2016 Report of the Supreme Court

Civil Practice Committee

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *Rules* 1:5-1, 1:5-6 and 1:21-2 — re: Reference to Municipal Court Presiding Judge, Municipal Division Manager and Municipal Courts

The Administrative Director of the Courts requested that the Conferences of Municipal Court Presiding Judges and Municipal Court Division Managers review the Part I Rules and make suggestions to amend the Rules to make reference to the Municipal Court Presiding Judge, the Municipal Division Manager and the municipal courts. The Civil Practice Committee, which has primary responsibility to review changes to a number of Part I Rules through *Rule* 1:13, is asked to consider the proposed revisions to *Rules* 1:5-1, 1:5-6 and 1:21-2.

The Committee agreed that *Rules* 1:5-1, 1:5-6 and 1:21-2 should be amended to make reference to the Municipal Court Presiding Judge, the Municipal Division Manager and the municipal courts, and approved the language proposed by the Conferences of Municipal Court Presiding Judges and Municipal Court Division Managers.

The proposed amendments to *Rules* 1:5-1, 1:5-6 and 1:21-2 follow.

1:5-1. Service: When Required

(a) …no change.

(b) Criminal and Municipal Actions. In criminal and municipal actions, unless otherwise provided by rule or court order, written motions (not made *ex parte*), briefs, appendices, petitions, memoranda and other papers shall be served upon all attorneys of record in the action, upon parties appearing *pro se* and upon such other agencies of government as may be affected by the relief sought.

Note: Source — *R.R.* 3:11-4(a), 4:5-1. Paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended _____ to be effective _____.

1:5-6. Filing

(a) …no change.

(b) What Constitutes Filing With the Court. Except as otherwise provided by *R.* 1:6-4 (motion papers), *R.* 1:6-5 (briefs), *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;

(8) In actions in the Municipal Courts, as provided by Part VII 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) …no change.

(d) …no change.

(e) …no change.

Note: Source — *R.R.* 1:7-11, 1:12-3(b), 2:10, 3:11-4(d), 4:5-5(a), 4:5-6(a) (first and second sentence), 4:5-7 (first sentence), 5:5-1(a). Paragraphs (b) and (c) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended November 26, 1990 to be effective April 1, 1991; paragraphs (b) and (c) amended, new text substituted for paragraph (d) and former paragraph (d) redesignated paragraph (e) July 13, 1994 to be effective September 1, 1994; paragraph (b)(1) amended, new paragraph (b)(2) adopted, paragraphs (b)(2), (3), (4), (5) and (6) redesignated paragraphs (b)(3), (4), (5), (6) and (7), and newly designated paragraph (b)(4) amended July 13, 1994 to be effective January 1, 1995; paragraphs (b)(1), (3) and (4) amended June 28, 1996 to be effective September 1, 1996; paragraph (b)(4) amended July 10, 1998 to be effective September 1, 1998; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraphs (c)(1) and (c)(3) amended July 28, 2004 to be effective September 1, 2004; subparagraph (c)(1)(E) adopted, paragraphs (c)(2) and (c)(3) amended, and paragraph (c)(4) adopted July 27, 2006 to be effective September 1, 2006; paragraph (b) 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; subparagraph (c)(1)(C) amended July 9, 2013 to be effective September 1, 2013; new subparagraph (b)(8) added _____ to be effective _____.

1:21-2. Appearances *Pro Hac* Vice

(a) …no change.

(b) Application for Admission. An application for admission *pro hac vice* shall be made on motion to all parties in the matter; which shall contain the following:

(1) In [both] civil, [and] criminal and municipal actions, the motion shall be supported by an affidavit or certification of the attorney stating that:

(A) the attorney is a member in good standing of the bar of the highest court of the state in which the attorney is domiciled or principally practices law;

(B) the attorney is associated in the matter with New Jersey counsel of record qualified to practice pursuant to *R.* 1:21-1;

(C) the client has requested to be represented by said attorney; and

(D) no disciplinary proceedings are pending against the attorney in any jurisdiction and no discipline has previously been imposed on the attorney in any jurisdiction. If discipline has previously been imposed, the certification shall state the date, jurisdiction, nature of the ethics violation and the penalty imposed. If proceedings are pending, the certification shall specify the jurisdiction, the charges and the likely time of their disposition. An attorney admitted pro hac vice shall have the continuing obligation during the period of such admission promptly to advise the court of a disposition made of pending charges or of the institution of new disciplinary proceedings.

(2) In criminal and municipal actions a motion so supported shall be granted unless the court finds, for specifically stated reasons, that there are supervening considerations of judicial administration.

(3) In civil actions the motion shall be granted only if the court finds, from the supporting affidavit, that there is good cause for such admission, which shall include at least one of the following:

(A) the cause in which the attorney seeks admission involves a complex field of law in which the attorney is a specialist, or

(B) there has been an attorney-client relationship with the client for an extended period of time, or

(C) there is a lack of local counsel with adequate expertise in the field involved, or

(D) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(E) there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

(F) such other reason similar to those set forth in this subsection as would present good cause for the *pro hac vice* admission.

(c) …no change.

(d) …no change.

(e) …no change.

Note: Source — *R.R.* 1:12-8. Amended December 16, 1969 effective immediately; caption and text amended November 27, 1974 to be effective April 1, 1975; amended January 10, 1979 to be effective immediately; former rule amended and redesignated as paragraphs (a) and (b) and paragraph (c) adopted July 22, 1983 to be effective September 12, 1983; paragraph (a) amended January 31, 1984 to be effective February 15, 1984; new paragraph (c) adopted and former paragraph (c) redesignated as paragraph (d) November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b)(2) and (3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1)(iv) added June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1,

1998; paragraphs (a)(1)(i), (a)(1)(ii), (a)(1)(iii), and (a)(1)(iv) amended and redesignated as (a)(1)(A), (a)(1)(B), (a)(1)(C), and (a)(1)(D) July 5, 2000 to be effective September 5, 2000; paragraph (a) amended and subsections of paragraph (a)(3) redesignated from (i) through (vi) to (A) through (F) July 12, 2002 to be effective September 3, 2002; paragraph (a) amended, portion of paragraph (a) redesignated as new paragraph (b), and former paragraphs (b), (c), and (d) redesignated as (c), (d), and (e) July 28, 2004 to be effective September 1, 2004; paragraph (a) amended July 9, 2013 to be effective September 1, 2013; paragraphs (b)(1) and (b)(2) amended _____ to be effective _____.

