2012 Report of the Supreme Court Civil Practice Committee

January 24, 2012

THIS REPORT IS DEDICATED TO THE MEMORY OF THE HON. SYLVIA B. PRESSLER, P.J.A.D., WHO CHAIRED THE COMMITTEE FOR DECADES WITH GREAT DISTINCTION UNTIL HER PASSING IN FEBRUARY 2010.

TABLE OF CONTENTS

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

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

A practitioner inquired whether the phrase "office address" in *Rule* 1:4-1 is limited to the attorney's *bona fide* office or whether the attorney may list the address and telephone number of a secondary or satellite office on letterhead. If the rule is intended to limit the "office address" to the *bona fide* office, he suggested that the rule be amended to so specify. The Committee determined that the rule should be clarified to indicate that an attorney will have to include his or her *bona fide* office address on papers filed with the court. Accordingly, the Committee recommends including the term "*bona fide*" in the rule such that the second sentence of paragraph (b) of the rule would read: "Above the caption at the left-hand margin of the first sheet of every paper to be filed there shall be printed or typed the name of the attorney filing the paper, the attorney's *bona fide* office address, as defined in *R.* 1:21-1(a), and telephone number or, if a party is appearing *pro se*, the name of such party, residence address and telephone number."

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

1:4-1. Caption: Name and Addresses of Party and Attorney; Format

(a) Caption. Every paper to be filed shall contain a caption setting forth the name, division and part thereof, if any, of the court, the county in which the venue in a Superior Court action is laid, the title of the action, the docket number except in the case of a complaint, the designation "Civil Action" or "Criminal Action," as appropriate, and a designation such as "complaint," "order," or the like. In a complaint in a civil action, the title of the action shall include the names of all the parties, but in other papers it need state only the name of the first party on each side with an appropriate indication that there are other parties. Except as otherwise provided by *R.* 5:4-2(a), the first pleading of any party shall state the party's residence address, or, if not a natural person, the address of its principal place of business.

(b) Format; Addresses. At the top of the first page of each paper filed, a blank space of approximately three (3) inches shall be reserved for notations of receipt and filing by the clerk. Above the caption at the left-hand margin of the first sheet of every paper to be filed there shall be printed or typed the name of the attorney filing the paper, the attorney's *bona fide* office address, as defined in *R.* 1:21-1(a), and telephone number or, if a party is appearing *pro se*, the name of such party, residence address and telephone number. No paper shall bear an attorney's post office box number in lieu of a street address. An attorney or *pro se* party shall advise the court and all other parties of a change of address or telephone number if such occurs during the pendency of an action.

Note: Source — *R.R.* 4:5-8, 4:10-1, 5:5-1(e), 7:5-2(a) (first two sentences); paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (a) redesignated as paragraph (a)(1) and paragraph (a)(2) added November 7, 1988 to be effective January 2, 1989; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (a)(1) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(2) caption and text deleted, paragraph (a)(1)

caption deleted, and paragraph (b) amended July 9, 2008 to be effective September 1, 2008; paragraph (b) amended to be effective .

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

In *State v. O'Brien*, 200 *N.J.* 520, 541 (2009), the Supreme Court asked both the Civil and Criminal Practice Committees to consider whether there should be more detailed standards to guide judges in exercising their discretion to submit a copy of written instructions to a jury under *Rule* 1:8-8(a). A subcommittee of the Civil Practice Committee was formed to address the directive in *O'Brien* and to also consider the views of the Criminal Practice Committee on the issue.

At the subcommittee's direction, a survey of Civil Division judges in the State was conducted to determine their practices and opinions about furnishing written copies jury instructions. The survey revealed that Civil Division judges prefer retaining the court's discretion and are overwhelmingly against any rule change which would require the preparation and presentation of written jury instructions in every case. None of the responding judges had experienced a case where lawyers had requested that such written charges be provided. However, most of the responding judges agreed that if a party makes such a request, the court should treat that request as a significant factor in deciding whether to do so.

The judges who expressed opposition to a mandatory standard, or a presumption, listed time constraints and potential delays in trial as the main reasons behind their objections. Some concerns were also raised that more literate or educated jurors might focus unduly on the written instructions and possibly would dominate the deliberations and stifle other jurors who may be less literate or educated. On the other hand, the minority of the surveyed judges who endorsed the practice felt that it would promote a more effective, reliable and practical administration of justice.

The subcommittee recommended that written jury instructions should not be mandatory or presumptive in civil cases, but instead should be left to the judges' discretion. The subcommittee, however, recommended that judges be encouraged to provide written instructions to the jury in complex cases, including all civil matters which are assigned to Tracks III and IV, whenever requested by a party. The judges would retain discretion to provide the written jury instructions whether or not a party made a request in all cases. The subcommittee's report is included as Appendix A to this Report.

The full Committee endorsed the subcommittee's recommendation that written jury instructions should not be presumptive in civil cases, but should be left to the discretion of the court. The Committee majority, however, rejected the subcommittee's recommendation that written instructions should be provided whenever a party makes a request in Track III and IV cases.

The full Committee determined that the trial court should consider these factors in determining whether to provide written jury instructions: (1) the track to which the case is assigned; (2) a request by one or more parties that written jury instructions be provided; (3) the length of the trial; (4) the complexity of the issues and the charge; (5) whether the parties timely submitted the complete charges to the court; (6) whether providing written instructions would unreasonably delay the proceedings; and (7) any other factor based upon the circumstances of the case.

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

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

(a) Materials. The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties. The court, in its discretion, may submit a copy of [all or part of] its instructions to the jury for its consideration in the jury room. In civil cases, the court may consider the following factors in exercising its discretion to provide a copy of its instructions to the jury: (1) the track to which the case is assigned; (2) a request of one or more parties for submission of written instructions to the jury; (3) the length of the trial; (4) the complexity of the issues and charge; (5) whether the parties timely submitted a proposed charge to the court; (6) whether providing written instructions would unreasonably delay the proceedings; and (7) any other factor based upon the circumstances of the case. The court may also, in its discretion and at such time and in such format as it shall determine, permit the submission to the jury of individual copies of any exhibit provided an appropriate request to employ that technique was made prior to trial on notice to all parties and provided further that the court finds that no party will be unduly prejudiced by the procedure.

(b) …no change.

(c) …no change.

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

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

C. Proposed Amendments to *R.* 1:11-2 — Withdrawal or Substitution

The Committee was advised by Committee staff that mediators in pending civil cases sometimes are not getting timely notice of the filing of substitutions of counsel. This results in mediators wasting time trying to schedule the mandatory teleconference or mediation session with attorneys who are no longer representing parties in the case. This pursuit can consume part of the one free hour of preparation time that the mediator has to make the mediation arrangements and hold the telephone conference with the parties. To remedy this situation, it was suggested to the Committee that *Rule* 1:11-2 be amended to require that, if a mediator has been appointed in a case, an attorney serve the mediator with the substitution of attorney form simultaneously with the filing of the form with the court.

The Committee agrees with the suggestion and recommends amending *Rule* 1:11-2 to include language requiring attorneys to serve a substitution of counsel on a mediator who is already assigned to the case.

The proposed amendments to *R.* 1:11-2 follow.

1:11-2. Withdrawal or Substitution

(a) Generally. Except as otherwise provided by *R*. 5:3-5(d) (withdrawal in a civil family action),

(1) prior to the entry of a plea in a criminal action or prior to the fixing of a trial date in a civil action, an attorney may withdraw upon the client's consent provided a substitution of attorney is filed naming the substituted attorney or indicating that the client will appear *pro se*. If the client will appear *pro se*, the withdrawing attorney shall file a substitution. An attorney retained by a client who had appeared *pro se* shall file a substitution.[,and] If a mediator has been appointed, the attorney shall serve a copy of the substitution of attorney on that mediator simultaneously with the filing of the substitution with the court, and

(2) after the entry of a plea in a criminal action or the fixing of a trial date in a civil action, an attorney may withdraw without leave of court only upon the filing of the client's written consent, a substitution of attorney executed by both the withdrawing attorney and the substituted attorney, a written waiver by all other parties of notice and the right to be heard, and a certification by both the withdrawing attorney and the substituted attorney that the withdrawal and substitution will not cause or result in delay.

(b) Professional Associations. If a partnership or attorney assumes the status of a professional corporation, or limited liability entity, pursuant to *Rules* 1:21-1A, 1:21-1B or 1:21-1C, respectively, or if a professional corporation or a limited liability entity for the practice of law dissolves and reverts to an unincorporated status, it shall not be necessary for the firm to file substitutions of attorney in its pending matters provided that the firm name, except for the addition or deletion of the entity designation, is not changed as a result of the change in status.

Note: Source – *R.R.* 1:12-7A; amended July 16, 1981 to be effective September 14, 1981; amended November 7, 1988 to be effective January 2, 1989; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; amended and paragraph designations and captions added January 21, 1999 to be effective April 5, 1999; paragraphs (a)(1) and (a)(2) amended July 27, 2006 to be effective September 1, 2006; paragraph (a)(1) amended to be effective .

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

In the last rules cycle, the Committee considered a request by a Committee member to provide a definite point in the litigation process at which the recovery in a suit on behalf of a minor or incapacitated individual would increase from 25% to 33⅓%, in order to ensure uniformity and consistency in the application of the recovery standard. Currently, the rule provides that the fee on any amount "recovered by settlement without trial" is limited to 25%. The Committee proposed that the 25% apply to any settlement that occurred prior to the close of evidence. The Committee also proposed that the attorney would have the right to apply for an enhancement under paragraph (f) of the rule, and that the enhancement would be limited to the standard rate of recovery, *i.e*. 33⅓%. The Supreme Court agreed that the phrase "recovered by settlement without trial" is ambiguous and that a standard should be stated. The Court noted, however, that "prior to the close of evidence" was too late in the litigation process. Accordingly, the Court referred this issue back to the Committee to consider a different event in the process that would trigger the higher percentage.

Reflecting upon to this directive from Court, the Committee initially felt that the triggering event for enhancement should be left in the trial court's discretion based upon the circumstances of the case, and to endorse a rule amendment that would reflect such discretion over the timing. After further discussion, the Committee concluded that such an amendment would conflict with other aspects of the rule.

The Committee ultimately came to the consensus that the triggering event for enhancement should be the close of the plaintiff's case in chief because there is little or no opportunity for manipulation at that point. The Committee consequently recommends amending subparagraph (c)(6) of *Rule* 1:21-7 to provide that the contingent fee limitation is not applicable

to a settlement that occurs after the close of the plaintiff's case in chief. The Committee further recommends that paragraph (f) of *Rule* 1:21-7, which provides a procedure for an enhanced fee on application to the Assignment Judge, be amended to make clear that the Assignment Judge has the authority to designate another judge to hear the application. This amendment will provide uniformity in the approach to handling these matters.

The proposed amendments to *R*. 1:21-7 follow.

1:21-7. Contingent Fees

(a) …no change.

(b) …no change.

(c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims and claims among family members that are subject to Part V of these Rules but excluding statutorily based discrimination and employment claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:

(1) 33 1/3% on the first $500,000 recovered;

(2) 30% on the next $500,000 recovered;

(3) 25% on the next $500,000 recovered;

(4) 20% on the next $500,000 recovered; and

(5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof; and

(6) where the amount recovered is for the benefit of a client who was a minor or mentally incapacitated when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement [without trial] before the close of plaintiff's case in chief shall not exceed 25%.

(d) …no change.

(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 or the designee of the Assignment Judge for the hearing and determining of a

reasonable fee in light of all the circumstances. 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; paragraphs (d) and (f) amended July 9, 2008 to be effective September 1, 2008; paragraphs (c)(6) and (f) amended to be effective _____.

E. Proposed Amendments to *Rules* 2:11-4 and 2:11-6 — re: Motions for Reconsideration

A Committee member suggested that *Rule* 2:11-6 be amended to rectify a material discrepancy in the calculation of the time period within which a party may file a motion for reconsideration in the Appellate Division. Pursuant to *Rule* 4:49-2, a party may seek reconsideration of a trial court judgment or order within 20 days of service of the judgment or order on all parties. Pursuant to *Rule* 2:11-6, however, a litigant may seek reconsideration of an Appellate Division judgment or order only within 10 days of the entry of the judgment or order. The Committee member contends that a party may be deprived of the full 10-day time period contemplated by *Rule* 2:11-6 because orders on motions in the Appellate Division are commonly transmitted by regular mail to the parties. He has requested that the Committee address the disparity in the time periods for motions for reconsideration set forth in *Rules* 2:11-6 and 4:49-2 by amending *Rule* 2:11-6 to reflect that the a motion for reconsideration must be filed within 10 days of service (not entry) of the judgment or order.

This suggestion was referred to the Appellate Division Rules Committee (ADRC) for its consideration. The ADRC did not favor the proposed amendment. The ADRC felt the amendment's use of the date of service as a trigger date for the deadline to file a reconsideration motion would generate uncertainty because the Clerks' Offices of the Appellate Division and Supreme Court may not always have a record of the day that an order is actually placed in the mail and will not know when the order is received by each of the parties. The ADRC noted that *Rule* 2:11-6 is subject to *Rule* 1:3-4(a), which provides for enlargement of the time to act by court order on notice or by consent of the parties in writing. Further, the Clerks of the Appellate Division and the Supreme Court typically apply liberal grace periods in connection with motions

to account for delays in the mail. The ADRC indicated that if the Committee were inclined to propose a rule amendment, it suggests increasing the time for filing a motion for reconsideration from 10 days to 15 days from the date of the order's entry, which would avoid uncertainty concerning the deadline for filing such motions.

The full Committee agreed with the ADRC that the date of service of an opinion or order should not be the trigger date for the deadline to file a motion for reconsideration. The Committee majority, however, determined that the time for filing a motion for reconsideration should be expanded from 10 days to 20 days from the date of issuance, rather than the 15 days suggested by the ADRC.

The ADRC opposed increasing the time frame to 20 days because that extra time will slow down the implementation of appellate orders and compliance with the terms of written appellate opinions. The extra time also could result in delays in the perfection of appeals and in placing matters on the calendar, particularly if a case has multiple successive orders from which reconsideration is sought.

While acknowledging the ADRC's concerns, the Committee majority concluded that because a main goal of the Court Rules is uniformity, the time period to file a motion for reconsideration of an appellate ruling should be increased to 20 days and thus made coextensive with the 20-day time period for filing such reconsideration motions in the trial court under *Rule* 4:49-2. Accordingly, the Committee recommends that the time period to file a motion for reconsideration should be extended to 20 days from the date the appellate order is entered. This revision, as drafted, would affect practice in both the Appellate Division and in the Supreme Court.

The Committee also recommends, for purposes of consistency with *Rule* 2:11-6, that *Rule* 2:11-4 be amended to extend the time to file an application for attorney's fees to 20 days from the date the appellate order is entered.

The proposed amendments to *Rules* 2:11-4 and 2:11-6 follow.

2:11-4. Attorney's Fees on Appeal

An application for a fee for legal services rendered on appeal shall be made by motion supported by affidavits as prescribed by *R.* 4:42-9(b) and (c), which shall be served and filed within [10] 20 days after the determination of the appeal. The application shall state how much has been previously paid to or received by the attorney for legal services both in the trial and appellate courts or otherwise, including any amount received by way of *pendente lite* allowances, and what arrangements, if any, have been made for the payment of a fee in the future. Fees may be allowed by the appellate court in its discretion:

(a) …no change.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 1:9-3, 2:9-3, 1:12-9(f), 4:55-7(a)(b)(e), 5:2-5(f). Paragraph (d) amended July 14, 1972 to be effective September 5, 1972; text amended and paragraph (g) and (h) adopted July 29, 1977 to be effective September 6, 1977; paragraphs (a) (b) (c) (e) (g) and (h) deleted, new paragraph (a) adopted, former paragraph (d) redesignated (b) and former paragraph (f) redesignated paragraph (c) November 1, 1985 to be effective January 2, 1986; introductory paragraph amended July 13, 1994 to be effective September 1, 1994; final paragraph added June 28, 1996 to be effective September 1, 1996; introductory paragraph amended to be effective .

2:11-6. Motion for Reconsideration

(a) Service; Filing; Contents; Argument. Within [ten] 20 days after entry of judgment or order, unless such time is enlarged by court order, a party may apply for reconsideration by serving two copies of a motion on counsel for each of the opposing parties and filing nine copies thereof with the Supreme Court, or five copies thereof with the Appellate Division, as appropriate. One filed copy shall be signed by counsel. The motion shall not exceed 25 pages and shall contain a brief statement and argument of the ground relied upon and a certificate of counsel that it is submitted in good faith and not for purposes of delay. The motion shall have annexed thereto a copy of the opinion or order that is the subject thereof. An answer shall be filed only if requested by the court, and within ten days after such request or within such other time as the court fixes therein. The motion will not be argued orally.

(b) …no change.

(c) …no change.

Note: Source — *CR. R.* 1:9-4(a)(b)(c). Caption, paragraph (a) and paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended _____ to be effective _____.

F. Proposed Amendments to *Rules* 2:2-3, 2:9-1 and 2:11-1 — re: Appeals from Orders Compelling or Denying Arbitration

During the last rules cycle, the Committee proposed and the Supreme Court adopted an amendment to *Rule* 2:2-3 providing that an order compelling arbitration shall be deemed a final judgment for appeal purposes. Thereafter, the Supreme Court referred to the Committee the issue of whether a court order declining to compel arbitration should be included in the list of orders that are deemed final for purposes of appeal pursuant to *Rule* 2:2-3. A subcommittee was formed to address the Supreme Court's referral of the issue. Although the subcommittee was unable to reach an agreement on whether *Rule* 2:2-3 should be amended to include orders declining to compel arbitration to the list of orders deemed final for purposes of appeal, the subcommittee's work was rendered moot by the Supreme Court's opinion in *GMAC v. Pittella*, 205 *N.J.* 575 (2011), in which the Court held that such orders shall be deemed final for purposes of appeal. The Court directed this Committee to prepare amendatory language to *Rule* 2:2-3(a) and to consider amendments to *Rule* 2:9-1 and any other rules to implement its decision.

Pursuant to the Court's directive, the Committee recommends that *Rule* 2:2-3(a) be amended to provide that an order declining to compel arbitration is deemed final for purposes of appeal; *Rule* 2:9-1(a) be amended to include that when appeal is taken from orders compelling or denying arbitration, the trial court retains jurisdiction with respect to claims and parties that remain in that court; and *Rule* 2:11-1(a) be amended to indicate that orders compelling or denying arbitration are entitled to preference on the appellate calendar. The ADRC has endorsed the wording of the proposed amendments.

The proposed amendments to *Rules* 2:2-3, 2:9-1 and 2:11-1 follow.

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by *R*. 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), and except for appeals from a denial by the State Police of an application to make a gun purchase under a previously issued gun purchaser card, which appeals shall be taken to the designated gun permit judge in the vicinage, appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by *R*. 8:2 (tax matters) and matters governed by *R*. 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;

(3) in such cases as are provided by law.

Final judgments of a court, for appeal purposes, shall also include those referred to by *R*. 3:28(f) (order enrolling defendant into the pretrial intervention program over the objection of the prosecutor), *R*. 3:26-3 (material witness order), *R*. 4:42-2 (certification of interlocutory order), *R*. 4:53-1 (order appointing statutory or liquidating receiver), *R*. 5:8-6 (final custody determination in bifurcated matrimonial action), and *R*. 5:10-6 (order on preliminary hearing in adoption action). An order granting or denying a motion to extend the time to file a notice of tort

claim pursuant to *N.J.S.A.* 59:8-9, whether entered in the cause or by a separate action, and [an] all orders compelling or denying arbitration, whether the action is dismissed or stayed, shall also be deemed a final judgment of the court for appeal purposes.

(b) …no change.

Note: Source — *R.R.* 2:2-1(a) (b) (c) (d) (f) (g), 2:2-4, 2:12-1, 3:10-11, 4:88-7, 4:88-8(a) (first sentence), 4:88-10 (first sentence), 4:88-14, 6:3-11(a). Paragraph (a) amended July 14, 1972 to be effective September 5, 1972; paragraph (b) amended November 27, 1974 to be effective April 1, 1975; caption and paragraph (a) amended June 20, 1979 to be effective July 1, 1979; paragraph (a) amended July 8, 1980 to be effective July 15, 1980; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(1) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (b) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 27, 2006 to be effective September 1, 2006; paragraph (a)(3) amended July 23, 2010 to be effective September 1, 2010; paragraph (a)(3) amended _____ to be effective _____.

2:9-1. Control by Appellate Court of Proceedings Pending Appeal or Certification

(a) Control Prior to Appellate Disposition. Except as otherwise provided by *Rules* 2:9-3, 2:9-4 (bail), 2:9-5 (stay pending appeal), 2:9-7 and 3:21-10(d), the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed. The trial court, however, shall have continuing jurisdiction to enforce judgments and orders pursuant to *R.* 1:10 and as otherwise provided. In addition, when an appeal is taken from an order compelling or denying arbitration, the trial court shall retain jurisdiction to address issues relating to claims and parties that remain in that court. The appellate court may at any time entertain a motion for directions to the court or courts or agencies below or to modify or vacate any order made by such courts or agencies or by any judge below.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 1:4-1 (first sentence), 1:10-6(a) (first and third sentences); paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; new paragraph (c) adopted July 16, 2009 to be effective September 1, 2009; paragraph (a) amended to be effective _____.

2:11-1. Appellate Calendar; Oral Argument

(a) Calendar. The clerk of the appellate court shall enter all appeals upon a docket in chronological order and, except for appeals on leave granted or from orders compelling or denying arbitration which shall be entitled to a preference, cases shall be argued or submitted for consideration without argument in the order of perfection, insofar as practicable, unless the court otherwise directs with respect to a category of cases or unless the court enters an order of acceleration as to a particular appeal on its own or a party's motion.

(b) …no change.

Note: Source — *R.R.* 1:8-1(a) (b), 1:8-2(a), 1:8-3, 1:8-4, 2:8-3. Amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended to be effective .

G. Proposal to Eliminate the Deposit for Costs Required for Civil Appeals — *Rules* 2:5-2 and 2:12-5

The Clerk of the Appellate Division, on behalf of the Clerks' Offices of the Supreme Court, Appellate Division and Superior Court, proposes that the deposit for costs required pursuant to *Rules* 2:5-2 and 2:12-5 be eliminated because the cost of collection and reimbursement of the deposit far exceeds the amount that the Judiciary is permitted to collect pursuant to *N.J.S.A.* 22A:2-20. The administrative reasons for eliminating the deposit for costs are (1) security deposits are often not received but the appeal is usually not dismissed for that reason; (2) requests for taxed costs are rarely made even when a deposit is received; (3) an application for costs permitted by statute would still be available; and (4) the Judiciary's administrative costs of collecting and reimbursing the deposit far exceeds the amount of the commission ($5.00) permitted by statute. The Committee concluded that there is no wisdom in retaining the rules. The Committee unanimously endorses the proposal recommending elimination of the deposit for costs provisions under *Rules* 2:5-2 and 2:12-5.

The proposal eliminating *Rules* 2:5-2 and 2:12-5 follow.

[2:5-2. Deposits for Costs; Application for Dismissal for Default

In all civil appeals the appellant shall, within 30 days after filing the notice of appeal or after entry of an order granting leave to appeal, deposit with the clerk of the appellate court $300 to answer the costs of the appeal. The party making the deposit shall give notice thereof to all other interested parties. If the deposit is not made within the time stated herein the appeal may be dismissed with costs on the application of any party. No deposit for costs shall be required where an appeal is taken by the State or any agency, officer or political subdivision thereof, or by an appellant who has filed a supersedeas bond or made a deposit in lieu thereof pursuant to *R*. 1:13-3(c), or if leave is granted to appeal as an indigent pursuant to *R*. 2:7-1.]

Note: Source — *R.R.* 1:2-10, 2:2-3(b), 2:2-5 amended July 16, 1981 to be effective September 14, 1981; amended July 14, 1992 to be effective September 1, 1992; *R*. 2:5-2 eliminated in its entirety to be effective .

[2:12-5. Deposit for Costs

In all civil actions, unless a supersedeas bond has been filed or a deposit in lieu thereof made pursuant to *R*. 2:5-2, the petitioner shall, within 30 days of the filing of the notice of petition for certification, deposit $300 with the clerk of the Supreme Court, to answer the costs on the petition, if denied, and the cost of the appeal if granted, but no deposit shall be required if the petitioner is a party exempted from making deposit by *R*. 2:5-2. Notice of deposit and dismissal for failure to make timely deposit shall be in accordance with *R*. 2:5-2.]

Note: Source — *R.R*. 1:10-7, 1:10-14(d) (second sentence). Amended July 22, 1983 to be effective September 12, 1983; amended July 13, 1994 to be effective September 1, 1994; *R*. 2:12-5 eliminated in its entirety to be effective .

H. Proposed Amendment to *R.* 2:6-1 — Preparation of Appellant's Appendix; Joint Appendix; Contents

Rule 1:38-3 lists a number of documents that are to be excluded from public access. Often those documents are intermingled with non-confidential documents in appendices submitted to the Appellate Division in appeals in which the record is not sealed. The Advisory Committee on Public Access to Court Records considered this issue and proposed an amendment to *Rule* 2:6-1 to clarify how confidential documents required to be excluded from public access should be submitted to the Appellate Division. The ADRC proposes an amendment to *Rule* 2:6-1 to provide that if the appellate record is not sealed, documents that are required to be excluded from public access pursuant *Rule* 1:38-3 shall be submitted in a separate appendix marked "confidential." The Committee endorsed the proposed amendment, but recommends that the following be added to the proposed language: "The format of the confidential appendix shall in all respects conform with the requirements of this rule." The ADRC has no objection to the additional language.

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

2:6-1. Preparation of Appellant's Appendix; Joint Appendix; Contents

(a) Contents of Appendix.

(1) Required Contents. The appendix prepared by the appellant or jointly by the appellant and the respondent shall contain (A) in civil actions, the complete pretrial order, if any, and the pleadings; (B) in criminal, quasi-criminal or juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below; (C) the judgment, order or determination appealed from or sought to be reviewed or enforced, including the jury verdict sheet, if any; (D) the trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions; (E) the statement of proceedings in lieu of record made pursuant to *R*. 2:5-3(f); (F) the notice or notices of appeal; (G) the transcript delivery certification prescribed by *R*. 2:5-3(e); (H) any unpublished opinions cited pursuant to *R*. 1:36-3; and (I) such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised. If the appeal is from a summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except that briefs in support of and opposition to the motion shall be included only as permitted by subparagraph (2) of this rule.

(2) Prohibited Contents. Briefs submitted to the trial court shall not be included in the appendix, unless either the brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included. A document that is included in appellant's appendix shall not also be included in respondent's appendix unless appellant's

appendix includes only a portion of the document and the complete document is required for a full understanding of the issues presented. If the same document has been annexed to more than one pleading or motion filed in the trial court, the document shall be reproduced in the appendix only with the first such pleading or motion and shall be referred to thereafter only by notation to the appendix page on which it appears.

