2008 Report of the Supreme Court Civil Practice Committee

January 15, 2008

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APPENDICES

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

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

A Superior Court judge observed that because *R.* 1:38(d) and (e) exempt from disclosure all records required to be kept confidential by statute, rule or court order, some civil settlements are shielded from public disclosure. Sealing certain settlements by court order, in such cases as those involving defective products or child molesters, may work a public harm by permitting such injuries to continue. The judge proposed amendments to *R.* 1:2-1 to limit the authority of the court to seal settlements unless either exceptional circumstances or good cause is shown. This matter was referred to the Protective Order Subcommittee.

The subcommittee agreed that the court should seal a settlement only upon a finding of good cause. Accordingly, it proposed the addition of a sentence to *R.* 1:2-1 stating, "No settlement shall be sealed by order of the court except for good cause shown, which shall be set forth on the record." The Committee unanimously supported the subcommittee's recommendation. The Committee also agreed to recommend elimination of the outdated reference to "robes" in the caption of the rule and to add a reference to "sealed settlements" to reflect more accurately the content of the rule.

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

1:2-1. Proceedings in Open Court; [Robes] Sealed Settlements

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

Note: Source — *R.R.* 1:28-6, 3:5-1 (first clause), 4:29-5, 4:118-5, 7:7-1, 8:13-7(c); amended July 14, 1992 to be effective September 1, 1992; caption and text amended _____ to be effective _____.

B. Proposed Amendments to *R.* 1:4-9 — Weight and Format of Filed Papers

The Committee Chair observed that a few years ago the rules were amended to permit the use of recycled paper, provided legibility was not affected, and raised the question of whether a futher amendment should be recommended, requiring the use of recycled paper. The Committee, recognizing that enforcement of such a requirement would be difficult but that use of recycled materials is to be encouraged, agreed to recommend that precatory language be added to the court rule.

See Section II.B. of this Report for proposed amendments to *R.* 1:4-9 that the Committee does not support.

The proposed amendments to *R.* 1:4-9 follow.

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

Except as otherwise provided by *R.* 2:6-10, pleadings and other papers filed with the court, including letter briefs and memoranda but excluding preprinted legal forms and documentary exhibits, shall be prepared on letter size (approximately 8.5 x 11 inches) paper of standard weight and quality for copy paper and shall be double spaced with no smaller than 10-pitch or 12-point type. Both sides of the paper may be used and recycled paper [may] should be used, provided legibility [can be] is maintained.

Note: Source — *R.R.* 1:27C; caption and text amended June 29, 1990 to be effective September 4, 1990; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 27, 2006 to be effective September 1, 2006; amended to be effective .

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

By Order dated July 8, 2004, the Supreme Court relaxed and supplemented *R.* 1:6-2 with respect to the procedures to be followed upon the filing of an affidavit of non-involvement pursuant to the New Jersey Medical Care Access and Responsibility and Patients First Act (P.L. 2004, C. 17), providing that:

1. A party filing such affidavit of non-involvement shall do so by annexing the affidavit, which shall comply with *R.* 1:6-6, to a notice of motion for dismissal of the action as to that party; and

2. if no opposition to the motion is filed in accordance with *R.* 1:6-3, an order shall be entered dismissing the action as to the moving party; or

3. if opposition to the motion is filed, the court shall proceed in accordance with *R.* 1:6-2.

The Committee recommends amendments to *R.* 1:6-2 to incorporate the terms of the Supreme Court's Order.

See Section II.D. of this Report for other proposed amendments to *R.* 1:6-2 that the Committee does not support.

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; Affidavit of Non-Involvement in Medical Malpractice Actions.

(1) Generally. When a civil action has been specially assigned 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, the judge, on receipt of motion papers, shall determine the mode and scheduling of 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.

(2) Motion for dismissal pursuant to *N.J.S.A* 2A-40. A party moving for dismissal of the action on the ground of non-involvement in the cause of action pursuant to *N.J.S.A*. 2A:53A-40 of the New Jersey Medical Care Access and Responsibility and Patients First Act, *N.J.S.A.* 2A:53A-37 to 42, shall annex to the notice of motion an affidavit of non-involvement complying with *R*. 1:6-6. If no opposition is filed in accordance with *R*. 1:6-3, an order shall be entered dismissing the action as to the moving party. If opposition is filed, the court shall proceed in accordance with this rule.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

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

July 24, 1978 to be effective September 11, 1978; former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; 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; paragraphs (b), (c), and (f) amended July 27, 2006 to be effective September 1, 2006; caption of paragraph (b) amended, former text of rule captioned and redesignated as paragraph (1), and new paragraph (2) adopted to be effective _____.

D. Proposed Amendments to *R.* 1:13-7 — Dismissal of Civil Cases for Lack of Prosecution

The Committee proposes two amendments to *R.* 1:13-7:

1. The Conference of General Equity Presiding Judges proposed that, for cases in the General Equity Part, *R.* 1:13-7 be amended to enable the court to send out dismissal notices after 60 days of inaction rather than the 120 days currently required under the rule, and to enter dismissals 30 days after the notice rather than the 60 days currently required under the rule. The rationale for this proposal is that these changes will support the expectation that equity cases move more quickly through the system than Civil Part cases. The Committee agreed that the compressed time frame will provide the opportunity for the General Equity part judges to manage their cases more expeditiously and move them accordingly. There was overwhelming support for the proposed rule change.

2. *Rule* 1:13-7 now provides that a complaint dismissed against a defendant for lack of prosecution may be restored, without a formal motion, by consent order accompanied by the answer of the defendant, the case information statement and the requisite fee. A Committee member, currently an Assignment Judge and formerly chair of the Conference of Civil Presiding Judges, suggested that this provision be limited to consent orders for restoration filed within 60 days of the dismissal order. If the complaint is not restored within 60 days of the dismissal, however, any subsequent restoration would need to be effected by motion for good cause shown, if filed within 90 days of the dismissal, and for exceptional circumstances if filed thereafter. In discussing this proposal, the Committee determined that it should be

applied only in multi-defendant cases and that the proposed amendments should incorporate standards similar to those set forth in *R*. 4:8-1 (Third Party Brought in by Defendant).

The proposed amendments to *R*. 1:13-7 follow.

1:13-7. Dismissal of Civil Cases for Lack of Prosecution

(a) Except in receivership and liquidation proceedings and in condemnation and foreclosure actions [as] governed by *R.* 4:64-8 and except as otherwise provided by rule or court order, whenever [any civil] an action [shall have] has been pending [in any court] for four months or, if a general equity action, for two months, without a required proceeding having been taken therein as here[in]after defined in subsection (b), the court shall issue written notice to the plaintiff advising that the action as to any or all defendants will be dismissed without prejudice 60 days following the date of the notice or 30 days thereafter in general equity cases unless, within said period, action specified in subsection (c) is taken. If no such [the] action [as prescribed in subsection (c)] is [not] taken, the court shall enter an order of dismissal without prejudice as to any named [party] defendant and shall furnish the plaintiff with a copy thereof. After dismissal, [R]reinstatement of [the] an action against a single defendant [after dismissal] may be permitted upon submission of a consent order [that vacates] vacating the dismissal and [allows] allowing the dismissed defendant to file an answer, provided the proposed consent order is accompanied by the answer for filing, a case information statement and the requisite fee. If the defendant has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal. [The entry of the consent order may be permitted in the discretion of the court. Otherwise, reinstatement of the action after dismissal may be permitted only on motion for good cause shown.] In multi-defendant actions in which at least one defendant has been properly served, the consent order shall be submitted within 60 days of the order of dismissal, and if not so submitted, a motion for reinstatement shall be required. The motion shall be granted on good cause shown if filed within 90 days of the order of dismissal, and thereafter shall be granted only on a showing of exceptional circumstances. In multi-defendant actions, if an order of

dismissal pursuant to this rule is vacated and an answering pleading is filed by the restored defendant during or after the discovery period, the restored defendant shall be considered an added party, and discovery shall be extended pursuant to *R.* 4:24-1(b). [The court may issue the written notice herein prescribed in any action pending on the effective date of this rule amendment, and this rule shall then apply.] Nothing in this rule precludes the court with respect to a particular defendant from imposing reasonable additional or different procedures to facilitate the timely occurrence of the next required proceeding to be taken in the case with respect to that defendant.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 1:30-3(a) (b) (c) (d), 1:30-4. Amended July 7, 1971 to be effective September 13, 1971; former rule redesignated as paragraph (a) and paragraph (b) adopted July 15, 1982 to be effective September 13, 1982; paragraph (b) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; caption and paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a) and (b) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended, former paragraph (b) deleted, and new paragraphs (b), (c), and (d) adopted July 28, 2004 to be effective September 1, 2004; paragraph (a) amended to be effective .

E. Proposed Amendments to *R.* 1:21-7 — Contingent Fees

Rule 1:21-7(f), as currently constituted, requires all applications for attorneys' fees in excess of those permitted by paragraph (c) of the rule to be submitted to the AOC, together with all papers filed in support of or in opposition thereto, as well as a copy of the court order fixing the fee. This requirement was added to the rule in 1972. There are no records to indicate why the requirement was added or what the AOC was expected to do with the information. At the present time, the applications are boxed and kept for about five years. The Committee agreed that there is no apparent rationale or necessity for the provision. Accordingly, the Committee recommends that this requirement be eliminated.

See Section II.E. of this Report for proposed amendments to *R.* 1:21-7 that the Committee does not support.

The proposed amendments to *R.* 1:21-7 follow, and include amendments concerning statutory unions that are discussed in Section I.R. of this Report.

1:21-7. Contingent Fees

(a) …no change.

(b) …no change.

(c) …no change.

(d) The permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal, and any interest included in a judgment pursuant to *R*. 4:42-11(b); but no deduction need be made for post-judgment interest or for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal. Where joint representation is undertaken [on behalf of] in both [a husband and wife or parent (or guardian) and child in a] the direct and derivative action, or where a claim for wrongful death is joined with a claim on behalf of a decedent, the contingent fee shall be calculated on the aggregate sum of the recovery.

(e) …no change.

(f) If at the conclusion of a matter an attorney considers the fee permitted by paragraph (c) to be inadequate, an application on written notice to the client may be made to the Assignment Judge for the hearing and determining of a reasonable fee in light of all the circumstances. [A copy of any such application and of all papers filed in support of or in opposition thereto, together with a copy of the court order fixing the fee shall be filed with the Administrative Office of the

Courts.] This rule shall not preclude the exercise of a client's existing right to a court review of the reasonableness of an attorney's fee.

(g) …no change.

(h) …no change.

(i) …no change.

Note: Source — *R.* 1:21-6(f), as adopted July 7, 1971 to be effective September 13, 1971 and deleted December 21, 1971 to be effective January 31, 1972. Adopted December 21, 1971 to be effective January 31, 1972. Amended June 29, 1973 to be effective September 10, 1973. Paragraphs (c) and (e) amended October 13, 1976, effective as to contingent fee arrangements entered into on November 1, 1976 and thereafter. Closing statements on all contingent fee arrangements filed as previously required between January 31, 1972 and January 31, 1973 shall be filed with the Administrative Office of the Courts whenever the case is closed; paragraph (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 24, 1978 to be effective September 11, 1978; paragraph (c) amended and new paragraphs (h) and (i) adopted January 16, 1984, to be effective immediately; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (e) amended June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c)(5) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended January 21, 1999 to be effective April 5, 1999; paragraphs (g) and (h) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) and (f) amended to be effective .

F. Proposed Amendments to *R.* 2:8-1 — Motions

In the 2004-2006 rules cycle, a subcommittee was formed to study and make recommendations on whether the Appellate Division should be required to issue findings of fact and conclusions of law when making a substantive determination on a motion. The subcommittee proposed that, on motions for emergent or injunctive relief, summary disposition, and relief based on the Rules of Professional Conduct, the Appellate Division be required to give a short statement of the reasons for its determination. The rationale behind the proposal was that, with a statement of reasons, an attorney will be better able to explain the disposition of the motion to the client and to plan an appeal strategy. The Committee supported the proposal and voted not to limit the requirement to the Appellate Division, but to recommend that it be applicable to the Supreme Court as well. The Appellate Division Rules Committee objected to this proposed amendment, taking the position that it would be burdensome on the court and that the decision to include a statement of reasons should remain in the court's discretion. A majority of the Civil Practice Committee reaffirmed its position and submitted the rule with its recommended amendments to the Supreme Court. The Court did not adopt the proposed amendments.

In this rules cycle, the *R.* 2:8-1 Subcommittee was reconstituted to reconsider the issue. It proposed to limit the requirement of a statement of reasons to the Appellate Division and only on applications for emergent or injunctive relief. Again, the rationale behind the proposal is that it will provide the attorney with information needed to explain the disposition of the motion to the client and to plan an appeal strategy. Committee members endorsed the proposal, but questioned why the requirement was not imposed on the Supreme Court as well. On a close vote on whether the proposed amendments should apply to both the Appellate Division and the Supreme Court, a majority of the Committee favored making the requirement applicable to the Supreme Court.

Accordingly, the Committee recommends the proposed amendment, as modified to specify its application to the Supreme Court.

The Appellate Division Rules Committee (ADRC) objects to this renewed recommendation. First, it notes that it is not aware of any other jurisdiction that has adopted the requirement that a statement of reasons accompany a determination on motions for emergent or injunctive relief. Second, it is of the opinion that such a requirement is burdensome and unnecessary in light of the fact that, if the rule amendment is adopted, the Appellate Division would be required to issue statements in approximately 500 motions each year. Third, the ADRC notes that it is difficult to envision what reasons other than "the interest[s] of justice do not require review" could be provided for the denial of a motion for leave to appeal. Fourth, the ADRC comments that a statement of reasons for granting or denying a stay pending appeal would necessarily include a discussion of the merits of the appeal, which would impose a significant burden upon the court. Fifth, members of the appellate panel may not all vote to grant or deny a motion for stay for the same reasons, thus necessitating separate statements of reasons by different members of the panel. Finally, the ADRC recognizes that some motion orders should be accompanied by a short statement of reasons for the ruling, but urges that the decision of when and under what circumstances the statements should be made should be left to the sound discretion of the court.

The report of the Appellate Division Rules Committee is included as Appendix A to this document.

The proposed amendments to *R.* 2:8-1 follow.

2:8-1. Motions

(a) …no change.

(b) …no change.

(c) …no change.

(d) Order and Notice. Unless the court otherwise directs, upon determination of the motion the court or the clerk acting under its direction shall forthwith enter an order granting or denying the motion in accordance with the determination of the court. [and] The court shall also issue a short statement of the reasons for its determination of motions for emergent or injunctive relief. The clerk shall mail true copies thereof to counsel.

(e) …no change.

Note: Source — *R.R.* 1:7-10(b), 1:11-1, 1:11-2(a) (b), 1:11-3, 2:11-1, 2:11-2, 2:11-3,4:61-1(c). Paragraph (a) amended, paragraph (c) adopted and former paragraph (c) redesignated (d) July 24, 1978 to be effective September 11, 1978; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) and (d) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended _____ to be effective _____.

G. Proposed Amendments to *R.* 4:3-3 — Change of Venue in the Superior Court

In cases that have been referred to court-annexed mediation, motions made and decided after the referral but before the actual mediation date are not served on the mediator. Consequently, the mediator, relying on the Order of Referral, prepares for the mediation while the case itself may have been transferred to another venue by order of the court. It was suggested that this situation be remedied by amending the court rules to require that, in cases that have been referred to court-annexed mediation, the party making the motion serve the motion on the mediator as well as on all parties, before the mediation is to take place, and to serve a copy of the resulting order on the mediator promptly. The Committee recognized that a motion and order to transfer venue could affect the mediator and agreed to recommend an amendment to the rule, limiting its application to motions to transfer venue.