B. Proposed New *R.* 1:4-10 — re: Assignments of Judgment

In April 2015, the Judicial Council approved issuance of an Administrative Directive mandating the process for an "assignee of record" and the inclusion of the assignee's name in the caption for post-judgment civil process. The Civil Practice Division proposes that in addition to the Administrative Directive, a rule be promulgated to address the assignee-of-record process and the assignee's name in the caption of post-judgment civil process.

After discussion, the Committee recommends the proposed new rule.

The proposed new *Rule* 1:4-10 follows.

1:4-10. Assignment of Judgment

Whenever there shall be an assignment of a judgment, the assignee may become the assignee of record by filing the assignment of judgment with the Clerk of the Court that entered the judgment. All such assignments of judgment must be in writing, showing the date thereof; the name and address of the assignor and assignee; the amount of the judgment or the amount remaining due on the judgment, whichever is lesser, and when and by what court the judgment was granted; a statement describing the rights assigned; and the docket number. All such assignments of judgment shall be executed by the judgment creditor or, if applicable, by a prior assignee of record and must be acknowledged as are deeds for recordation. When such assignment is filed with the court as herein provided, all forms of post-judgment civil process thereafter shall be captioned in the name of the original judgment creditor with the added wording "by assignee" followed by the name of the assignee.

Note: New Rule adopted _____ to be effective _____.

C. Proposed Amendments to *R.* 1:6-5 — re: Page Limitations for Trial Court Motion Briefs in Civil Matters

A retired appellate judge on recall in the Law Division suggests that the Committee consider whether there should be a new rule or amendment to the Court Rules establishing page limitations for motion briefs filed in the Civil Part of the Law Division. The judge states that in his experience the length of movants' briefs, respondents' briefs, and reply briefs far exceed the page limits for appellate briefs, and much of the briefing was unnecessary and unduly repetitive. Moreover, the extra length of such briefs has rarely assisted the judge in adjudicating the merits of the case. The judge contends that trial brief page limitations would provide the court with more time for thoughtful consideration of the merits of the motion and would allow and motivate scriveners to more carefully structure and argue the merits of the motion.

Although the Committee rejected a similar proposal of the Conference of Civil Presiding Judges to set page limitations for trial briefs in 2012, the Committee considered the proposal. After a lengthy discussion, a majority of the Committee determined that Local Rule of Civil Procedure 7.2(b) of the United States District Court for the District of New Jersey, which provides a 40-page limit for briefs and a 15-page limit for reply briefs, would be a useful model to apply to all motions filed in the Law Division. The page limitations would be subject to the parties' right to request permission from the court to file an overlength brief. Moreover, the parties would still have an opportunity to build the record by filing relevant affidavits, certifications and documents as exhibits, which would not be subject to the page limitations for briefs.

The proposed amendments to *Rule* 1:6-5 follow.

1:6-5. Briefs

The moving party's brief in support of a motion shall, pursuant to *R.* 1:6-3, be served and submitted to the court with the moving papers. The respondent shall serve and submit an answering brief at least 8 days before the return date. A brief filed in the Civil Part or the Special Civil Part in support of a motion or cross-motion and any answering brief, exclusive of any tables of contents or authorities, shall not exceed 40 pages and shall contain no more than 26 double-spaced lines of no more than 65 characters including spaces, each of no less than 10-pitch or 12-point type. A reply brief, if any, shall be served and submitted at least 4 days before the return date. A reply brief shall not exceed 15 pages and shall contain no more than 26 double-spaced lines of no more than 65 characters including spaces, each of no less than 10-pitch or 12-point type. Prior to the date on which the brief is due to be filed and served, a party may make an application in writing to the court to file an over-length brief exceeding these limitations, which the court may permit or disallow in its discretion and without awaiting a response from any other party concerning the request. No over-length briefs may be filed without advance permission to do so. Briefs may not be submitted after the time fixed by this rule or by court order, including the pretrial order, without leave of court, which may be applied for *ex parte*.

Note: Source — *R.R.* 4:5-5(b) (first sentence), 4:5-10(a)(b)(c)(e); paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; amended July 5, 2000 to be effective September 5, 2000; amended _____ to be effective _____.

D. Proposed Amendments to *R.* 1:9-3 — re: Service of Subpoenas

During the last rules cycle, the Administrative Director of the Constables Office of New Jersey's Bureau of Process Service and president of a private process service company contends that subpoenas are being improperly served by mail in violation of *Rule* 1:9-3. The Committee discussed that contention and whether *Rule* 1:9-3 should be amended to clarify that service of subpoenas can be made by mail. This item was held over for consideration by a subcommittee during this rules cycle.

During this rules cycle, a majority of subcommittee determined that *Rule* 1:9-3 should be amended to permit service by mail provided that the subpoena is accepted and personal service is waived. The subcommittee acknowledged that the current practice of mail service, particularly for records, is widespread. Further, mail service is a common and proper method of service of important legal documents. For instance, *Rule* 4:4-4 allows for optional mail service of the complaint. Additionally, it is through mail service that the court summons jurors for service. Mail service is more cost effective and a less inconvenient means to conduct discovery.