(3) Confidential Documents. If the appellate record is not sealed, any documents that are required to be excluded from public access pursuant to *R.* 1:38-3 shall be submitted in a separate appendix marked confidential. The format of the confidential appendix shall in all respects conform with the requirements of this rule.

(b) Form. Documents included in the appendix shall be abridged by omitting all irrelevant or formal portions, with asterisks being used to indicate omissions. The filing date of each included paper shall be stated at the head of the copy as well as its subject matter (*e.g.*, Pretrial Order, Notice of Appeal). Each page shall be numbered consecutively followed by the letter "a" to indicate the appendix (*e.g.*, 1a, 2a, etc.).

(c) Binding; Table of Contents. The appendix may be bound with the brief or separately, into volumes containing no more than 200 sheets each. If bound with the brief, it shall follow the brief, but there shall be a single table of contents of the brief and appendix. If bound separately it shall be prefaced with a table of contents. The table of contents shall indicate the initial page of each document, exhibit or other paper included, and the pages of the stenographic record at which each exhibit was marked for identification and was offered into evidence. Attachments to a document by way of affidavits, exhibits or otherwise shall each be separately identified in the table of contents and the initial page of each such attachment noted

therein. If there are multiple volumes of the appendix, each volume shall contain a full table of contents and shall specify on its cover the appendix pages included therein.

(d) Joint Appendix. Whenever possible counsel shall agree upon a joint appendix, which shall be bound separately. The cost thereof shall be apportioned between them.

Note: Source — *R.R.* 1:7-1(f), 1:7-2 (first six sentences), 1:7-3. Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a), (b) and (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1) and (c) amended July 12, 2002 to be effective September 3, 2002; new paragraph (a)(3) added to be effective .

I. Proposed Amendments to *R.* 2:9-5 — Stay of Judgment in Civil Actions and in Contempts

A judge on the Committee suggested that *Rule* 2:9-5 be amended to permit a stay in matters involving appeals of orders compelling or denying arbitration. In *GMAC v. Pittella*, 205 *N.J.* 572, 587 (2011), the Supreme Court amended *Rule* 2:2-3(a) to permit appeals as of right from any court order compelling or denying arbitration regardless of whether such order disposes of all issues and all parties. *N.J.S.A.* 2A:24-4 requires that when a trial court compels arbitration, it must stay the action until arbitration has been conducted in accordance with the parties' agreement.

The Court in *Pittella* did not address the applicable standard for courts to apply when evaluating whether to stay an arbitration pending the outcome of the appeal of the order compelling arbitration, or stay a trial after an order denying arbitration. The usual standard for a stay pending appeal includes consideration of the factors of irreparable harm, existence of a meritorious issue, and the likelihood of success. *See* Comment to *R.* 2:9-5; see also *Crowe v. DeGioia*, 90 *N.J.* 126, 133 (1982). The Committee member observed that the *Crowe* standard is more stringent than would ordinarily be appropriate in arbitration appeals. The Committee member recommended a change to *Rule* 2:9-5 requiring a stay in these matters, or suggesting a stay would ordinarily be appropriate, might be helpful as it is likely to shield the parties from a situation where substantial time, money, and effort are expended during one litigation process only to find that a subsequent appellate ruling nullifies the outcome, causing a different litigation process to begin anew.

The Committee recommends amending *Rule* 2:9-5 by adding a new paragraph (c) to provide that an application to stay an order compelling arbitration should be granted unless

exceptional circumstances are shown. Moreover, the Committee recommends that the rule provide that the trial court shall hear said application as opposed to the Appellate Division. The proposed amendment will relax the standard set forth in *Crowe v. DeGioia*, solely with respect to stays pending appeal of orders compelling or denying arbitration, in order to protect litigants from routinely undertaking duplicative efforts and incurring duplicative expenses in arbitration and in court proceedings in the same matter. The ADRC endorsed the proposed new paragraph (c) to *Rule* 2:9-5, but suggested language be added to the end of the new paragraph that a party may seek review by the appellate court of the trial court's disposition of the application for a stay pending appeal. The Committee approved the addition of the language suggested by the ADRC.

The proposed amendments to *R*. 2:9-5 follow.

2:9-5. Stay of Judgment in Civil Actions and in Contempts

(a) …no change.

(b) …no change.

(c) If an order compelling arbitration is appealed as of right pursuant to *R.* 2:2-3(a), then any party subject to the order may move in the trial court for a stay of the arbitration pending appeal. If so requested, the stay of the arbitration shall be granted unless the court finds that exceptional circumstances warrant the arbitration to proceed while the appeal is pending. In addition, when an appeal is taken from an order compelling or denying arbitration, the trial court shall retain jurisdiction to address issues relating to claims and parties that remain in that court. If an order compelling or denying arbitration is appealed as of right pursuant to *R.* 2:2-3(a) in circumstances where the trial court retains jurisdiction over remaining claims or parties pursuant to the exception set forth in *R.* 2:9-1(a), any party may move in that court for a stay of proceedings pertaining to such remaining claims or parties pending appeal. The trial court shall exercise its sound discretion in the interests of justice in deciding whether to grant or deny the stay and whether any conditions shall apply. Any party may apply to the appellate court, by way of a timely motion filed in accordance with *R.* 2:8-1, to obtain review of the trial court's disposition of the application for a stay pending appeal.

Note: Source — *R.R.* 1:4-5, 1:4-6, 1:4-7, 1:10-6(b), 2:4-3 (first three sentences). Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (a) amended July 16, 1981to be effective September 14, 1981; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; new paragraph (c) added _____ to be effective _____.

J. Proposed Amendments to *Rules* 2:9-5 and 2:9-6 — re: Supersedeas Bonds

During the last rules cycle, an attorney suggested that *Rule* 2:9-6 be amended to state the purpose of a supersedeas bond and to explicitly provide the court with flexibility in setting the amount of a supersedeas bond. The Committee considered, but did not recommend, the amendment to *Rule* 2:9-6. The Committee concluded that the language of *Rule* 2:9-5 clearly states the purpose of the bond is to stay the judgment or order adjudicating liability for a specified sum of money pending appeal, and therefore no additional language was necessary in *Rule* 2:9-6. The Committee further concluded that the current *Rule* 2:9-6 was broad enough to address issues regarding the form and amount of security. The Committee also reviewed proposed bill S-2116, which would limit the amount of an appeal bond in civil actions. Among other things, the Committee raised concerns that the bill would intrude upon the Court's rule-making authority and would be unnecessary because the current rule provides a judge with discretion in setting the amount of the supersedeas bond.

After considering the Committee's recommendation in the last rules cycle against amending *Rule* 2:9-5 or *Rule* 2:9-6, the Court reviewed Illinois Rule 305, which addresses the various types of security that are acceptable in posting a supersedeas bond and provides guidance to judges in exercising their discretion to reduce the amount of the bond required to be posted. Thereafter, the Court requested the Committee to undertake this cycle a fresh and thorough review of the supersedeas bond rules and procedures, including an examination of similar rules in other jurisdictions.

In this rules cycle, a subcommittee was formed to address the Court's request. While noting that there is a clear preference for supersedeas bonds in the full amount of the judgment, the subcommittee recommended that the rules governing supersedeas bonds be amended to set

forth criteria for the court to consider in making its good cause determination as to decreasing the amount of the bond. It determined that amending *Rule* 2:9-5 would be the best way to effectuate its recommendations because amending *Rule* 2:9-6 might be misconstrued as diluting the clear preference for a bond in the full amount of the judgment as set forth in paragraph (a) of that rule.

The proposed amendment to *Rule* 2:9-5 borrows language from the Illinois rule, but also expands upon the factors to be considered. The subcommittee also recommended that the rules be amended to explicitly authorize the court to condition a stay upon posting a supersedeas bond or other form of security. The subcommittee determined that reference to specific alternative forms of security should not be included in the rule because to do so may be interpreted as excluding other forms of security. Further, the subcommittee determined that the rules should not address punitive damages. The subcommittee did not define "good cause" in the rule because it wanted to ensure that the court has flexibility in determining what factors should be considered under the circumstances of each case. It did not endorse the bill's proposal to cap the amount of supersedeas bonds because it found such caps inadvisable. The full report of the Supersedeas Bonds Subcommittee is included as Appendix B to this Report.

The Committee endorsed the subcommittee's recommendations. In particular, the Committee agreed that the rules should be amended to provide criteria for the trial court to consider in making its good cause determination as to decreasing the amount of a supersedeas bond, and to explicitly authorize the court to condition a stay upon posting a supersedeas bond or other form of security.

The proposed amendments to *Rules* 2:9-5 and 2:9-6 follow.

2:9-5. Stay of judgment in civil actions and in contempts

(a) Stay on Order; Bond or Cash Deposit. Except as otherwise provided by *R*. 1:10 (Contempt), neither an appeal, nor motion for leave to appeal, nor a proceeding for certification, nor any other proceeding in the matter shall stay proceedings in any court in a civil action or summary contempt proceeding, but a stay with or without terms may be ordered in any such action or proceeding in accordance with *R*. 2:9-5(b). If a stay is denied after conviction in a summary contempt proceeding, bail shall be allowed as provided by *R*. 2:9-4. A judgment or order in a civil action adjudicating liability for a sum of money or the rights or liabilities of parties in respect of property which is the subject of an appeal or certification proceedings shall be stayed only upon the posting of a supersedeas bond pursuant to *R*. 2:9-6 or a cash deposit pursuant to *R*. 1:13-3(c), unless the court otherwise orders after notice and on good cause shown. In determining whether good cause exists to approve a supersedeas bond in an amount less than required by *R*. 2:9-6(a) or a form of security other than a supersedeas bond, the court shall consider all relevant factors, including, but not limited to, the amount and nature of the judgment, anticipated interest and costs, the availability and cost of a supersedeas bond or other form of security, the assets of the judgment debtor and of the judgment debtor's insurers, sureties and indemnitors, if any, the judgment debtor's ability to dissipate assets and the risk of harm to the parties on the appeal. The burden shall be upon the party seeking approval of a supersedeas bond in an amount less than required by *R*. 2:9-6(a) or a form of security other than a supersedeas bond to show that the posting of a supersedeas bond pursuant to *R*. 2:9-6(a) would cause undue economic hardship and that such lesser amount or other form of security is adequate and just in the circumstances. In the event the court approves a form of security other than a supersedeas bond or a supersedeas bond in an amount less than the amount of the judgment plus

anticipated interest and costs, the court shall impose additional conditions on the judgment debtor to prevent the dissipation, the diminution in the aggregate value, or the diversion of the judgment debtor's assets during the appeal. Such posting or deposit may be ordered by the court as a condition for the stay of any other judgment or order in a civil action.

(b) …no change.

Note: Source — *R.R.* 1:4-5, 1:4-6, 1:4-7, 1:10-6(b), 2:4-3 (first three sentences). Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (a) amended July 16, 1981to be effective September 14, 1981; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended to be effective .

2:9-6. Supersedeas Bond; Exceptions

(a) Supersedeas Bond. Except as otherwise provided in paragraph (c), the supersedeas bond shall be presented for approval to the court or agency from which the appeal is taken, or to the court to which certification is sought, and shall have such surety or sureties as the court requires. Unless the court otherwise orders [after notice on good cause shown] pursuant to *R.* 2:9-5(a), the bond shall be conditioned for the satisfaction of the judgment in full, together with interest and trial costs, and to satisfy fully such modification of judgment, additional interest and costs and damages as the appellate court may adjudge. When the judgment determines the disposition of the property in controversy or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court below, the amount of the supersedeas bond shall be fixed at such sum only as will secure the damages recovered for the use and detention of the property, trial and appellate costs, and interest. In all other cases not specifically provided for herein the amount of the supersedeas bond shall be fixed by the court.

(b) Appellants Excepted. When an appeal is taken or certification sought by the State or any political subdivision thereof or any of their respective officers or agencies or by direction of any of the principal departments of the State and the operation or enforcement of a judgment or order is stayed, no bond, obligation or other security shall be required from the appellant.

(c) Bail Forfeiture Appeals. Simultaneous with the filing of notice of appeal in respect of a bail forfeiture judgment by or on behalf of an insurer, the appellant shall deposit the full amount of the judgment with the Clerk of the Superior Court in cash or by certified, cashiers or bank check. The court for good cause shown may allow the posting of a supersedeas bond or other form of security in lieu of the cash deposit. Good cause, however, shall not be satisfied by

an application to extend the time to locate the defendant or to stay payment of a forfeited bond, entry of a judgment, or preclusion from the bail registry maintained by the Superior Court.

Note: Source — *R.R.* 1:4-8(a) (c); paragraph (a) amended and paragraph (c) adopted July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (c) amended to be effective .

K. Proposed Amendments to *R.* 4:4-7 — Return

In the last rules cycle, the Committee proposed an amendment to *Rule* 4:4-7 to provide that where service of process is made by registered or certified mail and simultaneously by regular mail, the return receipt card or the printout of the electronic confirmation of delivery by the U.S. Postal Service shall be filed as part of the proof of service. The Conference of General Equity Presiding Judges has suggested that the rule be further amended to allow a photocopy of the return receipt card to be filed as part of the proof of service. The Conference would like to give the party the option of submitting a copy of the card if, for whatever reason, the original is misplaced. The Committee agreed, and recommends amending the rule to provide that if the original is no longer available, a photocopy of the proof of service is acceptable.

The proposed amendments to *R.* 4:4-7 follow.

4:4-7. Return

The person serving the process shall make proof of service thereof on the original process and on the copy. Proof of service shall be promptly filed with the court within the time during which the person served must respond thereto either by the person making service or by the party on whose behalf service is made. The proof of service, which shall be in a form prescribed by the Administrative Director of the Courts, shall state the name of the person served and the place, mode and date of service, and a copy thereof shall be forthwith furnished plaintiff's attorney by the person serving process. If service is made upon a member of the household pursuant to *R*. 4:4-4 that person's name shall be stated in the proof or, if such name cannot be ascertained, the proof shall contain a description of the person upon whom service was made. If service is made by a person other than a sheriff or a court appointee, proof of service shall be by similar affidavit which shall include the facts of the affiant's diligent inquiry regarding defendant's place of abode, business or employment. If service is made by mail, the party making service shall make proof thereof by affidavit which shall also include the facts of the failure to effect personal service and the facts of the affiant's diligent inquiry to determine defendant's place of abode, business or employment. With the proof shall be filed the affidavit or affidavits of inquiry, if any, required by *R*. 4:4-4 and *R*. 4:4-5. Where service is made by registered or certified mail and simultaneously by regular mail, the return receipt card, or the printout of the electronic confirmation of delivery, which shall include an image of the recipient’s signature, provided by the U.S. Postal Service, or the unclaimed registered or certified mail shall be filed as part of the proof. A party making service by registered or certified mail and simultaneously by regular mail may file a photocopy of the return receipt card in lieu of the original return receipt card as the

proof of service but only if the original is unavailable. Failure to make proof of service does not affect the validity of service.

Note: Source — *R.R.* 4:4-7. Amended July 14, 1972 to be effective September 5, 1972; amended June 29, 1990 to be effective September 4, 1990; amended July 14, 1992 to be effective September 1, 1992; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; amended July 12, 2002 to be effective September 3, 2002; amended July 23, 2010 to be effective September 1, 2010; amended to be effective .

L. Proposed Amendments to *R.* 4:5-3 — Answer; Defenses; Form of Denials

In *Buck v. Henry,* 207 *N.J.* 377, 396 (2011), the Supreme Court asked the Committee to propose a change to *Rule* 4:5-3 or *Rule* 4:5 4 to address its directive that "a physician defending against a malpractice claim (who admits to treating the plaintiff) must include in his answer the field of medicine in which he specialized, if any, and whether his treatment of the plaintiff involved that specialty." In accordance with the Court's directive, the Committee recommends that a proposed amendment to *Rule* 4:5-3 be adopted, using the Court's language from *Buck v. Henry* quoted above, with the exception of making the text gender neutral.

The proposed amendments to *R.* 4:5-3 follow.

4:5-3. Answer; Defenses; Form of Denials

An answer shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adversary relies. A physician defending against a malpractice claim who admits to treating the plaintiff must include in his or her answer the field of medicine in which he or she specialized at that time, if any, and whether his or her treatment of the plaintiff involved that specialty. A pleader who is without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state and, except as otherwise provided by *R*. 4:64-1(d) (foreclosure actions), this shall have the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs.

Note: Source — *R.R.* 4:8-2; amended July 13, 1994 to be effective September 1, 1994; amended August 1, 2006 to be effective September 1, 2006; amended _____ to be effective _____.

M. Proposed Amendments to *R.* 4:10-2 — Scope of Discovery; Treating Physician

The Federal Rules of Civil Procedure were changed, effective December 1, 2010, to provide protection to draft expert reports and attorney-testifying expert communications, essentially making a change that New Jersey adopted in 2002. New Jersey's earlier rule was widely cited as the model for the wisdom of the new federal rule. There was, however, an unintended loophole in the New Jersey rule: arguably, our rule only protects drafts and communications before the service of the first report. The Discovery Subcommittee recommended that this loophole be corrected, consistent with recent amendments to Federal Rule of Civil Procedure 26, to protect all draft expert reports and attorney-expert communications beyond service of the first report. This change will permit the collaborative process between testifying expert and the hiring lawyer to continue throughout the engagement, without fear of intrusive discovery inquiries. Moreover, this change will facilitate matters such as the preparation of rebuttal reports, the preparation of critiques regarding the adverse expert's report, the preparation of settlement computations and the collaborative process necessary in preparing for the depositions of both the testifying expert and that of the adverse expert as well as preparation for trial. The Committee unanimously approved the Discovery Subcommittee's recommendations. Accordingly, the Committee recommends amending *Rule* 4:10-2(d) to protect all draft expert reports and communications.

The proposed amendments to *R.* 4:10-2 follow.

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

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

(a) …no change.

(b) …no change.

(c) …no change.

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

(1) A party may through interrogatories require any other party to disclose the names and addresses of each person whom the other party expects to call at trial as an expert witness, including a treating physician who is expected to testify and, whether or not expected to testify, of an expert who has conducted an examination pursuant to *R*. 4:19 or to whom a party making a claim for personal injury has voluntarily submitted for examination without court order. The interrogatories may also require, as provided by *R*. 4:17-4(a), the furnishing of a copy of that person's report. Discovery of communications between an attorney and any expert retained or specially employed by that attorney [occurring before service of an expert's report] is limited to facts and data considered by the expert in rendering the report. Except as otherwise expressly provided by *R*. 4:17-4(e), all other communications between counsel and the expert constituting the collaborative process in preparation of the report, including all preliminary or draft reports produced during this process, shall be deemed trial preparation materials discoverable only as provided in paragraph (c) of this rule.

(2) …no change.

(3) …no change.

(4) …no change.

(e) …change.

(f) …no change.

(g) …no change.

Note: Source — *R.R.* 4:16-2, 4:23-1, 4:23-9, 5:5-1(f). Amended July 14, 1972 to be effective September 5, 1972 (paragraphs (d)(1) and (2) formerly in R. 4:17-1); paragraph (d)(2) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c) and (d)(1) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (d)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) adopted July 10, 1998 to be effective September 1, 1998; paragraph (d)(1) amended July 12, 2002 to be effective September 3, 2002; corrective amendments to paragraph (d)(1) adopted September 9, 2002 to be effective immediately; caption amended, paragraphs (a), (c), and (e) amended, and new paragraphs (d)(4), (f), and (g) adopted July 27, 2006 to be effective September 1, 2006; paragraph (d)(1) amended to be effective .

N. Proposed Amendments to *R.* 4:12-4 — Disqualification for Interest

In the last rules cycle, the Committee rejected a proposal to allow videographing of depositions by in-house personnel. The Committee instead proposed an amendment to *Rule* 4:12-4 extending the prohibition against recording a deposition by a certified shorthand reporter "who is a relative, employee or attorney of a party or relative or employee of such attorney or is financially interested in the action" to videographers as well. A majority of the Committee members believed the risks involved in using in-house personnel (*e.g.*, built in biases, ability to tamper the recording) outweighed the advantages (*e.g.*, lower cost). There were many comments submitted to the Court opposing the Committee's recommendation. Opponents cited the economic advantage of using in-house videographers, the ability to provide a CD or DVD at the end of the deposition, and the added protection against tampering provided by the presence of a certified shorthand reporter.

The Court rejected the Committee's proposal as being not reflective of technological advances and requested the Committee to develop an amendment to *Rule* 4:12-4 that would specifically allow videographing by in-house personnel. In response, the Committee proposes that a sentence be added to the rule making clear that its prohibitions do not apply to a person making an audiovisual recording of the deposition but with certain exceptions. The proposal follows the recommendation of the Discovery Subcommittee. Although the Discovery Subcommittee prefers retaining the rule's existing text, it developed the proposal in accordance with the Court's request. The proposed language states that the prohibition against a certified court reporter recording a deposition shall not apply, so long as the individual is not a relative of the party and has no financial interest in the action, except that the person may be an attorney of a party or employee of such attorney.

The Committee unanimously agreed with the recommendations of the Discovery Subcommittee and recommends the proposed amendments to *Rule* 4:12-4.

The proposed amendments to *R.* 4:12-4 follow.

4:12-4. Disqualification for Interest

No deposition shall be taken before or recorded by a person, whether or not a certified [shorthand] court reporter, who is a relative, employee or attorney of a party or a relative or employee of such attorney or is financially interested in the action. Any regulations of the State Board of [Shorthand Reporters] Court Reporting respecting disqualification of certified [shorthand] court reporters shall apply to all persons taking or recording a deposition.

The foregoing prohibitions shall not apply to a person making an audiovisual recording of the deposition, provided (1) the person is not a relative of a party; and (2) the person has no financial interest in the action, except that the person may be an attorney of a party or an employee of such attorney.

Note: Source — *R.R.* 4:18-4. Amended July 17, 1975 to be effective September 8, 1975; amended July 12, 2002 to be effective September 3, 2002; amended _____ to be effective _____.

O. Proposed Amendments to *R.* 4:14-9 — Videotaped Depositions

A practitioner suggests that *Rule* 4:14-9 be amended to (1) change the words "videotaped" and "videotaping" to "videographed" and "videographing," respectively, to reflect the widespread change in technology from tape to DVD; (2) state that the videographer shall provide all opposing parties with a copy of the videographed deposition at the conclusion of the deposition and have an additional copy of the videographed deposition marked into evidence by the person conducting the stenographic recording; and (3) prohibit an attorney for a party or an employee of such attorney from acting as the videographer where the deposition is taken for use at trial in lieu of testimony. The Court rejected this latter proposal, which was included in the Committee's 2010 Report.

This matter was referred to the Discovery Subcommittee. The Discovery Subcommittee determined that the rule should be amended to reflect the change in technology. It, however, recommended that the term "audiovisual recording" be used instead of "videographing" as the term "audiovisual recording" is more commonly used. The Discovery Subcommittee further recommended that the rule should be amended to indicate that the audiovisual recording shall be marked as an exhibit to the deposition, and if feasible be provided a copy of the audiovisual recording to all parties present at the deposition. The Committee approved the recommendations of the Discovery Subcommittee.

The proposed amendments to *R.* 4:14-9 follow.

4:14-9. [Videotaped] Audiovisual Recording of Depositions

[Videotaped] An audiovisual recording of a deposition[s] may be [taken] made for discovery purposes or for use at trial in accordance with the applicable provisions of these discovery rules subject to the [following] provisions of *R*. 4:12-4 and to the [further] following requirements and conditions:

(a) Time for Taking [Videotaped] Audiovisually-Recorded Depositions. The provisions of *R*. 4:14-1 shall apply to [videotaped] audiovisually-recorded depositions except that such a deposition of a treating physician or expert witness which is intended for use in lieu of trial testimony shall not be noticed for taking until 30 days after a written report of that witness has been furnished to all parties. Any party desiring to take a discovery deposition of that witness shall do so within such 30-day period.

(b) Notice. A party intending to [videotape] make an audiovisual recording of a deposition shall serve the notice required by *R*. 4:14-2(a) not less than 10 days prior to the date therein fixed for the taking of the deposition. The notice shall further state that the deposition is to be [videotaped] audiovisually-recorded.g

(c) Transcript. The [videotaping] audiovisual recording of a deposition shall not be deemed to except it from the general requirement of stenographic recording and typewritten transcript. Prior to the swearing of the witness by the officer, the name, address and firm of the [videotape operator] person making the audiovisual recording shall be stated on the record.

(d) Filing, Copies. Immediately following the conclusion of the [videotaped] deposition, the [videotape operator] person making the audiovisual recording shall deliver [the tape] the audiovisual recording to the [party] officer taking or directing the deposition, who shall [take physical custody thereof and arrange for the making of one copy] mark it as an exhibit to

the deposition. Further, the person making the audiovisual recording shall, if feasible, provide a copy of the audiovisual recording to all parties present. If copies cannot be made at the conclusion of the deposition, [T]the party [taking] who noticed the audiovisual recording of the deposition shall [then] promptly furnish a copy of the [tape] audiovisual recording to [an adverse party who shall make it available for copying and inspection to] all [other] parties appearing at the deposition.

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

(f) Objections. Where [a videotaped] an audiovisually-recorded deposition is taken for use at trial in lieu of testimony, all evidential objections shall, to the extent practicable, be made during the course of the deposition. Each party making such objection shall, within 45 days following the completion of the deposition, file a motion for rulings thereon and all such motions shall be consolidated for hearing. The court may, however, on its own motion or the motion of a party, abbreviate the time period if the deposition of a treating physician or expert

witness is taken pursuant to *R.* 4:36-3(c) or for other good cause. A copy of the [tape] audiovisual recording shall be edited in accordance with said rulings and the copy so edited shall be made available for copying to all other parties.

(g) Cost of [Videotaped] Audiovisually-Recorded Depositions. All out-of-pocket expenses incurred in connection with [a videotaped] an audiovisual recording of a deposition, including [the] making [of copies herein] required copies and [the editing of tapes] edits shall be borne, in the first instance, by the party taking the deposition. The cost of court presentation of the [deposition] audiovisual recording shall be borne, in the first instance, by the party offering [the] that [deposition] recording.

(h) Record on Appeal. Where [a videotaped] an audiovisual recording of a deposition is used at trial, [a] the typewritten transcript thereof shall be included in the record on appeal. The [videotape] audiovisual recording itself shall not constitute part of the record on appeal except on motion for good cause shown.

Note: Adopted July 21, 1980 to be effective September 8, 1980; paragraph (e) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; introductory text and paragraphs (b) ,(d), and (f) amended July 28, 2004 to be effective September 1, 2004; title and introductory text and paragraphs (a) through (h) amended _____ to be effective _____ .