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

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

(a) …no change.

(b) Time; Form of Order; Filing. A motion for a change of venue shall be made not later than 10 days after the expiration of the time prescribed by *R*. 4:6-1 for the service of the last permissible responsive pleading, or, if the action is brought pursuant to *R*. 4:67 (summary actions), on or before the return date. If not so made, objections to venue shall be deemed waived except that if the moving party relies on *R*. 4:3-3(a)(2) the motion may be made at any time before trial. The order changing venue shall not be incorporated in any other order and shall be filed in triplicate. A copy of the motion to change venue shall be served on the mediator, if one has already been appointed, prior to the mediation date and a copy of the order entered on the motion shall be promptly served on the mediator.

(c) …no change.

Note: Source — *R.R.* 4:3-3. Paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended and paragraph (c) adopted November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (b) amended _____ to be effective _____.

H. Proposed Amendments to *R.* 4:23-5 — Failure to Make Discovery

As part of its review of the timing of motions to dismiss or suppress and extensions of discovery upon reinstatement, the Discovery Subcommittee proposed that the time a party must wait before filing a motion to dismiss with prejudice pursuant to *R*. 4:23-5(a)(2) be reduced from 90 to 60 days. The Committee agreed that the 90-day period currently provided in paragraph (a)(2) is excessive and endorsed the proposed amendment.

See Section II.M. of this Report for proposed amendments to *R*. 4:23-5 that the Committee does not support.

The proposed amendments to *R*. 4:23-5 follow.

4:23-5. Failure to Make Discovery

(a) Dismissal.

(1) …no change.

(2) With Prejudice. If an order of dismissal or suppression without prejudice has been entered pursuant to paragraph (a)(1) of this rule and not thereafter vacated, the party entitled to the discovery may, after the expiration of [90] 60 days from the date of the order, move on notice for an order of dismissal or suppression with prejudice. The attorney for the delinquent party shall, not later than 7 days prior to the return date of the motion, file and serve an affidavit reciting that the client was previously served as required by subparagraph (a)(1) and has been served with an additional notification, in the form prescribed by Appendix II-G, of the pendency of the motion to dismiss or suppress with prejudice. In lieu thereof, the attorney for the delinquent party may certify that despite diligent inquiry, which shall be detailed in the affidavit, the client's whereabouts have not been able to be determined and such service on the client was therefore not made. If the delinquent party is appearing pro se, the moving party shall attach to the motion a similar affidavit of service of the order and notices or, in lieu thereof, a certification as to why service was not made. Appearance on the return date of the motion shall be mandatory for the attorney for the delinquent party or the delinquent pro se party. The moving party need not appear but may be required to do so by the court. The motion to dismiss or suppress with prejudice shall be granted unless a motion to vacate the previously entered order of dismissal or suppression without prejudice has been filed by the delinquent party and either the demanded and fully responsive discovery has been provided or exceptional circumstances are demonstrated.

(3) …no change.

(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 July 27, 2006 to be effective September 1, 2006; paragraph (a)(2) amended to be effective .

I. Proposed Amendments to *R.* 4:24-1 ─ Time for Completion of Discovery

The Committee recommends two proposed amendments to *R.* 4:24-1:

1. The Conference of Civil Presiding Judges unanimously recommended an amendment to *R.* 4:24-1 to provide that the 60-day extension of discovery provided when new parties are added to the case (which period may be lengthened or shortened by the court) run from the current discovery end date. This clarification is intended to eliminate the confusion that has plagued judges and attorneys alike as to when the 60-day extension begins — from the date of the order allowing the addition of the new party? From the date the new party files an answer? From the current discovery end date? The Committee supports this proposal from the Conference of Civil Presiding Judges and agrees that the order allowing the addition of parties should specify that the 60-day extension is added to the current discovery end date.

2. Recognizing that the court should consider discovery extension requests when a pleading is reinstated following a *R.* 4:23-5(a)(1) dismissal or suppression, the Discovery Subcommittee recommended that *R.* 4:24-1 be amended to provide that the court specifically address the discovery needs of the parties upon reinstatement and set deadlines for the completion of necessary discovery. The Committee supported the subcommittee's recommendation to require that a motion to extend discovery must have appended to it all previous orders granting or denying an extension of discovery and to mandate the court to enter an order extending discovery for good cause shown upon the restoration of a pleading dismissed or

suppressed pursuant to *R.* 1:13-7 or *R.* 4:23-5(a)(1), with the order specifying the discovery to be completed and the time for completion.

See Section II.N. of this Report for other proposed amendments to *R.* 4:24-1 that the Committee does not support.

The proposed amendments to *R.* 4:24-1 follow.

4:24-1. Time for Completion of Discovery

(a) …no change.

(b) Added Parties. A party filing a pleading that joins a new party to the action shall serve a copy of all discovery materials upon or otherwise make them available to [such] the new party within 20 days after service of the new party's initial pleading. [The joinder of a new party shall extend the period for discovery for 60 days.] If a new party is joined, the current discovery end date shall be extended for a 60-day period, which may be reduced or enlarged by the court for good cause shown.

(c) Extensions of Time. The parties may consent to extend the time for discovery for an additional 60 days by stipulation filed prior to the expiration of the discovery period. [Such extension may be obtained by signed stipulation filed with the court or by application to the Civil Division Manager or team leader, by telephone or by letter copied to all parties, representing that all parties have consented to the extension. A consensual extension of discovery must be sought prior to the expiration of the discovery period. Any telephone application for extension must thereafter be confirmed in writing to all parties by the party seeking the extension.] If the parties do not agree or a longer extension is sought, a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases and with the designated managing judge in Track IV cases, and made returnable prior to the conclusion of the applicable discovery period. The movant shall append to such motion copies of all previous orders [extending discovery if there have been no previous orders extending discovery, the motion or the supporting certification shall so state.] granting or denying an extension of discovery or a certification stating that there are none. Upon restoration of a pleading dismissed pursuant to *R.* 1:13-7 or *R.* 4:23-5(a)(1) or if good cause is otherwise shown, [T]the court [may, for good cause shown] shall[,] enter an order

extending discovery [for a stated period] and specifying the date by which discovery shall be completed. The extension order [shall] may [also] describe the discovery to be [engaged in] completed and such other terms and conditions as may be appropriate. [Absent exceptional circumstances, n]No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.

(d) …no change.

Note: Source — *R.R.* 4:28(a)(d); amended July 13, 1994 to be effective September 1, 1994; amended January 21, 1999 to be effective April 5, 1999; caption amended, text amended and designated as paragraph (a), new paragraphs (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (d) adopted February 26, 2001 to be effective immediately; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 27, 2006 to be effective September 1, 2006; paragraphs (b) and (c) amended to be effective .

J. Proposed Amendments to *R.* 4:33-3 — Procedure

Rule 4:33-3 requires that a person seeking to intervene must file and serve a motion accompanied by a pleading. The Conference of Civil Division Managers requested an amendment to *R.* 4:33-3 to require not only that the pleading accompany a motion to intervene, but also that the appropriate fee for filing that pleading be submitted with the pleading and motion. The current practice is that the fee does not get paid until after the judge decides the motion. Staff must then pursue the intervenor to get the fee. If the fee is not paid (as all too often happens), the intervening party cannot be entered into the Automated Case Management System and, consequently, that party will not receive notice of court actions. This situation leads either to last minute adjournments of arbitration or trial when someone realizes that the intervenor has not been noticed or to the arbitration being held without the input of the intervenor who, as a party to the action, has a right to be present. Requiring the appropriate fee to accompany the intervenor's pleading when the motion is made would remedy this situation. If the motion is not granted, the fee can be refunded.

The Committee agreed with the proposal from the Conference of Civil Division Managers and with its rationale. Accordingly, the Committee recommends that *R.* 4:33-3 be amended to require that a motion for intervention be accompanied by the appropriate filing fee for the pleading sought to be filed.

See Section I.L. of this Report for a discussion of a similar recommendation of the Conference of Civil Division Managers, endorsed by the Committee, to amend *R.* 4:43-3 to require that a motion to vacate default be accompanied by a proposed answer, the civil case information statement and the necessary fee.

The proposed amendments to *R.* 4:33-3 follow.

4:33-3. Procedure

A person desiring to intervene shall file and serve on all parties a motion to intervene stating the grounds therefore and accompanied by a pleading setting forth the claim or defense for which intervention is sought. The appropriate fee for filing the pleading shall be paid at the time of filing but shall be returned if the motion for intervention is denied.

Note: Source — *R.R.* 4:37-4; amended to be effective _____.

K. Proposed Amendments to *R.* 4:38-1— Consolidation

An Assignment Judge pointed out a potential problem with the consolidation process. The problem occurs when a Special Civil Part case is filed in one county prior to the filing of a related Civil Part case in another county. The rule as it now reads directs that a motion to consolidate and change venue be made in the county of the first-filed case. In the Assignment Judge's example, the motion to consolidate would be filed where the Special Civil Part is venued, because of its status of having been filed first. He suggested that the rule be amended to clarify that, regardless of the age of the cases, a motion to consolidate a Special Civil Part case with a Civil or General Equity Part case should be made in the county where the Civil or General Equity case is venued, reasoning that the case in the court with the lesser jurisdiction should be consolidated with the case in the court with greater jurisdiction. The Committee agreed that a Special Civil Part case should be consolidated with a Civil or General Equity Part case, regardless of which case was filed first.

The proposed amendments to *R.* 4:38-1 follow.

4:38-1 Consolidation

(a) Actions in the Superior Court. When actions involving a common question of law or fact arising out of the same transaction or series of transactions are pending in the Superior Court, the court on a party's or its own motion may order the actions consolidated. If the actions are not triable in the same county or vicinage, the order shall be made by the Assignment Judge of the county in which the venue is laid in the action first instituted on a party's motion, the judge's own initiative, or on certification of the matter to the judge by a judge of the Law or Chancery Division. A motion to consolidate an action pending in the Special Civil Part with an action pending in the Chancery Division or the Civil Part of the Law Division shall be heard, regardless of which action was first filed, in the county in which venue is laid in the Chancery or Law Division, Civil Part action, and if granted, the Special Civil Part action shall be consolidated with the Chancery or Law Division, Civil Part action.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 4:43-1(a)(b)(c)(d)(e); paragraph (b) amended, paragraphs (c) and (d) deleted and former paragraph (e) redesignated as paragraph (c) July 26, 1984 effective September 10, 1984; paragraph (c) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended _____ to be effective _____.

L. Proposed Amendments to *R.* 4:43-3 — Setting Aside Default

The Conference of Civil Division Managers recommended that amendatory language be added to *R.* 4:43-3 to require that a motion to vacate default be accompanied by a proposed answer, the Civil case information statement (CIS) and the appropriate fee. Unless the answer accompanies the motion, there is a delay in the proceedings from the time the motion is granted and the answer is filed. Often, attorneys fail to submit the requisite pleading and/or fee and staff must pursue the delinquent attorney or the case is dismissed for lack of prosecution. Inclusion of the requirement that the answer, CIS and fee be filed with the motion to vacate default would mirror a similar requirement in *R.* 1:13-7 with respect to a consent order to reinstate an action. The Committee endorsed the proposed amendment in concept, but expressed concern about a situation in which a defense could be pleaded by motion in lieu of an answer, ultimately recommending that the amendatory language include a proposed answer or a motion under *R.* 4:6-2.

See Section I.J. of this Report for a discussion of a similar recommendation of the Conference of Civil Division Managers, endorsed by the Committee, to amend *R.* 4:33-3 to require that a motion to intervene be accompanied by the pleading, CIS, and appropriate fee.

The proposed amendments to *R.* 4:43-3 follow.

4:43-3. Setting Aside Default

A party's motion for the vacation of entry of default shall be accompanied by (1) either an answer to the complaint and Case Information Statement or a dispositive motion pursuant to *R*. 4:6-2, and (2) the filing fee for an answer, which shall be returned if the motion is denied. For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with *R*. 4:50.

Note: Source — *R.R*. 4:56-3; amended to be effective .

M. Proposed Amendments to *Rules* 4:44A and 4:48A — re: Protecting the Interests of Minors and Incapacitated Adults in Transfers or Assignments of Structured Settlements

The Probate Subcommittee was asked to review the language of *R*. 4:44A and make a recommendation to the Committee on how the interests of minors or incapacitated adults may best be protected with respect to transfers or assignments of structured settlements. Specifically, the subcommittee was to consider whether the appointment of a guardian *ad litem* is warranted to provide the necessary protection. The subcommittee determined that requiring the appointment of a guardian *ad litem* to represent the interest of a minor or incapacitated payee-transferor, even if he or she has a natural or judicially appointed guardian, is an important safeguard and recommended that *R*. 4:44A-1 be amended accordingly.

The subcommittee further determined that *R*. 4:44A-2 should be amended to require that where there is a guardianship or the payee-transferor has become incapacitated subsequent to the entry into the structured settlement, the proceeds of transfers should be deposited with the Surrogate unless the order provides for an alternative disposition that adequately safeguards the interests of the ward.

Additionally, the subcommittee recommended that *R*. 4:48A be amended to ensure that the court alerts the Surrogate when it has ordered funds to be deposited into the Surrogates' Intermingled Trust Fund (SITF). While the rule currently states that a copy of the order shall be furnished by the court to the Surrogate, the subcommittee was aware that this mandate is not uniformly followed, thus affording opportunities for misappropriation of the funds. The subcommittee proposed that the rule require a copy of the order to be forwarded to the Surrogate prior to entry and that the order contain an acknowledgment by the Surrogate of the notification.

Although the Committee acknowledged that the purpose of the proposed amendment is to ensure that settlements are deposited in the SITF, the Committee members were of the opinion that the failure to transfer the funds would not necessarily be remedied by requiring the Surrogate to sign off on the order ahead of time. Believing this to be an administrative matter, the Committee recommended that an Administrative Directive be issued, reiterating the rule requirement and directing that the order promptly be sent to the Surrogate directly from the judge's chambers. The Committee did, however, agree to recommend amendatory language to *R*. 4:48A directing that the court furnish a copy of the order to the Surrogate upon its entry, thus re-emphasizing the importance of timely notification to the Surrogate.

Finally, the subcommittee proposed that *R.* 4:48A(c) be amended to implement a recommendation from the Judiciary-Surrogates Liaison Committee that applications to withdraw funds from the SITF may be made by notice of motion, rather than by the filing of a verified complaint, as currently required by the rule. The rationale behind this recommendation is that the withdrawal of funds is an ongoing part of the guardian's responsibility toward the ward and should not have to be considered a new proceeding each time a withdrawal is deemed necessary.

The Committee endorsed these recommendations, recognizing that such amendments will further protect the assets of minors and incapacitated adults when they are unable to protect themselves. The full report of the Probate Subcommittee is included as Appendix B to this report.

The proposed amendments to *Rules* 4:44A-1, 4:44A-2 and 4:48A, along with a draft Administrative Directive addressing the necessity of alerting the Surrogate to an order mandating a deposit into the Surrogate's Intermingled Trust Fund, follow.