A majority of the full Committee was in favor of permitting service by mail for subpoenas *duces tecum* (production of documents or records) only. After the Committee's determination, the Advisory Committee on Professional Ethics issued Opinion 729, which concluded that attorneys cannot threaten contempt for failure to comply to a subpoena served by mail because the current *Rule* 1:9 does not authorize service of subpoenas by mail. The Committee would conclude that this recent Ethics Opinion, however, does not impact the proposed rule amendments to *Rule* 1:9 3.

The proposed amendments to *Rule* 1:9-3 follow.

1:9-3. Service

A subpoena may be served by any person 18 or more years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named together with tender of the fee allowed by law, except that if the person is a witness in a criminal action for the State or an indigent defendant, the fee shall be paid before leaving the court at the conclusion of the trial by the sheriff or, in the municipal court, by the clerk thereof. A subpoena which seeks only the production of documents or records may be served by registered, certified or ordinary mail and, if served in that manner, shall be enforceable only upon receipt of a signed acknowledgment and waiver of personal service.

Note: Source — *R.R.* 3:5-10(b) (last sentence), 3:5-10(d), 4:46-3, 5:2-2, 6:3-7(c), 7:4-6(a) (last sentence), 8:4-9(d); amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

E. Proposed Amendments to *R.* 2:6-2 — Contents of Appellant's Brief

1. Proposed Amendments to Paragraph (a) – Formal Brief

The Appellate Division Rules Committee (ADRC) proposes amending subparagraph (a)(1) of *Rule* 2:6-2 to require an appellant to include information as to where the appealed rulings may be located in the record. The proposed amendments require that: (1) the first item in the table of contents shall be a list of places in the record where judgements, orders, final and intermediate decisions and written or oral opinions may be found; and (2) at the end of each point heading the appellant shall include in parentheses the place in the record where the ruling appealed appears, or if the issue was not raised below. The Appellate Division Management Committee has approved the proposed amendments.

The Committee agreed in concept with the proposal of the ADRC, concluding that a table of ruling being appealed would be useful to judges who usually consult the appendices to briefs rather than the Appellate Division Case Information Statement for lower court rulings. The Committee suggested, however, that the list of appealed rulings should be separate from the table of contents and should be called a table of judgments, orders and rulings being appealed. The proposal was subsequently revised to incorporate this suggestion.

2. Proposed Amendments to Paragraph (b) — Letter Brief

The ADRC proposes amending paragraph (b) of *Rule* 2:6-2 to require the inclusion of a table of citations for letter briefs. The ADRC contends that most law firms have the capacity to insert a table of citations to a letter brief with little or no extra effort, and would voluntarily include a table of citations given the incentive of relief from the 20-page limitation.

The Committee agreed, and recommends the proposed amendments to paragraph (b) of *Rule* 2:6-2.

The proposed amendments to paragraphs (a) and (b) of *Rule* 2:6-2 follow.

2:6-2. Contents of Appellant's Brief

(a) Formal Brief. Except as otherwise provided by *R*. 2:6-4(c)(1) (statement in lieu of brief), by *R*. 2:9-11 (sentencing appeals), and by paragraph (b) of this rule, the brief of the appellant shall contain the following material, under distinctive titles, arranged in the following order:

(1) A table of contents, including the point headings to be argued. It is mandatory that [any point not presented below be so indicated by including in parenthesis a statement to that effect in the point heading.] for every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below.

(2) A table of judgments, orders and rulings being appealed. This table shall include a listing of the places in the record where the following items are located:

(A) The trial court's judgment(s), order(s), and ruling(s) being appealed, or the administrative agency's final decision(s);

(B) The trial judge's written or oral opinion;

(C) Intermediate decisions, if any, pertinent to the appeal. Such intermediate decisions include such items as Planning Board resolutions, initial decisions of the Administrative Law Judge, and Appeal Tribunal decisions.

[(2)](3) A table of citations of cases, alphabetically arranged, of statutes and rules and of other authorities.

[(3)](4) A concise procedural history including a statement of the nature of the proceedings and a reference to the judgment, order, decision, action or rule appealed from or sought to be reviewed or enforced. The appendix page of each document referred to shall be

stated. The plaintiff and defendant shall be referred to as such and shall not, except where necessary, be referred to as appellant and respondent.

[(4)](5) A concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript. The statement shall be in the form of a narrative chronological summary incorporating all pertinent evidence and shall not be a summary of all of the evidence adduced at trial, witness by witness.

[(5)](6) The legal argument for the appellant, which shall be divided, under appropriate point headings, distinctively printed or typed, into as many parts as there are points to be argued. New Jersey decisions shall be cited to the official New Jersey reports by volume number but if not officially reported that fact shall be stated and unofficial citation made. All other state court decisions shall be cited to the National Reporter System, if reported therein and, if not, to the official report. In the citation of all cases the court and year shall be indicated in parentheses except that the year alone shall be given in citing the official reports of the United States Supreme Court, the Supreme Court of New Jersey, and the highest court of any other jurisdiction.

[(6)](7) In addition to the foregoing, each brief may include an optional preliminary statement for the purpose of providing a concise overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes or, to the extent practicable, citations.

(b) Letter Brief. In lieu of filing a formal brief in accordance with paragraph (a) of this rule and except as otherwise provided by *R.* 2:9-11 (sentencing appeals), the appellant may file a letter brief. Letter briefs shall not exceed 20 pages and shall conform with the requirements of subparagraphs (1), (2), [(3)], (4), (5) and (6) of paragraph (a). As to any point not presented

below a statement to that effect shall be included in parenthesis in the point heading. No cover need be annexed provided that the information required by *R.* 2:6-6 is included in the heading of the letter.

(c) …no change.

(d) …no change.

Note: Source — *R.R.* 1:7-1(a) (b) (d) (e) (g); amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended, former paragraphs (a) (b) (c) and (e) redesignated subparagraphs (1) (2) (3) and (5), subparagraph (4) and paragraphs (b) and (c) adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended January 10, 1979 to be effective immediately; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(5) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and (b) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; new paragraph (d) added July 14, 1992 to be effective September 1, 1992; paragraph (a)(5) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(6) added July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (b) amended _____ to be effective _____.