P. Proposed Amendments to *R.* 4:17-4 — Form, Service and Time of Answers

A Civil Presiding Judge has suggested amending *Rule* 4:17-4 to require that plaintiffs must serve, with their answers to interrogatories, a form HIPAA authorization for each named medical provider. This amendment is intended to streamline the process whereby defense counsel, upon receiving a plaintiff's answers to interrogatories, must then prepare and send HIPAA authorizations to plaintiff's counsel, who then sends them to the client for execution; from there, the executed authorizations go back to defense counsel who then sends them to the medical provider. This matter was referred to the Discovery Subcommittee. The Discovery Subcommittee determined that the rule should be amended to require plaintiffs in personal injury actions to provide authorizations for each medical provider. It prepared a HIPAA authorization form to be potentially included as a sample or model in the Appendix to the Rules of Court. The form was derived from numerous sample forms gathered by members of the subcommittee.

The Committee determined that the requirement to provide a form HIPAA authorization for each medical provider should not be limited to personal injury cases, but should be required in any action that, in some respects, seeks damages for personal injuries, whether by complaint or counterclaim. The Committee also determined that authorizations should be provided by plaintiffs or counterclaimants for each "health care" provider who examined or treated them as opposed to each "medical" provider.

The Committee debated whether the rule should mandate a HIPAA authorization form. Some members felt that the rule should mandate a form to promote uniformity and to reduce disagreements by the parties or providers over competing forms. Others opposed mandating a form for various reasons, including that a unitary form may not be appropriate for all cases; some health care providers may not comply because they require that patients complete their own

forms; someone would be responsible for continuously updating the form as a result of changes to the federal regulations; and practitioners who already utilize acceptable forms would be burdened.

The Committee majority ultimately determined that the rule should provide that plaintiffs or counterclaimants must include authorizations in a form "substantially in accordance with" the proposed form in the Appendix. The Committee considered allowing parties to obtain court approval on good cause shown to alter the form, but the majority opposed including such an exception, particularly because it might unduly burden judges with motion practice. The Committee did, however, agree that the parties may consent to an alternative form.

With these limitations, the Committee approved a model HIPAA authorization form, which it is recommended should be included in the Appendix to the Rules. Accordingly, the Committee recommends that *Rule* 4:17-4 be amended to set forth a new paragraph (f) requiring plaintiffs and counterclaimants must serve, with their answers to interrogatories, a HIPAA authorization for each health care provider that treated them that is substantially in accordance with a form to be set forth in a new Appendix to the Rules of Court.

If the Court does not adopt the Committee's recommendation to mandate the use of the HIPAA form developed by the Committee, or its substantial equipment, the Court may nevertheless wish to consider including the form in the Appendix for the benefit of practitioners as a sample acceptable version.

The proposed amendments to *R*. 4:17-4 and proposed new Appendix follow.

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

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) Release of Medical Records. Subject to the issuance of a protective order for good cause under *R.* 4:10-3, a plaintiff or a counterclaimant in any action in which damages are sought for personal injuries shall serve, contemporaneous with his or her answers to interrogatories, an executed form authorizing disclosure to the opposing party or parties, for purposes of the litigation, of the plaintiff's or counterclaimant's medical records pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), 42 *U.S.C.* §§ 1301 *et seq*., as to each health care provider who examined or treated the plaintiff or counterclaimant. The authorizations shall be substantially in accordance with the form set forth in Appendix ### of the Court Rules, unless the parties consent to an alternative form.

Note: Source — *R.R.* 4:23-4, 4:23-5, 4:23-6(a)(b)(c)(d). Paragraph (a) amended and paragraph (d) adopted July 14, 1972 to be effective September 5, 1972; paragraph (a) amended September 13, 1976 to be effective September 13, 1976; paragraph (a) amended and paragraph (e) adopted July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended June 29, 1990 to be effective September 4, 1990; paragraphs (a), (b) and (e) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; paragraph (e) amended July 28, 2004 to be effective September 1, 2004; paragraph (d) amended July 27, 2006 to be effective September 1, 2006; new paragraph (f) added _____ to be effective _____.

Appendix (*R.* 4:17-4)

AUTHORIZATION TO DISCLOSE HEALTH INFORMATION PURSUANT TO HIPAA

Patient Name:_____ **Health Record Number:**_____

Patient Address:_____

Date of Birth:_____ **Social Security Number:** _____

Case Name/Docket No.: _____

1. I authorize the use or disclosure of the above named individual's health information as described below: _____

2. The following individual or organization is authorized to make the disclosure:

_____

Address: _____

_____

3. The type and amount of information to be used or disclosed is as follows: (include dates where appropriate)

   ☐ entire record (dates) (certified to be a true copy of the original record) _____

   ☐ billing info _____

   ☐ other (with appropriate dates) _____

4. This information may be disclosed to and used by the following individual or organization:

_____

Address: _____

for the purpose of:_____

5. I understand I have the right to revoke this authorization at any time. I understand if I revoke this authorization I must do so in writing and present my written revocation to the health information management department. I understand the revocation will not apply to information that has already been released in response to this authorization.

6. Unless otherwise revoked, this authorization will expire on the following date, event or condition ____ _____. If I fail to specify an expiration date, event or condition, this authorization will expire in six months.

7. I understand that authorizing the disclosure of this health information is voluntary. I can refuse to sign this authorization. Unless allowed by law, my refusal to sign, will not affect my ability to obtain treatment, receive payment for treatment, or my eligibility to receive benefits. I understand I may inspect or copy the information to be used or disclosed, as provided by federal regulation. I understand any disclosure of information carries with it the potential for an unauthorized re-disclosure and the information may not be protected by federal confidentiality rules.

_____ _____

Individual or Personal Representative Date

Q. Proposed Amendments to *R.* 4:21A-4 — Conduct of Hearing

The Supreme Court Arbitration Advisory Committee proposes, and the Conference of Civil Presiding Judges endorses, an amendment to paragraph (f) of *Rule* 4:21A-4 to provide a time frame for the service of an arbitration award on an absent defendant and to designate the person required to make the service. The Arbitration Advisory Committee recommends a 10-day time frame within which the party receiving the favorable arbitration award must serve it on the absent party in order to be consistent with the time frame in the proposed new *Rule* 4:21A-9, *see* Section I.S. below, and to give the absent party sufficient time to file a motion to vacate the default simultaneously with a motion to file a request for a trial *de novo* out of time. The Committee agrees, and recommends the proposed amendment to *Rule* 4:21A-4(f) to set forth the time frame for service of an arbitration award on an absent defendant.

The proposed amendments to *R.* 4:21A-4 follow.

4:21A-4. Conduct of Hearing

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) Failure to Appear. An appearance on behalf of each party is required at the arbitration hearing. If the party claiming damages does not appear, that party's pleading shall be dismissed. If a party defending against a claim of damages does not appear, that party's pleading shall be stricken, the arbitration shall proceed and the non-appearing party shall be deemed to have waived the right to demand a trial *de novo*. [Relief from any order entered pursuant to this rule shall be granted only on motion showing good cause and on such terms as the court may deem appropriate, including litigation expenses and attorney's fees incurred for services directly related to the non-appearance] Service shall be made at the same address at which the defending party was served with process if the process was originally served personally or by certified or ordinary mail, unless the party providing the notice has actual knowledge of a current different address in which case it shall be sent to that address. Service upon a party claiming damages who does not appear shall be made at the same address as set forth in the complaint, unless the party providing the notice has actual knowledge of a different current address in which case it shall be sent to that address. If a party who failed to appear has been served with a copy of the arbitration award as set forth in this Rule, relief from any order entered shall be granted only on motion showing good cause, which motion shall be filed within 30 days of the receipt of the arbitration award by the appearing party and on such terms as the Court may deem appropriate,

including litigation expenses and attorney's fees incurred for services directly related to the non-appearance.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a) and (b) amended, and new paragraph (f) adopted July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 23, 2010 to be effective September 1, 2010; paragraph (f) amended to be effective .

R. Proposed Amendments to *R.* 4:21A-6 — Entry of Judgment; Trial *De Novo*

An attorney who is a member of the automotive defense bar has expressed concern regarding what he perceives is an inconsistent method of resolving an award of attorney's fees to a successful plaintiff in non-binding arbitration of Lemon Law cases. In some counties, arbitrators appear to follow a "standing order" or custom against the arbitrator's inclusion of a specific amount of attorney's fees in the award, whereas in other counties arbitrators commonly either award "reasonable" attorney's fees or a specific dollar amount of attorney's fees. This perceived inconsistency, according to the attorney, leads to prolonging matters, as counsel, in the absence of a fee award by the arbitrator, will engage in protracted negotiations as to what constitutes a "reasonable" fee. The attorney requests that *Rule* 4:21A be amended to require arbitrators to award a specific dollar amount of attorney's fees to prevailing plaintiffs in fee-shifting cases. Moreover, the attorney requests that *Rule* 4:21A be amended to cross-reference *Rule* 4:42-9 and require an affidavit of services as a condition of all awards of attorney's fees so that defense counsel may question the reasonableness of the request.

This issue was referred to the Arbitration Advisory Committee for consideration. The Arbitration Advisory Committee reviewed the attorney's requests and determined that an affidavit of services should be required as a condition of an award of attorney's fees. It recommends that *Rule* 4:21A-6 be amended to include a reference to *Rule* 4:42-9. The Conference of Civil Presiding Judges endorses the proposed amendment to *Rule* 4:21A-6. The Committee agrees, and recommends a new paragraph (d) to *Rule* 4:21A-6 to provide that unless the parties agree to submitting a fee demand to an arbitrator, an affidavit of services pursuant to *Rule* 4:42-9(b) should be submitted to the court as a condition of obtaining an award of attorney's fees.

The proposed amendments to *R*. 4:21A-6 follow.

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

(a) …no change.

(b) …no change.

(c) …no change.

(d) In all actions where by statute or otherwise an award of attorney fees is allowed, all such issues are reserved for court resolution unless the parties otherwise agree to submit a fee demand to the arbitrator. In all cases in which attorney fees are sought, the party seeking attorney fees must comply with the provisions of *R*. 4:42-9(b).

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraphs (b)(1) and (c) amended November 2, 1987 to be effective January 1, 1988; paragraph (c)(5) amended November 7, 1988 to be effective January 2, 1989; paragraphs (b)(1) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended May 3, 1994 to be effective July 1, 1994; paragraph (b)(1) amended July 10, 1998 to be effective September 1, 1998; paragraphs (b) and (c) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended June 7, 2005 to be effective immediately; new paragraph (d) adopted to be effective .

S. Proposed New *R.* 4:21A-9 — Parties in Default

The Arbitration Advisory Committee proposes, and the Conference of Civil Presiding Judges endorses, a new *Rule* 4:21A-9 to address the issue of parties in default receiving notice of the arbitration proceeding. The new proposed rule provides a uniform procedure to address arbitration awards against parties in default and addresses some of the issues raised by the Appellate Division in *SWH Funding Corp. v. Walden Printing Co., Inc.*, 399 *N.J. Super*. 1 (App. Div. 2008). It requires that that a party in default must be provided with at least 30 days' notice of an arbitration hearing. Further, if the defaulting party fails to appear at the arbitration hearing, said party must be served with a copy of the arbitration award within 10 days of the receipt of the arbitration award. The Committee recommends the adoption of the new *Rule* 4:21A-9 to address the issue of parties in default receiving notice of arbitration proceedings.

The proposed new *R*. 4:21A-9 follows.

4:21A-9 Parties in Default

(a) If a party against whom an arbitration award is sought in a multiple party action (1) has had default entered against such party pursuant to *R.* 4:43-1, and the said default was entered less than six months prior to the date of the arbitration hearing, or (2) has had default judgment on liability pursuant to *R.* 4:43-2(b) entered against such party, the arbitration shall proceed against such party provided that the notice of hearing and proof of mailing as set forth in paragraph (b) of this rule has been complied with.

(b) If a party against whom an arbitration award is sought has had default or default judgment on liability entered against it as set forth in paragraph (a), then notice of the arbitration proceeding shall be provided to that party in the form set forth in Appendix XXVII to these Rules no later than 30 days prior to the arbitration hearing by ordinary mail addressed to the same address at which that party was served with process if the process was originally served personally or by certified or ordinary mail, unless the party providing the notice has actual knowledge of a different current address of the defaulting defendant in which case it shall be sent to that address. Proof of service of the notice of arbitration hearing herein shall be filed with the Clerk prior to the arbitration hearing and shall certify that the party serving the notice has no actual knowledge that the defaulting party's address has changed after service of original process, or, if the party has such knowledge, the proof shall certify the underlying facts. A copy of the filed proof of service of the notice provided to the defaulting party shall be provided to the arbitrator at the time of the arbitration hearing and the arbitrator shall indicate same in the arbitration award. In the event the arbitration hearing is adjourned or cancelled, the party providing such notice shall promptly notify the defaulting party of the underlying facts and the new date, if applicable.

(c) If a party against whom an arbitration award is sought has had default or default judgment on liability entered against it and did not appear at the arbitration hearing after notice has been provided in accordance with paragraph (b) of this rule, the party obtaining the arbitration award against such defaulting party shall serve a copy of the arbitration award upon such defaulting party within 10 days of the date of receipt of the arbitration award. Service shall be made by ordinary mail addressed to the same address at which that party was served with service of process if the process was originally served personally or by certified or ordinary mail unless the party serving the arbitration award has actual knowledge of a different current address of the party against whom the award was entered in which case, it shall be sent to that address.

(d) If a party who has obtained an arbitration award against the defaulting party moves for confirmation of the arbitration award and entry of judgment pursuant to *R.* 4:21A-6(b)(3), that party shall comply with the dictates of *R.* 4:43-2 and *R.* 1:5-7 and shall provide sufficient proof to the court that the provisions of this rule have been complied with.

Note: New Rule adopted _____ to be effective _____.

T. Proposed Amendments to *R.* 4:23-5(c) — Failure to Make Discovery

The Conference of Civil Presiding Judges recommends that *Rule* 4:23-5(c) be amended to permit motions to compel depositions. Currently, *Rule* 4:23-5(c) only provides that a propounder of requests for production of documents or request for a physical/mental examination may file a motion to compel responses to those discovery requests before moving to dismiss or suppress a pleading pursuant to *Rule* 4:23-5(a)(1). The Conference advised that motions to compel depositions are routinely granted, although *Rule* 4:23-5(c) does not provide specific authority for judges to grant such relief. The Committee agrees, and recommends that *Rule* 4:23-5(c) be amended to permit motions to compel depositions.

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

4:23-5. Failure to Make Discovery

(a) …no change.

(b) …no change.

(c) Motion to Compel. Prior to moving to dismiss pursuant to subparagraph (a)(1) of this rule, a party may move for an order compelling discovery demanded pursuant to *R.* 4:14, *R.* 4:18-1 or *R.* 4:19. An order granting a motion to compel shall specify the date by which compliance is required. If the delinquent party fails to comply by said date, the aggrieved party may apply for dismissal or suppression pursuant to subparagraph (a)(1) of this rule by promptly filing a motion to which the order to compel shall be annexed, supported by a certification asserting the delinquent party's failure to comply therewith.

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; paragraphs (a)(1) and (a)(2) amended July 9, 2008 to be effective September 1, 2008; subparagraphs (a)(1) and (a)(3) amended July 23, 2010 to be effective September 1, 2010; paragraph (c) amended to be effective .

U. Proposed Amendments to *R.* 4:42-9 — Attorney's Fees

In the last rules cycle, the Committee recommended that an award of all costs of suit, including attorney's fees, be allowed to defendants in SLAPP litigation who prevail on the ground that the activity complained of is protected by the free speech clause or the right to petition clause of the Constitution. The following is an excerpt from the 2010 Report with respect to this issue:

> Judge Pressler brought the question of counsel fees for protesters in strategic litigation against public participation (SLAPP) suits to the Committee's attention. SLAPP suits are employed by businesses to stifle the exercise by protesting citizens of First Amendment rights to free speech and to petition government for redress. The lawsuits against protesters allege causes of action sounding in defamation, various business torts, conspiracy and nuisance. Although SLAPP suits are often dismissed on the ground that the activities of the protesters are protected by the First Amendment, such suits are nonetheless effective to the extent that they typically require the protester-defendants to incur very substantial counsel fees. Recently, the Supreme Court held that SLAPP plaintiffs are protected if they brought the suit on advice of counsel and that counsel giving the advice is protected unless proved to have been actuated by malice. *See LoBiondo v. Schwartz* (*LoBiondo II*), 199 *N.J.* 62 (2009). The protester-defendants were vindicated on the merits, but were left without a remedy for the litigation expenses and other damages. Judge Pressler suggested that *R.* 4:49-9(a) be amended to provide that if a suit against SLAPP defendants is dismissed on First

Amendment grounds, the protesters will be entitled to an award of all costs of suit, including attorney's fees. The Committee agreed with the proposal.

The Supreme Court considered the recommendation, but was evenly divided on the issue. As a result, the proposed amendment was not adopted by the Court and the issue was remanded to the Civil Practice Committee. During this rules cycle, the Committee concluded that it should resubmit its proposal to the Court for further consideration.

The proposed amendments to *R*. 4:42-9 follow.

4:42-9. Attorney's Fees

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

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

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

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

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

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

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

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

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

(8) In all cases where attorney's fees are permitted by statute.

(9) In a SLAPP suit (strategic litigation against public participation) which terminates in favor of the defendant on the ground that the activity complained of is protected by the free speech clause or the right to petition clause of the First Amendment of the federal and state constitutions.

(b) …no change.

(c) …no change.

(d) …no change.

Note: Source — *R.R.* 4:55-7(a) (b) (c) (d) (e) (f), 4:55-8, 4:98-4(c). Paragraphs (a) and (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)(1) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a)(1) and (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended January 19, 1989 to be effective February 1, 1989; paragraph (a)(4) amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(5) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a)(1), (2) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(5) amended June 28, 1996 to be effective September 1, 1996; paragraph (a)(1) amended January 21, 1999 to be effective April 5, 1999; paragraph (a)(5) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(3) amended July 27, 2006 to be effective September 1, 2006; caption amended and subparagraphs (a)(5) and (a)(8) amended July 23, 2010 to be effective September 1, 2010; new (a)(9) adopted _____ to become effective _____.

V. Proposed Amendments to *R.* 4:43 — Default

In the unpublished opinion *Ives v. Rivera, et al*., Docket Number A-5551-08T3, decided May 21, 2010, the Appellate Division referred to the Committee the issue of service on defaulting parties of a motion to restore a complaint dismissed for lack of prosecution following entry of default. In *Ives*, the plaintiff/appellant appealed from an order denying his application to restore a dismissed complaint and from the order denying his motion for reconsideration and failed to serve the defendants with either motion. The trial judge, in denying the applications, held, in part, that while there is no express mandate in the court rules to serve a motion to reinstate entry of default on the defendant, it is logical to require that service be made, especially in light of *Rule* 4:43-1's requirement to serve a notice of motion to enter default on the defendant. He further held that the defendants are entitled to notice of a motion to reinstate default in the same manner as the original motion for entry of default. He also stated that, in the absence of service, there is no way for the defendants to express their position and for the court to determine whether the defendants have been prejudiced.

The Committee determined that *Rule* 4:43 should be amended to indicate that notice of a motion to reinstate entry of default should be served on the defendant.

The proposed amendments to *R*. 4:43-1 follow.

4:43-1. Entry of Default

If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules or court order, or if the answer has been stricken with prejudice, the clerk shall enter a default on the docket as to such party. Except where the default is entered on special order of the court, the moving party shall make a formal written request of the clerk for the entry of the default, supported by the attorney's affidavit. The affidavit shall recite the service of the process and copy of complaint on the defendant or defendants (if more than one, naming them), the date of service as appears from the return of the process, and that the time within which the defendant or defendants may answer or otherwise move as to the complaint, counterclaim, cross-claim, or third-party complaint has expired and has not been extended. The request and affidavit for entry of default shall be filed together within 6 months of the actual default, and the default shall not be entered thereafter except on notice of motion filed and served in accordance with *R*. 1:6 on the party in default. If defendant was originally served with process either personally or by certified or ordinary mail, the attorney obtaining the entry of the default shall send a copy thereof to the defaulting defendant by ordinary mail addressed to the same address at which defendant was served with process. If a complaint has been dismissed for lack of prosecution following the entry of default, notice of a motion to restore the complaint and for the renewed entry of default shall be filed and served in accordance with *R*. 1:6 on the party in default.

Note: Source — *R.R.* 4:56-1(a) (b) (c) (d); amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 12, 2002 to be effective September 3, 2002; amended _____ to be effective _____.

W. Proposed Amendments to *R.* 4:44A-1 — re: Applications for Transfer of Structured Settlement Rights

A trial judge requests that the Committee consider recommending an explicit requirement in the Rules that competitive quotes be submitted with applications seeking approval of transfers or assignments of structured settlement payments because such a requirement would help deter unreasonable annual discount rates and would help prevent finance companies from taking undue advantage of payee-transferors. The judge suggests that the approach taken by the court in the matter of *In re Transfer of Structured Settlement Rights by Spinelli*, 353 *N.J. Super*. 459 (Law Div. 2002), should be applied in all such cases. In *Spinelli*, the court found, in part, that proposed transfer was in the applicant's best interest because the applicant testified that he shopped around for price quotes before choosing the finance company, and the finance company provided the court with a copy of a quote from a competitor as to what it would have paid for the proposed transfer.

A subcommittee formed to address this issue recommended that *Rule* 4:44A should be amended to assist judges in protecting consumers from predatory conduct. The subcommittee, however, wanted to ensure that any rule changes did not overstep the role of the Judiciary or overburden trial judges. The subcommittee recommended amending *Rules* 4:44A-1 and 4:44A-2 to require payor-transferees to serve written notice on payee-transferors of the right to seek competitive offers, and to certify that they had done so. The judge at the hearing on the order to show cause would then decide whether to approve the transfer after hearing testimony from the payee-transferor on whether competitive bids were sought. A new Appendix was proposed, which would consist of a "Notice to Prospective Payee of Right to Seek Independent Professional Advice and Right to Obtain Competing Offers before Transferring Structured

Settlement Payment Rights" and a form Certification of the Payor-Transferee that it provided said notice. To guard against predatory practices, a majority of the Committee initially favored a further amendment to *Rule* 4:44A-2 to provide that the transfer will be approved only if the proposed transfer does not require the payee-transferor to purchase any insurance policy or enter into any other agreement in any way related to the proposed transfer, nor does it assess attorney's fees, costs or other expenses to the payee-transferor.

After the proposed amendments had been drafted, the Committee revisited the subject. Upon further reflection, the Committee majority concluded that *Rule* 4:44A-1 should be amended in a more limited fashion to require : (1) a certification by the payee-transferor that lists the names and ages of any dependents and explains the impact of the proposed transfer on the payee-transferor and any dependents; (2) a copy of all agreements in any way related to the proposed transfer and a certification that there are no undisclosed conditions or agreements; and (3) a copy of all prior orders granting or denying approval of a transfer or assignment of structured settlement payment rights or a certification that there have been no such prior orders. The majority's ultimate recommendation did not include additional terms concerning insurance coverage, counsel fees, or costs, leaving such potential measures to the Legislature's consideration. The Committee majority determined that in light of the amendments to *Rule* 4:44A-1, the proposed new Appendix is not necessary. Further, the Committee majority ultimately determined not to propose amendments to *Rule* 4:44A-2. *See* Section II.L. of this Report for proposed amendments to *Rule* 4:44A-2 considered but rejected.

The proposed amendments to *R*. 4:44A-1 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] Annexed to the verified complaint shall be (a) a copy of the proposed transfer or assignment agreement; [and] (b) a copy of the disclosure statement required by *N.J.S.A.* 2A:16-65[,]; (c) a certification by the payee-transferor that lists [of] the names and ages of [the payee-transferor's] any dependents and explains the impact of the proposed transfer on the payee-transferor and any dependents; (d) a copy of all agreements in any way related to the proposed transfer and a certification that there are no undisclosed conditions or agreements; and (e) either a copy of all prior orders granting or denying approval of a transfer or assignment of structured settlement payment rights or a certification that there have been no such prior orders. 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 July 9, 2008 to be effective September 1, 2008; amended to be effective .

X. Proposed Amendments to *R.* 4:46-1 — Time for Making, Filing, and Serving Motion

In 2006, the Committee recommended and the Supreme Court adopted a proposal to amend *Rule* 4:46-1 to require that summary judgment motions must be made returnable at least 30 days prior to the scheduled trial date. The purpose of the amendment was to give counsel sufficient time to prepare for trial if the motion is denied or partially granted. The sentence containing this timing requirement, however, was inserted in the rule immediately following a section dealing with a summary judgment by a party seeking "affirmative relief" in the lawsuit and thus could be read as not being applicable to the party against whom a claim for affirmative relief is asserted. It was not the intent of the rule amendment to treat the parties differently. The situation could be remedied by restructuring the rule to put the sentence regarding the timing of the summary judgment motion after references to both the party seeking relief and the party against whom relief is sought. The Committee recommends restructuring the rule so that timing requirement clearly applies to both the party seeking relief and the party against whom relief is sought.

The proposed amendments to *R.* 4:46-1 follow.

4:46-1. Time for Making, Filing, and Serving Motion

A party seeking any affirmative relief may, at any time after the expiration of 35 days from the service of the pleading claiming such relief, move for a summary judgment or order on all or any part thereof or as to any defense. [Said motion, however,] A party against whom a claim for such affirmative relief is asserted may move at any time for a summary judgment or order as to all or any part thereof. All motions for summary judgment shall be returnable no later than 30 days before the scheduled trial date, unless the court otherwise orders for good cause shown, and if the decision is not communicated to the parties at least 10 days prior to the scheduled trial date, an application for adjournment shall be liberally granted. Except as otherwise provided by *R*. 6:3-3 (motion practice in Special Civil Part) or unless the court otherwise orders, a motion for summary judgment shall be served and filed not later than 28 days before the time specified for the return date; opposing affidavits, certifications, briefs, and cross-motions for summary judgment, if any, shall be served and filed not later than 10 days before the return date; and answers or responses to such opposing papers or to cross-motions shall be served and filed not later than four days before the return date. No other papers may be filed without leave of court.

Note: Source – *R.R.* 4:58-1, 4:58-2. Caption and text amended November 1, 1985 to be effective January 2, 1986; amended November 5, 1986 to be effective January 1, 1987; amended November 7, 1988 to be effective January 2, 1989; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; amended July 27, 2006 to be effective September 1, 2006; amended July 9, 2008 to be effective September 1, 2008; second sentence amended and moved to third sentence to be effective .

Y. Proposed Amendments to *R.* 4:49-2 — Motion to Alter or Amend a Judgment or Order

A trial judge suggested an amendment to *Rule* 4:49-2 to require movants to include a copy of the court's bench or written decision with their applications for reconsideration. He stated that including a copy of the court's decision would enhance the court's ability to recall the decision, especially in instances where an application for reconsideration is filed outside of the 20-day time period provided in the rule. Moreover, the judge stated that having a hard copy of the court's decision would expedite the court's ability to analyze the validity of a movant's argument considering the time limitations on the court for motion calendar preparation.