4:44A-1. Venue; Complaint; Service

An action seeking approval of a transfer or assignment of structured settlement payment rights shall be brought by the proposed transferee in the county of the payee-transferor's residence by order to show cause and verified complaint to which shall be annexed a copy of the proposed transfer or assignment agreement, a copy of the disclosure statement required by *N.J.S.A.* 2A:16-65, and a list of the names and ages of the payee-transferor's dependents. The order to show cause and complaint shall be served in accordance with *R.* 4:67-3 on the payee-transferor, all persons entitled to support by the payee-transferor, and the issuer of the annuity. The order to show cause shall be returnable not less than 20 days following the date of service and shall advise that interested parties, other than the payee-transferor, may, in lieu of appearing on the return date, file an affidavit or certification in response to the order to show cause at least five days before the return date. If the payee-transferor is a minor or an incapacitated person, the court shall appoint a guardian *ad litem* to represent such payee-transferor whether or not a guardian or conservator has been judicially appointed.

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

4:44A-2. Hearing

The application shall be heard on the return date of the order to show cause. If the payee-transferor fails to appear, in person or by counsel or guardian *ad litem*, the complaint shall be dismissed. The court shall approve the transfer or assignment only if it expressly finds that (a) the payee-transferor either received independent professional advice regarding the transfer or assignment from a person neither affiliated with nor recommended by the assignee or transferee or that the payee-transferor has knowingly waived in writing the right to such advice; (b) the proposed transfer does not contravene any applicable statute or court order; (c) the transfer is in the best interests of the payee-transferor, taking into account the welfare and support of the payee-transferor's dependents; and (d) the transferee has complied or ensured compliance with all applicable provisions of *N.J.S.A.* 2A:16-69. The court shall also consider whether there have been any previous transfers and, if so, the terms thereof. The judgment approving the transfer or assignment shall incorporate the terms and conditions of *N.J.S.A.* 2A:16-67, which incorporation may be by reference. If the payee-transferor is a minor or an incapacitated person, the judgment shall also require that all proceeds of the assignment or transfer be deposited with the surrogate pursuant to *R.* 4:48A unless the court permits an alternative disposition that will adequately safeguard the interests of the payee-transferor.

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

4:48A. Judgments for Minors and Mentally Incapacitated Persons

(a) Minor. In the event of a judgment for a minor after trial or settlement, the court shall dispense with the giving of a bond and, except as otherwise ordered by the court, shall direct the proceeds of the judgment, if it does not exceed $5,000 to be disposed of pursuant to *N.J.S.A.* 3B:12-6, and if it exceeds the same, then to be deposited in court pursuant to *N.J.S.A.* 3B:15-16 and 17. A copy of the order directing deposit of the proceeds shall be furnished by the court to the surrogate upon its entry.

(b) …no change.

(c) Withdrawals. Withdrawal of funds deposited pursuant to this rule shall be sought by notice of motion, supported by an affidavit explaining the necessity for the requested withdrawal of funds [verified complaint, pursuant to *R.* 4:57, R. 4:83 and *N.J.S.A.* 22A:2-30, which shall be] filed in the Superior Court, Chancery Division, Probate Part. The proceeding [action] shall be *ex parte* unless there are adverse interests or unless the court otherwise orders.

Note: Adopted July 7, 1971 to be effective September 13, 1971; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a) and (b) amended and paragraph (c) adopted June 29, 1990 to be effective September 4, 1990; caption amended, and paragraph (b) caption and text amended July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (c) amended to be effective .

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

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TO: **ASSIGNMENT JUDGES**
CIVIL PRESIDING JUDGES
CIVIL JUDGES

FROM: **PHILIP S. CARCHMAN, P.J.A.D.**

SUBJ: **PROVISION OF FRIENDLY SETTLEMENT TO SURROGATE**

DATE: **_____, 2008**

Pursuant to *R.* 4:48A(a), when there is a judgment for a minor after trial or settlement and the proceeds of the judgment in excess of $5,000 are to be deposited in the Surrogate's Intermingled Trust Fund, the court must furnish a copy of the order directing deposit of the proceeds to the Surrogate. The burden is clearly on the court itself to notify the Surrogate directly of pending deposits. This procedure is to be strictly followed to protect the rights and interests of minors by ensuring that attorneys and *pro se* litigants remit personal injury settlement awards to the Surrogate for deposit in accordance with the court's order.

P.S.C.

Attachment
cc: Surrogates
Trial Court Administrators
Civil Division Managers
Stephen W. Townsend, Clerk
Theodore J. Fetter
Directors
Assistant Directors
Michelle V. Perone
Kevin M. Wolfe
Mary F. Rubinstein
Francis W. Hoeber
Steven D. Bonville

N. Proposed Amendments to *R.* 4:59-1 — Execution

The Committee recommends two amendments to *R.* 4:59-1:

1. *Rule* 4:59-1(a) requires in part that "[a] copy of the fully endorsed writ be served, personally or by ordinary mail, upon the judgment-debtor after a levy on the debtor's property has been made…." The Sheriffs' Association of New Jersey notes that the rule does not state who is to make such service — the Sheriff or the judgment-creditor — and requests that *R.* 4:59-1(a) be amended to make it clear that service of the fully endorsed writ on the judgment-debtor is the responsibility of the judgment-creditor.

It is the judgment-creditor who prepares and endorses the writ, which the court then issues. Once the Sheriff serves the writ on the bank, the bank will freeze the judgment-debtor's account and will notify the Sheriff of the amount in the account. The Sheriff then executes an Affidavit of Levy, noting the amount in the account, and provides this to the judgment-creditor. The common practice at this point is for the judgment-creditor to serve the judgment-debtor with a notice of motion to turn over funds, to which motion is attached a copy of the fully endorsed writ and the Affidavit of Levy. In some instances, albeit infrequently, this procedure is not followed and the question arises as to who should be responsible for serving the copy of the fully endorsed writ on the judgment-debtor.

The Committee agrees with the Sheriffs' Association recommendation that a clarifying amendment is in order, specifying that it is the judgment-creditor's responsibility to serve a copy of the fully endorsed writ on the judgment-debtor. It is the judgment-creditor who has prepared and endorsed the writ, and it is more

practicable for the judgment-creditor to serve the writ on one or a limited number of judgment-debtors than to expect the Sheriff to make service of the writ on all the judgment-debtors in the county.

2. A question had arisen as to whether the Notice to Debtor required by subsection (g) should or must be mailed to a corporation when the corporation is the debtor. The rule states that the notice must be mailed "to the person whose assets are to be levied on…." The Committee agreed that the Notice to Debtor should be served on a corporation or other entity when that entity is the debtor. Accordingly, the Committee recommends the addition of language indicating that the notice shall be mailed to the debtor's residence or, if the debtor is an entity, to the debtor's principal place of business.

The proposed amendments to *R*.4:59-1 follow.

4:59-1. Execution

(a) In General. Process to enforce a judgment or order for the payment of money and process to collect costs allowed by a judgment or order, shall be a writ of execution, except if the court otherwise orders or if in the case of a *capias ad satisfaciendum* the law otherwise provides. The amount of the debt, damages, and costs actually due and to be raised by the writ, together with interest from the date of the judgment, shall be endorsed thereon by the party at whose instance it shall be issued before its delivery to the sheriff or other officer. The endorsement shall explain in detail the method by which interest has been calculated, taking into account all partial payments made by the defendant. The judgment-creditor shall serve a [A] copy of the fully endorsed writ [shall be served,] personally or by ordinary mail, [up]on the judgment-debtor after a levy on the debtor's property has been made by the sheriff or other officer and in no case less than 10 days prior to turnover of the debtor's property to the creditor pursuant to the writ. Unless the court otherwise orders, every writ of execution shall be directed to a sheriff and shall be returnable within 24 months after the date of its issuance, except that in case of a sale, the sheriff shall make return of the writ and pay to the clerk any remaining surplus within 30 days after the sale, and except that a *capias ad satisfaciendum* shall be returnable not less than eight and not more than 15 days after the date it is issued. One writ of execution may issue upon one or more judgments or orders in the same cause. The writ may be issued either by the court or the clerk thereof.

(b) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

(g) Notice to Debtor. Every court officer or other person levying on a debtor's property shall, on the day the levy is made, mail a notice to the person whose assets are to be levied on stating that a levy has been made and describing exemptions from levy and how such exemptions may be claimed. The notice shall be in the form prescribed by Appendix VI to these rules; shall be mailed to the debtor's residence or, if the debtor is an entity, to the debtor's principal place of business; and copies thereof shall be promptly filed by the levying officer with the clerk of the court and mailed to the person who requested the levy. If the clerk or the court receives a claim of exemption, whether formal or informal, it shall hold a hearing thereon within 7 days after the claim is made. If an exemption claim is made to the levying officer, it shall be forthwith forwarded to the clerk of the court and no further action shall be taken with respect to the levy pending the outcome of the exemption hearing. No turnover of funds or sale of assets may be made, in any case, until 20 days after the date of the levy and the court has received a copy of the properly completed notice to debtor.

(h) …no change.

Note: Source — *R.R.* 4:74-1, 4:74-2, 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (f), and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (e), and (g) amended July 5, 2000 to be effective September 5, 2000; paragraph (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (d) amended, and

new paragraph (h) adopted July 27, 2006 to be effective September 1, 2006; paragraphs (a) and (g) amended to be effective .

O. Proposed Amendments to *R.* 4:72-1 — re: Complaint in Action for a Name Change of a Minor

According to rough estimates provided by the Civil Presiding Judges and Civil Division Managers, about twenty to thirty percent of the approximately 5,000 name change applications filed annually involve minors. The Conference of Family Presiding Judges had recommended that the applications for minors be handled in the Family Part when there is a related pending or recently concluded Family Part action. While the Conference of Civil Presiding Judges agreed with this recommendation, there is no way for Civil staff to identify those applications that should be handled in the Family Part. Accordingly, the Conference of Civil Presiding Judges and the Conference of Family Presiding Judges join in recommending that *R.* 4:72-1 be amended to require that the contents of the verified complaint for the name change for a minor contain the name and/or docket number of any Family Part case in which any of the parties in interest in the minor's name change application are currently involved or have been involved within the past three years. If no party in interest is involved in any pending or recently concluded (*i.e.* within the past three years) Family Part case, a certification of non-involvement should be required to be appended to the verified complaint. The Committee recognized that a name change application sometimes involves larger issues, the subject of which may have been part of a related Family Part case. Accordingly, the Committee endorses the joint recommendation of the Conferences of Civil and Family Presiding Judges that the application for the name change of a minor contains information about any Family Part case concerning the minor or his/her family within the last three years.

The proposed amendments to *R.* 4:72-1 follow.

4:72-1. Complaint

(a) Generally. An action for change of name shall be commenced by filing a verified complaint setting forth the grounds of the application. The complaint shall contain the date of birth of the plaintiff and shall state: (a) that the application is not made with the intent to avoid creditors or to obstruct criminal prosecution or for other fraudulent purposes; (b) whether plaintiff has ever been convicted of a crime and if so, the nature of the crime and the sentence imposed; (c) whether any criminal charges are pending against plaintiff and if so, such detail regarding the charges as is reasonably necessary to enable the Division of Criminal Justice or the appropriate county prosecutor to identify the matter. If criminal charges are pending, a copy of the complaint shall, at least 20 days prior to the hearing, be served upon the Director of the Division of Criminal Justice to the attention of the Records and Identification Section if the charges were initiated by the Division, and otherwise upon the appropriate county prosecutor. Service upon the Division or a prosecutor shall be accompanied by a request that the official make such response as may be deemed appropriate.

(b) Change of Name for Minor Involved in Family Action. If the complaint seeks a name change for a minor, the complaint shall state whether the child or any party in interest in the name change application is the subject of a family action pending or concluded within the three years next preceding the filing of the complaint. In such event, the action shall be transferred to the Family Part in the vicinage in which the family action is pending or was concluded.

Note: Source — *R.R.* 4:91-1. Amended July 11, 1979 to be effective September 10, 1979; amended July 15, 1982 to be effective September 13, 1982; amended November 1, 1985 to be effective January 2, 1986; amended July 13, 1994 to be effective September 1, 1994; former text of rule captioned and designated as paragraph (a) and new paragraph (b) adopted _____ to be effective _____.

P. Proposed Amendments to *R.* 4:74-7 — Civil Commitment – Adults

The Director of the Division of Mental Health and Guardianship Advocacy, Department of the Public Advocate, requested, on behalf of the Division, two changes to *R.* 4:74-7(f)(2) (exceptions to the civil commitment review process) to bring it into compliance with state and federal law and to reflect changes in psychiatric practice. The two provisions at issue — furnishing summary, as opposed to plenary, hearings to individuals with severe mental retardation or severe irreversible organic brain syndrome, and permitting substitution of a physician's testimony for that of a psychiatrist — were promulgated decades ago, when hospitals and the courts were grappling with providing review hearings, as mandated by Chief Justice Hughes, for thousands of patients, many of them elderly individuals who had grown old in the institution. At the time, there were relatively few board certified or board eligible psychiatrists who worked in the state institutions. As a result, in order to provide timely (after years of delay) due process to civil committees, the expedited procedures described above were authorized.

Today, however, every patient in New Jersey's psychiatric institutions is treated by a licensed physician who is either board certified or board eligible in psychiatry. Further, older patients and those diagnosed as mentally retarded no longer make up a substantial portion of the population of psychiatric hospitals, as efforts are made to discharge them to a more appropriate and less restrictive residence such as a nursing home or group home. Finally, the exceptions for individuals with severe mental retardation or severe irreversible organic brain syndrome ignore three decades of advances in the rights of those with disabilities such as the Americans with Disabilities Act and its related court decisions. In short, all exceptions for mental retardation, advanced age, or organic brain syndrome should be removed from the rule as these exceptions are very rarely invoked and are no longer appropriate.

The Committee acknowledged the expertise of the Director of the Division of Mental Health and Guardianship Advocacy, and recommends that the rule be amended in accordance with his suggestions.

The proposed amendments to *R*. 4:74-7 follow, and include proposed amendments concerning statutory unions that are discussed in Section I.R. of this Report.

4:74-7. Civil Commitment — Adults

(a) …no change.

(b) Commencement of Action.

(1) …no change.

(2) …no change.

(3) Certificates for Adults.

(A) …no change.

(B) Persons Disqualified. A person [who is a relative] related by blood, [or] marriage or statutory union [of] to the person being examined shall not execute any certificate required by this rule. If the screening service referral procedure is used, the same psychiatrist shall not sign both the screening certificate and the clinical certificate unless that psychiatrist has made a reasonable but unsuccessful attempt to have another psychiatrist conduct the evaluation and execute the certificate.

(c) …no change.

(d) …no change.

(e) …no change.

(f) Final Order of Commitment, Review.

(1) …no change.

(2) Review. The order shall provide for periodic reviews of the commitment no later than (1) three months from the date of the first hearing, and (2) nine months from the date of the first hearing, and (3) 12 months from the date of the first hearing, and (4) at least annually thereafter, if the patient is not sooner discharged. The court may schedule additional review hearings but, except in extraordinary circumstances, not more than once every 30 days. If the

court determines at a review hearing that involuntary commitment shall be continued, it shall execute a new order. All reviews shall be conducted in the manner required by paragraph (e) of this rule [except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration of two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no more than three months prior thereto. The court may, in its discretion, at a review hearing,]. [w]Where the advanced age of the patient or where the cause or nature of the mental illness renders it appropriate, and where it would be impractical to obtain the testimony of a psychiatrist as required in paragraph (e), the court may, in its discretion and with the consent of the patient, support its findings by the oral testimony of a physician on the patient's treatment team who has personally conducted an examination of the patient as close to the hearing date as possible, but in no event more than five days prior to the hearing date. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(g) …no change.

