the offer~~ (including costs). The offer shall not be effective unless, at time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature, and there are no unresolved equitable claims pending in the case.

b. If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve upon the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within

the time herein prescribed in the same or another amount or as specified therein.

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Exhibit B

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

a. Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve upon any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein ~~or for property or to the effect specified in the offer~~ (including costs). The offer shall not be effective unless, at time the offer is extended, the relief sought by the parties in the case is primarily monetary in nature.

b. If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve upon the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

Exhibit C

4:58-2. Consequences of Non-Acceptance of Claimant's Offer

a. If the offer of a claimant is not accepted and the claimant obtains a ~~verdict or determination at least as favorable as the rejected offer or, if a~~ money judgment~~,~~ in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: ~~(a)~~ (1) all reasonable litigation expenses incurred following non-acceptance; ~~(b)~~ (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and ~~(c)~~ (3) a reasonable attorney's fee, which shall belong to the client, for such subsequent services as are compelled by the non-acceptance, [such fee to be applied for within 20 days following entry of final judgment and in accordance with R. 4:42-9(b).]

b. No allowances shall be granted, however, if they would impose (1) undue hardship or (2) if the rejection of the claimant's offer was reasonable. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

c. If the claimant is awarded counsel fees, costs or interest as a prevailing party pursuant to a fee-shifting statute, contractual provision, decisional law or Rule of Court, the claimant shall not be allowed to recover duplicative fees, costs or interest under this Rule.

d. Allowances pursuant to this rule must be applied for within 20 days following of final judgment and in accordance with R. 4:42-9(b).

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Exhibit D

4:58-3 Consequences of Non-Acceptance of Offer of Party Not a Claimant

a. If the offer of a party other than the claimant is not accepted, and ~~the determination~~ the claimant obtains a monetary judgment that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge on the judgment.

b. A favorable determination qualifying for allowances under this rule is a ~~verdict or determination at least as favorable to the offeror as the offer or, if a~~ money judgment, ~~is~~ in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

c. No allowances shall be granted, however, if the claimant's claim is dismissed, a no-cause verdict is returned, [or] only nominal damages are awarded, or such allowances (1) would conflict with the policies underlying a fee-shifting statute or Rule of Court, or (2) impose undue hardship, or (3) if the rejection of the offer was reasonable. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

d. If the offeror is awarded counsel fees, costs or interest as a prevailing party pursuant to a fee-shifting statute, contractual provision, decisional law or Rule of Court, the offeror shall not be allowed to recover duplicative fees, costs or interest under this Rule.

e. Allowances pursuant to this rule must be applied for within 20 days following entry of final judgment and in accordance with R. 4:42-9(b).

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