Although determining that movants should not be required to submit transcripts of bench decisions with their motions for reconsideration, the Committee recommends that movants be required to include a copy of the court's written decision with their applications for reconsideration.

The proposed amendments to *R.* 4:49-2 follow.

4:49-2. Motion to Alter or Amend a Judgment or Order

Except as otherwise provided by *R*. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Note: Source — *R.R.* 4:61-6. Amended November 5, 1986 to be effective January 1, 1987; amended July 14, 1992 to be effective September 1, 1992; amended July 10, 1998 to be effective September 1, 1998; amended to be effective .

Z. Proposed Amendments to *R.* 4:59-1 and Appendix XII-D — re: Execution of Process

1. The federal government adopted a new regulation effective May 1, 2011, regarding the treatment of funds in judgment debtors' bank accounts that are exempt from garnishment under federal law. The new regulation requires banks and other financial institutions to "look back" two months and exclude from the garnishment any exempt benefits electronically deposited during that period. At its May 17, 2011 Administrative Conference, the Supreme Court approved amendments to *Rule* 6:7-1(b)(2) and Appendix XI-H (writ of execution used in Special Civil Part actions) to conform with the new federal regulation. In light of the new federal regulation, the Committee determined that *Rule* 4:59-1 and Appendix XII-D (writ of execution used in Civil Part actions) should be amended so that they comply with the federal law. Additionally, the Committee determined that the rule and appendix should be amended to include a 90-day "look back" period provision for consistency with *Rule* 6:7-1(b)(1) and the writ used in Special Civil Part actions.

2. The writ of execution in Appendix XII-D commands the sheriff to satisfy a judgment out of the personal property of the judgment debtor and if the personal property is insufficient or cannot be found, then out of the real property of the judgment debtor. The writ does not reflect the requirement of paragraph (c) of *Rule* 4:59-1 that "[i]f the debtor's personal property is insufficient or cannot be located, the judgment creditor shall file a motion, on notice, for an order permitting the sale of the real property." To ensure that all parties are aware that an order to sell realty is required, the Civil Practice Division and the Superior Court Clerk's Office recommend that the writ be amended to include language that subsequent to the levy by the sheriff, the sheriff must receive an order of the court before selling real property. Additionally,

the Civil Practice Division and the Superior Court Clerk's Office recommend that paragraph (a) of *Rule* 4:59-1 be amended to require a writ be in the form prescribed by Appendix XII-D or Appendix XII-E, as appropriate. The language of the writs apply in the vast majority of cases and will lead to more efficient processing of writs in the vicinage Clerks' offices. The Committee agrees, and recommends the proposed amendments to *Rule* 4:59-1(a) and Appendix XII-D.

The proposed amendments to *R*. 4:59-1 and Appendix XII-D 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. Except if the court otherwise orders the writ of execution shall be in the form prescribed by Appendix XII-D and Appendix XII-E, as appropriate, to these rules. Except with respect to writs issued out of the Special Civil Part, 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. Except with respect to writs issued out of the Special Civil Part, the judgment-creditor shall serve a copy of the fully endorsed writ, personally or by ordinary mail, 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. A writ of execution issued by the Civil Part of the Law Division shall not be directed to a Special Civil Part Officer except by order of the Civil Presiding Judge and such order shall specify the amount of the Officer's fee. One writ of

execution may issue on one or more judgments or orders in the same cause. The writ may be issued either by the court or the clerk thereof.

(b) Contents of Writs of Execution and Other Process for the Enforcement of Judgments. All writs of execution and other process for the enforcement of judgments shall provide that any levy pursuant thereto shall exclude:

(1) all funds in an account of the debtor with a bank or other financial institution, if all deposits into the account during the 90 days immediately prior to service of the writ were electronic deposits, made on a recurring basis, of funds identifiable by the bank or other financial institution as exempt from execution, levy or attachment under New Jersey or federal law, and

(2) all funds deposited electronically in an account of the debtor with a bank or other financial institution during the two months immediately prior to the account review undertaken by the bank or other financial institution in response to the writ that are identified by the bank or other financial institution as exempt from execution, levy or attachment under New Jersey or federal law.

[(b)] (c) Execution to Enforce a Court Order for the Support of Dependents. Income withholding to enforce a judgment or order for the periodic payment of alimony or child support shall be governed by *R*. 5:7-5(b), (c) and (d). The Presiding Judge of the Family Division in each vicinage may issue a standing or special order authorizing the Probation Division to execute on cash or cash-equivalent assets, as defined herein, to collect child support or alimony judgments payable through the Probation Division, and directing that writs of execution to collect past-due child support or alimony be served on the holder of such assets by the Probation Division. In vicinages where such an order is issued, an execution to enforce an alimony or child support judgment against cash or cash-equivalent assets shall be governed by

R. 5:7-5(e) and the Vicinage Chief Probation Officer shall be designated Deputy Clerk of the Superior Court for the limited purpose of certifying writs of execution for alimony or child support judgments payable through the Probation Division. Cash or cash-equivalent assets include bank accounts, retirement accounts, trusts, insurance proceeds, net monetary awards and settlements from civil lawsuits, non-court settlements, proceeds from estates, investments, commissions, bonuses and any other asset from which funds are readily available without the need for seizure, inventory or public sale.

[(c)] (d) Order of Property Subject to Execution; Required Motion.

(1) Execution First Made Out of Personal Property; Motion. The execution shall be made out of the judgment debtor's personal property before the judgment-creditor may proceed to sale of the debtor's real property. If the debtor's personal property is insufficient or cannot be located, the judgment creditor shall file a motion, on notice, for an order permitting the sale of the real property. The motion, which shall not be joined with any other application for relief, shall be supported by a certification specifying in detail the actions taken by the judgment creditor to locate and proceed against personal property. The notice of motion shall state that if the motion is not successfully defended, the judgment debtor's real property will be subject to sale. The notice shall have annexed the listing of Legal Services Offices and Lawyer Referral Offices as required by *R*. 4:4-2. No sale of real property shall proceed unless an order granting the motion has been entered.

(2) Execution First Made Out of Property of Party Primarily Liable. If a writ of execution is issued against several parties, some liable after the others, the court before or after the levy may, on application of any of them and on notice to the others and the execution creditor, direct the sheriff or other officer that, after levying upon the property liable to

execution, he or she raise the money, if possible, out of the property of the parties in a designated sequence.

[(d)] (e) Wage Executions; Notice, Order, Hearing. Proceedings for the issuance of an execution against the wages, debts, earnings, salary, income from trust funds or profits of a judgment-debtor shall comply with the requirements of paragraph (a) of this rule and shall be on notice to the debtor. The notice of wage execution shall state (1) that the application will be made for an order directing a wage execution to be served on the defendant's named employer, (2) the limitations prescribed by 15 *U.S.C.A.* §§ 1671-1677, inclusive and *N.J.S.A.* 2A:17-50 *et seq*. and *N.J.S.A.* 2A:17-57 et seq. on the amount of defendant's salary which may be levied upon, (3) that defendant may notify the court and the plaintiff in writing within ten days after service of the notice of reasons why the order should not be entered, (4) if defendant so notifies the clerk, the application will be set down for hearing of which the parties will receive notice as to time and place, and if defendant fails to give such notice, the order will be entered as of course, and (5) that defendant may object to the wage execution or apply for a reduction in the amount withheld at any time after the order is issued by filing a written statement of the objection or reasons for a reduction with the clerk and sending a copy to the creditor's attorney or directly to the creditor if there is no attorney, and that a hearing will be held within seven days after filing the objection or application for a reduction. The judgment-creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers. The notice of wage execution shall be served on the judgment-debtor in accordance with *R.* 1:5-2. A copy of the notice of application for wage execution, together with proof of service in accordance with *R.* 1:5-3, shall be filed with the clerk at the time the form of order for wage execution is submitted. No order shall be entered unless the form of order was filed within 45 days of service

of the notice or 30 days of the date of the hearing. The writ shall include a provision directing the employer immediately to give the judgment-debtor a copy thereof and it shall also include a provision that the judgment-debtor may, at any time, notify the clerk and the judgment-creditor in writing of reasons why the levy should be reduced or discontinued. If an objection from the judgment-debtor is received by the clerk after a wage execution has issued, all moneys remitted by the employer shall be held until further order of the court and the matter shall be set down for a hearing to be held within seven days of receipt of the objection.

[(e)] (f) Supplementary Proceedings. In aid of the judgment or execution, the judgment creditor or successor in interest appearing of record, may examine any person, including the judgment debtor, by proceeding as provided by these rules for the taking of depositions or the judgment creditor may proceed as provided by *R*. 6:7-2, except that service of an order for discovery or an information subpoena shall be made as prescribed by *R*. 1:5-2 for service on a party. The court may make any appropriate order in aid of execution. If the warrant for arrest is not executed within 24 months after the date of the entry of the order authorizing it, both the order and the warrant shall be deemed to have expired and to be of no further effect.

[(f)] (g) Sheriff's Costs. The sheriff shall file a bill of taxed costs with the final report with the clerk of the court.

[(g)] (h) 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 last known address of the person or business entity 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 by qualified persons. The notice shall be in the form prescribed by Appendix VI to these rules 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)] (i) The forms in Appendices XI-I and XI-L through XI-R, inclusive, shall be used in the Law Division, Civil Part, as well as in the Special Civil Part.

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 (f) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) redesignated as subparagraph (c)(2), new paragraph (c) caption adopted, new subparagraph (c)(1) caption and text adopted, and paragraph (g) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended, new paragraph (b) adopted, and former paragraphs (b), (c), (d), (e), (f), (g) and (h) redesignated (c), (d), (e), (f), (g), (h) and (i) respectively, to be effective _____.

Appendix XII-D
WRIT OF EXECUTION

Attorney for Plaintiff

_____

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

_____ **COUNTY**

_____ Plaintiff **DOCKET NO:** _____

Vs

WRIT OF EXECUTION

_____ Defendant

THE STATE OF NEW JERSEY

TO THE SHERIFF OF _____

WHEREAS, on the _____ day of _____ judgment was recovered by Plaintiff,

_____ in an action in the Superior Court of New Jersey, Law Division, __

_____ County, against Defendant, for damages of

$ _____ and costs of $ _____ ; and

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

THEREFORE, WE COMMAND YOU that you satisfy the said Judgment out of the personal property of the said Judgment debtor within your County; and if sufficient personal property cannot be found then, subsequent to your levy and only after receipt of an order of the court pursuant to *R.* 4:59-1(c)[1], out of the real property in your County belonging to the judgment debtor(s) at the time when the judgment was entered or docketed in the office of the Clerk of this Court or at any time thereafter, in whosesoever hands the same may be [and]. Any levy pursuant to this writ shall exclude (1) all funds in an account of the debtor with a bank or other financial institution, if all deposits into the account during the 90 days immediately prior to service of the writ were electronic deposits, made on a recurring basis, of funds identifiable by

[1] Reference to *R.* 4:59-1(c) will be changed to *R.* 4:59-1(d) if the court approves all proposed amendments to *Rule* 4:59-1 and Appendix XII.

the bank or other financial institution as exempt from execution, levy or attachment under New Jersey or federal law, and (2) all funds deposited electronically in an account of the debtor with a bank or other financial institution during the two months immediately prior to the account review undertaken by the bank or other financial institution in response to the writ that are identifiable by the bank or other financial institution as exempt from execution, levy or attachment under New Jersey or federal law. [y] You shall pay [the] said monies realized by you from such property to _____, Esq., attorney in this action[; and that]. [w]Within twenty-four months after the date of its issuance you shall return this execution and your proceedings thereon to the Clerk of the Superior Court of New Jersey at Trenton.

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

WITNESS, HONORABLE_____a Judge of the Superior Court, at_____this_____day of_____, 20_____.

_____, CLERK

ENDORSEMENT

Judgment Amount*:	$_____
Additional Costs:	$_____
Interest thereon:	$_____
Credits:	$_____
Sheriff's Fees:	$_____
Sheriff's Commissions	$_____
TOTAL	$_____

*"Judgment Amount" includes amount of verdict or settlement, plus pre-judgment court costs, plus any applicable statutory attorney's fee.

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

_____
Attorney for Plaintiff

Dated: _____, 20____

Note: Form adopted as Appendix XII-D July 27, 2006 to be effective September 1, 2006, amended September 11, 2006 to be effective immediately; amended July 9, 2008 to be effective September 1, 2008; amended July 23, 2010 to be effective September 1, 2010; amended to be effective _____.

AA. Proposed Amendments to *R.* 4:73-7 — Jury; View of Property

A Civil presiding judge suggested that *Rule* 4:73-7 be amended to switch the presumption of a site visit in condemnation trials to a presumption of no site visit. The Conference of Civil Presiding Judges endorsed the proposed amendment, given that site visits are, in actual practice, the exception rather than the rule. The Committee agrees with the Conference, and recommends that the rule be amended to reflect a presumption of no site visit.

The proposed amendments to *R.* 4:73-7 follow.

4:73-7. Jury; View of Property

If a jury is demanded, the appeal shall be tried by a jury drawn from the general panel. The jury shall not view the land and property to be taken, unless the court otherwise orders.

Note: Source — *R.R.* 4:92-7. Amended July 7, 1971 effective September 13, 1971; amended to be effective .

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

An attorney who represents providers of telepsychiatry services in New Jersey and Pennsylvania has requested that the Committee consider amending *Rule* 4:74-7(b)(1) and (b)(2) to permit facsimile and/or electronic submission of clinical certificates with respect to civil commitment proceedings. *Rule* 4:74-7(b) requires that original involuntary commitment applications and clinical certificates be filed with the court. The attorney submits that requiring original certificates has created hurdles, inefficiency and additional costs. It is proposed that the clinical certificates could be faxed or e-mailed directly to the judge. In response to the proposal, the Division of Mental Health and Addiction Services (DMHAS) proposes that *Rules* 1:4-4 and 4:74-7(b)(1) be amended to permit facsimile transmission of documents from a DMHAS-approved screening service when telepsychiatry is utilized in the civil commitment process.

The Committee discussed the civil commitment process and the use of telepsychiatry in that process. An individual involuntarily admitted to a short-term care or psychiatric facility or hospital may be detained by the facility or hospital for no more than 72 hours from the time that the psychiatrist executes the screening certificate. An application for a temporary order involuntarily committing the individual, which is supported by the screening certificate and a clinical certificate, must be made within that 72-hour period. While the admitting facility or hospital will have the original clinical certificate readily available, it is more difficult to obtain the original screening certificate in a timely basis when the screening is performed by telepsychiatry. The Committee determined that facsimile copies of screening certificates should be acceptable where telepsychiatry is performed. The Committee recommends an amendment to *Rule* 4:74-7(b)(1) to permit a facsimile of the original screening certificate where screening was

performed by telepsychiatry by a screening service having a DMHAS approved plan of telepsychiatry.

The proposed amendments to *R*. 4:74-7 follow.

4:74-7. Civil Commitment — Adults

(a) …no change.

(b) ...no change.

(1) Screening Service Referral. A person who has been involuntarily admitted to a short-term care or psychiatric facility or special psychiatric hospital on referral by a screening service may be detained by the facility or hospital without court order for not more than 72 hours from the time the original screening certificate was executed. During that period the facility or hospital may institute proceedings by filing with the court both the original clinical certificate completed by a psychiatrist on the patient's treatment team and the original screening certificate executed by a psychiatrist or other physician affiliated with the screening service. If the screening was performed by means of telepsychiatry by a screening service having a Division of Mental Health and Addiction Services approved plan of telepsychiatry, the facility or hospital may file with the court a facsimile of the original screening certificate in lieu of the original. A copy of the certificates shall be filed with the office of the county adjuster.

(2) …no change.

(3) …no change.

(A) …no change.

(B) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

(g) …no change.

(h) …no change.

(i) …no change.

(j) …no change.

Note: 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; paragraph (f)(2) amended July 9, 2008 to be effective September 1, 2008; paragraph (b)(1) amended to be effective .

CC. Proposed Amendments to Appendix II - Form Interrogatories A — re: Medicare Liens

When a plaintiff receives a tort injury recovery, Medicare is to be reimbursed for any medical payments made on behalf of the plaintiff. For quite some time, there has been an obligation on plaintiffs to ensure that Medicare liens were dealt with in settlements. Under federal law, liability insurers must report settlements to Medicare and how existing and future Medicare liens are being addressed — that is, if a plaintiff who is a Medicare recipient (*e.g.*, over 65 years or permanently disabled) will need future treatment, those future liens must be dealt with in settlement. Failure to comply with the law subjects the plaintiff, the plaintiff's attorney, tortfeasors and insurers to personal liability. The Conference of Civil Presiding Judges discussed options to facilitate the early sharing of information regarding the existence or likelihood of a Medicare lien, and recommends that the Form A Interrogatories be amended to require the litigant's social security number and a copy of the Medicare card.

The Committee discussed whether there are any potential confidentiality issues in requiring plaintiffs to provide their social security numbers in the Form A Interrogatories. It was determined that there are no such issues as discovery materials are not considered court records, and therefore are not open to public access. *See Estate of Frankl v. Goodyear Tire & Rubber Co.*, 181 *N.J.* 1 (2004). If discovery materials are filed with the court, it is the duty of the party filing them to redact any confidential personal identifiers, such as social security numbers. *See R.* 1:38. Moreover, Form Interrogatories A(1) already require provision of social security numbers. The Committee recommends amending Form Interrogatories A, Question 1 to require disclosure to defense counsel of the plaintiff's social security number and a copy of his or her Medicare card.

The proposed amendments to Appendix II- Form Interrogatories A, Question 1 follow.

APPENDIX II. — INTERROGATORY FORMS

Form A. Uniform Interrogatories to be Answered by Plaintiff in All Personal Injury Cases (Except Medical Malpractice Cases): Superior Court

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

(Caption)

1. Full name, present address, [and] date of birth, Social Security number, and Medicare number, if applicable. If Medicare number is applicable, attach a copy of the Medicare card.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

16. …no change.

17. …no change.

18. …no change.

19. …no change.

20. …no change.

21. …no change.

22. …no change.

23. …no change.

24. …no change.

25. …no change.

26. …no change.

TO BE ANSWERED ONLY IN AUTOMOBILE ACCIDENT CASES

…no change.

FOR PRODUCT LIABILITY CASES (OTHER THAN PHARMACEUTICAL AND TOXIC TORT CASES), ALSO ANSWER A(2)

CERTIFICATION

…no change.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 23 and certification amended July 28, 2004 to be effective September 1, 2004; caption and final instruction amended July 23, 2010 to be effective September 1, 2010; interrogatory 1 amended to be effective .

DD. Proposed Amendments to Appendix II - Form Interrogatories A(1), C, C(1) and C(3)

1. An attorney asks the Committee to consider changes to the following questions on the Form Interrogatories:

- Question 2 of Form C Uniform Interrogatories — The question asks the responder to describe in detail his/her "version" of the accident. The attorney claims that defense counsel generally avoid answering the question by claiming that plaintiffs fail to define "version" and that the question cannot be answered accurately.
- Question 10 of Form A(1) Uniform Interrogatories and Question 13 of Form C(3) — The questions ask for identification of any treatise to be relied upon at trial. The attorney suggests that these questions should be modified to make clear that these questions deal only with treatises to be used in the plaintiff's case in chief and not to material to be used for impeachment on cross examination. It is his understanding that some judges are construing this to require disclosure of treatises that will be used for the latter purpose.

2. An attorney who represents plaintiffs in personal injury cases, some of which involve pedestrian knockdown incidents, notes that Form C(1) interrogatories #13, #15, #18 and #19 do not use the word "pedestrian," which gives defense counsel wiggle room to answer these particular interrogatories as "not applicable." This results in the propounder of the interrogatories to file, and the court to decide, motions to compel answers to these interrogatories. An amendment to these Form C(1) interrogatories would solve this problem.

These issues were referred to the Discovery Subcommittee for consideration. The Discovery Subcommittee agreed with the suggestions of the two attorneys and proposed amendments to effectuate the suggestions. The Committee endorsed the proposed amendments and recommends that Form Interrogatories A(1), C, C(1) and C(3) be amended accordingly.

The proposed amendments to Appendix II- Form Interrogatories A(1), C, C(1) and C(3) follow.

APPENDIX II. — INTERROGATORY FORMS

Form A(1). Uniform Interrogatories to be Answered by Plaintiff in Medical Malpractice Cases Only: Superior Court

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

(Caption)

1. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. Unless for purposes of impeachment, [I]if you or your expert intend to rely on or use in any way at trial any treatise, identify the treatise by title, author and edition and indicate the pertinent portions to be relied on or used at trial.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

16. …no change.

17. …no change.

18. …no change.

19. …no change.

20. …no change.

21. …no change.

CERTIFICATION

…no change.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 9 and certification amended July 28, 2004 to be effective September 1, 2004; new paragraph 19 (e) added July 23, 2010 to be effective September 1, 2010; interrogatory 10 amended to be effective .

APPENDIX II — INTERROGATORY FORMS

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

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

(Caption)

1. …no change.

2. Describe [your version of] the accident or occurrence in detail, setting forth the date, location, time and weather.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

Certification

…no change.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; entire text deleted and new text added June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 10 and certification amended July 28, 2004 to be effective September 1, 2004; interrogatory 3 amended July 27, 2006 to be effective September 1, 2006; interrogatory 2 amended to be effective .

APPENDIX II. — INTERROGATORY FORMS

Form C(1). Uniform Interrogatories to be Answered by Defendant in Automobile Accident Cases Only: Superior Court

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

(Caption)

1. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. State in terms of feet the distance between: (a) the front of your vehicle and the point of impact at the time you first observed the other vehicle, [or] vehicles, or pedestrian collided with, and state your speed at that time; (b) the front of the other vehicle, [or] vehicles, or pedestrian collided with and the point of contact at the time you first observed [it or them] the other vehicle, vehicles, or pedestrian and state its, [or] their, his or her speed at that time; and (c)

your vehicle and the vehicle, [or] vehicles, or pedestrian collided with at the time you first saw it, [or] them, or him or her.

14. …no change.

15. State what part of your vehicle came into contact with what part of the other vehicle, [or] vehicles, or pedestrian involved.

16. …no change.

17. …no change.

18. Did you observe the plaintiff's vehicle or plaintiff pedestrian prior to the accident? YES ( ) or NO ( ). If the answer is "yes", set forth the time that elapsed from the time you first saw the plaintiff's vehicle or plaintiff pedestrian until the impact occurred.

19. …no change.

20. …no change.

Certification

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; certification amended July 28, 2004 to be effective September 1, 2004; interrogatories 13, 14, 15, and 18 amended to be effective .

APPENDIX II. — INTERROGATORY FORMS

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

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

(Caption)

1. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. Unless for purposes of impeachment, [I]if you or your expert intend to rely on or use in any way at trial any treatise, identify the treatise by title, author and edition and indicate the pertinent portions to be relied on or used at trial.

14. …no change.

15. …no change.

CERTIFICATION

…no change.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 15(c) and certification amended July 28, 2004 to be effective September 1, 2004; interrogatory 15(c) amended July 27, 2006 to be effective September 1, 2006; interrogatory 13 amended to be effective .

EE. Housekeeping Amendments

The Committee recommends the following "housekeeping" amendments:

Rules 1:5-6, 4:64-1 and 4:64-2 — to address irregularities in residential mortgage foreclosure actions. See Section III.A. of this Report for the amendments to *Rules* 1:5-6, 4:64-1 and 4:64-2 adopted out of cycle.

Rule 1:13-9 — to clarify paragraph (f) of the rule. See Section III.B. of this Report for the amendment to *R.* 1:13-9 adopted out of cycle.

Rule 4:26-5(b) — to correct an incorrect reference in the rule. See Section III.C. of this Report for the amendment to *R.* 4:26-5 adopted out of cycle.

Appendix XII-A, Appendix XII-F, Appendix XII-G and Appendix XII-H — to delete attachment of the list of contact information for Superior Court Deputy Clerk Offices, Legal Services Offices and Lawyer Referral Services, and to direct individuals to the Civil Division Management Offices in the counties and the Judiciary's website for a copy of the current list.

The proposed amendments to Appendix XII-A, Appendix XII-F, Appendix XII-G and Appendix XII-H follow.

APPENDIX XII-A — SUMMONS

Attorney(s) _____

Office Address _____

_____

Town, State, Zip Code _____

Telephone Number _____

Attorney(s) for Plaintiff _____

Superior Court of New Jersey

_____ COUNTY

_____ DIVISION

Docket No:

_____

_____

Plaintiff(s)

Vs.

_____

_____

Defendant(s)

CIVIL ACTION
SUMMONS

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

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. [(The address of each deputy clerk of the Superior Court is provided.)] (A directory of the addresses of each deputy clerk of the Superior Court is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of $135.00 and completed Case Information Statement) if you want the court to hear your defense.

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

If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). [A list of these offices is provided.] If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. [A list of these numbers is also provided.] A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.

_____
Clerk of the Superior Court

DATED: _____

Name of Defendant to Be Served: _____

Address of Defendant to Be Served: _____

Note: Adopted July 13, 1994, effective September 1, 1994; amended June 28, 1996, effective September 1, 1996; address/phone information updated July 1, 1999, effective September 1, 1999; amended July 12, 2002 to be effective September 3, 2002; amended July 27, 2006 to be effective September 1, 2006; address/phone information updated October 10, 2006 to be effective immediately; address/phone information updated November 1, 2006 to be effective immediately; address/phone information updated November 17, 2006 to be effective immediately; amended July 23, 2010 to be effective September 1, 2010; amended and Directory of Superior Court Deputy Clerk's Offices, County Lawyer Referral, and Legal Services Offices deleted to be effective .