(h) …no change.

(i) …no change.

(j) …no change.

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

(f) amended and paragraphs (g) and (h) caption and text amended November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended, subparagraphs (b)(1) and (2) adopted, paragraphs (c), (d) and (e) amended, caption and text of paragraph (f) amended, and caption and text of subparagraphs (g)(1) and (2) amended November 7, 1988 to be effective immediately; November 7, 1988 amendments rescinded February 21, 1989 retroactive to November 7, 1988; November 7, 1988 amendments reinstated June 6, 1989 to be effective June 7, 1989; subparagraph (c)(2) amended June 6, 1989 to be effective June 7, 1989; paragraph (g) recaptioned and text adopted and paragraphs (g) (h) (i) and (j) redesignated (h) (i) (j) and (k) June 29, 1990 to be effective September 4, 1990; paragraphs (c), (e) and (g) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2), (c)(1) and (4), (e), (f), (h)(2), (i)(1) and (2)and (k) amended July 13, 1994 to be effective September 1, 1994; amended January 22, 1997 to be effective March 1, 1997; paragraph (f)(2) amended July 27, 2006 to be effective September 1, 2006; paragraphs (b)(3)(B) and (f)(2) amended to be effective .

Q. Proposed Amendments to *Rules* 4:86-1, 4:86-2, 4:86-3, 4:86-4, 4:86-5, 4:86-6, 4:86-7, 4:86-8, and 4:86-12 to Reflect and Implement the Changes to the Guardianship Statutes, *N.J.S.A.* 3B: 1-1 *et seq.* and *N.J.S.A.* 3B:12-24.1, *et seq.*

A Probate Subcommittee was directed to review all the revisions to the Guardianship Statutes that became effective in January 2006 and to determine what, if any, amendments to the current court rules would be needed to implement the statutory changes. The subcommittee studied the changes and recommended both global and specific rule revisions, which the full Committee supports. These proposals include:

- Deleting the word "mentally" as a modifier of incapacity, as *N.J.S.A.* 3B:1-2 provides a definition of incapacity that encompasses not only mental impairment, but also impairment by reason of abuse of drugs or alcohol, or physical illness or disability. This proposed amendment affects *Rules* 4:86-1, 4:86-2, 4:86-3, 4:86-4, 4:86-5, 4:86-6, 4:86-7, 4:86-8, and 4:86-12.

- Amending *R.* 4:86-1 to include the appointment of a *pendente lite* guardian and to permit the establishment of a limited guardianship, both of which changes are part of the revisions to the Guardianship Statute.

- Adding language to *Rules* 4:86-2 and 4:86-4 regarding the medical information disclosure provided in *N.J.S.A.* 3B:12-24.1(d) and directing physicians or psychologists to give an opinion on the areas of control that an alleged incapacitated person may retain.

- Conforming *R.* 4:86-5 with the mandate of *N.J.S.A.* 3B:12-24.1(e), to require that the alleged incapacitated individual attend the hearing at which a determination as to capacity will be made, by replacing the permissive "may" with "shall" in the rule. It is also proposed that if the alleged incapacitated individual is unable to appear because of physical or mental incapacity, the plaintiff and court-appointed attorney may certify to the incapacity. Additionally, language should be included in *R.* 4:86-5 to correspond to *R.* 4:67-4, regarding appropriate responses to summary actions, and, the word "alleged" should be added before "incapacitated individual" in the caption of the rule.

- Amending the appointment priority for guardians in *R.* 4:86-6 to include statutory partners, the Office of the Public Guardian and other priorities as contained in *N.J.S.A.* 3B:12-25 and to reflect the general and limited guardianships provided by

N.J.S.A. 3B:12-24(a) and (b). For purposes of clarity, it is proposed that subsection (c) of the rule be divided into two sections.

- Adding language to the caption and the body of *R.* 4:86-7 to recognize that an application for a hearing to determine a return to capacity should include a return of partial capacity. Because *N.J.S.A.* 3B:12-28 mandates a summary action to restore partial or full rights, the phrase "motion in the original cause" should be deleted from the language of the rule.

- Adding "in General Equity" to the caption of *R.* 4:86-12 to clarify that an application for a special medical guardian is not filed with the Probate Part, but rather with the Chancery Division – General Equity Part.

It should be noted that the subcommittee did not recommend changes to *Rules* 4:86-9 and 4:86-10 because the statutes governing the veterans' guardianships and the Division of Developmental Disabilities have not been amended.

The full report of the Probate Subcommittee is included as Appendix B to this report.

The proposed amendments to *Rules* 4:86-1, 4:86-2, 4:86-3, 4:86-4, 4:86-5, 4:86-6, 4:86-7, 4:86-8, and 4:86-12 follow, and include proposed amendments concerning statutory unions that are discussed in Section I.R. of this Report.

RULE 4:86. ACTION FOR GUARDIANSHIP OF AN [MENTALLY] INCAPACITATED PERSON OR FOR THE APPOINTMENT OF A CONSERVATOR

4:86-1. Complaint

Every action for the determination of [mental] incapacity of a person and for the appointment of a guardian of that person or of the person's estate or both, other than an action with respect to a veteran under *N.J.S.A.* 3B:13-1 *et seq.*, or with respect to a kinship legal guardianship under N.J.S.A. 3B:12A-1 *et seq.*, shall be brought pursuant to *R.* 4:86-1 through *R.* 4:86-8 for appointment of a general, limited or *pendente lite* temporary guardian. The complaint shall state the name, age, domicile and address of the plaintiff, of the alleged [mentally] incapacitated person and of the alleged [mentally] incapacitated person's spouse or statutory partner, if any; the plaintiff's relationship to the alleged [mentally] incapacitated person; the plaintiff's interest in the action; the names, addresses and ages of the alleged [mentally] incapacitated person's children, if any, and the names and addresses of the alleged [mentally] incapacitated person's parents and nearest of kin; the name and address of the person or institution having the care and custody of the alleged [mentally] incapacitated person; and if the alleged [mentally] incapacitated person has lived in an institution, the period or periods of time the alleged [mentally] incapacitated person has lived therein, the date of the commitment or confinement, and by what authority committed or confined. The complaint also shall state the name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged [mentally] incapacitated person, any person named as health care representative in any health care directive executed by the alleged [mentally] incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged [mentally] incapacitated person.

Note: Source — *R.R.* 4:102-1. Amended July 22, 1983 to be effective September 12, 1983; former *R*. 4:83-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; R. 4:86 caption amended, and text of *R*. 4:86-1 amended July 12, 2002 to be effective September 3, 2002; caption and text amended to be effective .

4:86-2. Accompanying Affidavits

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

(a) An affidavit stating the nature, location and fair market value (1) of all real estate in which the alleged [mentally] incapacitated person has or may have a present or future interest, stating the interest, describing the real estate fully or by metes and bounds, and stating the assessed valuation thereof; and (2) of all the personal estate which he or she is, will or may in all probability become entitled to, including the nature and total or annual amount of any compensation, pension, insurance, or income which may be payable to the alleged [mentally] incapacitated person. If the plaintiff cannot secure such information, the complaint shall so state and give the reasons therefor, and the affidavit submitted shall in that case contain as much information as can be secured in the exercise of reasonable diligence;

(b) Affidavits of two physicians, having qualifications set forth in *N.J.S.A.* 30:4-27.2t or the affidavit of one such physician and one licensed practicing psychologist as defined in *N.J.S.A.* 45:14B-2. The affidavits may make disclosures about the alleged incapacitated person pursuant to *N.J.S.A.* 3B:12-24.1(d). If an alleged [mentally] incapacitated person has been committed to a public institution and is confined therein, one of the affidavits shall be that of the chief executive officer, the medical director, or the chief of service providing that person is also the physician with overall responsibility for the professional program of care and treatment in the administrative unit of the institution. However, where an alleged [mentally] incapacitated person is domiciled within this State but resident elsewhere, the affidavits required by this rule may be those of persons who are residents of the state or jurisdiction of the alleged [mentally] incapacitated person's residence. Each affiant shall have made a personal examination of the

alleged [mentally] incapacitated person not more than 30 days prior to the filing of the complaint, but said time period may be relaxed by the court on an ex parte showing of good cause. To support the complaint, each affiant shall state: (1) the date and place of the examination; (2) whether the affiant has treated or merely examined the alleged [mentally] incapacitated individual; (3) whether the affiant is disqualified under *R.* 4:86-3; (4) the diagnosis and prognosis and factual basis therefor; (5) for purposes of ensuring that the alleged [mentally] incapacitated person is the same individual who was examined, a physical description of the person examined, including but not limited to sex, age and weight; [and] (6) the affiant's opinion of the extent to which [that] the alleged [mentally] incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the circumstances and conduct of the alleged [mentally] incapacitated person upon which this opinion is based, including a history of the alleged [mentally] incapacitated person's condition; and (7) if applicable, the extent to which the alleged incapacitated person retains sufficient capacity to retain the right to manage specific areas, such as, residential, educational, medical, legal, vocational or financial decisions. The affidavit should also include an opinion as to whether the alleged [mentally] incapacitated person is capable of attending the hearing and if not, the reasons for the individual's inability.

(c) In lieu of the affidavits provided for in paragraph (b), an affidavit of one affiant having the qualifications as required therein, stating that he or she has endeavored to make a personal examination of the alleged [mentally] incapacitated person not more than 30 days prior to the filing of the complaint but that the alleged [mentally] incapacitated person or those in charge of him or her have refused or are unwilling to have the affiant make such an examination. The time period herein prescribed may be relaxed by the court on an *ex parte* showing of good cause.

Note: Source — *R.R.* 4:102-2; former *R.* 4:83-2 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a), (b), and (c) amended July 12, 2002 to be effective September 3, 2002; paragraphs (b) and (c) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) (b) and (c) amended to be effective .

4:86-3. Disqualification of Affiant

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

Note: Source — *R.R.* 4:102-3; former *R.* 4:83-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 28, 2004 to be effective September 1, 2004; amended _____ to be effective _____.

4:86-4. Order for Hearing

(a) Contents of Order. If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings should be taken thereon, it shall enter an order fixing a date for hearing and requiring that at least 20 days' notice thereof be given to the alleged [mentally] incapacitated person, any person named as attorney-in-fact in any power of attorney executed by the alleged [mentally] incapacitated person, any person named as health care representative in any health care directive executed by the alleged [mentally] incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged [mentally] incapacitated person, the alleged [mentally] incapacitated person's spouse or statutory partner, children 18 years of age or over, parents, the person having custody of the alleged [mentally] incapacitated person, the attorney appointed pursuant to *R*. 4:86-4(b), and such other persons as the court directs. Notice shall be affected by service of a copy of the order, complaint and supporting affidavits upon the alleged [mentally] incapacitated person personally and upon each of the other persons in such manner as the court directs. The order for hearing shall expressly provide that appointed counsel for the alleged incapacitated person is authorized to seek and obtain medical and psychiatric information from all health care providers. The court, in the order, may, for good cause, allow shorter notice or dispense with notice, but in such case the order shall recite the ground therefor, and proof shall be submitted at the hearing that the ground for such dispensation continues to exist. A separate notice shall, in addition, be personally served on the alleged [mentally] incapacitated person stating that if he or she desires to oppose the action he or she may appear either in person or by attorney and may demand a trial by jury.

(b) Appointment and Duties of Counsel. The order shall include the appointment by the court of counsel for the alleged [mentally] incapacitated person. Counsel shall (1) personally

interview the alleged [mentally] incapacitated person; (2) make inquiry of persons having knowledge of the alleged [mentally] incapacitated person's circumstances, his or her physical and mental state and his or her property; (3) make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed by the alleged [mentally] incapacitated person or to discover any interests the alleged [mentally] incapacitated person may have as beneficiary of a will or trust. At least three days prior to the hearing date counsel shall file a report with the court and serve a copy thereof on plaintiff's attorney and other parties who have formally appeared in the matter. The report shall contain the information developed by counsel's inquiry; shall make recommendations concerning the court's determination on the issue of mental incapacity; may make recommendations concerning the suitability of less restrictive alternatives such as a conservatorship or a delineation of those areas of decision-making that the alleged [mentally] incapacitated person may be capable of exercising; and whether a case plan for the [mentally] incapacitated person should thereafter be submitted to the court. The report shall further state whether the alleged [mentally] incapacitated person has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court. The report shall also make recommendations concerning whether good cause exists for the court to order that any power of attorney, health care directive, or revocable trust created by the alleged [mentally] incapacitated person be revoked or the authority of the person or persons acting thereunder be modified or restricted. If the alleged [mentally] incapacitated person obtains other counsel, such counsel shall notify the court and appointed counsel at least five days prior to the hearing date.

(c) Examination. If the affidavit supporting the complaint is made pursuant to *R.* 4:86-2(c), the court may, on motion and upon notice to all persons entitled to notice of the hearing under paragraph (a), order the alleged [mentally] incapacitated person to submit to an

examination. The motion shall set forth the names and addresses of the physicians who will conduct the examination, and the order shall specify the time, place and conditions of the examination. Upon request, the report thereof shall be furnished to either the examined party or his or her attorney.

(d) Guardian *Ad Litem*. At any time prior to entry of judgment, where special circumstances come to the attention of the court by formal motion or otherwise, a guardian *ad litem* may, in addition to counsel, be appointed to evaluate the best interests of the alleged [mentally] incapacitated person and to present that evaluation to the court.

(e) Compensation. The compensation of the attorney for the party 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 July 27, 2006 to be effective September 1, 2006; paragraphs (a) through (e) amended _____ to be effective _____.

4:86-5. Proof of Service; Appearance of [Mentally] Alleged Incapacitated Person at Hearing; Answer

Prior to the hearing, the plaintiff shall file proof of service of the notice, order for hearing, complaint and affidavits and proof by affidavit that the alleged [mentally] incapacitated person has been afforded the opportunity to appear personally or by attorney, and that he or she has been given or offered assistance to communicate with friends, relatives, or attorneys. The plaintiff or appointed counsel [may] shall produce the alleged [mentally] incapacitated person at the hearing or the court may direct the plaintiff to do so, unless the plaintiff and the court-appointed attorney certify that the alleged incapacitated person is unable to appear because of physical or mental incapacity and the court finds that it would be prejudicial to the health of the alleged [mentally] incapacitated person or unsafe for the alleged [mentally] incapacitated person or others to do so. If the alleged [mentally] incapacitated person or any person receiving notice of the hearing intends to appear by an attorney, such person shall, not later than five days before the hearing, serve and file an answer, affidavit or motion in response to the complaint.

Note: Source — *R.R.* 4:102-5; caption and text of former *R.* 4:83-5 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended _____ to be effective _____.

4:86-6. Hearing; Judgment

(a) Trial. Unless a trial by jury is demanded by or on behalf of the alleged [mentally] incapacitated person, or is ordered by the court, the court without a jury shall, after taking testimony in open court, determine the issue of [mental] incapacity. If there is no jury, the court, with the consent of counsel for the alleged [mentally] incapacitated person, may take the testimony of a person who has filed an affidavit pursuant to *R.* 4:86-2(b) by telephone or may dispense with oral testimony and rely on the affidavits submitted. Telephone testimony shall be recorded verbatim.

(b) …no change.

