NOTICE TO THE BAR

APPELLATE DIVISION GUIDELINES FOR ENTERTAINING EMERGENT APPLICATIONS

The Appellate Division is issuing new guidelines setting forth the criteria considered by the court in reviewing applications for permission to file an emergent motion. These guidelines clearly explain the standards examined by the court in its determination of these applications. The guidelines, together with the revised Application for Permission to File Emergent Motion, take effect on September 14, 2015.

An attorney or litigant who seeks relief on an emergent basis must contact the Clerk's office at (609)633-7082 between regular business hours of 8:30 a.m. to 4:30 p.m. The Clerk's office shall arrange for the completion by the applicant of an application for permission to file an emergent motion in the form set forth on the Judiciary's website njcourts.com. If an attorney or litigant seeks emergent relief after regular business hours, on holidays or weekends, he or she must contact the State Police Operational Dispatch Bureau duty trooper at (609)963-6900, option #1. The duty trooper will then contact the emergent duty judge.

1. **What matters are emergent**. In deciding if a matter is emergent, the court considers the nature of the alleged impending harm, in addition to the time frame in which it will occur. A matter is not emergent just because something will occur before the court could normally decide an ordinary motion. The threatened occurrence must also involve either irreparable injury or some similar showing that the interests of justice require our hearing the matter on short notice.

For example, the fact that two parents have a dispute over ordinary child visitation on an upcoming weekend is not emergent, under that definition, because the trial court can order that a lost visitation opportunity be made up at a later time. On the other hand, a court-ordered requirement to turn over privileged information is emergent, under that definition, because the privilege will be destroyed as soon as the documents are disclosed. In that example, however, the court will also consider whether the turnover is imminent or whether the trial court has set a deadline that would allow the court to decide a stay application within three to four weeks.

2. **Deciding the application**. In deciding whether to allow the filing of a short-notice motion, the court ordinarily does not consider the merits of the proposed motion. That is, the court considers whether the matter is emergent but does not consider whether the application for permission to file, itself, demonstrates that the motion will be meritorious. For example, the court will not attempt to decide, at the application stage, whether a tenant seeking permission to file a short-notice motion for a stay of eviction will ultimately be able to meet the Crowe v. DeGioia, 90 N.J. 126 (1982), factors.

3. **Deciding the application – special situations**. The court applies a different standard to applications filed either on the eve of a scheduled trial or during the trial. Short-notice appellate motions filed during a trial, or close to the start of a scheduled trial, are uniquely disruptive and burdensome to both the adversary and to the trial court. Additionally, such motions typically involve interlocutory review of a trial court's order and therefore must also satisfy the demanding standards for a grant of leave to appeal. For those reasons, when a case is either in trial or about to go to trial, the Appellate Division will not grant an application for permission to file a short-notice motion, unless the applicant can make at least a prima facie showing that the proposed motion would satisfy the standards for granting leave to appeal.

There is, however, an exception to this policy for situations in which an attorney has been ordered by two different judges to appear for trial in two different places at the same time. For example, if an attorney has been ordered on a Friday to appear for trial in Atlantic County on the following Monday, when the attorney is already scheduled to appear for trial in Passaic County on that Monday, the court will ordinarily permit the attorney to file an emergent motion for relief. That does not, of course, mean that all such motions will ultimately be granted. It means that the court will ordinarily permit the filing of a motion for relief on short notice and then judge each motion on its individual merits.

4. **Self-generated emergencies**. Emergent applications place a burden on the adversary and the court to "drop everything" and turn immediate attention to that application. An applicant who claims to have an emergency must behave as though the matter is genuinely emergent. The court will be reluctant to grant permission for a short-notice filing when the timing of the application indicates that the applicant is responsible for a "self-generated emergency." For example, if a trial judge has ordered on June 1 that a defendant must take some action by June 30, and the

defendant waits until June 28 to seek permission to file an emergent motion, that would be considered a self-generated emergency unless the defendant provides a good explanation for the delay.

In reviewing a last-minute application, the court will consider whether the applicant has unreasonably delayed filing the application, to the point where it cannot fairly be heard on short notice without prejudice to the adversary. The court will, for example, consider whether the application has been filed so late (e.g., 4:30 on Friday afternoon seeking a stay of an event due to occur on Monday morning) that the adversary would not have a fair chance to file opposition before the court would have to decide the application. The court may also consider whether its own schedule allows for consideration of an unreasonably-delayed application within the time frame sought by the applicant.

Unless an applicant provides a persuasive, written explanation for the delay, the court may either (a) decline to hear a "self-generated emergency" application, or (b) set a briefing schedule that allows the adversary a fair chance to respond, and the court a reasonable time to decide the motion, even if that schedule leaves the applicant at risk that the threatened harm may occur in the interim.

For example, the court would ordinarily allow a tenant to file a short-notice motion to stay an eviction, if the application is timely. However, if the tenant waits until late Friday afternoon to seek permission to apply on short notice for a stay of Monday morning's impending eviction, the court nonetheless may not consider the stay application until Monday in order to give the landlord a fair chance to respond. If the tenant is evicted before the application is decided, the remedy, if one is appropriate, may consist of ordering that the landlord let the tenant back into the premises.

In deciding whether to entertain a last-minute application and on what schedule, the court will consider the magnitude of the threatened harm to the applicant if the short-notice motion is not heard in time to prevent the harm from occurring. In other words, the court will not mechanically refuse to hear an application solely because it is submitted late, but will do what is just and consistent with fairness and common sense.

5. **Legal effect of granting permission to file**. The fact that the court grants permission to file a short-notice stay motion does not, by itself, operate as a stay. In an appropriate case, where

the threatened harm is severe and will occur very quickly, the court may enter an interim stay to preserve the status quo for a day or two while the court considers the stay motion. However, the court will rarely enter a stay in favor of the applicant without first hearing from the other side. Litigants who unreasonably delay filing their applications should not expect to thereby "rush" the court into giving them an immediate stay without hearing from the other side.

Carmen Messano
Presiding Judge for Administration
Appellate Division

Dated: August 26, 2015