[**Directory of Superior Court Deputy Clerk's Offices**
County Lawyer Referral and Legal Services Offices

ATLANTIC COUNTY: Deputy Clerk of the Superior Court Civil Division, Direct Filing 1201 Bacharach Blvd., First Fl. Atlantic City, NJ 08401	LAWYER REFERRAL (609) 345-3444 LEGAL SERVICES (609) 348-4200
BERGEN COUNTY: Deputy Clerk of the Superior Court Civil Division, Room 115 Justice Center, 10 Main St. Hackensack, NJ 07601	LAWYER REFERRAL (201) 488-0044 LEGAL SERVICES (201) 487-2166
BURLINGTON COUNTY: Deputy Clerk of the Superior Court Central Processing Office Attn: Judicial Intake First Fl., Courts Facility 49 Rancocas Rd. Mt. Holly, NJ 08060	LAWYER REFERRAL (609) 261-4862 LEGAL SERVICES (800) 496-4570
CAMDEN COUNTY: Deputy Clerk of the Superior Court Civil Processing Office Hall of Justice 1st Fl., Suite 150 101 South 5th Street Camden, NJ 08103	LAWYER REFERRAL (856) 964-4520 LEGAL SERVICES (856) 964-2010
CAPE MAY COUNTY: Deputy Clerk of the Superior Court 9 N. Main Street Cape May Court House, NJ 08210	LAWYER REFERRAL (609) 463-0313 LEGAL SERVICES (609) 465-3001
CUMBERLAND COUNTY: Deputy Clerk of the Superior Court Civil Case Management Office 60 West Broad Street P.O. Box 10 Bridgeton, NJ 08302	LAWYER REFERRAL (856) 696-5550 LEGAL SERVICES (856) 691-0494
ESSEX COUNTY: Deputy Clerk of the Superior Court Civil Customer Service Hall of Records, Room 201 465 Dr. Martin Luther King Jr. Blvd. Newark, NJ 07102	LAWYER REFERRAL (973) 622-6204 LEGAL SERVICES (973) 624-4500

~~GLOUCESTER COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Case Management Office~~
~~Attn: Intake~~
~~First Fl., Court House~~
~~1 North Broad Street~~
~~Woodbury, NJ 08096~~

~~LAWYER REFERRAL~~
~~(856) 848-4589~~
~~LEGAL SERVICES~~
~~(856) 848-5360~~

~~HUDSON COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Superior Court, Civil Records Dept.~~
~~Brennan Court House - 1st Floor~~
~~583 Newark Ave.~~
~~Jersey City, NJ 07306~~

~~LAWYER REFERRAL~~
~~(201) 798-2727~~
~~LEGAL SERVICES~~
~~(201) 792-6363~~

~~HUNTERDON COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division~~
~~65 Park Avenue~~
~~Flemington, NJ 08822~~

~~LAWYER REFERRAL~~
~~(908) 735-2611~~
~~LEGAL SERVICES~~
~~(908) 782-7979~~

~~MERCER COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Local Filing Office, Courthouse~~
~~175 S. Broad Street, P.O. Box 8068~~
~~Trenton, NJ 08650~~

~~LAWYER REFERRAL~~
~~(609) 585-6200~~
~~LEGAL SERVICES~~
~~(609) 695-6249~~

~~MIDDLESEX COUNTY:~~
~~Deputy Clerk of the Superior Court,~~
~~Middlesex Vicinage~~
~~2nd Floor - Tower~~
~~56 Paterson Street, P.O. Box 2633~~
~~New Brunswick, NJ 08903-2633~~

~~LAWYER REFERRAL~~
~~(732) 828-0053~~
~~LEGAL SERVICES~~
~~(732) 249-7600~~

~~MONMOUTH COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Court House~~
~~P.O. Box 1269~~
~~Freehold, NJ 07728-1269~~

~~LAWYER REFERRAL~~
~~(732) 431-5544~~
~~LEGAL SERVICES~~
~~(732) 866-0020~~

~~MORRIS COUNTY:~~
~~Morris County Courthouse~~
~~Civil Division~~
~~Washington and Court Streets~~
~~P. O. Box 910~~
~~Morristown, NJ 07963-0910~~

~~LAWYER REFERRAL~~
~~(973) 267-5882~~
~~LEGAL SERVICES~~
~~(973) 285-6911~~

~~OCEAN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~118 Washington Street, Room 121~~
~~P.O. Box 2191~~

~~LAWYER REFERRAL~~
~~(732) 240-3666~~
~~LEGAL SERVICES~~
~~(732) 341-2727~~

Toms River, NJ 08754-2191

PASSAIC COUNTY:
Deputy Clerk of the Superior Court
Civil Division
Court House
77 Hamilton Street
Paterson, NJ 07505

LAWYER REFERRAL
(973) 278-9223
LEGAL SERVICES
(973) 523-2900

SALEM COUNTY:
Deputy Clerk of the Superior Court
Attn: Civil Case Management Office
92 Market Street
Salem, NJ 08079

LAWYER REFERRAL
(856) 935-5629
LEGAL SERVICES
(856) 451-0003

SOMERSET COUNTY:
Deputy Clerk of the Superior Court
Civil Division
P.O. Box 3000
40 North Bridge Street
Somerville, N.J. 08876

LAWYER REFERRAL
(908) 685-2323
LEGAL SERVICES
(908) 231-0840

SUSSEX COUNTY:
Deputy Clerk of the Superior Court
Sussex County Judicial Center
43-47 High Street
Newton, NJ 07860

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 383-7400

UNION COUNTY:
Deputy Clerk of the Superior Court
1st Fl., Court House
2 Broad Street
Elizabeth, NJ 07207-6073

LAWYER REFERRAL
(908) 353-4715
LEGAL SERVICES
(908) 354-4340

WARREN COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
Court House
413 Second Street
Belvidere, NJ 07823-1500

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(908) 475-2010]

APPENDIX XII-F

OSC AS ORIGINAL PROCESS – SUMMARY ACTION
PURSUANT TO *R* 4:67-1(A)
FAMILY PART *R*. 5:4-3(b)
SUBMITTED WITH NEW COMPLAINT
FORM CAN ALSO BE FOUND AT
WWW.NJCOURTSONLINE.COM

SUPERIOR COURT OF NEW JERSEY
_____ DIVISION _____ COUNTY
_____ PART

[I*nsert the plaintiff's name*], Plaintiff(s), v. [I*nsert the defendant's name*], Defendant(s).	Docket No.: CIVIL ACTION ORDER TO SHOW CAUSE SUMMARY ACTION

THIS MATTER being brought before the court by _____, attorney for plaintiff, [*insert the plaintiff's name*], seeking relief by way of summary action pursuant to R. 4:67-1(a), based upon the facts set forth in the verified complaint filed herewith; and the court having determined that this matter may be commenced by order to show cause as a summary proceeding pursuant to [*insert the statute or court rule that permits the matter to be brought as a summary action*] and for good cause shown.

IT IS on this _____ day of _____, 20__, *ORDERED* that the defendant(s), [*insert defendant's name(s)*], appear and show cause on the _____day of _____, 20___ before the Superior Court at the _____ County Courthouse in _____, New Jersey at _____ o'clock in the _____ noon, or as soon thereafter as counsel can be heard, why judgment should not be entered for:

A. [*Set forth with specificity the return date relief that the plaintiff is seeking.*];

B. _____;

C. _____;

D. Granting such other relief as the court deems equitable and just.

And it is further ORDERED that:

1. A copy of this order to show cause, verified complaint and all supporting affidavits or certifications submitted in support of this application be served upon the defendant(s), [personally *or alternate: describe form of substituted service*] within ____ days of the date hereof, in accordance with *R*. 4:4-3 and *R*. 4:4-4, this being original process.

2. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant(s) no later than three (3) days before the return date.

3. Defendant(s) shall file and serve a written answer, an answering affidavit or a motion returnable on the return date *[Family Part alternate:* appearance or response] to this order to show cause and the relief requested in the verified complaint and proof of service of the same by _____, 20__. The answer, answering affidavit or a motion [*Family Part alternate:* appearance, response], as the case may be, must be filed with the Clerk of the Superior Court in the county listed above and a copy of the papers must be sent directly to the chambers of Judge _____.

4. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by _____, 20__. The reply papers must be filed with the Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

5. If the defendant(s) do/does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

6. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

7. Defendant(s) take notice that the plaintiff has filed a lawsuit [*Family Part alternate:* divorce action] against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer, an answering affidavit or a motion returnable on the return date to the order to show cause [*Family Part alternate*: appearance or response] and proof of service before the return date of the order to show cause.

These documents must be [fled] filed with the Clerk of the Superior Court in the county listed above. [A list of these offices is provided.] A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include a $ _____ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your answer, answering affidavit or motion [*Family Part alternate*: appearance or response] to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your answer, answering affidavit or motion [*Family Part alternate*: appearance or response] with the fee or judgment may be entered against you by default.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). [A list of these offices is provided.] If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. [A list of these numbers is also provided.] A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.

9. The Court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____ days before the return date.

_____

J.S.C.

Note: Adopted as Appendix XII-F July 9, 2008 to be effective September 1, 2008; amended and Directory of Superior Court Deputy Clerk's Offices, County Lawyer Referral, and Legal Services Offices deleted _____ to be effective _____.

~~ATLANTIC COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division, Direct Filing~~
~~1201 Bacharach Blvd., First Fl.~~
~~Atlantic City, NJ 08401~~

~~LAWYER REFERRAL~~
~~(609) 345-3444~~
~~LEGAL SERVICES~~
~~(609) 348-4200~~

~~BERGEN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Case Processing Section, Room 119~~
~~Justice Center, 10 Main St.~~
~~Hackensack, NJ 07601-0769~~

~~LAWYER REFERRAL~~
~~(201) 488-0044~~
~~LEGAL SERVICES~~
~~(201) 487-2166~~

~~BURLINGTON COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Central Processing Office~~
~~Attn: Judicial Intake~~
~~First Fl., Courts Facility~~
~~49 Rancocas Rd.~~
~~Mt. Holly, NJ 08060~~

~~LAWYER REFERRAL~~
~~(609) 261-4862~~
~~LEGAL SERVICES~~
~~(609) 261-1088~~

~~CAMDEN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Processing Office~~
~~1st Fl., Hall of Records~~
~~101 S. Fifth St.~~
~~Camden, NJ 08103~~

~~LAWYER REFERRAL~~
~~(856) 964-4520~~
~~LEGAL SERVICES~~
~~(856) 964-2010~~

~~CAPE MAY COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~9 N. Main Street~~
~~Box DN-209~~
~~Cape May Court House, NJ 08210~~

~~LAWYER REFERRAL~~
~~(609) 463-0313~~
~~LEGAL SERVICES~~
~~(609) 465-3001~~

~~CUMBERLAND COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Case Management Office~~
~~Broad & Fayette Sts., P.O. Box 615~~
~~Bridgeton, NJ 08302~~

~~LAWYER REFERRAL~~
~~(856) 692-6207~~
~~LEGAL SERVICES~~
~~(856) 451-0003~~

~~ESSEX COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~50 West Market Street~~
~~Room 131~~
~~Newark, NJ 07102~~

~~LAWYER REFERRAL~~
~~(973) 622-6207~~
~~LEGAL SERVICES~~
~~(973) 624-4500~~

~~GLOUCESTER COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Case Management Office~~
~~Attn: Intake~~
~~First Fl., Court House~~
~~1 North Broad Street, P.O. Box 129~~
~~Woodbury, NJ 08096~~

~~LAWYER REFERRAL~~
~~(856) 848-4589~~
~~LEGAL SERVICES~~
~~(856) 848-5360~~

~~HUDSON COUNTY: Deputy Clerk of the Superior Court~~
~~Superior Court, Civil Records Dept.~~
~~Brennan Court House - 1st Floor~~
~~583 Newark Ave.~~
~~Jersey City, NJ 07306~~

~~LAWYER REFERRAL~~
~~(201) 798-2727~~
~~LEGAL SERVICES~~
~~(201) 792-6363~~

HUNTERDON COUNTY: Deputy Clerk of the Superior Court Civil Division 65 Park Avenue Flemington, NJ 08822	LAWYER REFERRAL (908) 735-2611 LEGAL SERVICES (908) 782-7979
MERCER COUNTY: Deputy Clerk of the Superior Court Local Filing Office, Courthouse 175 S. Broad Street, P.O. Box 8068 Trenton, NJ 08650	LAWYER REFERRAL (609) 585-6200 LEGAL SERVICES (609) 695-6249
MIDDLESEX COUNTY: Deputy Clerk of the Superior Court Administration Building Third Floor 1 Kennedy Sq., P.O. Box 2633 New Brunswick, NJ 08903-2633	LAWYER REFERRAL (732) 828-0053 LEGAL SERVICES (732) 249-7600
MONMOUTH COUNTY: Deputy Clerk of the Superior Court Court House 71 Monument Park P.O. Box 1269 Freehold, NJ 07728-1269	LAWYER REFERRAL (732) 431-5544 LEGAL SERVICES (732) 866-0020
MORRIS COUNTY: Deputy Clerk of the Superior Court Civil Division 30 Schuyler Pl., P.O. Box 910 Morristown, NJ 07960-0910	LAWYER REFERRAL (973) 267-5882 LEGAL SERVICES (973) 285-6911
OCEAN COUNTY: Deputy Clerk of the Superior Court Court House, Room 119 118 Washington Street Toms River, NJ 08754	LAWYER REFERRAL (732) 240-3666 LEGAL SERVICES (732) 341-2727
PASSAIC COUNTY: Deputy Clerk of the Superior Court Civil Division Court House 77 Hamilton St. Paterson, NJ 07505	LAWYER REFERRAL (973) 278-9223 LEGAL SERVICES (973) 345-7171
SALEM COUNTY: Deputy Clerk of the Superior Court 92 Market St., P.O. Box 18 Salem, NJ 08079	LAWYER REFERRAL (856) 935-5628 LEGAL SERVICES (856) 451-0003
SOMERSET COUNTY: Deputy Clerk of the Superior Court Civil Division Office New Court House, 3rd Fl. P.O. Box 3000 Somerville, NJ 08876	LAWYER REFERRAL (908) 685-2323 LEGAL SERVICES (908) 231-0840

SUSSEX COUNTY:
Deputy Clerk of the Superior Court
Sussex County Judicial Center
43-47 High Street
Newton, NJ 07860

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 383-7400

UNION COUNTY:
Deputy Clerk of the Superior Court
1st Fl., Court House
2 Broad Street
Elizabeth, NJ 07207-6073

LAWYER REFERRAL
(908) 353-4715
LEGAL SERVICES
(908) 354-4340

WARREN COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
Court House
413 Second Street
Belvidere, NJ 07823-1500

LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 475-2010

APPENDIX XII-G

OTSC AS ORIGINAL PROCESS –
SUBMITTED WITH NEW COMPLAINT
PRELIMINARY INJUNCTIVE RELIEF
PURSUANT TO RULE 4:52-1 – NO TRO
FORM CAN ALSO BE FOUND AT
WWW.NJCOURTSONLINE.COM

SUPERIOR COURT OF NEW JERSEY
_____ Division _____ County
_____ PART

(Insert the Plaintiff's name), Plaintiff(s) v. *(Insert the defendant's name),* Defendant(s)	Docket No CIVIL ACTION ORDER TO SHOW CAUSE PRELIMINARY INJUNCTION PRUSUANT TO *RULE* 4:52

THIS MATTER being brought before the court by _____, attorney for plaintiff, (*insert the plaintiff's name)*, seeking relief by way of preliminary injunction at the return date set forth below pursuant to *R*. 4:52, based upon the facts set forth in the verified complaint filed herewith and for good cause shown.

It is on this ____ day of _____ ORDERED that defendant(s), *(insert the defendant's name)*, appear and show cause before the Superior Court at the _____ County Courthouse in _____, New Jersey at _____ o'clock in the _____ noon or as soon thereafter as counsel can be heard, on the _____day of _____, 20 __ why an order should not be issued preliminarily enjoining and restraining [insert the defendant's name] from

A. (*Set forth with specificity the return date relief that the plaintiff is seeking)*;

B. _____;

C. _____;

D. Granting such other relief as the court deems equitable and just.

And it is further ORDERED that:

1. A copy of this order to show cause, verified complaint, legal memorandum and any supporting affidavits or certifications submitted in support of this application be served upon the defendant(s) [personally or alternate: describe form of substituted service] within ____ days of the date hereof, in accordance with *R*. 4:4-3 and *R*. 4:4-4, this being original process.

2. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant no later than three (3) days before the return date.

3. Defendant(s) shall file and serve a written response to this order to show cause and the request for entry of injunctive relief and proof of service by _____, 20__. The original documents must be filed with the clerk of the Superior Court in the county listed above. [A list of these offices is provided.] A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. You must send a copy of your opposition papers directly to Judge _____, whose address is _____, New Jersey. You must also send a copy of your opposition papers to the plaintiff's attorney whose name and address appears above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of $ _____ and serve your opposition on your adversary, if you want the court to hear your opposition to the injunctive relief the plaintiff is seeking.

4. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by _____, 20__. The reply papers must be filed with the

Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

5. If the defendant does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

6. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

7. Defendant takes notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer to the complaint and proof of service within 35 days from the day of service of this order to show cause; not counting the day you received it.

These documents must be [fled] filed with the Clerk of the Superior Court in the county listed above. [A list of these offices is provided.] A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include a $_____ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer (with the fee) or judgment may be entered against you by default. Please note: Opposition to the order to show cause is not an Answer and you must file both. Please note further: if you do not

file and serve an Answer within 35 days of this Order, the court may enter a default against you for the relief plaintiff demands.

8. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). [A list of these offices is provided.] If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. [A list of these numbers is also provided.] A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf.

9. The court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than _____ days before the return date.

_____
J.S.C.

Note: Adopted as Appendix XII-G July 9, 2008 to be effective September 1, 2008; amended and Directory of Superior Court Deputy Clerk's Offices, County Lawyer Referral, and Legal Services Offices deleted _____ to be effective _____.

~~ATLANTIC COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division, Direct Filing~~
~~1201 Bacharach Blvd., First Fl.~~
~~Atlantic City, NJ 08401~~

~~LAWYER REFERRAL~~
~~(609) 345-3444~~
~~LEGAL SERVICES~~
~~(609) 348-4200~~

~~BERGEN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Case Processing Section, Room 119~~
~~Justice Center, 10 Main St.~~
~~Hackensack, NJ 07601-0769~~

~~LAWYER REFERRAL~~
~~(201) 488-0044~~
~~LEGAL SERVICES~~
~~(201) 487-2166~~

~~BURLINGTON COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Central Processing Office~~
~~Attn: Judicial Intake~~
~~First Fl., Courts Facility~~
~~49 Rancocas Rd.~~
~~Mt. Holly, NJ 08060~~

~~LAWYER REFERRAL~~
~~(609) 261-4862~~
~~LEGAL SERVICES~~
~~(609) 261-1088~~

~~CAMDEN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Processing Office~~
~~1st Fl., Hall of Records~~
~~101 S. Fifth St.~~
~~Camden, NJ 08103~~

~~LAWYER REFERRAL~~
~~(856) 964-4520~~
~~LEGAL SERVICES~~
~~(856) 964-2010~~

~~CAPE MAY COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~9 N. Main Street~~
~~Box DN-209~~
~~Cape May Court House, NJ 08210~~

~~LAWYER REFERRAL~~
~~(609) 463-0313~~
~~LEGAL SERVICES~~
~~(609) 465-3001~~

~~CUMBERLAND COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Case Management Office~~
~~Broad & Fayette Sts., P.O. Box 615~~
~~Bridgeton, NJ 08302~~

~~LAWYER REFERRAL~~
~~(856) 692-6207~~
~~LEGAL SERVICES~~
~~(856) 451-0003~~

~~ESSEX COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~50 West Market Street~~
~~Room 131~~
~~Newark, NJ 07102~~

~~LAWYER REFERRAL~~
~~(973) 622-6207~~
~~LEGAL SERVICES~~
~~(973) 624-4500~~

~~GLOUCESTER COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Case Management Office~~
~~Attn: Intake~~
~~First Fl., Court House~~
~~1 North Broad Street, P.O. Box 129~~
~~Woodbury, NJ 08096~~

~~LAWYER REFERRAL~~
~~(856) 848-4589~~
~~LEGAL SERVICES~~
~~(856) 848-5360~~

~~HUDSON COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Superior Court, Civil Records Dept.~~
~~Brennan Court House -- 1st Floor~~
~~583 Newark Ave.~~
~~Jersey City, NJ 07306~~

~~LAWYER REFERRAL~~
~~(201) 798-2727~~
~~LEGAL SERVICES~~
~~(201) 792-6363~~

~~HUNTERDON COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division~~
~~65 Park Avenue~~
~~Flemington, NJ 08822~~

~~LAWYER REFERRAL~~
~~(908) 735-2611~~
~~LEGAL SERVICES~~
~~(908) 782-7979~~

~~MERCER COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Local Filing Office, Courthouse~~
~~175 S. Broad Street, P.O. Box 8068~~
~~Trenton, NJ 08650~~

~~LAWYER REFERRAL~~
~~(609) 585-6200~~
~~LEGAL SERVICES~~
~~(609) 695-6249~~

~~MIDDLESEX COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Administration Building~~
~~Third Floor~~
~~1 Kennedy Sq., P.O. Box 2633~~
~~New Brunswick, NJ 08903-2633~~

~~LAWYER REFERRAL~~
~~(732) 828-0053~~
~~LEGAL SERVICES~~
~~(732) 249-7600~~

~~MONMOUTH COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Court House~~
~~71 Monument Park~~
~~P.O. Box 1269~~
~~Freehold, NJ 07728-1269~~

~~LAWYER REFERRAL~~
~~(732) 431-5544~~
~~LEGAL SERVICES~~
~~(732) 866-0020~~

~~MORRIS COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division~~
~~30 Schuyler Pl., P.O. Box 910~~
~~Morristown, NJ 07960-0910~~

~~LAWYER REFERRAL~~
~~(973) 267-5882~~
~~LEGAL SERVICES~~
~~(973) 285-6911~~

~~OCEAN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Court House, Room 119~~
~~118 Washington Street~~
~~Toms River, NJ 08754~~

~~LAWYER REFERRAL~~
~~(732) 240-3666~~
~~LEGAL SERVICES~~
~~(732) 341-2727~~

~~PASSAIC COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division~~
~~Court House~~
~~77 Hamilton St.~~
~~Paterson, NJ 07505~~

~~LAWYER REFERRAL~~
~~(973) 278-9223~~
~~LEGAL SERVICES~~
~~(973) 345-7171~~

~~SALEM COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~92 Market St., P.O. Box 18~~
~~Salem, NJ 08079~~

~~LAWYER REFERRAL~~
~~(856) 935-5628~~
~~LEGAL SERVICES~~
~~(856) 451-0003~~

~~SOMERSET COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division Office~~
~~New Court House, 3rd Fl.~~
~~P.O. Box 3000~~
~~Somerville, NJ 08876~~

~~LAWYER REFERRAL~~
~~(908) 685-2323~~
~~LEGAL SERVICES~~
~~(908) 231-0840~~

~~SUSSEX COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Sussex County Judicial Center~~
~~43-47 High Street~~
~~Newton, NJ 07860~~

~~LAWYER REFERRAL~~
~~(973) 267-5882~~
~~LEGAL SERVICES~~
~~(973) 383-7400~~

~~UNION COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~1st Fl., Court House~~
~~2 Broad Street~~
~~Elizabeth, NJ 07207-6073~~

~~LAWYER REFERRAL~~
~~(908) 353-4715~~
~~LEGAL SERVICES~~
~~(908) 354-4340~~

~~WARREN COUNTY:~~
~~Deputy Clerk of the Superior Court~~
~~Civil Division Office~~
~~Court House~~
~~413 Second Street~~
~~Belvidere, NJ 07823-1500~~

~~LAWYER REFERRAL~~
~~(973) 267-5882~~
~~LEGAL SERVICES~~
~~(973) 475-2010~~

APPENDIX XII-H

OSC AS ORIGINAL PROCESS –
SUBMITTED WITH NEW COMPLAINT
PRELIMINARY INJUNCTIVE RELIEF AND
TEMPORARY RESTRAINING ORDER

PURSUANT TO RULE 4:52
FORM CAN ALSO BE FOUND AT
WWW.NJCOURTSONLINE.COM

SUPERIOR COURT OF NEW JERSEY
_____ DIVISION _____ COUNTY
_____ PART

[*Insert the plaintiff's name*] Plaintiff(s), v. [*Insert the defendant's name*] Defendant(s).	Docket No.: CIVIL ACTION ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS PURSUANT TO RULE 4:52

THIS MATTER being brought before the court by _____, attorney for plaintiff, [*insert the plaintiff's name*], seeking relief by way of temporary restraints pursuant to *R.* 4:52, based upon the facts set forth in the verified complaint filed herewith; and it appearing that [the defendant has notice of this application] *or* [defendant consent's to plaintiff's application] *or* [immediate and irreparable damage will probably result before notice can be given and a hearing held] and for good cause shown.

It is on this ____ day of _____ *ORDERED* that defendant, [*insert the defendant's name*], appear and show cause before the Superior Court at the _____ County Courthouse in _____, New Jersey at _____ o'clock in the _____ noon or as soon thereafter as counsel can be heard, on the _____day of _____, 20 __ why an order should not be issued preliminarily enjoining and restraining defendant, [*insert the defendant's name*], from

A. [*Set forth with specificity the return date relief that the plaintiff is seeking.*];

B. _____;

C. _____;

D. Granting such other relief as the court deems equitable and just.

And it is further *ORDERED* that pending the return date herein, the defendant is [*temporarily*] enjoined and restrained from:

A. [S*et forth with specificity the temporary restraints that the plaintiff is seeking.*];

B. _____;

C. _____.

And it is further *ORDERED* that:

1. The defendant may move to dissolve or modify the temporary restraints herein contained on two (2) days notice to the [plaintiff's attorney *or alternate:* plaintiff].

2. A copy of this order to show cause, verified complaint, legal memorandum and any supporting affidavits or certifications submitted in support of this application be served upon the defendant [personally *or alternate: describe form of substituted service*] within ____ days of the date hereof, in accordance with *R*. 4:4-3 and *R*. 4:4-4, this being original process.

3. The plaintiff must file with the court his/her/its proof of service of the pleadings on the defendant no later than three (3) days before the return date.

4. Defendant shall file and serve a written response to this order to show cause and the request for entry of injunctive relief and proof of service by _____, 20__. The original documents must be filed with the Clerk of the Superior Court in the county listed above. [A list of these offices is provided.] A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. You must send a copy of your opposition papers directly to Judge _____, whose address is _____, New Jersey. You must also send a copy of your opposition papers to the plaintiff's attorney whose name and address appears above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file your opposition and pay the required fee of $ _____ and serve your opposition on your adversary, if you want the court to hear your opposition to the injunctive relief the plaintiff is seeking.

5. The plaintiff must file and serve any written reply to the defendant's order to show cause opposition by _____, 20__. The reply papers must be filed with the

Clerk of the Superior Court in the county listed above and a copy of the reply papers must be sent directly to the chambers of Judge _____.

6. If the defendant does not file and serve opposition to this order to show cause, the application will be decided on the papers on the return date and relief may be granted by default, provided that the plaintiff files a proof of service and a proposed form of order at least three days prior to the return date.

7. If the plaintiff has not already done so, a proposed form of order addressing the relief sought on the return date (along with a self-addressed return envelope with return address and postage) must be submitted to the court no later than three (3) days before the return date.

8. Defendant take notice that the plaintiff has filed a lawsuit against you in the Superior Court of New Jersey. The verified complaint attached to this order to show cause states the basis of the lawsuit. If you dispute this complaint, you, or your attorney, must file a written answer to the complaint and proof of service within 35 days from the date of service of this order to show cause; not counting the day you received it.

These documents must be [fled] filed with the Clerk of the Superior Court in the county listed above. [A list of these offices is provided.] A directory of these offices is available in the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/10153_deptyclerklawref.pdf. Include a $_____ filing fee payable to the "Treasurer State of New Jersey." You must also send a copy of your Answer to the plaintiff's attorney whose name and address appear above, or to the plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve your Answer (with the fee) or judgment may be entered against you by default. Please note: Opposition to the order to show cause is not an Answer and you must file both. Please note further: if you do not file and serve an Answer within 35 days of this Order, the Court may enter a default against you for the relief plaintiff demands.