F. Proposed Amendments to *R.* 2:6-11(d)

The Appellate Division Rules Committee proposes amending paragraph (d) of *Rule* 2:6-11 to narrow the types of "cases" that may be brought to the court's attention by letter after a brief has been filed and to limit the length of such letters to two pages. The present use of the word "cases" within the rule may be overbroad and invite submission of letters bringing unauthorized, unpublished opinions to the court's attention. The page limitation will preclude practitioners from attempting to submit unauthorized supplemental briefs containing advocacy in the guise as letters calling new authority to the court's attention. The Appellate Division Management Committee has approved the proposed amendments.

The Committee determined that the proposed amendments to the Rule will not prohibit a party from filing a motion to request to file a reply brief. The Committee further concluded that while the length of the letter should be limited to two pages, a party could seek leave to file a letter exceeding that limitation. The Committee suggested other edits to the proposed rule such as referencing *Rule* 1:36-3 in the Rule, changing reference to the Appellate Division to the reviewing court, and adding reference to rules and ordinances in the Rule.

The proposed amendments to paragraph (d) of *Rule* 2:6-11 follow.

2:6-11. Time for Serving and Filing Briefs; Appendices; Transcript; Notice of Custodial Status

(a) …no change.

(b) …no change.

(c) …no change.

(d) Letter to Court After Brief Filed. No briefs other than those [herein specified] permitted in paragraphs (a) and (b) of this rule shall be filed or served without leave of court. A party may, however, without leave, serve and file a letter calling to the court's attention, with a brief indication of their significance, relevant [cases decided] published opinions issued, or legislation enacted or rules, regulations and ordinances adopted, subsequent to the filing of the brief. Unpublished opinions shall not be submitted pursuant to this rule, unless they are of a type that the reviewing court is permitted under *R.* 1:36-3 to cite in its own opinions. Any other party to the appeal may, without leave, file and serve a [short] letter in response thereto within five days after receipt thereof. The initial letter and subsequent responses shall not exceed two pages in length without leave.

(e) …no change.

(f) …no change.

(g) …no change.

Note: Source — *R.R.* 1:7-12(a)(c), 1:10-14(b), 2:7-3. Paragraph (b) amended by order of September 5, 1969 effective September 8, 1969; paragraph (a) amended July 7, 1971 to be effective September 13, 1971; caption and paragraphs (a) and (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended May 8, 1975 to be effective immediately; paragraphs (c), (d) and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended and titles of paragraphs (c)(d) and (e) added November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 28, 2004 to be effective September 1, 2004; paragraph (f) adopted July 16, 2009 to be

effective September 1, 2009; paragraph (f) caption and text amended July 9, 2013 to be effective September 1, 2013; new paragraph (g) adopted July 22, 2014 to be effective September 1, 2014; paragraph (d) amended _____ to be effective _____.

G. Proposed Amendments to *R.* 2:12-9 — Where Party Appeals and at the Same Time Makes Application for Certification

A Committee member suggests amending *Rule* 2:12-9 to clarify its applicability to appeals as of right. The Rule provides that a party seeking certification for review of a final judgment of the Appellate Division and also appealing from the final judgment must state in the petition for certification all questions intended to be raised on appeal. The denial of certification shall be deemed to be a dismissal of the appeal. The Committee member states that as the Rule is currently written, it appears to apply to every matter in which a petition for certification is filed contemporaneously with a notice of appeal with respect to an Appellate Division final judgment. The Committee member contends that a denial of certification should not result in the automatic dismissal of an appeal taken as of right. For example, a party may file a notice of appeal as of right from an Appellate Division decision affirming a trial court's grant of summary judgment where one member of the Appellate Division panel filed a dissent along with a petition for certification seeking review of an issue the dissenter did not squarely address. The Committee member argues that the Rule was not intended to provide for the summary dismissal of appeals as of right in a manner that conflicts with the purpose of appealing as of right. The suggestion is to carve out appeals pursuant to subparagraphs (a)(2), (a)(3) and (a)(4) of *Rule* 2:2-1 from *Rule* 2:12-9.

After discussion, a majority of the Committee voted in favor of clarifying the rule. Following the Committee's determination, the Clerk of the Supreme Court confirmed that notwithstanding that the Rule appears to be applicable to all appeals as of right, the Court's practice is to not apply it to appeals as of right based on a dissent in the Appellate Division. The Clerk agreed that the Rule should be clarified.

The proposed amendments to *Rule* 2:12-9 follow.

2:12-9. Where Party Appeals and at the Same Time Makes Application for Certification

Except in the case of an appeal as of right pursuant to *R.* 2:2-1(a)(2), a [A] party who seeks certification to review a final judgment of the Appellate Division and also appeals therefrom shall state in the petition for certification all questions intended to be raised on appeal. The denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders.

Note: Amended July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

H. Proposed Amendments to *R.* 4:3-2 — Venue in the Superior Court

A practitioner suggests amending the heading and text of paragraph (b) of *Rule* 4:3-2 to change references to "corporate" and "corporation" to "business entity." He contends that the proposed amendments would eliminate confusion as to where venue is properly laid for all business entities and would reduce the number of motions that are filed to change venue. He contends that there are many forms of business entities that have registered offices and/or operate in New Jersey other than corporations. The proposed amendment would also make the Rule consistent with the language of *Rule* 6:1-3 (cases litigated in the Special Civil Part).

Concluding that the proposed amendments would not change the substance of the Rule, the Committee unanimously agreed that the Rule should be amended to replace reference to "corporate" and "corporation" with "business entity."

The proposed amendments to paragraph (b) of *Rule* 4:3-2 follow.

4:3-2. Venue in the Superior Court

(a) …no change.

(b) [Corporate Parties] Business Entity. For purposes of this rule, a [corporation] business entity shall be deemed to reside in the county in which its registered office is located or in any county in which it is actually doing business.