(c) Appointment of General or Limited Guardian. If a guardian of the person or of the estate or of both the person and the estate is to be appointed, the court shall appoint and letters shall be granted to the [mentally] incapacitated person's spouse or statutory partner, [if the spouse was] living with the [mentally] incapacitated person as husband or wife or statutory partner at the time the [mental] incapacity arose, or to the [mentally] incapacitated person's next of kin; or the Office of the Public Guardian for Elderly Adults for adults within the statutory mandate of the office, or if none of them will accept the appointment or if the court is satisfied that no appointment from among them will be in the best interests of the [mentally] incapacitated person or estate, then the court shall appoint and letters shall be granted to such other person who will accept appointment as the court determines is in the best interests of the [mentally] incapacitated person including registered professional guardians or surrogate decision-makers chosen by the incapacitated person before incapacity by way of a durable power of attorney, health care proxy or advanced directive.

(d) Duties of Guardian. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with *R*. 4:96-1. The judgment appointing the guardian shall fix the amount of the bond, unless dispensed with by the court. The order of appointment shall require the guardian of the estate to file with the court within 90 days of appointment an inventory specifying all property and income of the [mentally] incapacitated person's estate, unless the court dispenses with this requirement. Within this time period, the guardian of the estate shall also serve copies of the inventory on all next of kin and such other interested parties as the court may direct. The order shall also require the guardian to keep the Surrogate continuously advised of the whereabouts and telephone number of the guardian and of the [mentally] incapacitated person, [and] to advise the Surrogate within 30 days of the [mentally] incapacitated person's death or of any major change in his or her status or health and to report on the condition of the incapacitated person and property as required by *N.J.S.A.* 3B:12-42.

Note: Source — *R.R.* 4:102-6(a)(b)(c), 4:103-3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (c) of former *R*. 4:83-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) amended, caption of paragraph (c) amended and text of former paragraph (c) amended and divided into paragraph (c) and newly designated and captioned paragraph (d) adopted _____ to be effective _____.

4:86-7. Regaining [Mental] Full or Partial Capacity

Upon the commencement of a separate summary action [or upon the filing of a motion in the original cause] by the [mentally] incapacitated person or an interested person on his or her behalf, supported by affidavit and setting forth facts evidencing that the previously [mentally] incapacitated person no longer is [mentally] incapacitated or has returned to partial capacity, the court shall, on notice to the persons who would be set forth in a complaint filed pursuant to *R*. 4:86-1, set a date for hearing, take oral testimony in open court with or without a jury, and may render judgment that the person no longer is [mentally] fully or partially incapacitated, that his or her guardianship be modified or discharged subject to the duty to account, and that his or her person and estate be restored to his or her control, or render judgment that the guardianship be modified but not terminated.

Note: Source — *R.R.* 4:102-7; former *R*. 4:83-7 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended to be effective .

4:86-8. Appointment of Guardian for Nonresident [Mentally] Incapacitated Person

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

Note: Source — *R.R.* 4:102-8. Amended July 26, 1984 to be effective September 10, 1984; former *R.* 4:83-8 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended to be effective .

4:86-12. Special Medical Guardian in General Equity

(a) Standards. On the application of a hospital, nursing home, treating physician, relative or other appropriate person under the circumstances, the court may appoint a special guardian of the person of a patient to act for the patient respecting medical treatment consistent with the court's order, if it finds that:

(1) the patient is [mentally] incapacitated, unconscious, underage or otherwise unable to consent to medical treatment;

(2) …no change.

(3) …no change.

(4) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraphs (a), (b) and (c) of former *R.* 4:83-12 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(1) amended July 12, 2002 to be effective September 3, 2002; caption and paragraph (a)(1) amended to be effective .

R. Proposed Amendments to Court Rules to Reflect Rights Accorded Partners in a Civil Union as Established by P.L. 2006, c.103

To recognize the rights accorded partners in a civil union and the union itself as established by P.L. 2006, c.103, the Committee recommends amendments to the relevant rules, inserting "or statutory union," after references to marriage, and "or statutory partner," after references to spouse. In *R.* 1:21-7, with respect to the issue of joint representation, the Committee proposes eliminating reference to husband and wife and to parent and child, and substituting instead the language "direct and derivative action."

The proposed amendments to *Rules* 1:5-6, 1:12-1, 1:18B-1, 1:21-7, 4:26-5, 4:28-3, 4:74-7, 4:80-1, 4:86-1, 4:86-3, 4:86-6, 4:86-10, 4:93-1, and 4:93-3 follow.

1:5-6. Filing

(a) …no change.

(b) What Constitutes Filing With the Court. Except as otherwise provided by *R.* 1:6-4 (motion papers), *R.* 1:6-5 (briefs), and *R.* 4:42-1(e) (orders and judgments), a paper is filed with the trial court if the original is filed as follows:

(1) …no change.

(2) …no change.

(3) …no change.

(4) In actions in the Chancery Division, Family Part, with the deputy clerk of the Superior Court in the county of venue if the action is for dissolution of marriage, or statutory union, with the Surrogate of the county of venue if the action is for adoption, and in all other actions, with the Family Division Manager in the county of venue, as designee of the deputy clerk of the Superior Court;

(5) …no change.

(6) …no change.

(7) …no change.

(c) …no change.

(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; subparagraph (c)(1)(E) adopted, paragraphs (c)(2) and (c)(3) amended, and paragraph (c)(4) adopted July 27, 2006 to be effective September 1, 2006; paragraph (b)(4) amended to be effective .

1:12-1. Cause for Disqualification; On the Court's Motion

The judge of any court shall be disqualified on the court's own motion and shall not sit in any matter, if the judge

(a) is by blood or marriage or statutory union the second cousin of or is more closely related to any party to the action;

(b) is by blood or marriage or statutory union the first cousin of or is more closely related to any attorney in the action. This proscription shall extend to the partners, employers, employees or office associates of any such attorney except where the Chief Justice for good cause otherwise permits;

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

Paragraphs (c), (d) and (e) shall not prevent a judge from sitting because of having given an opinion in another action in which the same matter in controversy came in question or given an opinion on any question in controversy in the pending action in the course of previous proceedings therein, or because the board of chosen freeholders of a county or the municipality in which the judge resides or is liable to be taxed are or may be parties to the record or otherwise interested.

Note: Source — *R.R.* 1:25B(a); introductory paragraph, paragraph (d), and concluding paragraph amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended _____ to be effective _____.

1:18B-1. Obligation to Report.

(a) …no change.

(b) Form of Report. The annual judicial financial reporting statement shall be in a form promulgated by the Administrative Director and approved by the Supreme Court. It shall cover the judge, the judge's spouse, or statutory partner, and the judge's dependent children residing in the same domicile.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

Note: Adopted January 15, 2002 to be effective immediately; paragraphs (a), (c), (d), (e) and (f) amended January 6, 2003 to be effective immediately; paragraph (b) amended _____ to be effective _____.

1:21-7. Contingent Fees

(a) …no change.

(b) …no change.

(c) …no change.

(d) The permissible fee provided for in paragraph (c) shall be computed on the net sum recovered after deducting disbursements in connection with the institution and prosecution of the claim, whether advanced by the attorney or by the client, including investigation expenses, expenses for expert or other testimony or evidence, the cost of briefs and transcripts on appeal, and any interest included in a judgment pursuant to *R*. 4:42-11(b); but no deduction need be made for post-judgment interest or for liens, assignments or claims in favor of hospitals or for medical care and treatment by doctors and nurses, or similar items. The permissible fee shall include legal services rendered on any appeal or review proceeding or on any retrial, but this shall not be deemed to require an attorney to take an appeal. Where joint representation is undertaken [on behalf of] in both [a husband and wife or parent (or guardian) and child in a] the direct and derivative action, or where a claim for wrongful death is joined with a claim on behalf of a decedent, the contingent fee shall be calculated on the aggregate sum of the recovery.

(e) …no change.

(f) …no change.

(g) …no change.

(h) …no change.

(i) …no change.

Note: Source — *R*. 1:21-6(f), as adopted July 7, 1971 to be effective September 13, 1971 and deleted December 21, 1971 to be effective January 31, 1972. Adopted December 21, 1971 to be effective January 31, 1972. Amended June 29, 1973 to be effective September 10, 1973.

Paragraphs (c) and (e) amended October 13, 1976, effective as to contingent fee arrangements entered into on November 1, 1976 and thereafter. Closing statements on all contingent fee arrangements filed as previously required between January 31, 1972 and January 31, 1973 shall be filed with the Administrative Office of the Courts whenever the case is closed; paragraph (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 24, 1978 to be effective September 11, 1978; paragraph (c) amended and new paragraphs (h) and (i) adopted January 16, 1984, to be effective immediately; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (e) amended June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c)(5) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended January 21, 1999 to be effective April 5, 1999; paragraphs (g) and (h) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended to be effective .

4:26-5. Unknown Defendants: *In Rem* Actions

(a) …no change.

(b) Description of Unknown Defendants. When it shall appear by the affidavit of inquiry required by *R.* 4:4-5(c) that the affiant has been unable to ascertain whether or not any person who is a proper party defendant is married, or[, if married, the given name of the wife of such male defendant or the surname and either the given name or initial thereof of the husband of such female defendant,] in a statutory partnership or, if so, the given name or initial of the defendant's spouse or statutory partner, or that the affiant has been unable to ascertain whether or not any person who is a proper party defendant is still the owner of the specific property or res or any interest therein, and has been unable to ascertain the names and residences of any of the person's successors in right, title and interest in the same, or that the affiant has been unable to ascertain whether or not such person is still alive, or if such person is known or believed to be dead, that the affiant has been unable, in either case, to ascertain the names and residences of such person's heirs, devisees or personal representatives or his, hers, their, or any of their, successors in right, title or interest in the property or res or interest therein, or of such of them as may be proper parties defendant in the action, any such person or unknown person or persons may be made a party defendant by such of the following designations as may be appropriate:

(1) As to any such male person and such wife or statutory partner, if he has any, by designating such male person by his proper given name and surname, as it appears of record or otherwise, and by designating such wife or statutory partner by the given name and surname of such male person, as it so appears[, with "Mrs." prefixed thereto]; or

(2) As to any such female person and such husband or statutory partner, if she has any, by designating such female person by her proper given name and surname, as it appears, of record or otherwise, and by designating such husband or statutory partner either

(i) By the name of such female, as it so appears, as "Mr. ..., husband or statutory partner of ..." using such surname of such female person in the first blank and such given name and such surname of such female person in the second blank; or

(ii) By the name "John Doe, husband or statutory partner of ..., said name of John Doe being fictitious," using the given name and surname of such female person in the blank; or

(3) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

Note: Source — *R.R.* 4:30-4(a)(b) (first sentence) (c)(d)(e); introductory paragraph and paragraphs (b), (c) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (b), and subparagraphs (b)(1), (b)(2), (b)(2)(i) and (b)(2)(ii) amended to be effective .

4:28-3. Claims by or Against Spouse or Statutory Partner

(a) Generally. Claims by or against a husband and wife or statutory partner may be joined with claims by or against either of them separately.

(b) Mandatory Joinder of Spouses or Statutory Partners in Certain Negligence Actions. All claims by spouses or statutory partners for physical injury and consortium losses resulting from the same course of negligent conduct of others shall be joined in a single action and shall be deemed to have been waived if not so joined unless the court, for good cause shown, otherwise orders.

Note: Source — *R.R.* 4:32-7; caption, paragraph (a) and caption and text of paragraph (b) amended to be effective .

4:74-7. Civil Commitment — Adults

(a) …no change.

(b) Commencement of Action.

(1) …no change.

(2) …no change.

(3) Certificates for Adults.

(A) …no change.

(B) Persons Disqualified. A person [who is a relative] related by blood, [or] marriage or statutory union [of] to the person being examined shall not execute any certificate required by this rule. If the screening service referral procedure is used, the same psychiatrist shall not sign both the screening certificate and the clinical certificate unless that psychiatrist has made a reasonable but unsuccessful attempt to have another psychiatrist conduct the evaluation and execute the certificate.

(c) …no change.

(d) …no change.

(e) …no change.

(f) Final Order of Commitment, Review.

(1) …no change.

(2) Review. The order shall provide for periodic reviews of the commitment no later than (1) three months from the date of the first hearing, and (2) nine months from the date of the first hearing, and (3) 12 months from the date of the first hearing, and (4) at least annually thereafter, if the patient is not sooner discharged. The court may schedule additional review hearings but, except in extraordinary circumstances, not more than once every 30 days. If the

court determines at a review hearing that involuntary commitment shall be continued, it shall execute a new order. All reviews shall be conducted in the manner required by paragraph (e) of this rule [except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration of two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no more than three months prior thereto. The court may, in its discretion, at a review hearing,]. [w]Where the advanced age of the patient or where the cause or nature of the mental illness renders it appropriate, and where it would be impractical to obtain the testimony of a psychiatrist as required in paragraph (e), the court may, in its discretion and with the consent of the patient, support its findings by the oral testimony of a physician on the patient's treatment team who has personally conducted an examination of the patient as close to the hearing date as possible, but in no event more than five days prior to the hearing date. A scheduled periodic review, as set forth above, shall not be stayed pending appeal of a prior determination under this rule.

(g) …no change.

(h) …no change.

(i) …no change.

(j) …no change.

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

(f) amended and paragraphs (g) and (h) caption and text amended November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended, subparagraphs (b)(1) and (2) adopted, paragraphs (c), (d) and (e) amended, caption and text of paragraph (f) amended, and caption and text of subparagraphs (g)(1) and (2) amended November 7, 1988 to be effective immediately; November 7, 1988 amendments rescinded February 21, 1989 retroactive to November 7, 1988; November 7, 1988 amendments reinstated June 6, 1989 to be effective June 7, 1989; subparagraph (c)(2) amended June 6, 1989 to be effective June 7, 1989; paragraph (g) recaptioned and text adopted and paragraphs (g) (h) (i) and (j) redesignated (h) (i) (j) and (k) June 29, 1990 to be effective September 4, 1990; paragraphs (c), (e) and (g) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2), (c)(1) and (4), (e), (f), (h)(2), (i)(1) and (2)and (k) amended July 13, 1994 to be effective September 1, 1994; amended January 22, 1997 to be effective March 1, 1997; paragraph (f)(2) amended July 27, 2006 to be effective September 1, 2006; paragraphs (b)(3)(B) and (f)(2) amended to be effective .

4:80-1. Application

(a) Contents. Unless a complaint for probate is filed with the Superior Court pursuant to *R.* 4:83, an application for the probate of a will, for letters testamentary, letters of administration, letters of administration of non-resident estates in which administration has not been sought in the decedent's state of residence, letters of administration with the will annexed, letters of administration ad prosequendum, letters of substitutionary administration and letters of substitutionary administration with the will annexed shall be filed with the Surrogate's Court, stating: (1) the applicant's residence; (2) the name and date of death of the decedent, his or her domicile at date of death and date of the last will, if any, of decedent; (3) the names and addresses of the spouse or statutory partner, heirs, next of kin and other persons, if any, entitled to letters, and their relationships to decedent, and, to the best of the applicant's knowledge and belief, identifying any of them whose names or addresses are unknown and stating further that there are no other heirs and next of kin; (4) the ages of any minor heirs or minor next of kin; and in an application for probate of a will, whether the testator had issue living when the will was made, and whether he or she left any child born or adopted thereafter or any issue of such after-born or adopted child, and the names of after-born or adopted children since the date of the will, or their issue, if any. The applicant shall verify under oath that the statements are true to the best of the applicant's knowledge and belief.

(b) …no change.

(c) …no change.

(d) …no change.

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

amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended to be effective .