9. If you cannot afford an attorney, you may call the Legal Services office in the county in which you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). [A list of these offices is provided.] If you do not have an attorney and are not eligible for free legal assistance you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. [A list of these numbers is also provided.] A directory with contact information for local Legal Services Offices and Lawyer Referral Services is available in

the Civil Division Management Office in the county listed above and online at http://www.judiciary.state.nj.us/prose/ 10153_deptyclerklawref.pdf.

10. The court will entertain argument, but not testimony, on the return date of the order to show cause, unless the court and parties are advised to the contrary no later than ___ days before the return date.

_____
J.S.C.

Note: Adopted as Appendix XII-H July 9, 2008 to be effective September 1, 2008; amended and Directory of Superior Court Deputy Clerk's Offices, County Lawyer Referral, and Legal Services Offices deleted to be effective .

ATLANTIC COUNTY: Deputy Clerk of the Superior Court Civil Division, Direct Filing 1201 Bacharach Blvd., First Fl. Atlantic City, NJ 08401	LAWYER REFERRAL (609) 345-3444 LEGAL SERVICES (609) 348-4200
BERGEN COUNTY: Deputy Clerk of the Superior Court Case Processing Section, Room 119 Justice Center, 10 Main St. Hackensack, NJ 07601-0769	LAWYER REFERRAL (201) 488-0044 LEGAL SERVICES (201) 487-2166
BURLINGTON COUNTY: Deputy Clerk of the Superior Court Central Processing Office Attn: Judicial Intake First Fl., Courts Facility 49 Rancocas Rd. Mt. Holly, NJ 08060	LAWYER REFERRAL (609) 261-4862 LEGAL SERVICES (609) 261-1088
CAMDEN COUNTY: Deputy Clerk of the Superior Court Civil Processing Office 1st Fl., Hall of Records 101 S. Fifth St. Camden, NJ 08103	LAWYER REFERRAL (856) 964-4520 LEGAL SERVICES (856) 964-2010
CAPE MAY COUNTY: Deputy Clerk of the Superior Court 9 N. Main Street Box DN-209 Cape May Court House, NJ 08210	LAWYER REFERRAL (609) 463-0313 LEGAL SERVICES (609) 465-3001
CUMBERLAND COUNTY: Deputy Clerk of the Superior Court Civil Case Management Office Broad & Fayette Sts., P.O. Box 615 Bridgeton, NJ 08302	LAWYER REFERRAL (856) 692-6207 LEGAL SERVICES (856) 451-0003
ESSEX COUNTY: Deputy Clerk of the Superior Court 50 West Market Street Room 131 Newark, NJ 07102	LAWYER REFERRAL (973) 622-6207 LEGAL SERVICES (973) 624-4500
GLOUCESTER COUNTY: Deputy Clerk of the Superior Court Civil Case Management Office Attn: Intake First Fl., Court House 1 North Broad Street, P.O. Box 129 Woodbury, NJ 08096	LAWYER REFERRAL (856) 848-4589 LEGAL SERVICES (856) 848-5360
HUDSON COUNTY: Deputy Clerk of the Superior Court Superior Court, Civil Records Dept. Brennan Court House-- 1st Floor 583 Newark Ave. Jersey City, NJ 07306	LAWYER REFERRAL (201) 798-2727 LEGAL SERVICES (201) 792-6363
HUNTERDON COUNTY: Deputy Clerk of the Superior Court Civil Division 65 Park Avenue Flemington, NJ 08822	LAWYER REFERRAL (908) 735-2611 LEGAL SERVICES (908) 782-7979
MERCER COUNTY: Deputy Clerk of the Superior Court Local Filing Office, Courthouse 175 S. Broad Street, P.O. Box 8068 Trenton, NJ 08650	LAWYER REFERRAL (609) 585-6200 LEGAL SERVICES (609) 695-6249

MIDDLESEX COUNTY:
Deputy Clerk of the Superior Court
Administration Building
Third Floor
1 Kennedy Sq., P.O. Box 2633
New Brunswick, NJ 08903-2633

LAWYER REFERRAL
(732) 828-0053
LEGAL SERVICES
(732) 249-7600

MONMOUTH COUNTY:
Deputy Clerk of the Superior Court
Court House
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Freehold, NJ 07728-1269

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Deputy Clerk of the Superior Court
Civil Division
30 Schuyler Pl., P.O. Box 910
Morristown, NJ 07960-0910

LAWYER REFERRAL
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OCEAN COUNTY:
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Court House, Room 119
118 Washington Street
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Sussex County Judicial Center
43-47 High Street
Newton, NJ 07860

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2 Broad Street
Elizabeth, NJ 07207-6073

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(908) 354-4340

WARREN COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
Court House
413 Second Street
Belvidere, NJ 07823-1500

LAWYER REFERRAL
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II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendment to *R.* 1:5-6 — Filing

Subparagraph (c)(2) of *Rule* 1:5-6 provides that answers by defendants against whom default has been entered will be accepted and filed in mortgage or tax foreclosure actions. As a result, the Superior Court Clerk's Office is required to accept answers in cases in which default has already been entered. These matters may then be added to the vicinage equity judges' caseloads as much as two or three years after the complaint was filed. The Conference of General Equity Presiding Judges proposes that *Rule* 1:5-6(c)(2) be amended to remove the phrase "other than in a mortgage or tax foreclosure action" so that all answers filed by defendants against whom default has been entered in all cases will be stamped "Received but not Filed (date)" and returned to the filer. The Conference of General Equity Presiding Judges submits that the proposed amendment would make dockets more manageable. The Committee did not come to a consensus on the proposed amendment, and declines to recommend an amendment to *Rule* 1:5-6.

B. Proposed Amendment to *R.* 1:21-1(c) — Who May Practice; Appearance in Court

A mediator inquired whether a corporation or limited liability company may represent itself in court-ordered mediation (Civil presumptive mediation or General Equity referred mediation). Currently, staff has required corporations and limited liability companies to be represented by counsel in mediation. *Rule* 1:21-1(c) provides that any entity, no matter how formed or for whatever purposes (other than a sole proprietorship), may appear or file any paper in any action in any court except through an attorney authorized to practice in this State. The mediator argues that mediation, although court ordered, is not an "appearance" in court; therefore, there should be no prohibition for a corporation to appear *pro se* (or through a non-attorney) in mediation. It has been noted that if settlement is reached at mediation, a *pro se* corporation cannot file a stipulation of dismissal because of the *Rule* 1:21-1(c) prohibition.

Members expressed concern with corporations appearing *pro se* in mediation because unrepresented corporations cannot sign settlement documents, thus creating problems with the later enforcement of a settlement achieved in the mediation. Also, it was perceived that many attorneys are not comfortable dealing with adverse unrepresented corporations. The Committee does not recommend an amendment to *Rule* 1:21-1(c).

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

A subcommittee was established during the last rules cycle to review *Rule* 1:21-7(c) and make recommendations regarding the maximum allowable contingent fees for tort recoveries. The subcommittee's work carried over to this rules cycle. A majority of the subcommittee determined that an increase to the maximum allowable contingent fees is warranted. The majority recommended increasing the dollar amount set forth in subparagraphs (1) through (4) from $500,000 to $750,000. The reasoning for the increase is that the dollar amount has not been increased since 1996 and it perceived that it is fair to adjust the maximum allowable limit as it impacts only those cases in which there has been a substantial recovery. The majority of the subcommittee also recommended setting a presumptive twenty (20%) maximum contingent fee for settlement amounts in excess of $3 million. A presumptive 20% enhancement should be the starting point from which a plaintiff could apply for a lesser amount and the plaintiff's attorney could apply for a greater amount. The court would then use its discretion in determining the actual award amount. A minority of the subcommittee found that there is data available both to support and refute the recommendation for increasing the limits to $750,000. Further, there should be no presumptive 20% enhancement for verdicts in excess of $3 million because the rule already provides for a fee enhancement in individual cases. Finally, the minority of the subcommittee was of the view that there should be no increase in these economic times.

After discussion, a slight majority of the full Committee rejected the subcommittee's recommendation to increase the dollar amount for contingent fees. An overwhelming majority of the full Committee, however, rejected the proposal for a presumptive 20% enhancement for any recovery in excess of $3 million. Accordingly, the Committee declines to recommend any amendments to the rule regarding the maximum allowable contingent fees.

See Section I.D. of this Report for proposed amendments to *Rule* 1:21-7 that the Committee recommends.

D. Proposed Amendment to *R.* 1:36-3 – Unpublished Opinions

In the last rules cycle, the Committee proposed and the Court endorsed a recommendation to limit the requirement to provide unpublished opinions to the court and other parties to contrary opinions rather than all relevant opinions as previously required. The Court, in considering the proposal (which was adopted), realized that there are broader issues associated with the current prohibition on the court and litigants citing opinions not approved for publication and has referred the substance of the rule, following the first sentence, to the Committee for recommendations.

A subcommittee was formed to address the Supreme Court's referral of the issue. The subcommittee reviewed the history of amendments to the rule, paying close attention to the 2010 amendments. The subcommittee discussed making all written opinions precedential but preferred continuance of the current practice as it appears fair to all persons, some of whom many not enjoy the same access to legal research resources as others, while at the same time recognizing the far and facile reach of internet searching, and the myriad tools available to research the law. The subcommittee expressed general satisfaction with the current rule except with respect to some opinions that neglect or ignore *Rule* 1:36-3's conditional prohibition on citing unpublished opinions. The subcommittee, however, determined that that problem is not significant and does not warrant a rule change.

Although the subcommittee did not recommend amending the rule, some members of the full Committee noted that unpublished opinions may be helpful, especially in cases of first impression, to the bench and bar, but should not be precedential. Some members also expressed concern that legal arguments may be substantively affected by the courts' inability to cite to unpublished opinions, apart from the narrow exceptions noted in the rule.

The full Committee initially agreed with the subcommittee. In light of a November 4, 2011 *New Jersey Law Journal* editorial on the subject, the subcommittee was asked to reconsider its prior recommendation. Although it discussed the wisdom of continuing the practice of prohibiting courts from citing unpublished opinions, a majority of the subcommittee concluded that there was no adequate reason to adjust the present practice. The subcommittee noted that current federal practice is inconsistent, as several circuit courts have their own variation of the federal citation rule. Since our State's rule is uniform, the subcommittee determined that federal practice is no reason to change New Jersey's court rule. The subcommittee reaffirmed its prior recommendation that no amendment is necessary to *Rule* 1:36-3.

Members of the full Committee discussed whether prohibiting judges from citing unpublished opinions gives judges, in essence, a license to "plagiarize" unpublished opinions. Although judges are permitted to consider unpublished opinions in their review of a case, they are not permitted to discuss or cite to unpublished opinions in their decisions. Some members stated that the present prohibition in *Rule* 1:36-3 hinders the transparency of the court's reasoning. Additionally, members stated that issues arise when there are no published opinions that address how new laws and regulations should be interpreted, and there are not enough published opinions on a particular issue. These members suggested that a modest amendment to the rule to allow discussion of unpublished opinions by judges.

By a slight majority, the Committee reaffirmed its prior position that no amendment to *Rule* 1:36-3 is necessary at this time. Accordingly, the Committee does not recommend an amendment to *Rule* 1:36-3.

E. Proposed Amendments to *Rules* 4:4-3 and 4:4-4 — re: Service of Process

An attorney submitted several requests with respect to *Rules* 4:4-3 and 4:4-4. First, the attorney requested that the Committee address whether litigants should be required to file a motion to obtain an order permitting service of process by mail. He states that some judges have required a motion on notice to the defendant be filed, although the Court Rules do not require such a notice of motion. Second, the attorney asked that the Committee to consider amending the Rules to permit service of process by mail in all civil matters. He contends that there should not be two different predominant modes of service in the Law Division (*i.e.*, personal service in the Civil Part and service by mail in the Special Civil Part) where the only difference between the two parts is the amount in controversy. Lastly, the attorney perceives that there is an anomaly in the language of *Rule* 4:4-3, which authorizes service by mail but does not mention the ability to enter default and the language in *Rule* 4:4-4(c). The attorney has suggested amending *Rule* 4:4-4(c) to add language that if service is made in accordance with *Rule* 4:4-3(a), default may be entered.

The Committee considered these various issues relating to the service rules, but determined that no amendments are necessary to *Rules* 4:4-3 and 4:4-4.

F. Proposed Amendment to *R.* 4:23-5(a) — Dismissal for Failure to Make Discovery

A Committee member has suggested that subparagraph (a)(1) of *Rule* 4:23-5 be amended to provide that upon the filing of a motion pursuant to the rule, the motion shall be granted unless the party against which the motion has been filed provides fully responsive discovery or exceptional circumstances are demonstrated. He contends that such a rule amendment would prevent the late filing of opposition papers, the submission of unresponsive answers to discovery and the need to file a second motion for more specific answers. After discussion, the Committee determined that no amendments to *Rule* 4:23-5(a)(1) are necessary at this time.

G. Proposed Amendment to *R.* 4:23-5(c) — Motions to Compel Discovery

An attorney suggests that paragraph (c) of *Rule* 4:23-5 be amended to provide for motions to compel answers to interrogatories. Currently, *Rule* 4:23-5(c) only provides that a propounder of requests for production of documents or request for a physical/mental examination may file a motion to compel responses to those discovery requests before moving to dismiss or suppress a pleading pursuant to *Rule* 4:23-5(a)(1). The attorney contends that the practical impact of a motion for dismissal or suppression is that a case is stalled in excess of 92 days with little or no adverse consequence to the delinquent party so long as responses to interrogatories and a motion to reinstate are provided before the return date of the motion to dismiss or suppress with prejudice pursuant to *Rule* 4:23-5(a)(2). The attorney notes that as a practice he files motions to compel responses to interrogatories, but believes it is conceivable that judges may deny said motions since *Rule* 4:23-5(c) does not provide specific authority for judges to grant such relief.

The matter was referred to the Discovery Subcommittee, which rejected the proposal to amend *Rule* 4:23-5(c) to allow a party the option of moving to compel answers to interrogatories in lieu of immediately initiating the two-step dismissal procedure of the rule. The Discovery Subcommittee was of the view that allowing motions to compel answers to interrogatories will have the unwelcome result of more discovery motions and will not result in the aggrieved party getting the discovery any faster in the vast majority of cases. The Committee agreed, and accordingly, does not recommend amending *Rule* 4:23-5(c) to provide for motions to compel responses to interrogatories.

See Section I.T. of this Report for proposed amendments to *Rule* 4:23-5(c) that the Committee recommends.

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

A Civil Presiding Judge has suggested the abolition of the consensual 60-day discovery extension now provided for in *Rule* 4:24-1(c). The judge observes that as a result of the consensual extension, there is an almost automatic 60 extra days of discovery in every case. Also, since second, or even third, good cause extensions are difficult to reject, the courts are often allowing 450 or more discovery days in Track II cases, and about two years in Track III cases. The judge further notes that the 60-day consensual extension often postpones the time in which a trial judge will get involved in the management of the case. He points out that the consensual extension has not cut down on discovery extension motion practice, but only moves it 60 days down the road. The judge further notes that many of the motion papers are rather perfunctory and suggests that it would be helpful if the rule were amended to provide, or at least a commentary included, to tell counsel that they must address the four inquiries set forth in *Vitti v. Brown*, 359 *N.J. Super*. 40, 51 (Law Div. 2003) for exceptional circumstances, or the nine good cause factors set forth in *Tynes v. St. Peters Medical Center*, 408 *N.J. Super*. 159, 169-70 (App. Div.), *certif. denied*, 200 *N.J*. 502 (2009).

The Conference of Civil Presiding Judges does not endorse elimination of the 60-day consensual extension, taking the position that this would not reduce, and might even increase, the number of such motions.

After discussion, the Committee determined that no rule change is necessary.

I. Proposed Amendments to *R.* 4:25-4 — Designation of Trial Counsel

The Conference of Civil Presiding Judges recognized that a major reason for trial adjournments is the unavailability of trial counsel designated to try the cases pursuant to *Rule* 4:25-4. The rule currently permits the court to waive, on notice to the parties, trial counsel designation in Track III or IV tort cases pending for more than three years and in Track I or II tort cases pending for more than two years if the unavailability of designated counsel will delay trial.

The Conference recommends allowing the court to waive designation of trial counsel after two years, for all cases on all tracks, thus advancing trial date certainty and potentially opening up litigation opportunities for newer attorneys. The Conference found it unfair that plaintiffs in medical malpractice cases must routinely wait well in excess of the 450 day discovery period before having their day in court. Trials are routinely adjourned based on the requirements of *Rule* 4:25-4. Additionally, the limited number of defense counsel permitted to try these cases has had a substantial impact on the newer members of the bar in their quest to obtain litigation and trial experience. Newer attorneys deprived of the opportunity to try cases in court have often turned routine discovery processes such as depositions and discovery motions, into the adversarial equivalent of trials.

The Conference contends these major problems could be abated by a change to the designation of trial counsel rule. Such a change could limit the ability of malpractice insurance carriers' ability to essentially control the trial schedule by unduly limiting the roster of authorized defense counsel.

The Committee rejected this proposed rule amendment, determining that the rule change is not necessary and would likely lead to substantial opposition from the bar. The Committee

also noted that the present rule appropriately takes into account that clients often want experienced attorneys handling their trials. Accordingly, the Committee does not recommend an amendment to *Rule* 4:25-4.

J. Proposed Amendments to *Rules* 4:28-4, 4:80 and 4:83 — re: Medicaid Recovery

The Assistant Director of the Division of Medical Assistance and Health Services in the Department of Human Services requested that the Rules be amended regarding Medicaid third-party liability and estate recoveries. Essentially, the proposed amendments seek to require parties to send notice of various estate proceedings in which a decedent was a recipient or former recipient of Medicaid benefits, or of any civil actions brought by or on behalf of a beneficiary of such benefits, to the Division of Medical Assistance and Health Services' Office of Legal and Regulatory Affairs, Recovery Units. The Committee determined that the subject matters in the proposed amendments are not appropriate for the Court Rules, but may instead be addressed by amending the governing statutes and regulations. Thus, the Committee does not recommend the proposed amendments to *Rules* 4:28-4, 4:80 and 4:83.

K. Proposed Amendments to *R.* 4:36-3 — Trial Calendar

Several amendments are proposed:

1. The Conference of Civil Presiding Judges proposed two amendments to *Rule* 4:36-3 to tighten up the adjournment process and reduce the number of applications:

a. *Rule* 4:36-3(b) currently states that "An initial request for an adjournment for a reasonable period of time to accommodate a scheduling conflict or the unavailability of an attorney, a party or a witness shall be granted if made timely in accordance with this rule." (Emphasis supplied). The Conference suggested that the rule be amended to change "shall" to "may," thereby giving the court discretion to deny, in appropriate circumstances, such adjournment requests.

b. The unavailability of expert witnesses is a major reason for trial adjournments. *Rule* 4:36-3(c) allows each expert one adjournment based on unavailability. Thereafter, the expert must appear at trial either in person, by videotaped testimony, or, if all parties consent, by having the expert's de bene esse deposition read or presented to the jury. When there are multiple experts, the rule can result in multiple adjournments. The Conference recommended amending the rule to allow each party (as opposed to each expert) one "free" adjournment for an expert's unavailability.

2. A practitioner proposed that *Rule* 4:36-3(a) be amended to add the following language: "The court shall advise all parties of the initial trial date no less than ten weeks prior thereto and no trial date shall be scheduled prior to the discovery end date." It has been the practitioner's experience that in many matters being case managed or where there has been a motion for extension of the discovery end date, the judge unilaterally inserts a trial date in the order which violates the minimum of the ten week period. He claimed that this practice

precludes the filing of summary judgment motions because discovery is incomplete, the motion would not be returnable prior to the trial date, and the filing of a dispositive motion arguably violates *Rule* 4:46-1. He also claimed that scheduling of a trial date while discovery is pending would always conflict with *Rule* 4:24-1(c) by changing the good cause standard for discovery extension motions to one of exceptional circumstances. He suggested that his proposed language would remedy this situation.

The Committee did not favor the proposed rule changes. The Committee determined that judges should not be given the discretion to deny an initial trial adjournment request, because of concerns about inconsistency. The Committee also opposed amending the rule to allow each party (as opposed to each expert) one "free" adjournment for an expert's unavailability, and to provide that no trial will be scheduled prior to the discovery end date. The Committee concluded that these amendments are unnecessary, and, accordingly, does not recommend amending *Rule* 4:36-3.

L. Proposed Amendment to *R.* 4:44A-2 — re: Transfer of Structured Settlement Rights

A trial judge requests that the Committee consider recommending an explicit requirement in the Rules that competitive quotes be submitted with applications seeking approval of transfers or assignments of structured settlement payments because such a requirement would help deter unreasonable annual discount rates and would help prevent finance companies from taking undue advantage of payee-transferors. The judge suggests that the approach taken by the court in the matter of *In re Transfer of Structured Settlement Rights by Spinelli*, 353 *N.J. Super*. 459 (Law Div. 2002), should be applied in all such cases. In *Spinelli*, the court found, in part, that proposed transfer was in the applicant's best interest because the applicant testified that he shopped around for price quotes before choosing the finance company, and the finance company provided the court with a copy of a quote from a competitor as to what it would have paid for the proposed transfer.

A subcommittee formed to address this issue initially favored amending *Rule* 4:44A to assist judges in protecting consumers from predatory conduct. The subcommittee, however, wanted to ensure that any rule changes did not overstep the role of the Judiciary or overburden judges.

A majority of the Committee initially favored a further amendment to *Rule* 4:44A-2 to provide that the transfer will be approved only if the proposed transfer does not require the payee-transferor to purchase any insurance policy or enter into any other agreement in any way related to the proposed transfer, nor does it assess attorney's fees, costs or other expenses to the payee-transferor. After the proposed amendments had been drafted, the Committee revisited the topic. The Committee majority ultimately determined that the proposed amendments to *Rule*

4:44A-2 were more substantive in nature than procedural, and preferably should be addressed instead by the Legislature. The Committee majority, therefore, does not recommend amendments to *Rule* 4:44A-2.

See Section I.W. of this Report for the proposed amendments to *Rule* 4:44A-1 that the Committee recommends.

M. Proposed Amendment to Form Interrogatories C(3), Question 1

An attorney asks the Committee to consider changes to Question 1 of Form Interrogatories C(3). Question 1 asks for the identification and description of persons present at the "alleged occurrence." The attorney states that defense counsel fail to answer the question, claiming that plaintiffs fail to set forth what the "alleged occurrence" is. This matter was referred to the Discovery Subcommittee for consideration. The Discovery Subcommittee determined that no amendment to the rule was warranted. The Committee agreed, and accordingly, does not recommend an amendment to Form Interrogatories C(3), Question 1.

N. Fees for the Duplication of Documents in Discovery

An attorney requested that that a rule be adopted that sets forth the amount that can be charged for duplication of documents in discovery. The attorney states that in two substantial personal injury matters in which he represents plaintiffs, he has requested copies of any and all medical records obtained by defense counsel in response to subpoenas at no cost. Defense counsel advised that the copies would be provided at a cost of $0.25 per page. The attorney contends that defense firms are making a profit on duplication because the actual cost of duplication should be no more than $0.05 per page.

The Committee determined that setting an amount for duplication fees in the Rules would be problematic because that amount would have to be frequently updated or, alternatively, fixed in perpetuity at a level that may not reflect actual reasonable costs. The Committee concluded that no rule change is necessary, and that the reasonableness of duplication charges should be left to the sound discretion of the judge assigned to the case.

O. Page Limitations for Briefs Filed in the Law Division, Civil Part

The Conference of Civil Presiding Judges recommends a rule change setting forth page limitations for briefs filed on motions in the Civil Part of the Law Division. Judges have noted that parties are filing extensive motion briefs with arguments not relevant to the issues at hand. The Supreme Court, Appellate Division and the Family Part have page limitations for submissions to the court. *See Rules* 2:6-7 and 5:5-4(b). The Conference recommends that moving briefs be limited to 40 pages, opposition briefs be limited to 25 pages and reply briefs be limited to 15 pages. The Committee initially voted in favor of proposing a new rule for motion briefs filed in the Civil Part of the Law Division. The rule would provide that briefs of movants and respondents should be limited to 30 pages and reply briefs should be limited to 15 pages. It would further provide that briefs of respondent/cross movants should not exceed 45 pages, and briefs of movant/cross respondents should not exceed 30 pages. The page limitations would be subject to informal approval by the court to file an overlength brief.

The Committee revisited the topic after proposed amendments to *Rule* 1:6-5 had been drafted. While some members of the Committee continued to support setting page limitations for briefs — in part as a means of requiring attorneys to present succinct arguments — other members opposed setting limitations because parties should be able to fully address all issues in the trial court without being so constrained. It was also pointed out that the appellate rules and case law generally disfavor raising points on appeal that were not raised below.

By a slight majority, the Committee voted against recommending the rule proposal. Accordingly, the Committee does not endorse a rule setting forth page limitations for motion briefs filed in the Civil Part of the Law Division.

P. Proposal for Registration of Process Servers in New Jersey

The President of the New Jersey Professional Process Servers Association (NJPPS) proposes the establishment of a registration program for private process servers in New Jersey, including a code of conduct and amendments to some Court Rules. He believes that private process servers should have credible forms of identification to present, especially in light of national security and community safety concerns. The registry, if adopted, would require changes to *Rule* 1:14 (to include a Code of Ethics for Registered Process Servers) and *Rule* 4:4-3 (to specify the use of a registered process). NJPPS also proposes an amendment to *Rule* 4:4-7 to exclude registered process servers from having to submit affidavits of service, and permit them to submit returns of service in the form of certifications like Sheriffs and court appointees.

The Committee was of the view that a registration program is not warranted, and could result in unjustifiable exclusivity. The Committee declines to recommend the proposal.

III. RULE AMENDMENTS ADOPTED OUT OF CYCLE

A. Amendments to *Rules* 1:5-6, 4:64-1 and 4:64-2 — re: Residential Mortgage Foreclosure

On December 20, 2011, the Supreme Court adopted, on an emergent basis, amendments to *Rules* 1:5-6, 4:64-1 and 4:64-2. The rule amendments require plaintiff's counsel in all residential mortgage foreclosure actions to file with the court: (1) an affidavit or certification executed by the attorney that the attorney has communicated with an employee or employees of the plaintiff who (a) personally reviewed documents for accuracy and (b) confirmed the accuracy of all court filings in the case to date; (2) the name(s), title(s), and responsibilities of the employee(s) of the plaintiff who provided this information to the attorney; and (3) an affidavit or certification executed by the attorney that all the filings in the case comport with all requirements of *Rule* 1:4-8(a).