(c) …no change.

Note: Source — *R.R.* 4:3-2. Paragraph (a) amended December 20, 1983 to be effective December 31, 1983. Paragraph (c) adopted January 9, 1984 to be effective immediately; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (b) amended _____ to be effective _____.

I. Proposed Amendments to *R.* 4:5-4 — Affirmative Defenses; Misdesignation of Defense and Counterclaim

In *J.B. Pool Management v. Four Seasons at Smith Homeowners Association*, 431 *N.J. Super*. 233 (App. Div. 2013), the Appellate Division held that the defenses of frustration of purpose and impossibility of performance, when relied upon by a defendant in a breach of contract case, generally should be pled as affirmative defenses. The Appellate Division, in footnote 8 of the opinion, refers to the Committee the issue of whether *Rule* 4:5-4 should be amended to include these defenses. During the last rules cycle, the Committee considered the issue and proposed amending *Rule* 4:5-4 to incorporate the defenses of frustration of purpose and impossibility of performance. The Committee also recommended that the Rule be clarified to provide that the defenses listed in the Rule are not the only defenses that must be pled as affirmative defenses.

The Supreme Court considered the Committee's recommendations and referred this item back to the Committee. The Court expressed concern with the Rule's present (and long-standing) structure of listing some but not all affirmative defenses. The Court has requested that the Committee define "affirmative defense" and, as part of the definition, develop a list of affirmative defenses and modernize the language of the defenses.

In this rules cycle, a subcommittee was formed to address this issue. The subcommittee, as part of its review, considered the federal, Delaware and Pennsylvania rules governing affirmative defenses. *Rule* 4:5-4 uses the same names for affirmative defenses as the federal rule and essentially similar to the Delaware and Pennsylvania rules. The subcommittee also considered New York's rule, which has approximately 54 affirmative defenses with definitions, but that rule vastly differs from *Rule* 4:5-4 such that comparison was not useful. The

subcommittee determined that "modernizing" the rule would only confuse the bar. Further, providing a complete list of defenses would further encourage attorneys to list all of the defenses as boiler point. The subcommittee concluded that amending *Rule* 4:5-4, other than to include the defenses of frustration of purpose and impossibility of performance, is unwarranted.

The Committee agreed with the subcommittee that *Rule* 4:5-4 should not include an exhaustive list of affirmative defenses and that modernizing the rule is unwarranted, but the Rule should be amended to include the defenses of frustration of purpose and impossibility of performance.

The proposed amendments to *Rule* 4:5-4 follow.

4:5-4. Affirmative Defenses; Misdesignation of Defense and Counterclaim

A responsive pleading shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense [such as] including but not limited to accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, frustration of purpose, illegality, impossibility of performance, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, and waiver. If a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if the interest of justice requires, shall treat the pleading as if there had been a proper designation.

Note: Source — *R.R.* 4:8-3; amended _____ to be effective _____.

J. Proposed Amendments to *R.* 4:11-4 — Testimony for Use in Foreign Jurisdictions

As part of its July 22, 2014 Omnibus Rule Amendment Order, the Supreme Court adopted amendments to *Rule* 4:11-4 to incorporate provisions of the Uniform Interstate Deposition and Discovery Act. Those amendments became effective on September 1, 2014. A Notice to the Bar was issued to provide guidance to the bar on procedure for requesting issuance of a subpoena for testimony for use in foreign jurisdictions. In light of some confusion over the amendments to paragraph (b) of *Rule* 4:11-4, the discovery subcommittee reviewed this Rule during this rules cycle.

The discovery subcommittee recommended amending paragraph (b) of *Rule* 4:11-4 to clarify the procedure for requesting subpoenas for testimony for use in another state. The proposed amendments provide that a party may submit a subpoena to Clerk of the Superior Court in Trenton as opposed to the deputy clerk in the county in which discovery is sought. The proposed amendments also replace reference in the Rule to the fee statute with reference to *Rule* 1:43.

The Committee agreed with the proposed amendments to paragraphs (a) and (b) of *Rule* 4:11-4.

The proposed amendments to *Rule* 4:11-4 follow.

4:11-4. Testimony for Use in Foreign Jurisdictions

(a) Testimony for Use in the United States or Another Country. Whenever the deposition of a person is to be taken in this State pursuant to the laws of the United States or another country for use in connection with proceedings there, the Superior Court may, on ex parte petition, order the issuance of a subpoena to such person in accordance with *R*. 4:14-7. The petition shall be captioned in the Superior Court, Law Division, shall be designated "petition pursuant to *R*. 4:11-4" and shall be filed in accordance with *R*. 1:5-6(b). It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to [*N.J.S.A*. 22A:2-7] *R*. 1:43.

(b) Testimony for Use in a Foreign State.

(1) Submission of Foreign Subpoena. Whenever the deposition of a person is to be taken in this State pursuant to the laws of a foreign state for use in connection with proceedings there, an out-of-state attorney or party may submit a foreign subpoena along with a New Jersey subpoena which complies with subparagraph (3) to an attorney authorized to practice in this State or to the [clerk of the court in the county in which discovery is sought to be conducted in this State] Clerk of the Superior Court in Trenton. The foreign subpoena must include the following phrase below the case number: "For the Issuance of a New Jersey Subpoena Under New Jersey Rule 4:11-4 (b)" and shall be filed in accordance with *R*. 1:5-6(b). It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to [*N.J.S.A*. 22A:2-7] *R*. 1:43.

(2) …no change.

(3) …no change.

(4) Service of Subpoena. A subpoena issued by an attorney authorized to practice in this State or by [a clerk of the court] the Clerk of the Superior Court in Trenton must be served in compliance with *R*. 1:9-3 and *R*. 1:9-4.

(5) …no change.