RULE 4:86. ACTION FOR GUARDIANSHIP OF AN [MENTALLY] INCAPACITATED PERSON OR FOR THE APPOINTMENT OF A CONSERVATOR

4:86-1. Complaint

Every action for the determination of [mental] incapacity of a person and for the appointment of a guardian of that person or of the person's estate or both, other than an action with respect to a veteran under *N.J.S.A.* 3B:13-1 *et seq.*, or with respect to a kinship legal guardianship under N.J.S.A. 3B:12A-1 *et seq.*, shall be brought pursuant to *R.* 4:86-1 through *R.* 4:86-8 for appointment of a general, limited or *pendente lite* temporary guardian. The complaint shall state the name, age, domicile and address of the plaintiff, of the alleged [mentally] incapacitated person and of the alleged [mentally] incapacitated person's spouse or statutory partner, if any; the plaintiff's relationship to the alleged [mentally] incapacitated person; the plaintiff's interest in the action; the names, addresses and ages of the alleged [mentally] incapacitated person's children, if any, and the names and addresses of the alleged [mentally] incapacitated person's parents and nearest of kin; the name and address of the person or institution having the care and custody of the alleged [mentally] incapacitated person; and if the alleged [mentally] incapacitated person has lived in an institution, the period or periods of time the alleged [mentally] incapacitated person has lived therein, the date of the commitment or confinement, and by what authority committed or confined. The complaint also shall state the name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged [mentally] incapacitated person, any person named as health care representative in any health care directive executed by the alleged [mentally] incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged [mentally] incapacitated person.

Note: Source — *R.R.* 4:102-1. Amended July 22, 1983 to be effective September 12, 1983; former *R*. 4:83-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; R. 4:86 caption amended, and text of *R*. 4:86-1 amended July 12, 2002 to be effective September 3, 2002; caption and text amended to be effective _____.

4:86-3. Disqualification of Affiant

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

Note: Source — *R.R.* 4:102-3; former *R.* 4:83-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 28, 2004 to be effective September 1, 2004; amended _____ to be effective _____.

4:86-6. Hearing; Judgment

(a) Trial. Unless a trial by jury is demanded by or on behalf of the alleged [mentally] incapacitated person, or is ordered by the court, the court without a jury shall, after taking testimony in open court, determine the issue of [mental] incapacity. If there is no jury, the court, with the consent of counsel for the alleged [mentally] incapacitated person, may take the testimony of a person who has filed an affidavit pursuant to *R.* 4:86-2(b) by telephone or may dispense with oral testimony and rely on the affidavits submitted. Telephone testimony shall be recorded verbatim.

(b) …no change.

(c) Appointment of General or Limited Guardian. If a guardian of the person or of the estate or of both the person and the estate is to be appointed, the court shall appoint and letters shall be granted to the [mentally] incapacitated person's spouse or statutory partner, [if the spouse was] living with the [mentally] incapacitated person as husband or wife or statutory partner at the time the [mental] incapacity arose, or to the [mentally] incapacitated person's next of kin; or the Office of the Public Guardian for Elderly Adults for adults within the statutory mandate of the office, or if none of them will accept the appointment or if the court is satisfied that no appointment from among them will be in the best interests of the [mentally] incapacitated person or estate, then the court shall appoint and letters shall be granted to such other person who will accept appointment as the court determines is in the best interests of the [mentally] incapacitated person including registered professional guardians or surrogate decision-makers chosen by the incapacitated person before incapacity by way of a durable power of attorney, health care proxy or advanced directive.

(d) Duties of Guardian. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with *R.* 4:96-1. The judgment appointing the guardian shall fix the amount of the bond, unless dispensed with by the court. The order of appointment shall require the guardian of the estate to file with the court within 90 days of appointment an inventory specifying all property and income of the [mentally] incapacitated person's estate, unless the court dispenses with this requirement. Within this time period, the guardian of the estate shall also serve copies of the inventory on all next of kin and such other interested parties as the court may direct. The order shall also require the guardian to keep the Surrogate continuously advised of the whereabouts and telephone number of the guardian and of the [mentally] incapacitated person, [and] to advise the Surrogate within 30 days of the [mentally] incapacitated person's death or of any major change in his or her status or health and to report on the condition of the incapacitated person and property as required by *N.J.S.A.* 3B:12-42..

Note: Source — *R.R.* 4:102-6(a)(b)(c), 4:103-3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (c) of former *R.* 4:83-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (a), caption of paragraph (c) amended and text of former paragraph (c) amended and divided into paragraph (c) and newly designated paragraph (d) adopted _____ to be effective _____.

4:86-10. Appointment of Guardian for Persons Receiving Services From the Division of Developmental Disabilities

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

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

(b) …no change.

(c) …no change.

(d) …no change.

Note: Adopted July 7, 1971 to be effective September 13, 1971; amended July 24, 1978 to be effective September 11, 1978. Former rule deleted and new rule adopted November 5, 1986 to be effective January 1, 1987; caption amended and paragraphs (b), (c) and (d) of former R. 4:83B10 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraphs (b), (c), and (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) amended to be effective .

4:93-1. Complaint

An action under *N.J.S.A.* 3B:27-6 to declare dead an absentee, whether a resident or nonresident of this State, may be brought by a spouse or statutory partner, any next of kin, creditor, executor, administrator, beneficiary under an insurance policy on the absentee's life, or any other person interested in the estate. The complaint shall specify the facts as to the plaintiff's interest.

Note: Source — *R.R.* 4:111-1. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:92-1 redesignated June 29, 1990 to be effective September 4, 1990; amended _____ to be effective _____.

4:93-3. Parties Defendant

The order to show cause shall be directed to all persons in interest, including (a) the persons who would have an interest, as executor or beneficiary under a will of the absentee, or as heir, next of kin or spouse or statutory partner of the absentee or otherwise, in any real or personal property by reason of the death of the absentee, testate or intestate; (b) the carrier and beneficiaries of any insurance known to the plaintiff which is payable on the death of the absentee; (c) those persons entitled, in a fiduciary or beneficial capacity, to any interest known to the plaintiff, which interest expires or is contingent upon the death of the absentee; and (d) such other persons as the court directs.

Note: Source — *R.R.* 4:111-3; former R. 4:92-3 redesignated June 29, 1990 to be effective September 4, 1990; amended to be effective .

S. Housekeeping Amendments

The Committee recommends the following "housekeeping" amendments:

R. 1:40-6(d) — to eliminate an outdated reference to three free hours of mediation and replace it with the current requirement of two free hours.

R. 4:32-2 — to correct an incorrect reference in the rule.

See Section III of this Report for amendments to *R*. 4:32-2 proposed and adopted out of cycle.

The proposed amendments to *Rules* 1:40-6 and 4:32-2 follow.

1:40-6. Mediation of Civil, Probate, and General Equity Matters

The CDR program of each vicinage shall include mediation of civil, probate, and general equity matters, pursuant to rules and guidelines approved by the Supreme Court.

(a) …no change.

(b) …no change.

(c) …no change.

(d) Withdrawal and Removal from Mediation. A motion for removal from mediation shall be filed and served upon all parties within 10 days after the entry of the mediation referral order and shall be granted only for good cause. Any party may withdraw from mediation after the initial [three] two hours provided for by paragraph (a) of this rule. The mediation may, however, continue with the consent of the mediator and the remaining parties if they determine that it may be productive even without participation by the withdrawing party.

(e) …no change.

(f) …no change.

(g) …no change.

Note: Adopted July 5, 2000 to be effective September 5, 2000 (and former *Rule* 1:40-6 redesignated as *Rule* 1:40-7); paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraphs (e) and (g) amended July 27, 2006 to be effective September 1, 2006; paragraph (a) amended September 11, 2006 to be effective immediately; paragraph (d) amended _____ to be effective _____.

4:32-2. Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in the Class; Multiple Classes and Subclasses

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) …no change.

(B) …no change.

(C) …no change.

(2) …no change.

(3) …no change.

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

(f) …no change.

(g) …no change.

(h) …no change.

Note: Effective September 8, 1969; 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; caption amended, paragraphs (a) and (d) caption and text amended, paragraph (b) amended, former *R.* 4:32-4 deleted and readopted as amended as new paragraph (e), former *R.* 4:32-3 deleted and adopted as reformatted as new paragraph (f), and new paragraphs (g) and (h) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended October 9, 2007, to be effective immediately; paragraph (e)(4) amended to be effective .

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Amendments to *R.* 1:4-1 — Caption: Name and Addresses of Party and Attorney; Format

An attorney suggested that the Committee consider a rule amendment requiring that pleadings be written in English. Currently, there is nothing in the rule to prevent a litigant from submitting to the court and serving on the adversary a pleading written in a foreign language. The Committee discussed this issue fully, taking into consideration the possible effect on access to justice, the ethnic diversity of the State, the differences in cases and litigants between Special Civil Part cases and Civil Part cases, and the availability and cost of interpreting services. It was noted that the federal rules have no such requirement. The judges on the Committee reported that submission of court papers in a language other than English has not been a problem. Litigants with special needs are handled by staff and the ombudsman in the courthouse. The Committee concluded that it was not necessary to put such a requirement in the court rules.

B. Proposed Amendments to *R.* 1:4-9 — Size, Weight and Format of Filed Papers

An attorney questioned why *R.* 1:4-9 continues to require double spacing for court documents when computers print legibly with 1.5 or less line spacing. He suggested that the rule require copies of briefs in .RTF or .TXT format so that judges would be able to cut and paste the text that they wish to incorporate into their decisions.

The Committee took the position that there was no need to change the rule as it is currently constituted and, accordingly, rejected the proposal.

See Section I.B. of this Report for proposed amendments to *R.* 1:4-9 that the Committee supports.

C. Proposed Amendments to *R.* 1:5-3 ─ Proof of Service

It had been suggested that *R.* 1:5-3, which now requires the proof of service to be filed "promptly," be amended to state the timeframe within which it must be filed, *e.g.* within 20 days after making service. It was felt that attorneys either do not file, or do not file timely, the proof of service, making it difficult for the court to determine when the first defendant was served and thus when the discovery period (which commences at the time an answer is filed or 90 days after the first defendant is served) should begin. Following discussion of this proposal, the Committee concluded that the current practice is not problematic and determined that no rule amendment is necessary at this time.

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

The Conference of Civil Presiding Judges requested that the Committee reconsider the amendment to *R.* 1:6-2(f), effective September 1, 2006, which requires the court to give all parties one day's notice of the time and place it intends to place its findings on the record with respect to an orally argued motion. The Conference expressed concern over the practicality of providing one day's notice, as judges often take advantage of unexpected periods of time to put motion decisions on the record. Moreover, the Conference noted that having attorneys come to the courthouse to hear the decision is an additional cost to the client. Finally, the Conference observed that the long-standing practice is that an attorney or *pro se* party can obtain a copy of the tape containing the record for $10.00.

Judges on the Committee reported that they had not found the requirement burdensome to date. Committee members also noted that attorneys often call the law clerk to learn the judge's decision, and thus rejected the "extra cost to the client" rationale proffered by the Conference. The Committee members were of the opinion that some time was needed to see how the rule, as amended, is actually working. Accordingly, they declined to reconsider the amendment of the rule, reasoning that it was premature at this point.

See Section I.C. of this Report for proposed amendments to *R.* 1:6-2 that the Committee supports.

E. Proposed Amendments to *R.* 1:21-7 — Contingent Fees

A practitioner had requested that the contingent fee recoverable for cases involving a minor or mentally incapacitated individual be raised from 25% to the 33⅓% allowable on other cases. He asserted that the discrepancy in treatment is illogical and unfair because an attorney, in fact, expends more time and effort in representing an infant or mentally incapacitated individual than most other clients and, therefore, should be able to obtain the same contingent fee as he would in representing an adult. In support of his position, he noted that 1) extra time is involved in getting a guardian appointed, 2) discovery is more burdensome as facts must be garnered from external sources rather than from the minor or incapacitated individual, 3) communication with the client is more difficult, and 4) preparation for and attendance at a "friendly hearing" is time-consuming. The Committee acknowledged that the fee difference set forth in the rule is an expression of the salutary public policy of being more solicitous of the well-being of children and mentally incapacitated individuals, and so declined to support the proposed amendment.

See Section I.E. of this Report for proposed amendments to *R.* 1:21-7 that the Committee supports.

F. Proposed Amendments to *R.* 1:36-3— Unpublished Opinions

The United States Supreme Court adopted amendments to the federal rules to allow the citation of unpublished opinions in federal courts, effective December 1, 2006. The rule change covers only those unpublished opinions issued after the effective date. The Committee discussed three issues relating to the question of whether *R.* 1:36-3 should be modified to reflect the change in federal policy.

First, it considered whether the New Jersey rule should reflect the federal language that would eliminate the need for a copy of an unpublished opinion to be provided to the parties and the court if it is available in a publicly accessible electronic database. The Committee recognized that some attorneys and litigants may use Westlaw references, while the Judiciary uses the Lexis-Nexis database. Because the two are not interchangeable with respect to citations of unpublished opinions, the Committee agreed to retain the New Jersey requirement that copies of the unpublished opinions be furnished to the parties and the court.

The second issue was whether the New Jersey rule should be changed to allow the court to cite unpublished opinions. The Committee discussed this issue at length. Among the views expressed were the following: 1) if there is no published opinion on point, then it would be appropriate to cite an unpublished opinion; 2) all unpublished opinions have value, even if it is less than published opinions, and, therefore, citation should be permitted; 3) allowing judges to rely on unpublished opinions may affect and skew trends in the development of case law; 4) if one published opinion is supported by a series of unpublished opinions, these should be noted and used by the courts; 5) there is plenty of case law on point and, therefore, no need to cite unpublished opinions. In the end, the Committee voted overwhelmingly against permitting a judge to cite an

unpublished opinion except as currently authorized by *R*. 1:36-3 (*res judicata,* collateral estoppel, the single controversy doctrine or any other similar principle of law).

The third issue was whether the New Jersey rule should be amended to allow unpublished opinions to have precedential value. One Committee member suggested that unpublished opinions are, in fact, precedent and the court should look to all opinions, unpublished as well as published, to see what was done on an issue in the past in order to determine a course of action in the present. The Committee did not agree, however, and took the position that the rule should not be amended to allow an unpublished opinion to constitute precedent.

Accordingly, the Committee does not recommend any revisions to *R*. 1:36-3 in response to the changes in the federal rules.

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

A General Equity judge requested a change to the appellate rules to require appellate briefs to be submitted to the trial court, expressing the view that it would be beneficial to trial judges to be able to monitor the status of appellate filings and, further, that such a requirement might encourage increased civility in the written submissions. Initially, this suggestion was sent to the Conference of Civil Presiding Judges, but the chair of that conference determined that the Civil Practice Committee was the appropriate body to consider the proposed amendment. Given the number of cases on appeal, especially in the criminal court, the Committee concluded that it would be burdensome on both attorneys and judges to forward copies of briefs and appendices in all cases. Accordingly, the Committee declined to recommend this change, reasoning that if a trial judge wants a copy of a brief in a particular case, he or she can request it from the appellate court.

H. Proposed Amendments to *R.* 2:8 -1— Motions

An attorney noted that *R.* 2:5-1(b) requires that a copy of a notice of appeal to the Appellate Division be served on the trial judge and questioned why there is no similar provision in *R.* 2:8-1(b) for motions for leave to file an interlocutory appeal. He suggested that the trial judge should be made aware that his/her interlocutory order is being challenged. The Committee agreed, but noted that the attorney's concern has already been addressed in *R.* 2:5-6, which requires that applications for leave to appeal from interlocutory orders be served and filed with the court from which the appeal is taken. Consequently, no rule amendment is necessary.