On June 9, 2011, the Court adopted further amendments to *Rules* 4:64-1 and 4:64-2. Those amendments require that before entry of judgment, plaintiff's counsel must file an affidavit (a) stating that the attorney has communicated with an employee of the plaintiff or plaintiff's mortgage loan servicer (1) who personally reviewed the affidavit of amount due and the original or true copy of the note, mortgage and recorded assignments, if any, submitted to the court, and (2) who confirmed the accuracy of those documents; (b) setting out the date and mode of communication employed; (c) setting out the name(s), title(s), and responsibilities in those titles of the plaintiff's employee(s) or the employee(s) of plaintiff's mortgage loan servicer with whom the attorney communicated; and (d) attesting that the complaint and all subsequent documents filed with the court comport with the requirements of *Rule* 1:4-8(a). Additionally, where judgment has been entered but no sale of the property has occurred, plaintiff's counsel

before the sale of the property is required to file a similar affidavit. The following model forms were promulgated on June 9, 2011: (1) Certification of Diligent Inquiry to be Annexed to Residential Mortgage Foreclosure Complaints Pursuant to *Rules* 1:5-6(c)(1)(E) and 4:64-1(a)(2), (a)(3); (2) Affidavit of Diligent Inquiry to be Annexed to Notices of Motion for Judgment in Residential Mortgage Foreclosure Actions Pursuant to *Rule* 4:64-2 and That Must be Submitted in Actions Pending Judgment or Sale as of June 9, 2011; and (3) Affidavit of Amount Due to be Annexed to Notices of Motion for Judgment in Residential Mortgage Foreclosure Actions Pursuant to *Rule* 4:64-2 and That Must be Submitted in Residential Mortgage Foreclosure Actions Pending as of June 9, 2011.

The amendments to *Rules* 1:5-6, 4:64-1 and 4:64-2, adopted and effective as of December 20, 2010 and June 9, 2011, follow.

1:5-6. Filing

(a) Time for Filing. In any trial court, unless otherwise stated, all papers required to be served by *R.* 1:5-1 shall be filed with the court either before service or promptly thereafter, unless the rule requiring service or filing provides otherwise. Whenever in these rules provision is made for the publication, mailing or posting of notice, proof thereof shall be filed with the court within 20 days after the publication or mailing or posting.

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

(1) In civil actions in the Superior Court, Law Division, and in actions in the Superior Court, Chancery Division, General Equity, except mortgage and tax foreclosure actions, with the deputy clerk of the Superior Court in the county of venue;

(2) In criminal actions in the Superior Court, Law Division, with the Criminal Division Manager in the county of venue, as designee of the deputy clerk of the Superior Court;

(3) In mortgage and tax foreclosure actions, with the Clerk of the Superior Court, unless and until the action is deemed contested and the papers have been sent by the Clerk to the county of venue, in which event subsequent papers shall be filed with the deputy clerk of the Superior Court in the county of venue;

(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 a dissolution action, 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) In probate matters in the Surrogate's Court, with the Surrogate, and in actions in the Chancery Division, Probate Part, with the Surrogate of the county of venue as deputy clerk of the Superior Court;

(6) In actions of the Special Civil Part, as provided by Part VI of these rules;

(7) In actions in the Tax Court, as provided by Part VIII of these rules.

The foregoing notwithstanding, in any case the judge or, at the judge's chambers, a member of the staff may accept papers for filing if they show the filing date and the judge's name and office. The filed papers shall be forwarded forthwith to the appropriate office.

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

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

(A) the required filing fee; or

(B) a completed Case Information Statement as required by *R.* 4:5-1 in the form set forth in Appendices XII-B1 or XII-B2 to these rules; or

(C) in Family Part actions, the affidavit of insurance coverage required by *R.* 5:4-2(f), the Parents Education Program registration fee required by *N.J.S.A.* 2A:34-12.2, the Affidavit of Verification and Non-Collusion as required by *R.* 5:4-2(c), the Confidential Litigant Information Sheet as required by *R.* 5:4-2(g) in the form prescribed by the Administrative Director of the Courts, or the Affidavit or Certification of Notification of Complementary Dispute Resolution Alternatives as required by *R.* 5:4-2 (h) in the form prescribed in Appendix XXVII-A or XXVII-B of these rules; or

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

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

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

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

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

(4) a paper shall be returned stamped “Received but not Filed (date)” if it does not conform to the requirements of *R.* 1:4-9 with notice that if the document is retransmitted on conforming paper within 10 days after the date of the clerk's notice, filing will be deemed to have been made on the stamped receipt date.

(d) Misfiled Papers. If papers are sent to the wrong filing office, they shall be stamped “Received but not Filed (date)” and transmitted by that office to the proper filing office and a notice shall be sent by the transmitting office to the filer of the paper advising of the transmittal. The stamped received date shall be deemed to be the date of filing.

(e) Attorneys Answerable for Clerk's Fees. The attorney of record in every action shall be answerable for the clerk's lawful fees and charges.

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) amended June 15, 2007 to be effective September 1, 2007; subparagraph (c)(1)(C) amended July 16, 2009 to be effective September 1, 2009; subparagraph (c)(1)(E) amended December 20, 2010 to be effective immediately; subparagraphs (b)(4) and (c)(1)(C) amended July 21, 2011 to be effective September 1, 2011.

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

(a) Title Search; Certifications.

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

(2) In all residential foreclosure actions, plaintiff's attorney shall annex to the complaint a certification of diligent inquiry:

(A) that the attorney has communicated with an employee or employees of the plaintiff who (i) personally reviewed the documents being submitted and (ii) confirmed their accuracy; and

(B) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule.

(3) Plaintiff's attorney shall also annex to the complaint a certification, executed by the attorney, attesting that the complaint and all documents annexed thereto comport with the requirements of *R.* 1:4-8(a).

(b) Contents of Mortgage Foreclosure Complaint. In an action in the Superior Court to foreclose a mortgage, the complaint shall state:

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

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

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

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

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

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

(7) the default date;

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

(9) if applicable, any prepayment penalty;

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

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

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

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

When a married person who has not executed the mortgage is made a party defendant, the plaintiff shall set out the particular facts relied on to bar the married person's rights and interest

in the subject property, including whether the married person's rights and interest in the property were acquired before or after the date of the mortgage.

(c) Definition of Uncontested Action. An action to foreclose a mortgage or to foreclose a condominium lien for unpaid assessments pursuant to *N.J.S.A.* 46:8B-21 shall be deemed uncontested if, as to all defendants,

(1) a default has been entered as the result of failure to plead or otherwise defend; or

(2) none of the pleadings responsive to the complaint either contest the validity or priority of the mortgage or lien being foreclosed or create an issue with respect to plaintiff's right to foreclose it; or

(3) all the contesting pleadings have been stricken or otherwise rendered noncontesting.

An allegation in an answer that a party is without knowledge or information sufficient to form a belief as to the truth of an allegation in the complaint shall not have the effect of a denial but rather of leaving the plaintiff to its proofs, and such an allegation in an answer shall be deemed noncontesting to the allegation of the complaint to which it is responsive.

(d) Procedure to Enter Judgment.

(1) Prejudgment notices; responses.

(A) Notice of motion for entry of judgment shall be served within the time prescribed by subparagraph (d)(2) of this rule on mortgagors and all other named parties obligated on the debt and all parties who have appeared in the action including defendants whose answers have been stricken or rendered noncontesting. The notice shall have annexed a copy of the affidavit of amount due filed with the court. If the premises are residential, the notice shall be served on each tenant, by personal service or registered or certified mail, return receipt requested,

accompanied by the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. Said notice of tenants' rights shall be contained in an envelope with the following text in bold and in at least 14 point type: "Important Notice about Tenants Rights." If the name of the tenant is unknown, the notice may be addressed to Tenant. Any party having the right of redemption who disputes the correctness of the affidavit may file an objection stating with specificity the basis of the dispute and asking the court to fix the amount due.

(B) Defaulting parties shall be noticed only if application for final judgment is not made within six months of the entry of default.

(2) Application for judgment; entry.

If the action is uncontested as defined by paragraph (c) the court, on motion on 10 days notice if there are no other encumbrancers and on 30 days notice if there are other encumbrancers, and subject to paragraph (h) of this rule, may enter final judgment upon proof establishing the amount due. The application for entry of judgment shall be accompanied by proofs as required by *R.* 4:64-2 and in lieu of the filing otherwise required by *R.* 1:6-4 shall be only filed with the Office of Foreclosure in the Administrative Office of the Courts. The Office of Foreclosure may recommend entry of final judgment pursuant to *R.* 1:34-6.

(e) Priorities; Subsequent Encumbrances. A party holding a subsequent encumbrance for a sum certain and filing an uncontesting answer may have the encumbrance included for payment in the foreclosure judgment on the filing of proofs pursuant to *R.* 4:64-2. The judgment shall not order payment to a subsequent encumbrancer unless

(1) the priority of the encumbrance has been determined; and

(2) the encumbrancer has filed an affidavit stating that notice of the amount claimed due on the encumbrance has been served on all defendants whose addresses are known or readily ascertainable and none of the defendants, whose names and addresses shall be listed in the affidavit, has, within 10 days after the date of service of the notice made written objection to the validity, priority or amount of the encumbrance; and

(3) all prior encumbrances of parties to the action, including answering and defaulting parties, have been previously satisfied or ordered paid; and

(4) the encumbrance extends to the entire interest being foreclosed; and

(5) no cross-claim pursuant to *R.* 4:64-5 has been filed.

No judgment by default shall be entered against a defendant postponing that defendant's rights or claims to those of any other defendant unless the priority of the right or claims of the latter and the facts upon which they depend are distinctly set forth in the pleadings. A controversy between such defendants may be settled upon application for surplus moneys pursuant to *R.* 4:64-3.

(f) Tax Sale Foreclosure; Strict Mortgage Foreclosures. If an action to foreclose or reforeclose a tax sale certificate in personam or to strictly foreclose a mortgage where provided by law is uncontested as defined by paragraph (c), the court, subject to paragraph (h) of this rule, shall enter an order fixing the amount, time and place for redemption upon proof establishing the amount due. The order of redemption in tax foreclosure actions shall conform to the requirements of *N.J.S.A.* 54:5-98 and *R.* 4:64-6(b). The order for redemption or notice of the terms thereof shall be served by ordinary mail on each defendant whose address is known at least 10 days prior to the date fixed for redemption. Notice of the entry of the order of redemption, directed to each defendant whose address is unknown, shall be published in accordance with

R. 4:4-5(a)(3) at least 10 days prior to the redemption date and, in the case of an unknown owner in a tax foreclosure action joined pursuant to *R.* 4:26-5, a copy of the order or notice shall be posted on the subject premises at least 20 days prior to the redemption date in accordance with *N.J.S.A.* 54:5-90. The court, on its own motion and on notice to all appearing parties including parties whose answers have been stricken, may enter final judgment upon proof of service of the order of redemption as herein required and the filing by plaintiff of an affidavit of non-redemption. The Office of Foreclosure may, pursuant to *R.* 1:34-6, recommend the entry of both the order for redemption and final judgment.

(g) Security Interest Foreclosure. A plaintiff in the mortgage foreclosure action who also holds a security interest in personal property located on the subject real estate and who elects to have the personal property sold by the sheriff at public sale together with the real property may, by separate count, seek to foreclose the security interest in the mortgage foreclosure action, and the judgment of foreclosure shall direct a single public sale of the real estate and personal property. Notice of the sale of such personal property shall be given to the debtor and the secured creditors pursuant to *N.J.S.A.* 12A:9-504. If necessary the court shall apportion the proceeds of sale, and the proceeds allocated to the personal property shall be distributed pursuant to *N.J.S.A.* 12A:9-504 whether or not the persons entitled thereto are parties to the foreclosure action.

(h) Minors; Mentally Incapacitated Persons; Military Service. Except as otherwise provided by law or by *R.* 4:26-3 (virtual representation) no judgment or order for redemption shall be entered under this rule against a minor or mentally incapacitated person who is not represented by a guardian or guardian ad litem appearing in the action. No judgment or order for redemption shall be entered against a defendant in military service of the United States who has

defaulted by failing to appear unless that defendant is represented in the action by an attorney authorized by the defendant or appointed to represent defendant in the action and who has appeared or reported therein.

(i) Answer by United States and State of New Jersey. Rule 4:6-1(a) notwithstanding, the United States of America and the State of New Jersey, if a party defendant to a mortgage foreclosure action, shall have 60 days from the date of service of the complaint upon it to file and serve its answer.

Note: Source — *R.R.* 4:82-1, 4:82-2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; new paragraphs (a) and (b) adopted, and former paragraphs (a), (b), (c), (d), (e), (f), and (g) redesignated as paragraphs (c), (d), (e), (f), (g), (h), and (i) July 27, 2006 to be effective September 1, 2006; paragraph (b) caption and text amended September 11, 2006 to be effective immediately; paragraphs (d) and (f) amended October 10, 2006 to be effective immediately; paragraph (d) amended July 9, 2008 to be effective September 1, 2008; text of paragraph (d) deleted, new subparagraphs (d)(1) and (d)(2) captions and text adopted, and paragraph (f) amended July 23, 2010 to be effective September 1, 2010; caption amended, paragraph (a) caption amended, text of former paragraph (a) renumbered as paragraph (a)(1), and new subparagraphs (a)(2) and (a)(3) added December 20, 2010 to be effective immediately; subparagraph (a)(2) amended June 9, 2011 to be effective immediately.

4:64-2. Proof; Affidavit

(a) Supporting Instruments. Proof required by *R.* 4:64-1 may be submitted by affidavit, unless the court otherwise requires. The moving party shall produce the original mortgage, evidence of indebtedness, assignments, claim of lien (*N.J.S.A.* 46:8B-21), and any other original document upon which the claim is based. In lieu of an original document, the moving party may produce a legible copy of a recorded or filed document, certified as a true copy by the recording or filing officer or by a New Jersey attorney, or a copy of an original document, if unfiled or unrecorded, certified as a true copy by a New Jersey attorney.

(b) Contents of Proof of Amount Due. If the action is uncontested, the plaintiff shall file with the Office of Foreclosure an affidavit of amount due, which shall have annexed a schedule as set forth in Appendix XII-J of these rules. The schedule shall state the principal due as of the date of default; advances authorized by the note or mortgage for taxes, hazard insurance and other stated purposes; late charges, if authorized by the note or mortgage, accrued to the date of the filing of the complaint; a computation of accrued interest; a statement of the *per diem* interest accruing from the date of the affidavit; and credit for any payments, credits, escrow balance or other amounts due the debtor. Prejudgment interest, if demanded in the complaint, shall be calculated on rate of interest provided by the instrument of indebtedness. A default rate of interest, if demanded in the complaint and if reasonable, may be used to calculate prejudgment interest from the date of default to the judgment. The schedule shall include notice that there may be surplus money and the procedure for claiming it. The proof of amount due affidavit may be supported by computer-generated entries.

(c) Time; signatory. The affidavit prescribed by this rule shall be sworn to not more than 60 days prior to its presentation to the court or the Office of Foreclosure. The affidavit shall

be made either by an employee of the plaintiff, if the plaintiff services the mortgage, on the affiant's knowledge of the plaintiff's business records kept in the regular course of business, or by an employee of the plaintiff's mortgage loan servicer, on the affiant's knowledge of the mortgage loan servicer's business records kept in the regular course of business. In the affidavit the affiant shall confirm:

(1) that he or she is authorized to make the affidavit on behalf of the plaintiff or the plaintiff's mortgage loan servicer;

(2) that the affidavit is made based on a personal review of business records of the plaintiff or the plaintiff's mortgage loan servicer, which records are maintained in the regular course of business;

(3) that the financial information contained in the affidavit is accurate; and

(4) that the default remains uncured.

The affidavit shall also include the name, title, and responsibilities of the individual, and the name of his or her employer. If the employer is not the named plaintiff in the action, the affidavit shall provide a description of the relationship between the plaintiff and the employer.

(d) Affidavit. Plaintiff's counsel shall annex to every motion to enter judgment in a residential mortgage foreclosure action an affidavit of diligent inquiry stating: (1) that the attorney has communicated with an employee or employees of the plaintiff or the plaintiff's mortgage loan servicer who (A) personally reviewed the affidavit of amount due and the original or true copy of the note, mortgage and recorded assignments, if any, being submitted and (B) confirmed their accuracy; (2) the date and mode of communication employed; (3) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) or the employee(s) of the

plaintiff's mortgage loan servicer with whom the attorney communicated pursuant to this rule; and (4) that the aforesaid documents comport with the requirements of *R.* 1:4-8(a).

Note: Source — *R.R.* 4:82-3. Caption amended and paragraph (b) deleted July 7, 1971 to be effective September 13, 1971; amended November 27, 1974 to be effective April 1, 1975; amended November 7, 1988 to be effective January 2, 1989; amended July 13, 1994 to be effective September 1, 1994; text amended and designated as paragraph (a), paragraph (a) caption adopted, new paragraphs (b) and (c) adopted July 9, 2008 to be effective September 1, 2008; caption amended and new paragraph (d) added December 20, 2010 to be effective immediately; paragraphs (c) and (d) amended June 9, 2011 to be effective immediately.

B. Amendment to *R.* 1:13-9 — *Amicus Curiae*; Motion; Grounds for Relief; Briefs

In an Order dated March 24, 2011, the Supreme Court adopted amendments to *Rule* 1:13-9 to clarify that paragraph (f) of the rule affects the time for filing an *amicus curiae* motion with the Supreme Court or the Appellate Division only where the court has established an accelerated briefing schedule.

The amendment to *R.* 1:13-9, adopted and effective as of March 24, 2011, follows.

1:13-9. *Amicus Curiae*; Motion; Grounds for Relief; Briefs

(a) An application for leave to appear as *amicus curiae* in any court shall be made by motion in the cause stating with specificity the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein and the nature of the applicant's special interest, involvement or expertise in respect thereof. The court shall grant the motion if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby. The order granting the motion shall define with specificity the permitted extent of participation by the amicus and shall, where appropriate, fix a briefing schedule.

(b) Briefs filed by an *amicus curiae* in any court shall comply with all applicable rules.

(c) Except as provided in subsection (f), motions for leave to appear as an *amicus curiae* in the Appellate Division shall be accompanied by the proposed *amicus curiae* brief and shall be filed on or before the day when the last brief is due from any party.

(d) An *amicus curiae* who has been granted leave to appear in a cause may, without seeking further leave:

(1) file a brief in an appeal taken to any court from a final judgment or appealable interlocutory order, provided that the brief is filed on or before the day on which the last brief is due from any party;

(2) file a brief in support of or in opposition to a motion for leave to appeal, provided that the brief is filed on or before the day on which the last brief is due from any party;

(3) file a brief in the Supreme Court in support of or in opposition to a petition for certification, provided that the brief is filed on or before the day on which the last brief is due from any party; and

(4) file a brief on the merits after the Supreme Court has granted a petition for certification or a motion for leave to appeal, or after a notice of appeal has been filed, provided that the brief is filed in compliance with the time frames fixed in subsection (e) of this Rule.

(e) An *amicus curiae* who has not been granted leave to appear in a cause may file a motion for leave to appear in the Supreme Court, provided that the motion is accompanied by the proposed *amicus curiae* brief. Except as provided in Subsection (f) of this Rule, motions for leave to appear as an *amicus curiae* in the Supreme Court shall be filed within seventy-five (75) days of the date when the Supreme Court posts on its public website a notice of:

(1) an order granting certification;

(2) an order granting leave to appeal; or

(3) the filing of a notice of appeal.

Untimely motions may be granted by the Supreme Court only on a showing of good cause demonstrated to the satisfaction of the Court.

(f) In the event that the Supreme Court, or the Appellate Division, has directed the parties to submit briefs in accordance with an accelerated schedule, an *amicus curiae* shall file its motion for leave to appear, accompanied with its brief, on or before the date fixed for the last brief due from any party.

Note: Adopted July 16, 1979 to be effective September 10, 1979; caption and text amended July 13, 1994 to be effective September 1, 1994; former text reallocated as paragraphs (a) and (b), paragraph (a) amended, and new paragraphs (c), (d), (e) and (f) adopted July 23,

2010 to be effective September 1, 2010; paragraph (f) amended March 24, 2011 to be effective immediately.

C. Amendment to *R.* 4:26-5 — Unknown Defendants; In Rem Actions

Effective September 1, 2010, *Rule* 4:4-5 was amended to correct the internal numbering of the paragraphs of the rule. Among other things, subparagraph (c) of *Rule* 4:4-5 was redesignated as subparagraph (a)(3). The amendment to *Rule* 4:4-5, while reflected in *Rule* 4:26-5(c) was not reflected in *Rule* 4:26-5(b). At its March 8, 2011 Administrative Conference, the Supreme Court considered and approved a corrective amendment to *Rule* 4:26-5(b). By order dated March 8, 2011, the amendment to *Rule* 4:26-5 was adopted and became effective immediately.

The amendment to *R*. 4:26-5, adopted and effective as of March 8, 2011, follows.

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

(a) Applicability. *R.* 4:26-5 applies only to actions governed by *R.* 4:4-5 (actions affecting specific property or a *res*).

(b) Description of Unknown Defendants. When it shall appear by the affidavit of inquiry required by *R.* 4:4-5(a)(3) 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, 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, 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 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, 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 either

(i) By the name of such female, as it so appears, as "Mr. ..., husband 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 of ..., said name of John Doe being fictitious," using the given name and surname of such female person in the blank; or

(3) As to any such person, whether such person is still alive or whether it is not known whether such person is alive or dead, or if such person is known or is believed to be dead, and as to any such person's unknown heirs, devisees or personal representatives or his, hers, their, or any of their successors in right, title and interest in such specific property or interest therein or such res, thus: "..., his or her heirs, devisees and personal representatives and his, hers, their, or any of their, successors in right, title and interest," using the name of such person in the blank.

(c) Designation of Unknown Owner or Claimant. When it shall appear by the affidavit of inquiry required by *R.* 4:4-5(a)(3) that the affiant has been unable to ascertain the name or names of any unknown owner or claimant, such unknown owner or claimant may be made a party defendant and shall be sufficiently described for all purposes including service of process by the designation "Unknown Owner (or Unknown Claimant), his or her heirs, devisees and personal representatives, and his, hers, their or any of their successors in right, title and interest." Where title to real property or an interest therein or a lien or encumbrance thereon is involved, the inquiry shall include, and the affidavit of inquiry shall recite, reasonable diligence

in searching the title, or having it searched, for a period of 60 years immediately prior to the commencement of the action. If such search does not disclose the name of a person who it is alleged or claimed owns the same or a part thereof, or some interest therein, or holds a lien or encumbrance thereon, the action may proceed against unknown owners or unknown claimants.

(d) Other Designations. Where the manner of joining or designating an unknown defendant is not specifically fixed by this rule, the court may on motion with or without notice order the action to proceed against such defendant by fixing the manner and the designation by which the person shall be made a party defendant, adding a description of the person's interest in the action and stating so much of the person's name as is known.

(e) Effect of Designation. The person or persons designated as set forth in *R.* 4:26-5 shall be deemed as a party defendant to the action and as sufficiently described for all purposes, including service of process.

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 (c) amended July 23, 2010 to be effective September 1, 2010; paragraph (b) amended March 8, 2011 to be effective immediately.

IV. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendment to *R.* 1:8-8 – Materials to be Submitted to the Jury; Note-taking; Juror Questions

In *State v. Morgan,* 2011 *N.J. Super*. *LEXIS* 225 (App. Div. Dec. 9, 2011), the Appellate Division asked both the Civil and Criminal Practice Committees to develop recommendations for the Supreme Court's consideration as to whether jurors should be permitted to take written instructions outside of the jury deliberations room. Specifically, the Appellate Division asked the Committees to make recommendations "to either explicitly forbid the practice, or permit it under specific guidelines reflective of, but not limited to, the concerns" raised in the opinion. The Committee has recommended amendments to *Rule* 1:8-8 in response to the Supreme Court's request in *State v. O'Brien*, 200 *N.J*. 520, 541 (2009). *See* Section I.B. this Report for the proposed amendments to *Rule* 1:8-8. Because the referral from the Appellate Division occurred after the Committee's last meeting of the rules cycle, this matter will be held for consideration in the next rules cycle.

B. Proposed Amendments — *R.* 2:2-1 (Appeals to the Supreme Court from Final Judgments) and *R.* 2:13-2(b) (Quorum; Temporary Assignment)

A former litigant wrote to the Chief Justice raising objections and suggesting changes to (1) the use of two-judge panels to decide cases in the Appellate Division pursuant to *Rule* 2:13-2(b) and (2) the wording of *Rule* 2:2-1(a) regarding the scope of an appeal to the Supreme Court as of right based upon a dissent in the Appellate Division. The writer suggested that two-judge appellate panels be eliminated because they allegedly increase confirmation bias, decrease diversity and decrease expertise. The writer also suggested that *Rule* 2:2-1(a)(2) should be reworded allow the Supreme Court to undertake a complete review of the majority ruling in a 2-1 Appellate Division decision and not just the discrete issue that provoked the dissent.

The long-standing use of two-judge Appellate Division panels to hear many appeals derives from recommendations set forth in the Report on Appellate Division Reforms, 102 *N.J.L.J*. Index page 41 (July 20, 1978), by a Committee appointed by Chief Justice Hughes, consisting of Justices Pashman, Schreiber, and Handler. In 1978, *Rule* 2:13-2(b) was amended as a measure to increase the efficiency of the disposition of appeals in the Appellate Division. The provision states that appeals are presumptively to be decided by two-judge panels, unless the presiding judge on the panel determines that three judges should decide a particular appeal because of its complexity or other factors.

After some initial discussion by the Committee at its final meeting of this rules cycle, this issue was held over to the next rules cycle so that further consideration could be given to the subject.

C. Proposed Amendments to *R.* 4:17-5 — Objections to Interrogatories

In the previous term, the Committee proposed amendments to (1) prohibit the practice of stating general objections to interrogatories; (2) set forth the process for stating specific objections to specific questions; and (3) make the provisions of *Rule* 4:23-1(c) (award of expenses incurred in relation to a motion for an order compelling discovery) applicable to motions made to strike objections and compel answers to interrogatories. The Court declined to adopt these proposed amendments, noting that a federal examination of civil litigation practices, particularly discovery practices, had been including a major conference on the subject at Duke University. Accordingly, the Court remanded the proposed amendments to the Committee, to review them in light of the federal study and the Duke Conference.

During this term, the Committee referred the proposed amendments to the Discovery Subcommittee for reconsideration. The full Committee initially recommended the proposed amendment to *Rule* 4:17-5. After further consideration, however, it was determined that this singular issue should be held for further discussion in the next rules cycle, as it may implicate the broader issues raised at the Duke Conference. Those broader issues remain the subject of review by the Discovery Subcommittee.