(6) Motion or Application to a Court. A motion or an application to the court for a protective order or to enforce, quash, or modify a subpoena issued by an attorney authorized to practice in this State or by [a clerk of the court] the Clerk of the Superior Court in Trenton under section (b) must comply with the rules and statutes of this State and be submitted to the court in the county in which discovery is to be conducted or the deponent resides, is employed or transacts business. It must be filed as a miscellaneous matter bearing the caption that appears on the subpoena. The following phrase must appear below the case number of the newly filed matter: "Motion or Application Related to a Subpoena Issued Under *R*. 4:11-4(b)." Any later motion or application relating to the same subpoena must be filed in the same matter.

[(7) Application to Pending Actions. This section applies to requests for discovery in cases pending on the effective date of this section.]

Note: Source — *R.R.* 4:17-4. Amended July 21, 1980 to be effective September 8, 1980; text amended and designated as paragraph (a), paragraph (a) caption adopted, and new paragraph (b) adopted July 22, 2014 to be effective September 1, 2014; paragraph (a) and subparagraphs (b)(1), (b)(4) and (b)(6) amended and subparagraph (b)(7) deleted to be effective _____.

K. Proposed Amendments to *Rule* 4:14-6 — Certification and Filing by Officer; Exhibits; Copies

The Certified Court Reporters Association – New Jersey, Inc. (CCRA-NJ) suggests amending paragraph (a) of *Rule* 4:14-6 to provide guidance to attorneys and court reporters regarding a court reporter's personal equipment. Specifically, CCRA-NJ asserts that a rule limiting access to a reporter's backup recording is necessary because backup recordings solely assist the reporter in preparing the transcript. Moreover, the backup recording is not required by law or by Court Rule. CCRA-NJ proposes that the Rule be amended to add the following sentence: "A reporter's backup recording, if any, used as an aid in preparing the transcript, is not a judicial record and shall not be made available to any party absent an Order of the Court."

The Committee referred this item to the Conferences of Civil Presiding Judges for consideration. The Conference of Civil Presiding Judges endorsed the rule proposal.

After discussion, the Committee unanimously approved the language proposed by the CCRA-NJ.

The proposed amendments to *Rule* 4:14-6(a) follow.

4:14-6. Certification and Filing by Officer; Exhibits; Copies

(a) Certification and Filing. The officer shall certify on the deposition that the witness was duly sworn and that the deposition is a true record of the testimony. The officer shall then promptly file with the deputy clerk of the Superior Court in the county of venue a statement captioned in the cause setting forth the date on which the deposition was taken, the name and address of the witness, and the name and address of the reporter from whom a transcript of the deposition may be obtained by payment of the prescribed fee. The reporter shall furnish the party taking the deposition with the original and a copy thereof. Depositions shall not be filed unless the court so orders on its or a party's motion. The original deposition shall, however, be made available to the judge to whom any proceeding in the matter has been assigned for disposition at the time of the hearing or as the judge may otherwise request. Filed depositions shall be returned by the court to the party taking the deposition after the termination of the action. A videotaped deposition shall be sealed and filed in accordance with *R*. 4:14-9(d). A reporter's backup recording, if any, used as an aid in preparing the transcript, is not a judicial record and shall not be made available to any party absent an order of the court.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 4:20-6(a)(b)(c). Paragraph (c) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (c) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraphs (a) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended _____ to be effective _____.

L. Proposed Amendments to *R.* 4:18-1 — re: FOIA and OPRA Requests for Information

During the last rules cycle, an attorney suggests a rule amendment requiring the propounder of Freedom of Information Act ("FOIA") and New Jersey Open Public Records Act ("OPRA") requests to provide copies of the FOIA and OPRA requests to all counsel in the pending litigation. The attorney analogizes this situation to the propounder of subpoena on a nonparty being required to provide notice and copies of the subpoena to all counsel in pending litigation. The attorney contends that release of certain public records could affect a pending matter because a party in pending litigation may have a confidentiality interest in the public records and the lack of notice of the request could prejudice that party. The attorney contends that it is insufficient for counsel to include a standing request for notice of such FOIA or OPRA requests in his or her interrogatories or requests to produce documents, because opposing parties frequently ignore such standing requests or respond to them belatedly.

Initially, Committee members expressed opposing views regarding placing restrictions on FOIA or OPRA requests in the Court Rules. This issue was referred to the discovery subcommittee and held over for further consideration during this rules cycle.

During this rules cycle, the discovery subcommittee considered the issue, and recommended amending *Rule* 4:18-1 to require that a party requesting records under FOIA and OPRA to provide a copy of the request to all counsel. The discovery subcommittee concluded that notice should be given to allow parties to assert that the records are confidential or privileged.

The vast majority of the Committee agreed with the recommendation, but suggested that the proposed language clarify that the request must be relevant to pending litigation.

The proposed amendments to *Rule* 4:18-1 follow.

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

(a) … no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) Notice of Requests for Public Records. A party who requests public records pursuant to the Freedom of Information Act, 5, *U.S.C.A.* §552, or the Open Public Records Act, *N.J.S.A.* 47:1A-1 to -13, that are relevant to a pending litigation from another party in the same litigation shall serve a copy of the request on all parties.

Note: Source — *R.R.* 4:24-1. Former rule deleted and new R. 4:18-1 adopted July 14, 1972 to be effective September 5, 1972; rule caption and paragraph (c) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; caption and paragraphs (a) and (b) amended July 27, 2006 to be effective September 1, 2006; paragraph (b) caption amended, paragraph (b) text reallocated and captioned as subparagraphs (b)(1) and (b)(2), subparagraph (b)(2) amended, new subparagraphs (b)(3) and (b)(4) adopted, former paragraph (c) redesignated as paragraph (d), and new paragraph (c) caption and text adopted July 23, 2010 to be effective September 1, 2010; new paragraph (e) adopted _____ to be effective _____.