A Committee member cited a case currently before the New Jersey Supreme Court in which an attorney failed to disclose the existence of a related case. She suggested that the court rules be amended to require that a motion to file an interlocutory appeal be accompanied by a Case Information Statement in order to ensure that there are no pending or related cases with the same legal issues. The Committee determined that the case before the Court was more a matter of professional ethics than of court management and that was premature to act on this suggestion until the Court ruled. Additionally, it was pointed out that many interlocutory appeals are filed as emergent applications and to require the submission of a CIS in such situations would be burdensome. The Committee declined to make a recommendation at this time.

I. Proposed Amendments to *R.* 2:12-10 — Granting or Denial of Certification

A practitioner pointed out that *R.* 2:12-10 allows for a petition for certification to be granted on the affirmative vote of three or more justices, whereas *R.* 2:11-6 provides that a majority of the Court must agree to grant a motion for reconsideration of a denial of a petition for certification. He questioned why more justices would be required to grant a motion for reconsideration than the petition for certification in the first place. The Committee rejected his contention that this was an illogical distinction. Instead, it took the position that it is intellectually consistent to require more justices to approve a motion for reconsideration of a denial of a petition for certification than to grant a petition for certification, reasoning that if three justices voted to grant the petition on a motion for reconsideration, those same three justices would have voted to grant the petition in the first place. Moreover, it is clearly logical to require more votes to overturn a matter than to grant it. Accordingly, the Committee declined to recommend the proposal.

Subsequent to the Committee's determination on this matter, the 11/5/2007 issue of the New Jersey Law Journal contained an editorial addressing the question of how many votes should be necessary on a motion for reconsideration of a denial of a petition for certification in the context of *Fetisov v. Vigilant Insurance Company,* 190 *N.J.* 394 (2007). In that case, retirements and recusals of justices resulted in a strange sequence of events, ending in denial of both the petition for certification and the motion for reconsideration. The editorial questioned whether the Court "might want to consider for the future whether its internal practices — those governing reconsideration motions, those related to the calling up of lower court judges to fill in for recused justices, and those related to the recalling of retired justices — ought to be revisited in light of what happened in *Fetisov*." The Committee members acknowledged that the rule, as written, works well when there are seven justices present, but that problems can arise when one or two are

missing. They recognized, however, that it is the Chief Justice who makes the determination as to whether to call up a lower-court judge temporarily to fill a space on the Court. The Committee concluded that this issue is a matter of Court practice and, accordingly, declined to recommend a rule amendment.

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

In the last rules cycle, *R.* 4:10-2 was amended to prohibit the ex parte interview of a physician without a release from the patient. The text reads, "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." In its comments to the proposed amendments, the New Jersey Defense Association suggested that the text of the rule specify what a party may do rather than what may not be done. The Association also suggested that the text be included in a separate provision rather than be a part of subsection (d). Specifically, the Association proposed the following language:

> (f) In a case in which a party's medical condition has been placed in issue, any other party may conduct an interview with that party's treating physician through use of an authorization for the disclosure of protected medical information in the form set forth in Appendix XII-C. Absent entry of a protective order pursuant to *R.* 4:10-3, such interviews may be conducted *ex parte* after reasonable notice is provided to the physician and adverse party of the time, place and scope of the interview.

The Committee determined that there was no need to deviate from the language recently approved and declined to make the recommended changes.

The Association also objected to the language in the authorization form (Appendix XII-C) advising the physician that the plaintiff's counsel may be present at the interview, believing that the provision is contrary to the spirit of the *Stempler* case, which is to encourage such interviews. The Committee members noted that *Stempler* pre-dated the HIPAA regulations and took the position that the presence of the attorney is an available safeguard, but is not mandatory. The Committee concluded that its language embodied the spirit of *Stempler* as tempered by HIPAA and determined that no change was warranted at this time.

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

The New Jersey Defense Association suggested that, while it is implicit in the amendments that were adopted in the last rules cycle, it should be made clear that when a protective order is challenged after its entry, any party seeking to preserve that protective order may make and/or supplement a good cause showing at that time. Accordingly, the Association proposed the addition of language stating, "If such an application is made, any party opposing the vacation or modification of the protective order may make a showing of good cause, or supplement a previous showing of good cause, for the protective order."

The Committee took the position that this subsequent showing of good cause was implicitly provided for in the current rule and that judges should address the issue on a case by case basis. Accordingly, no further clarification is necessary.

L. Proposed Amendments to *R.* 4-17 — Interrogatories to Parties

In the 2004-2006 rules cycle, an attorney suggested three amendments to *R.* 4:17 that the Committee declined to support. Specifically, he requested that the rule be revised to require that 1) information or documents be specifically identified when being withheld in answer to a specific interrogatory, thus avoiding boilerplate objections; 2) answers to interrogatories include all information in the possession of the party and the party's attorney(s); and 3) defense counsel be obligated to make continual inquiry of the insurance company to ascertain that no surveillance films, stills or the like are in the insurer's possession and that the interrogatory be answered accordingly.

The practitioners on the Committee did not view the absence of identification of specific documents as a problem. Accordingly, the Committee declined to recommend the changes proposed in the first request. The Committee vigorously opposed the attorney's second suggestion, observing that the Rules of Professional Conduct, especially RPC 3.3, address the conduct of the attorney and the obligation of candor toward the tribunal. With respect to the third proposal, the Committee noted that an attorney may always ask about the existence of tapes or films. Consequently, the members felt that no rule amendments were necessary.

The attorney requested the Committee to reconsider its rejection of proposal #3. He contended that the rationale expressed by the Committee ("attorneys can always ask about the existence of the tapes…") does not address the problem because the defendant can deny their existence if he or she is unaware of them, even though the tapes may actually exist and be in the possession of the defendant's insurance company. He maintained that unless the defendant is required to make inquiry of the insurance company, the only way to determine the existence of

these materials would be to repeatedly subpoena the defendant's insurance company, a step he asserted should not be necessary.

The attorney also objected to the Committee's vigorous opposition to his proposal concerning representations to the tribunal, claiming that RPC 3.3 does not address the exchange of discovery between adversaries, especially with respect to the boilerplate objections that are the subject of his first proposal.

The Committee reaffirmed its prior rejection of the suggested amendments, relying on the views previously expressed. It noted, however, that the appropriate reference to the Rules of Professional Conduct should be to RPC 3.4, not 3.3.

M. Proposed Amendments to *R.* 4:23-5 — re: Protection for the Non-Delinquent Party

In light of questions raised by *Sprankle v. Adamar of New Jersey, Inc.*, 388 *N.J. Super.* 216 (L. Div. 2006), the Discovery Subcommittee was charged to consider whether *R.* 4:23-5 and/or *R.* 4:24-1should be amended to include different standards for extensions of discovery upon reinstatement of a dismissed or suppressed pleading. In *Sprankle*, the court reinstated the plaintiff's complaint under an "exceptional circumstances" standard and allowed a discovery extension for the defendant only, based on a "good cause" standard. The subcommittee determined not to recommend rule changes based on separate standards, being of the opinion that the extension of discovery upon reinstatement is case-sensitive and should be left to the discretion of the court.

The subcommittee further acknowledged that in many cases a motion to dismiss without prejudice under *R.* 4:23-5(a)(1) is not made until near the end of the discovery period. The rule, as currently constituted, requires dismissal or suppression without regard to the date of the discovery default or the discovery end date. A majority of the subcommittee agreed that the rule should be amended to provide that dismissal or suppression without prejudice is mandatory only if the motion is filed within 60 days of the discovery default. If not filed within 60 days of the default, the dismissal without prejudice is discretionary. Similarly, to encourage prompt reinstatement following a dismissal without prejudice, a majority of the subcommittee recommended that the time beyond which sanctions may be imposed on the delinquent party be reduced from 90 to 60 days. The premise on which these recommendations are based is that both parties should be held accountable, one for failing to provide discovery and the other for waiting too long to seek relief

from the court. The goal was to put the onus on the party who wants the discovery to pursue relief from the court expeditiously.

The Committee discussed these proposals at length. Some members opined that the proposed amendments did not go far enough in providing a consequence to the actions of the delinquent party, while others expressed a reluctance to involve the court in a dispute that should be settled between the parties. On a close vote, the Committee declined to recommend any changes to *R*. 4:23-5(a)(1).

See Section I.H. of this report for proposed amendments to *R*. 4:23-5 that the Committee supports.

N. Proposed Amendments to *R.* 4:24-1 — Time for Completion of Discovery

A Committee member suggested that *R.* 4:24-1(c) be amended to require that the stipulation requesting an "automatic," consensual extension of discovery for up to 60 days be required to set forth what discovery still needs to be accomplished and a timetable for its completion. Alternatively, it was proposed that 60 days be added to the discovery period of each track, thus obviating the need for the automatic extension. Under this alternative, all discovery extension requests would be by motion. The Committee did not agree that parties applying for the automatic 60-day extension should be required to set forth what discovery still needs to be accomplished. Neither did it support the addition of 60 days to the discovery periods to avoid the automatic extension. The automated notice of the approaching discovery end date (DED), which is sent to all parties 60 days prior to the DED, allows counsel to review the file to see what discovery remains outstanding. The availability of the automatic, 60-day discovery extension is intended to provide a flexible solution if additional time is needed to complete the process. Accordingly, the Committee determined that the rule should not be amended in the manner proposed.

See Section I.I. of this Report for proposed recommendations to *R.* 4:24-1 that the Committee supports.

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

Among the motions listed in *R.* 4:24-2 that must be made returnable prior to the discovery end date are motions for leave to file a third-party complaint (pursuant to *R.* 4:8), motions to join additional parties (under *Rules* 4:7-6, 4:28-1 or 4:30), motions for consolidation (*R.* 4:38-1), and motions for separate trials (*R.* 4:38-2). These motions, if granted, could result in the need for additional discovery, but, because they are made returnable before the discovery end date, they are less likely to result in an adjournment of a trial or arbitration date. Absent from this list are motions to amend pleadings, which can also result in the need for additional discovery. Such motions can be made at any time before trial and are often made very close to the trial or arbitration date, thus necessitating an adjournment. The Conference of Civil Presiding Judges concluded that this disparate treatment of motions is inconsistent and frustrates the goal of trial date certainty. Accordingly, the Conference proposed that motions to amend pleadings under *R.* 4:9 be added to the list of motions in *R.* 4:24-2 that must be made returnable prior to the discovery end date absent leave granted by the court for good cause shown. The Committee noted, however, that the purpose of *R.* 4:9 was to allow litigants to conform their pleadings to facts or evidence adduced during the discovery process. Accordingly, the Committee declined to adopt the Conference's recommendation, taking the position that such an amendment would frustrate the purpose for which the rule was originally intended.

P. Proposed Amendments to *R.* 4:73-4 — Report of Commissioners; Service

The Committee was asked to consider ways to shorten or streamline the condemnation process. Currently, the average time to disposition of condemnation cases is eight months. Some condemnation cases may go on for far longer than that, however, and there is considerable interest in the Legislature in compressing the time period (now, four months) in which the condemnation commissioners' report must be filed, and in any other ways to abbreviate the timing. Committee members were of the opinion that the eight-month average time to disposition for such cases could not be compressed while still meeting due process mandates, and recognized that when the resolution of condemnation cases is delayed, it is usually for very justifiable reasons. Therefore, the Committee does not propose any changes to the current rules at this time.

Q. Proposed Amendments to Parts I, II, and IV — Affidavits and Certifications

It had been pointed out that, while *R*. 1:4-4(b) permits certifications in lieu of affidavits, many rules still read as requiring the filing of affidavits. Accordingly, it was suggested that all references in the rules to an affidavit be changed to "affidavit or certification," whereas references to certifications alone should be left as is. In considering this suggestion, the Committee took the position that the proposed amendment is unnecessary as *R*. 1:4-4(b) specifically permits the use of a certification in lieu of "the affidavit, oath or verification required by these rules…."

R. Proposed Amendments to *R.* 4:83-5 — Verification

A Superior Court judge took the position that there is inconsistency in the language of *Rules* 1:4-4(b) and 4:83-5. *Rule* 1:4-4 provides that a certification shall state that "…the foregoing statements made by me are true," whereas *R.* 4:83-5 provides that a verification shall state that "… all the allegations thereof are true to the best of plaintiff's knowledge and belief." He questioned the reason for the different requirements, asserting that the inconsistency is confusing and has no principled basis. He contended that the language of *R.* 4:83-5 is meaningless because it does not allow any conclusion about the truth of the assertion, only that the statements are true as far as the individual making them knows. He suggested that either the language of *R.* 4:83-5 should be conformed to the language of *R.* 1:4-4 or an appropriate cross-reference to *R.* 1:4-4 be inserted. He further suggested that other rules be scanned to see if there are similar inconsistencies in the verification or certification requirements.

A Committee member with a probate practice reviewed this suggestion and noted that there are instances in probate in which the plaintiff may not be able to affirm on personal knowledge. He cited three specific situations from his recent experiences:

- Action to Probate a Copy of a Lost Will — if the executor is a bank, the verifying officer may know nothing of the circumstances under which the original will was executed, who had custody, or how it was inadvertently destroyed on personal knowledge.

- Action to Set Aside a Probated Will Alleging Undue Influence — plaintiff may not have knowledge of the pleaded allegations; only discovery after commencement of the action will produce the facts to support a claim for the relief sought.

- Accounting Actions — plaintiff may only have bank records, and no personal knowledge of the transactions and facts set forth in the accounting

Based on these experiences, he concluded that *R*. 4:83-5 should not be amended as the proposed revisions might create the notion that there is an "insurmountable burden" to filing probate actions where plaintiffs have little or no personal knowledge of the facts they need to plead. Further, the "best knowledge and belief" standard would have to be retained for accountings since only in rare cases will the verifier know personally every detail in the accounting.

He further suggested that the problem of what allegations made in probate complaints are evidential should be addressed in the comments to *Rules* 1:4-7 and 4:83-5, and *R*. 1:4-7 should expressly point out the *R*. 4:83-5 exception.

After considering the various issues raised in the discussion, the Committee agreed with this analysis and determined that there was no inconsistency in the rules, especially in light of the fact that the actions under *R*. 4:83-5 are initiated by a verified complaint, not an affidavit requiring personal knowledge. The Committee further noted the distinction between an affidavit submitted under *R*. 1:6-6 intended as substantive evidence and the verification of a probate complaint based on information and belief. Judge Pressler offered to include a note in the commentary to *R*. 1:6-6 that the complaint may not require personal knowledge, but that if the information is to be evidentiary, something more than "information and belief" may be required.

S. Proposed Amendment for Review of Interlocutory Decisions in Civil Rights Cases Where the Plaintiff is Indigent

A practitioner, who represents Civil Rights plaintiffs, many of whom are poor, suggested that, in such cases (*i.e.*, Civil Rights cases involving poor plaintiffs), any interlocutory orders be reviewed by a judge or panel at the Appellate Division level before the jury is discharged. He asserted that this procedural step would facilitate the provision of equal justice for poor Civil Rights plaintiffs in the appeals process. He further suggested that an Appellate panel be established to immediately hear complaints alleging violations of court rules and procedures (in any type of case) in order to shield litigants from the time and expense of the appeal process. The Committee declined to accept these suggestions, reasoning that they had limited application and were not necessary to the orderly operation of the judicial system.