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

In *Jatczyszyn v. Marcal Paper Mills, Inc*., 422 *N.J. Super*. 123 (App. Div. 2011), a products liability action, the Appellate Division held the trial court erred in not tolling the discovery period under Track III during the time the action was removed to federal court and under the exclusive jurisdiction of the federal court. In light of this decision, a Committee member proposed that following amendment to *Rule* 4:24-1(a): "On matters removed to Federal Court the discovery period shall be stayed from the date the Notice of Removal is filed to the date an order of remand is entered." This matter was referred to the Discovery Subcommittee for consideration. The Discovery Subcommittee agreed in concept to the amending *Rule* 4:24-1; however, it was unable to reach a decision on the proposed language as it is unclear what date should be considered the trigger date for recommencing the discovery period. The date would depend upon the manner in which a matter is returned to the Superior Court from the federal court. It was agreed that the proposed amendment to *Rule* 4:24-1 should be held for consideration in the next rules cycle.

E. Discovery Reform Issues

In May 2010, the federal Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law. The purpose of the conference was to explore the current costs of civil litigation, particularly discovery, and to discuss possible solutions. The result of the conference was the Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation (the "Duke Conference Report"). The Discovery Subcommittee viewed a presentation on the Duke Conference Report and the proposals being considered at the federal level. The presentation fostered a discussion concerning whether and to what extent New Jersey should revisit its own discovery rules. Members of the Discovery Subcommittee offered varying views regarding whether large- or small-scale changes should be made to existing rules. The Discovery Subcommittee agreed that it should consider the following subjects/questions:

1. Meet and Confer. Should New Jersey adopt a version of the federal "meet and confer" requirement?

2. Case Management. Should New Jersey utilize greater case management conferences than currently in use to manage and control on-going discovery issues?

3. Privilege Logs. Should New Jersey review the manner in which the bar creates, and the bench reviews, privilege logs?

4. Interrogatories. Should New Jersey consider presumptively limiting the number of interrogatories as a general rule? If so, should there be presumptive limits on other forms of discovery?

5. Expert reports. The federal rules were changed, effective December 1, 2010, to provide protection to draft expert reports and attorney-testifying expert communications, essentially making a change that New Jersey adopted in 2002. New Jersey's earlier rule was widely cited as the model for the wisdom of the new federal rule but it was recognized there was an unintended loophole in the New Jersey rule: arguably, it only protects drafts and communications before the service of the first report. Thus, should New Jersey consider an amendment to close this possible loophole?

The Supreme Court authorized the Discovery Subcommittee to review those issues. With respect to the draft expert report issue, the Committee recommended the proposed amendments to *Rule* 4:10-2. *See* Section I.M. of this Report for the proposed amendments to *Rule* 4:10-2. The Subcommittee discussed the four remaining issues (meet and confer, case management, privilege logs and interrogatories), but determined that they are vast in scope and that forging a consensus on such issues could be challenging. The Discovery Subcommittee recommended, and the Committee agreed, that these issues should be held for further consideration in the next rules cycle.

V. MISCELLANEOUS MATTERS

A. Proposed Amendments to *Rules* 1:5-6(c) and 1:6-2 — re: mandatory Notice of Motion form

The Conference of Civil Presiding Judges endorsed a mandatory, standard Notice of Motion form to be used with any Civil Part motion proposed by the Conference of Civil Division Managers. The purpose of the form is to promote accuracy of the motion information entered into ACMS by Civil staff. Amendments to *Rules* 1:5-6(c) and 1:6-2 are necessary to implement the mandatory Notice of Motion form, which the Conference recommends as an Appendix to the Rules of Court. Committee members expressed several concerns regarding the proposed mandatory Notice of Motion form. One concern is that requiring use of the form implicitly tells attorneys that they do not know how to ask for the relief that they seek in a notice of motion, and may be either redundant or unduly burdensome. A second concern is that *pro se* litigants would likely not understand the form, and consequently would not be likely to use it or fill it out correctly. A third concern is the complexity of the form itself. The Committee requested that the form be simplified, and that its concerns be considered by the Conferences. After consideration of the Committee's concerns, the Conference of Civil Presiding Judges and the Conference of Civil Division Managers withdrew their proposed amendments to *Rules* 1:5-6(c) and 1:6-2, which would require submission of a mandatory Notice of Motion form.

B. Proposed Amendments — *R.* 2:7 – Appeals by Indigent Persons

In its 2009-2011 Report, the Criminal Practice Committee proposed revisions to the Guidelines for Determination of Consequence of Magnitude to trigger the advisement of the right to counsel, and entitle an indigent defendant to the assignment of counsel under *Rodriguez v. Rosenblatt*, 56 *N.J.* 281 (1971) and to *Rules* 2:7-2, 2:7-4 and 3:23-8 to address the assignment of counsel in municipal appeals. The Criminal Practice Committee declined to recommend revisions to *Rules* 2:5-3 and 2:7-4 with respect to the provision of transcripts at the public expense for municipal appeals. As Part II rule proposals have also traditionally been reviewed by the Civil Practice Committee, the Committee has been asked to comment on the proposed amendments to *Rules* 2:7-2 and 2:7-4.

The Committee discussed the proposal of the Criminal Practice Committee seeking to eliminate the last sentence of *Rule* 2:7-2(d) ("An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal an application for the assignment of counsel on appeal"). The Criminal Practice Committee recommends eliminating the sentence because it suggests there must be counsel when assigned counsel fails to file an appeal. That could remain as a sanction, but would be inconsistent with the proposed non-mandatory approach to assignment where a *Rodriguez* sentence was not imposed.

The Appellate Division Clerk's Office indicates that, under present practices, when an attorney files a notice of appeal, the attorney remains as the attorney of record unless he or she seeks to be relieved as counsel. The ADRC reviewed the proposal and recommends that the sentence remain in the rule, but should be revised to provide that the attorney must submit a motion to be relieved as counsel with the filing of the notice of appeal.

Some members of the Committee expressed concern with the ADRC's proposed modification because it might put too much of an onus on attorneys to file a motion to be relieved. The Committee determined that it should not weigh in on the merits of the proposed amendments until the Criminal Practice Committee has reviewed the revisions to the proposal recommended by the ADRC. This matter, consequently, will be referred back to the Criminal Practice Committee given that Committee's expertise in criminal matters.

C. Proposed Amendment to *R.* 4:37-1 — Voluntary Dismissal; Effect Thereof

Rule 4:37-1(a) provides that a plaintiff may voluntarily dismiss an action without a court order by filing a notice of dismissal at any time before service by the adverse party of an answer or motion for summary judgment. A Committee member suggested amending *Rule* 4:37-1(a) to provide that a plaintiff may dismiss an action without a court order by filing a notice of dismissal at any time before service of any motion that would definitively dispose of the matter. The effect would be to preclude a subsequent lawsuit. The member indicated that the policy rationale in so amending the rule is that when a defendant expends energy and resources to prepare a motion that has the potential to dispose of a matter with preclusive effect, the plaintiff should not be permitted to withdraw the action without first obtaining a court order. It was noted that by comparison, Federal Rule of Civil Procedure 41 provides that a plaintiff may voluntarily dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. After introduction, but prior to discussion by the Committee, the member withdrew the proposed amendment to *Rule* 4:37-1(a).

D. Proposed Amendment to *Rules* 4:43-3 and 4:50 — re: Refunds of Filing Fees

The Chair raised a possible ambiguity or omission in *Rule* 4:43-3 concerning when a defendant may be entitled to a refund of the filing fee submitted with an answer, if the answer is not accepted for filing by the court. *Rule* 4:43-3 states that when moving to vacate a default, the defendant must either file an answer and the Civil Case Information Statement, or a dispositive motion. Such answer or motion must be accompanied by "the filing fee for an answer or dispositive motion, which shall be returned if the motion to vacate the entry of default is denied." *R.* 4:43-3(2). The Chair inquired whether the filing fees for the motion and the answer are necessary if a motion to vacate is not to vacate the entry of default by instead to vacate default judgment under *Rule* 4:50, and if the fee for the answer is refundable if such a motion is denied. The Chair notes that *Rule* 4:50 is silent on this matter.

The Committee sought input from the Conference of Civil Division Managers on this matter, as the Conference is knowledgeable about the refund process. The Conference advised that filing fees for answers are routinely refunded when the motions to vacate default judgment are denied, and there is no general problem with the refunding of fees in such matters. The Conference advised that an amendment to *Rule* 4:50 to clarify that the filing fee is refunded if the motion to vacate default judgment is denied is not necessary, although it did not oppose a rule amendment for consistency with the refund language of *Rule* 4:43-3.

In light of this helpful information, the Chair withdrew this subject from further consideration.

E. Issuance of Civil Arrest Warrants to Sheriffs

The Somerset County Sheriff and president of the Sheriffs' Association of New Jersey has pointed out apparent confusion as to how civil arrest warrants are being handled. This matter was referred to the Committee for a possible rule amendment or directive to clarify or formalize the procedure. The Committee discussed the concern of sheriffs that they are being sent to multiple addresses to serve the warrants.

The Committee referred this issue to the Special Civil Part Practice Committee for consideration since the apparent problems are likely to be more prevalent in Special Civil Part matters.

Respectfully submitted,

Hon. Jack M. Sabatino, J.A.D., Chair
Justice Peter G. Verniero, Ret., Vice-Chair
Hon. Allison E. Accurso, P.J.Ch.
Hon. Peter F. Bariso, Jr., P.J.Cv.
Professor John S. Beckerman
Anne J. Cralle, Esq. (designee of Melville D. Miller, Esq.)
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Dated: January 24, 2012

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APPENDIX A

SUPREME COURT CIVIL PRACTICE COMMITTEE
JURY INSTRUCTIONS SUBCOMMITTEE

A Report on the Evaluation of Implementing Standards for Trial Judges
Of the Exercise of the Court's Discretion in Submitting
Written Jury Instructions to the Jury Pursuant to R. 1:8-8(a)

The provisions of R. 1:8-8(a) are, in pertinent part:

> Materials. The jury may take into the jury room the exhibits received in evidence, and if the court so directs in a civil action, a list of the claims made by the parties and of the defenses to such claims, a list of the various items of damage upon which proof was submitted at the trial and a list of the verdicts that may be properly found by the jury. Any such list may be prepared by an attorney or the court, but before delivery to the jury, it shall be submitted to all parties. **The court, in its discretion, may submit a copy of all or part of its instructions to the jury for its consideration in the jury room.** The court may also, in its discretion and at such time and in such format as it shall determine, permit the submission to the jury of individual copies of any exhibit provided an appropriate request to employ that technique was made prior to trial on notice to all parties and provided further that the court finds that no party will be unduly prejudiced by the procedure. (Emphasis added.)

In State v. O'Brien, 200 N.J. 520 (2009), the Supreme Court requested that this Committee consider more detailed standards to guide judges in exercising their discretion in providing written instructions to a jury for its consideration in the jury room. More specifically, the Court stated:

> The purpose underlying Rule 1:8-8 is to authorize the judge to provide the jury with written instructions where it would be helpful. Deciding what to do requires an exercise of discretion based on the particular facts of the case. That does not include the adoption of a blanket rule regarding the provision of written instructions that the judge applies in every case. Thus, at trial, a judge should make an individualized decision regarding the submission of written instructions to the jury on the basis of what is before him and not on any preconceived policy rationale.
>
> Because the rule is silent regarding the kinds of considerations that should inform such a determination, we refer the matter to the Civil and Criminal Practice Committees for consideration of a more detailed standard to guide judges in exercising their discretion. By way of example, but not limitation, the committees

> should consider whether, if there is a request, there should be a presumption that instructions that are immediately available will be provided; whether there should be a contrary presumption that instructions that are not immediately available will not be provided; whether a definition of "immediately available" should be adopted; and what kinds of considerations regarding the nature of the case should factor into the judge's Rule 1:8-8 calculus.
>
> [Id. at 541.]

Pursuant to the Supreme Court's request, a Subcommittee of the Civil Practice Committee was formed and met on various occasions to develop recommendations and suggestions. As part of the process, the Subcommittee distributed a Jury Instruction Survey to judges sitting in the Civil Division.

Results of Survey

The survey revealed that Civil Division judges are overwhelmingly against any rule change which would require the preparation and presentation of written jury instructions. Interestingly, not one of the responding judges had experienced a case where lawyers had requested that written charges be provided. Nevertheless, most judges agree that if a party requests written instructions be provided, that request ought to be a significant factor in agreeing to do so. Judges were adamant that there is no call for a "sea change" to the current rule.

Sixty-four (64) Civil Division judges responded to the survey. A significant majority presided over at least forty (40) civil trials. Most judges did not provide jury instructions in writing. The majority of those who did utilize written jury instructions provided the entire set of instructions. Civil judges were overwhelmingly against the required preparation and presentation of written jury charges. Specifically, fifty-five (55) out of fifty-seven (57) judges indicated the written jury instructions should not be mandatory in all cases. Judges who frequently provide printed jury instructions cite the complexity of the case and the respect for the jury's thought processes as being important factors in their decision to provide written instructions. Judges who were critical of a mandatory standard, or a presumption, listed time constraints, delay in trial and "bad practice" as the main reasons behind their objections. All judges vigorously asserted that the decision to provide written jury instructions be left in their discretion. Judges commented that a requirement to provide written jury instructions in all cases would waste resources, time and money. Some judges opined that providing written instructions to a jury may result in jurors focusing on one aspect of the charge while neglecting the charge as a whole. Many judges also opined that since jury charges are tailored to each case, significant secretarial/judicial word processing time would be required to present a finished product to a jury. It was suggested that the current process of having a judge make his or her own notes on standard charges would continue to encourage substance over form.

On the other hand, the minority of judges who endorsed the practice of providing jurors with a copy of the instructions cited to a more effective, reliable and practical administration of

justice. As one judge pointed out, to expect lay people, even collectively, to recall with exactness the intricacies of the entire jury charge is "at best fanciful, and at worst delusional." The judges who provide written instructions note that with the advance of technology, production of the finished product can be accomplished without unreasonable delay. The judges who provide written instructions note that the judge need not be conversant with technology, given the fact that the Model Jury Charges are available on the Infonet, and that staff should be conversant with utilization of word processing. The judges who regularly utilize the practice of providing jurors with written instructions observe that it seems that jurors visibly relax when they were told that they need not try to memorize the words of the judge because they will have a printed copy with them to refer to, if needed, in the jury room. Judges who recommend the practice also note that jurors, who have been permitted to take notes during the trial, need not focus on note-taking during the judge's instruction, and instead can listen and focus on what the judge is saying; in other words, truly listen to the charge as a whole.

Discussion and Recommendations from Subcommittee

Initially, this Subcommittee observes that fear of technology ought not to be a factor in the Subcommittee's recommendations. Model Jury Charges are available on the Infonet, and at least one member of the judge's staff ought to be conversant in the use of technology, and that person need not be the judge. Moveover, because the preparation of the jury charge is an integral part of the presentation of each party's case, it is not unreasonable to place some responsibility on counsel to assist the court in preparing the written instructions. In fact, it is the use of technology which facilitates the efficient utilization of printed jury instructions, making the practice much easier to implement than it would have been ten (10) years ago.

That being said, some very thoughtful comments need to be considered which would question the widespread utilization of providing a copy of written instructions to jurors. The Subcommittee is reluctant to impact on the honored longstanding process of jury deliberations without a demonstration that significant changes are necessary. One concern was that jurors who are less literate may be intimidated or pressured by jurors with a higher level of education. Another concern was that a jury's focus on the written jury charge could distract the jurors from an overall fair and thoughtful weighing of the evidence in the context of the law. One thoughtful jurist also raised concerns regarding compliance with the American with Disabilities Act, *i.e.*, accommodations within the jury room for visually impaired jurors.

After much thought and consideration, it is the recommendation of this Subcommittee that judges be encouraged to provide jurors with a copy of written jury instructions in complex cases, including all civil matters which are Track III or Track IV matters, whenever requested by the parties. Of course, judges retain their discretion to provide written jury instructions to jurors in all cases whether or not requested by the parties.

The Subcommittee's conclusion is that in all Track III and Track IV cases, attorneys are required to present the judge with proposed written charges at – or shortly before – the commencement of the trial. Given the advance of technology, it ought not be difficult or time consuming to have those attorneys provide the judge's staff with proposed charges

electronically. The judge's secretary and/or law clerk should be able to incorporate all revisions in an expedited manner. The consensus is that the judge retains flexibility in modifying and changing the anticipated charge and that said changes and modifications can be made without unreasonable delay. Said differently, each judge carefully prepares his or her instructions to the jury. Converting that preparation into written form ought not be unduly complicated or difficult. If the parties request printed charges, and/or if the judge concludes that the benefit of having a jury utilize the printed form for their consultation in the jury room facilitates the work of the jury, the benefits outweigh the concern over practical difficulties.

Nevertheless, if a party requests printed charges, it is the responsibility of that party to notify his/her adversary by way of a pretrial submission. Said party must provide the court with a full copy of the proposed charges in the form directed by the court, presumably electronically.

Finally, when printed instructions are presented to a jury, the judge should address the fact that a copy of his or her jury instructions will be provided when the jury deliberates. The court needs to emphasize that the printed charge is not being provided so that the jurors read same in book form. In fact, the recommendation is that only one or two copies be provided to the jury to illustrate that it is not a document to be read by each individual juror. Further, the trial judge must emphasize that there ought not to be discussion regarding the interpretation of the charge within the jury room. If there is debate over the interpretation, a question of the interpretation ought to be presented to the court and not debated among the jurors.

Hon. Robert L. Polifroni, P.J.Cv., Chair
Hon. John C. Kennedy, J.A.D.
Hon. Heidi Willis Currier, J.S.C.
Risa M. David, Esq.
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ADDENDUM
SUGGESTED REVISION TO R. 1:8-8(a)

Rule 1:8-8(a) reads, in pertinent part:

> The court, in its discretion, may submit a copy of all or part of its instructions to the jury for its consideration in the jury room.

A proposed rule change is as follows:

> In civil cases, the court, in its discretion, may submit a copy of ~~all or part of~~ its instructions to the jury for its consideration in the jury room. In Track III and IV cases, if requested by any party, it is presumed a copy will be provided by the court. In all cases, any request that a copy of the charge be provided to the jury must be made in pretrial submissions, and a draft be submitted to the court at the commencement of the trial, in a format as directed by the court. The failure of a party to timely provide a full copy of the proposed charge shall be deemed a waiver of the party's right to request same. In all cases, the decision to submit jury instructions in printed form shall rest within the court's sound discretion, considering the totality of the circumstances presented, including whether or not said submission shall result in an unreasonable delay of the proceedings. In all cases, full jury instructions must be read orally. Whenever a copy of said instructions is provided to the jury, the court shall emphasize that the charge must be taken as a whole, and that the jury not pick any particular instruction and place undue emphasis upon it. The court shall further instruct the jury to present the court with any question(s) regarding the interpretation of the charge.

APPENDIX B

October 26, 2010

REPORT OF THE SUBCOMMITTEE ON SUPERSEDEAS BONDS

The Supreme Court has requested the Civil Practice Committee to undertake a further review of the supersedeas bond rules and procedures and to determine "on an expedited basis" whether the current rules should be amended. The inaugural meeting of the Civil Practice Committee was convened on September 28, 2010, and Judge Sabatino at that time empanelled a subcommittee to study the issue and report to the full committee on October 26, 2010.

What follows is the report of the subcommittee.[2]

1. Introduction

Because the full committee had addressed this issue during the last rules cycle, and given the subcommittee's time constraints, it is sufficient to simply note that under current rules judgments for money damages are generally stayed only upon the posting of a supersedeas bond or a cash deposit in the full amount of the judgment plus interest and costs "unless the court otherwise orders after notice on good cause shown." R. 2:9-6(a). The rules do not specify what principles should guide the court in ruling upon the existence of good cause.

[2] The subcommittee examined the Illinois model, which seemed to be of particular interest to the Supreme Court, as well as legislation and rules in seven other states and the rules and practice in federal court.

Legislators, courts and others are rightly concerned that execution against large judgments during an appeal period can force the financial ruin of an individual, a business or a corporation unable to post a full supersedeas bond even in circumstances where the judgment debtor is not liquidating its assets or attempting to flee from justice. Justice does not always mandate the removal of every element of risk from a claim that may not survive appeal, simply because an honest, but hard pressed, judgment debtor pursues appeal. An inflexible requirement for a full supersedeas bond on appeal can also at times dramatically and, perhaps unfairly, improve the position of the judgment creditor to the detriment of other creditors and create an unwarranted preference.

These considerations have prompted some states to set arbitrary caps on supersedeas bonds. Legislation setting such a cap is proposed in New Jersey, as well. Such caps do little to address the problems faced by individuals and small businesses noted above and may, in a painful irony, benefit individuals or businesses whose actions have caused widespread harm. For this reason, as well as others, the subcommittee's recommendations which follow do not include the fixing of an artificial cap on supersedeas bonds.

While the subcommittee shall focus upon the amount and form of security other than a full supersedeas bond, and the considerations a court might weigh in approving a stay conditioned upon such alternative amounts and type of security, it

must be recognized that there exist many issues relative to appeal bonds that are not being examined by this subcommittee. These issues merit further study, but are presently beyond the immediate mandate of the Supreme Court.[3]

2. The Current Rules

The current rules establish a clear preference for a supersedeas bond "conditioned for the satisfaction of the judgment in full, together with interest and trial costs, and to satisfy fully such modification of judgment, additional interest and costs and damages as the appellate court may adjudge." R. 2:9-6(a). While the propriety of a rule which requires a supersedeas bond conditioned upon the possibility of such "additional … damages as the appellate court may adjudge" may be debated, it is the position of the subcommittee at this time that the presumptive preference for a full supersedeas bond in the first instance ought not to be disturbed. The policies underlying the rule are well established and understood. See Courvoisier v. Harley Davidson, 162 N.J. 153, 158 (1994).

Requiring a full supersedeas bond as a condition of a stay of execution on a judgment in all circumstances would, at times, work an injustice. An appellant

[3] If the prevailing party appeals, must the respondent post a bond to stay the appellant's efforts at collection? See BASF v. Old World Trading Corp., 979 F.2d 615 (7 Cir. 1992); Tennessee Valley Auth. v. Atlas Mach. & Iron Works, Inc., 803 F.2d 794 (4 Cir. 1986). Should a court consider the rights of a judgment debtor's unsecured creditors where the posting of a supersedeas bond might jeopardize the financial stability of the judgment debtor and create a preference? See Olympia Equip. v. Western Union Tel. Co., 786 F.2d 794 (7 Cir. 1986) Where a judgment debtor waits to ascertain if the judgment creditor attempts to execute, and only thereafter secures a supersedeas bond, must the judgment creditor return seized assets? See Moses v. K-Mart Corp., 922 F.Supp. 600 (S.D. Fla. 1996). Is it fair to require a supersedeas bond for the full amount of the judgment where the judgment itself creates a lien on the judgment debtor's real property? Questions such as these have not been addressed by the subcommittee.

confronted with a judgment clearly exceeding its assets and earning power would never qualify for a full supersedeas bond and would face financial ruin before its appeal may be heard. A distressed appellant forced to marshal and pledge all its cash and assets in order to secure a supersedeas bond might also trigger aggressive action by its general, unsecured creditors who would rightly fear that a judgment creditor will shortly obtain an unwarranted preference. The self-protective actions of other unsecured creditors would likely include bankruptcy or dissolution proceedings against a corporate appellant. Such concerns are not fanciful. See Olympia Equipment Leasing Co. v. Western Union Tel. Co., 786 F.2d 794 (7 Cir. 1986).

Further, requiring a full supersedeas bond in all cases can cause an anomaly where the judgment creditor's prospect of collection against an honest but financially distressed appellant would be materially improved by the posting of a bond, well beyond the prospects that would obtain if no appeal were taken.

Recognition of these realities, no doubt, prompted the qualification in the rule empowering a court to dispense with a full supersedeas bond "on good cause shown." R.2:9-5(a). The problem here, however, is that the rule is utterly silent on what constitutes "good cause" and the procedure by which a court might make such a determination.

3. Recommendation for Amendment

The subcommittee believes it is desirable to amend the rules to set forth some criteria a court should consider in making its "good cause" determination and to explicitly empower a court to condition a stay upon the posting of other forms of security or a supersedeas bond in an amount less than the amount of the judgment plus interest and costs in appropriate circumstances. The purpose of the proposed amendment is not to restrict a court's discretion in any way, but rather to broaden the considerations and alternatives a court might evaluate in exercising that discretion.

The subcommittee also determined that it would not be appropriate to list the alternative forms of security a court could consider – i.e. letters of credit, certificates of deposit, pledges of accounts receivable or the like - because to do so might be viewed as a restriction of discretion or limitation upon the breadth of acceptable alternatives. If the Supreme Court would like to suggest particular alternatives to a full supersedeas bond, it might be appropriate to include such references in a rule comment.

Further, the subcommittee considered, but rejected, an amendment that specifically addressed punitive damages. A full exposition on the question of bonding punitive damages is beyond the mandate of the subcommittee at this time, but there are several schools of thought on the issue. One is that punitive damages are a windfall and to bond such damages may make innocent unsecured creditors

bear the burden of the debtor's wrongdoing. See In re GAC Corp., 681 F.2d 1295 (11 Cir. 1982). Another is that " … if a firm cannot be punished beyond the point of obliterating the equity claimants, then a firm already bankrupt would be free to [undertake wrongful acts] with impunity." Olympia Equip. v. Western Union Tel. Co., supra, 786 F.2d at 803 (concurring opinion of Judge Easterbrook). Given such considerations, the subcommittee elected not to specifically address punitive damages, but rather, at this time, to allow the issue to be addressed by subsequent caselaw.

Finally, the subcommittee elected to place the substantive amendment within R. 2:9-5(a), rather than R. 2:9-6(a). The reasoning here is that R. 2:9-6(a) sets forth clearly the criteria for a full supersedeas bond, which is the presumptive choice when the court is asked to approve a stay. To amend that rule might be misconstrued as diluting the clear preferences for full supersedeas bonds. Also, the first reference to "good cause" is found in R. 2:9-5(a) and it was felt that the amendment should logically be part of that rule.

The task undertaken by a court in determining whether to approve something less than a full supersedeas bond as a condition of a stay of execution is not an easy one. The modest amendment suggested by the subcommittee is designed simply to identify factors a court may wish to consider when its discretion is invoked under R. 2:9-5(a) and

R. 2:9-6(a) and to aid a court in thoughtfully exploring the necessity and form of security other than a full supersedeas bond with sureties.

At the same time, the subcommittee did not find it appropriate to identify with particularity the types of alternative security a court could consider. To do so would be a restriction upon the court's discretion and might impair a court's consideration of a type of security not listed which might be most suitable under the circumstances. Given the universe of financial instruments available under the law, the subcommittee did not wish a partial list of such instruments to imply the exclusion of others.

Also, as noted, fixing an artificial cap on security for a stay of execution seems unwarranted and unwise. Extremely large judgments are rare and the problems posed by an application for a stay of execution on such judgments are accommodated by the proposed amendments.

The subcommittee also notes that it debated altering the standard for security other than a full supersedeas bond from "good cause" to "exceptional circumstances." The latter standard, if adopted, would establish beyond debate that the explicit preference under the rule is for a full supersedeas bond.