M. Proposed Amendments to *Rules* 4:21A-4(f) and 4:21A-5

During the 2010-2012 rules cycle, the Committee proposed amending paragraph (f) of *Rule* 4:21A-4 to provide a time frame for the service of an arbitration award on an absent defendant. After the Supreme Court considered the recommendation, there was some confusion with the proposed language of the amendments with respect to whom and what is being served. As a result, the rule amendments were withdrawn. Thereafter, the Supreme Court Arbitration Advisory Committee was asked to review and refine the language of the proposed amendments to paragraph (f) of *Rule* 4:21A-4 and consider the language of *Rule* 4:21A-5 in its review.

During this rules cycle, the Arbitration Advisory Committee conducted that review. The Arbitration Advisory Committee recommended amending paragraph (f) of *Rule* 4:21A-4 to require a party to serve an arbitration award on a non-appearing party within 10 days of receipt of the award and to require the party serving the arbitration award specifically state the date of receipt of the arbitration award. The proposed amendments provide the non-appearing party with notice of date from which the 30 days to file a motion setting aside the arbitration award runs. Moreover, it precludes a party from waiting until 25 days after it receives the award to serve the award on a non-appearing party.

In conjunction with the proposed amendments to *Rule* 4:21A-4(f), the Arbitration Advisory Committee recommended amending *Rule* 4:21A-5 to provide that a copy of the arbitration award will be provided to the parties that appear at the hearing.

The Committee agreed with the proposed amendments submitted by the Arbitration Advisory Committee.

The proposed amendments to *Rules* 4:21A-4(f) and 4:21A-5 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.] A party obtaining the arbitration award against the non-appearing party shall serve a copy of the arbitration award within 10 days of receipt of the arbitration award upon counsel of record, or, if not represented, upon such non-appearing party and shall specifically state the date of said receipt when serving the award. Service shall be made as set forth in *R*. 4:21A-9(c). Relief from any order entered pursuant to this rule shall be granted only on motion showing good cause, which motion shall be filed within 30 days of the date of receipt of the arbitration award by the appearing party, who shall have made service as set forth above, 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 _____.

4:21A-5. Arbitration Award

No later than ten days after the completion of the arbitration hearing, the arbitrator shall file the written award with the civil division manager. The court shall provide a copy thereof to [each of] the parties who appear at the hearing. The award shall include a notice of the right to request a trial *de novo* and the consequences of such a request as provided by *R*. 4:21A-6.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (c) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (b) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c)(1) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) caption deleted and text amended, and paragraphs (b) and (c) deleted July 5, 2000 to be effective September 5, 2000; amended _____ to be effective _____.

N. Proposed Amendments to *Rules* 4:30A, 4:42-9(a)(6) and 4:58-2

In *Wadeer v. New Jersey Manufacturers Insurance Company*, 220 *N.J.* 591 (2015), the plaintiff filed an uninsured motorist (UM) claim as a result of injuries he suffered in a motor vehicle accident. The insurer refused to settle the UM claim, rejected two arbitration awards (one of which was in the policy limits), and an offer of judgment (within the policy limits) by the plaintiff. The jury awarded the plaintiff an amount in excess of the policy limits and the plaintiff unsuccessfully moved to enter judgment in the full amount of the verdict notwithstanding the policy limits. The trial court entered an award at the policy limits as well as an award for attorneys' fees and prejudgment interest. The plaintiff subsequently filed an action against the insurer alleging the insurer acted in bad faith in refusing to settle the claim. The Supreme Court held that the plaintiff's claim alleging his insurer acted in bad faith by failing to settle his UM claim is barred under the principle of *res judicata* because it was raised, fairly litigated, and determined by the trial court in the first litigation.

The Supreme Court referred the following items to the Committee for consideration:

- Whether *Rule* 4:30A (Entire Controversy Doctrine) should be amended to permit an insured to bring a first-party bad faith claim against an insurer after resolution of an underlying, interrelated UM action;
- Whether *Rule* 4:58-2 (Offer of Judgment – Consequences of Non-Acceptance of Claimant's Offer) should be amended to provide that application of the rule should be triggered by measuring the amount of the offer of judgment filed by the plaintiff against the full damages verdict rather than against the molded judgment entered by the court in a UM/UIM action; and

- Whether *Rule* 4:42-9(a)(6) should be extended to authorize a fee award to an insured who brings direct suit against his insurer to enforce any direct coverage, including UM/UIM coverage.

A subcommittee was formed to address these issues. With respect to *Rule* 4:30A, the subcommittee concluded that bad faith issues are separate and distinct from the issues in underlying UM/UIM matters, and should not be required to be plead. The Committee agreed, and unanimously approved the proposed amendments to *Rule* 4:30A.

Regarding *Rule* 4:58-2, the subcommittee concluded that UM/UIM carriers are given an unfair advantage in the molding of the judgment to their policy limits thereby avoiding offer of judgment repercussions. Further, the relevant sections of the Rule do not foster settlement of these types of cases. The subcommittee recommended amending *Rule* 4:58-2 so that all defendants might be in the same position and neither party in this type of action is given an advantage. *Rule* 4:58-3 is the inverse of *Rule* 4:58-2, and similar rule amendments are proposed. The Committee agreed that the offer of judgment rule in the UM/UIM context has no teeth and should be amended. The Committee approved the proposed amendments to *Rules* 4:58-2 and 4:58-3.

Lastly, concerning *Rule* 4:42-9(a)(6), the subcommittee noted that the Rule has not been extended to authorize a fee award to an insured who brings a direct suit against his insurer to enforce any direct coverage, including UM/UIM. A slight majority of the subcommittee agreed that the Rule should be amended to allow for fee shifting for <u>any</u> action against an insurer for any first party insurance coverage, not just UM/UIM claims. The rationale for the rule proposal is (1) to discourage groundless disclaimers by assessing against insurers the expense incurred by their insureds in enforcing coverage and (2) to provide more equitably for the insured the

benefits bargained for in the contract of insurance without additional expense over and above the premiums paid for insurance protection. A minority of the subcommittee contended that the proposed amendments to *Rule* 4:58 address the issue the Court asked the Committee to consider regarding UM/UIM claims. The proposed amendments to *Rule* 4:42-9(a)(6) will put plaintiffs in UM/UIM cases in a better position than plaintiffs in all other automobile negligence cases because they will get counsel fees if they get a verdict. A copy of the subcommittee's report is in Appendix 1.