T. Proposed Amendments to Appendix II, Form C(3) Interrogatories

A practitioner suggested that the Form C(3) Interrogatories be amended to compel nurses as well as doctors to answer the interrogatories. He asserted that nurses frequently object to answering these interrogatories, even though essentially the same information is routinely sought from them. The Committee determined that the form interrogatories are specifically drafted to elicit responses from doctors and would not be appropriate for nurses. The members commented that it is the practitioner's responsibility to draft a separate set of interrogatories to be answered by nurses. Therefore, the Committee declined to amend the interrogatories as requested.

U. Proposed Amendments to Appendix XII-A — Summons

To alleviate problems associated with a plaintiff obtaining an affidavit of non-military service when needed to be granted default judgment, a practitioner suggested that the summons form be amended either to 1) add language that would require the defendant to provide the court and the adverse party with notice of military status within 35 days of the date of service of process, or 2) include with the summons a form to be filled out by the defendant indicating "name, rank and serial number." This proposal, he believes, would not pose a burden on any defendant and would assist poorer plaintiffs who are victims of consumer fraud by giving them the information they need to obtain a default judgment.

The Committee commented that the need for an affidavit of non-military service arises when the defendant cannot be found and served, and noted that neither proposed amendment will help in that situation. Further, the Committee noted that the summons form is in compliance with the Federal Servicemembers Civil Relief Act. Accordingly, it does not recommend changing the summons form as proposed.

V. Proposed Amendments Regarding Complementary Dispute Resolution Programs

The Supreme Court Complementary Dispute Resolution Committee had proposed changes to the following rules:

- *R.* 1:40-1 — to require that attorneys discuss available CDR options at initial meetings with clients, provide clients with informational CDR materials available on the Judiciary website and obtain the signature of the client certifying that the materials were in fact provided and CDR options discussed.
- *R.* 4:5-1 — to require that the attorney's certification referenced by the proposed amendments to *R.* 1:40-1 be annexed to all first pleadings in all civil matters covered by Part IV of the Rules of Court.

The Committee reviewed the proposed changes to *Rules* 1:40-1 and 4:5-1 and concluded that directing attorneys to discuss available CDR options, to provide clients with CDR materials available on the Judiciary website, and to obtain the signature of the client certifying that such materials were discussed would constitute an unwarranted intrusion on the attorney/client relationship. Further, the Committee noted that the obligation on the attorney to be aware of the CDR options and to discuss them with clients is already contained in *R.* 1:40-1. Therefore, the Committee did not support the amendments proposed by the CDR committee.

In response to the Committee's rejection of its proposed amendments to *Rules* 1:40-1 and 4:5-1, the CDR Committee modified its proposal, recommending that *R.* 1:40-1 be amended to specify that the requirement to discuss CDR options with the client take place prior to filing the initial pleadings rather than at the initial attorney-client meeting. It eliminated the requirement that the client certify to the receipt and discussion of the CDR informational materials, but retained the

requirement that the attorney so certify. The CDR Committee also dropped its former proposal to amend *R*. 4:5-1 to require that the attorney include the certification referenced in *R*. 1:40-1 with the first pleading.

The Committee reviewed these modified proposals and reaffirmed its position that the amendments to *Rules* 1:40-1 and 4:5-1, as proposed, would interfere impermissibly with the attorney/client relationship and would constitute an unnecessary reiteration of the current R. 1:40-1 requirement regarding the attorney's obligation to discuss CDR options with clients. Accordingly, it declined to support the recommendations of the CDR committee.

The modified proposals were presented to the Court by the CDR Committee in its Report for the 2004-2007 rules cycle. The Court did not adopt them.

III. RULE RECOMMENDATIONS ADOPTED OUT OF CYCLE

A. Proposed Amendments to *R.* 4:32-2 — Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in the Class; Multiple Classes and Subclasses

In the 2004-2006 rules cycle, the Committee recommended changes to *R.* 4:32 (the "Class Action Rule") to conform the New Jersey rules to the then recently enacted federal class action rule, *F.R.Civ.P.* 23. The revisions to the New Jersey Rules of Court were adopted July 27, 2006 and became effective September 1, 2006. The rules, as adopted, contained a subtle but, in the Committee's view, significant change to the wording of *R.* 4:32-2(a) from that recommended by the Committee. The Committee's proposal, as set forth in its March 7, 2006 Supplemental Report and mirroring the language of the federal rules, had proposed that the first sentence of *R.* 4:32-2(a) read, "When a person sues or is sued as a representative of a class, the court **shall, at an early practicable time, determine** by order whether to certify the action as a class action." (Emphasis added.) As adopted by the Court, the first sentence now reads, "When a person sues or is sued as a representative of a class, the court **as soon as practicable shall determine** by order whether to certify the action as a class action." (Emphasis added.) The Committee requested the Court to amend *R.* 4:32-2(a) on an emergent basis consistent with the Committee's earlier recommendation. The rationale for the request is to clarify that the court need not make a determination on class certification as the first procedural step after the commencement of the action. The court should have the time and flexibility to allow discovery to proceed and motions to dismiss or for summary judgment to be decided prior to class certification, as it deems necessary and appropriate. Further, since it was the intent of the Committee to follow the language of the federal rule, out-of-cycle

consideration of the proposal was requested so that members of the bar do not attempt to construe the Court's intent in adopting variant language in this particular part of the rule.

At its October 9, 2007 Administrative Conference, the Supreme Court considered and approved the Civil Practice Committee's request on an emergent basis. By order dated October 9, 2007, the amendments to *R*. 4:32-2 were adopted and became effective immediately.

See Section I.S. of this Report for proposed housekeeping amendments to *R*. 4:32-2.

The amendments to *R*. 4:32-2, adopted and effective as of October 9, 2007, follow.

4:32-2. 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 [as soon as practicable] shall, at an early practicable time, determine by order whether to certify the action as a class action. An order 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) …no change.

(c) …no change.

(d) …no change.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) …no change.

(B) …no change.

(C) …no change.

(2) …no change.

(3) …no change.

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

(f) …no change.

(g) …no change.

(h) …no change.

Note: Effective September 8, 1969; 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; caption amended, paragraphs (a) and (d) caption and text amended, paragraph (b) amended, former *R.* 4:32-4 deleted and readopted as amended as new paragraph (e), former *R.* 4:32-3 deleted and adopted as reformatted as new paragraph (f), and new paragraphs (g) and (h) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended October 9, 2007, to be effective immediately and paragraph (e)(4) amended to be effective .

IV. MATTERS REFERRED TO OTHER COMMITTEES

A. Proposed Amendments to *R.* 1:21-6 — Recordkeeping; Sharing of Fees; Examination of Records

An attorney pointed out that *R.* 1:21-6 requires that any attorney who practices in New Jersey maintain a trust account and a business account in-state. He recognized that this made sense when the attorney practicing in New Jersey was required to maintain a *bona fide* office here as well. He questioned whether this requirement is still relevant for attorneys who are licensed in New Jersey, but whose primary practice is out-of-state now that the *bona fide* office requirement has been eliminated. The Committee determined that this issue should be addressed by the Professional Responsibility Rules Committee. Accordingly, this matter was forwarded to that committee for its consideration.

Respectfully submitted,

Hon. Sylvia B. Pressler (Ret.), Chair
Hon. Stephen Skillman, P.J.A.D., Vice-Chair
Hon. Allison E. Accurso, P.J.Cv.
David F. Bauman, Esq.
Hon. Rachel N. Davidson, J.S.C.
Hon. Hector E. DeSoto, J.S.C.
Professor Howard M. Erichson
Stacy A. Fols, Esq.
Hon. Maurice J. Gallipoli, A.J.S.C.
Professor Suzanne Goldberg
Jeffrey J. Greenbaum, Esq.
William S. Greenberg, Esq.
Kenneth S. Javerbaum, Esq.
Richard Kahn, Esq.
Hon. Harriet Farber Klein, J.S.C.
Carl E. Klotz, Esq.
Ralph J. Lamparello, Esq.
Linda Lashbrook, Esq.
Gary J. Lesneski, Esq.
Howard J. McCoach, Esq.
Hon. Anne McDonnell, P.J.Cv.
Hon. Carmen Messano, J.A.D.
Melville D. Miller, Esq.
Kenneth I. Nowak, Esq.
Hon. Thomas P. Olivieri, P.J.Ch.
Hon. Edith K. Payne, J.A.D.
Gary Potters, Esq.
James A. Schragger, Esq.
William J. Volonte, Esq.
Jonathan D. Weiner, Esq.
Tiffany M. Williams, Esq.
Jane F. Castner, Esq., AOC Staff
Mary F. Rubinstein, Esq., AOC Staff

Dated: **January 15, 2008**

APPENDIX A

REPORT OF APPELLATE DIVISION RULES COMMITTEE

The only recommendation in the 2008 report of the Civil Practice Committee regarding the appellate rules is that the Court amend Rule 2:8-1(d) to require an appellate court to "issue a short statement of reasons for its determination on motions for emergent or injunctive relief." This is a modified version of a recommendation for amendment of Rule 2:8-1(d) that the Civil Practice Committee proposed in its 2006 report, which the Appellate Division Rules Committee opposed and the Court declined to adopt. The only difference between the two proposals is that the 2006 proposal was not limited to motions for "emergent or injunctive relief," but also would have applied to motions for "summary disposition" and "relief based on the Rules of Professional Conduct." The Appellate Division Rules Committee opposes the Civil Practice Committee's 2008 proposed amendment to Rule 2:8-1(d) for substantially the same reasons it opposed the proposed 2006 amendment.

Initially, we note 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 the Appellate Division Rules Committee is not aware of any jurisdiction that has adopted such a requirement.

Moreover, this requirement would be both burdensome and unnecessary. The Appellate Division Clerk's office indicates that this court disposed of 248 motions for emergent relief and 328 motions for stay during the 2006-07 court year. Although the clerk's office does not maintain separate statistics for stay motions that seek "injunctive relief," we believe that a majority of stay motions could be so characterized. Therefore, if the Civil Practice Committee's recommendation were adopted, the Appellate Division would be required to issue statements of reasons in connection with approximately 500 motions each year.

We note that 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 the denial of a motion for leave to appeal an interlocutory order, which reflects the appellate court's conclusion that, in the words of the court rule, "the interest[s] of justice" do not require such 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 "motion for injunctive relief" in the proposed new rule encompasses all motions for stays pending the outcome of appeal other than motions for 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 (2008). 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 all vote to grant or deny a motion for 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 Appellate Division Rules 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 motion that requires some explanation for the court's order is not limited to the two categories of motions 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.

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 our 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 appellate court's sound discretion.

Respectfully submitted,

Hon. Stephen Skillman, Chair	John M. Chacko
Hon. Edwin H. Stern	Jeffrey A. Newman
Hon. Dorothea O'C. Wefing	Stephen W. Townsend
Hon. Clarkson S. Fisher, Jr.	Jack Trubenbach
Hon. Jack M. Sabatino	Ellen T. Wry
Hon. Marie P. Simonelli	

Dated: January 3, 2008

Appendix B

Report Of the Ad Hoc Probate Subcommittee

The subcommittee of Civil Practice Committee members Judge Thomas Olivieri, Linda Lashbrook and Richard Kahn, together with Shirley B. Whitenack (who was a prime mover in New Jersey's adoption in 2005 of the revised guardianship statute that became effective January 11, 2006) and Kevin Wolfe of the AOC, were initially charged by the Civil Practice Committee with reviewing all of the guardianship statute revisions to determine what rule amendments should be made. The subcommittee was also asked to review a suggestion that *Rule* 4:44A and other affected rules be amended to better protect minors and incapacitated individuals with respect to proposed transfers of their interests in structured settlements. Finally, the subcommittee reviewed the status of the promulgation of the Model Probate Order to Show Cause previously endorsed by the Civil Practice Committee.

I.

Guardianship Rules

The new guardianship statute expressly permits the appointment of a *pendente lite* guardian, and also permits (and indeed encourages) in appropriate circumstances a limited guardianship. The statute clearly provides that a guardian may be appointed not only for an adult "mentally" incapacitated individual, but also for an adult whose incapacity is by reason of abuse of drugs, or alcohol use, or physical illness or disability. Thus, the existing rules' reference to "mentally incapacitated" is misleadingly restrictive. See N.J.S.A.3B:1-2

and N.J.S.A. 3B:12-24.1(a) and (b). The subcommittee's proposed rule amendments reflect this broader approach.

II.

Rule 4:44A

The Civil Practice Committee also directed the ad hoc probate subcommittee to review the language of *Rule* 4:44A and address concerns as to how the interests of minors or incapacitated adults may best be protected with respect to transfers or assignments of structured settlements, and specifically, whether the appointment of a guardian ad litem is warranted in such situations. It was also pointed out to the subcommittee that the existing rule is silent as to the circumstances that constitute a transfer "in the best interests" of the minor or incapacitated individual and whether the amount paid for the transfer is subject to the requirements of *Rule* 4:48A.

The subcommittee concluded that these concerns could readily be addressed by an express requirement in *Rule* 4:44A-1 that, if the payee-transferor is a minor or is incapacitated, a guardian ad litem be appointed to represent his or her interests, even if he or she has a natural or judicially appointed guardian. Also, the subcommittee recommends that an additional sentence be added to *Rule* 4:44A-2 requiring (where there is a guardianship or the payee-transferor has become incapacitated subsequent to entry into the structured settlement) that proceeds of transfers be deposited with the Surrogate unless the Order provides for an alternative disposition that adequately safeguards the interests of the ward (e.g. deposit into a trust established in connection with the

structured settlement – typically a “special needs trust” under OBRA-93).

The subcommittee determined that it is futile and even inappropriate for the Rules of Court to define “best interests” since such determination would necessarily be very fact-sensitive and the courts will doubtless be dealing with a wide variety of circumstances in which parties will seek to assign structured settlements. The subcommittee concluded that the phrase, while quite broad, is sufficient to alert the court (and the proposed guardian ad litem) that it should not “rubber stamp” such applications, but rather be assured that the proposed transfer is an improvement on the status quo.

It was also suggested that the subcommittee propose two other amendments to *Rule* 4:48A, for the Committee’s consideration. The first, to *Rule* 4:48A(a), would insert a penultimate sentence intended to alert the Surrogate that funds are proposed to be deposited into the Surrogates’ Intermingled Trust Fund. The second, to *Rule* 4:48A(c), is intended to implement a recommendation by the Judiciary- Surrogates Liaison Committee that applications for withdrawals from the Surrogate’s Intermingled Trust Fund may be made by ex parte motion, rather than by requiring the filing of a verified complaint. The subcommittee endorses these two additional amendments.

III.

Model Orders to Show Cause for Probate and Guardianship Matters – An Update

Since this issue has been in the works for quite some time, an update seemed needed.

In November 2005, the Administrative Office of the Courts issued Directive #16-05, promulgating three standard form Orders to Show Cause previously approved by the Judicial Council. The Directive stated that the Supreme Court has asked the respective rules committees to submit the model forms for inclusion in the Appendices to the Rules and also to "provide necessary references to the existence of these and their required use in the relevant rules." Surrogates were copied on the Directive.

It became immediately apparent to probate practitioners that the forms, particularly the General Equity model Order to Show Cause, was an imperfect fit when it came to probate litigation. Accordingly, the subcommittee drafted and presented for the Committee's review and approval an Order to Show Cause for probate matters, as well as a Notice of Hearing for guardianship matter. It is hoped that these forms will be approved and included as appendices to the Rules of Court.