In discussing the subcommittee's report concerning the proposed amendments to *Rule* 4:42-9, some Committee members advocated for a fee shifting provision for direct actions because the economics of litigation sometimes discourage policyholders with claims for coverage of smaller amounts (*e.g.*, for certain theft or fire losses) from suing their insurers because the costs of hiring an attorney to handle such small cases will exceed or substantially diminish their net recovery. Other Committee members expressed doubt that the American rule against fee shifting should be diluted in this context, raising concerns that allowing such fee shifting will cause insurance premiums to rise.

A majority of the Committee opposed amending *Rule* 4:42-9 to provide for the collection of counsel fees for a prevailing claimant in a UM/UIM matter, assuming that the Court adopts the recommendation to amend *Rule* 4:58 to make the offer of judgment process effective for plaintiffs in UM/UIM matters.

The Committee, however, is requesting clarification from the Court as to whether it should consider the broader and controversial question of amending *Rule* 4:42-9 to address direct actions by insureds for first party insurance coverage.

The proposed amendments to *Rules* 4:30A, 4:58-2 and 4:58-3 follow.

4:30A. Entire Controversy Doctrine

Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by *R*. 4:64-5 (foreclosure actions) and *R*. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions). Claims of bad faith, which are asserted against an insurer after an underlying uninsured motorist/underinsured motorist claim is resolved in a Superior Court action, are not precluded by the entire controversy doctrine.

Note: Adopted June 29, 1990 to be effective September 4, 1990; amended July 14, 1992 to be effective September 1, 1992; amended July 10, 1998 to be effective September 1, 1998; amended _____ to be effective _____.

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

(a) In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits, [I]if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by *R*. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by *R*. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

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

Note: Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text amended and designated as paragraph (a), new paragraph (b) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended, new paragraph (b) added, and previous paragraph (b) becomes new paragraph (c) _____ to be effective _____.

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

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a monetary judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by *R.* 4:58-2, which shall constitute a prior charge on the judgment or verdict in uninsured/underinsured motorist actions.

(b) A favorable determination qualifying for allowances under this rule is a money judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

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

Note: Source — *R.R.* 4:73; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text allocated into paragraphs (a), (b), (c), and paragraphs (a), (b), (c) amended July 27, 2006 to be effective September 1, 2006; paragraphs (a) and (b) amended _____ to be effective _____.

O. Proposed Amendments to R. 4:46-2 — re: Summary Judgment Motions Statement of Material Facts

A practitioner has requested that the Committee provide guidance on the following sentence of paragraph (a) of *Rule* 4:46-2: "The motion for summary judgment shall be served with briefs, a statement of material facts and with or without supporting affidavits." The practitioner contends that the statement of material facts should be a separate document from the brief because *Rule* 2:6-1(a)(2) provides that trial briefs are not supposed to be part of the appendix on appeal. He states that opposing counsel combine the statement of material facts with the trial brief and advise him that the practice of combining the documents is satisfactory.

The Committee concluded that the Rule should be clarified to provide that the statement of material facts should be a separate document from the brief. The Committee unanimously recommends that paragraph (a) of *Rule* 4:46-2 be amended to provide that a separate statement of material facts should be submitted in support of a summary judgment motion.

The proposed amendments to paragraph (a) of *Rule* 4:46-2 follow.

4:46-2. Motion and Proceedings Thereon

(a) Requirements in Support of Motion. The motion for summary judgment shall be served with a brief[s,] and a separate statement of material facts [and] with or without supporting affidavits. The statement of material facts shall set forth in separately numbered paragraphs a concise statement of each material fact as to which the movant contends there is no genuine issue together with a citation to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. The citation shall identify the document and shall specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on. A motion for summary judgment may be denied without prejudice for failure to file the required statement of material facts.

(b) ...no change.

(c) …no change.

Note: Source — *R.R.* 4:58-3. Amended July 14, 1972 to be effective September 5, 1972; amended June 29, 1973 to be effective September 10, 1973; amended and subparagraphs designated June 28, 1996 to be effective September 1, 1996; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended _____ to be effective _____.

P. Proposed Amendments to R. 4:72 — Actions for Change of Name

A Committee member suggests amending *Rule* 4:72-1 to require that all name change applications provide notice to the Attorney General's Office, County Prosecutor's Office and Homeland Security. Currently, the Rule only requires a name change applicant to notify the Attorney General's Office or County Prosecutor if criminal charges are pending. The Committee member states that the Rule and the statute governing name changes are antiquated and pre-date the terror attacks of September 11, 2001, the monitoring requirements of Megan's Law and current concerns with identity theft. He is concerned that an individual on a terror watch list, a Megan's Law list or otherwise under observation may be lost by law enforcement because they are granted a new legal name.

Initially, Committee members discussed whether the Judiciary has the legal authority to broaden the scope of the *N.J.S.A.* 2A:52-1, the statutory notice provision governing name changes. A subcommittee was formed to further consider this issue. The subcommittee considered that since September 11, 2001, several bills to amend the statute governing names changes have been introduced in the Legislature, but none have passed. While noting the limitations of the name change statute, the subcommittee agreed that law enforcement should be notified when an individual files an application for a name change. The subcommittee proposed amending: (1) *Rule* 4:72-3 to require applicants to serve the Director of the Division of Criminal Justice with notice of filing of a name change application and (2) *Rule* 4:72-4 to require the applicant to present adequate proof of his or her current name at the hearing.

The Committee agreed with the subcommittee's rule proposals.

Subsequent to the Committee's approval of the rule proposals, the County Prosecutors Association of New Jersey requested that *Rule* 4:72-1 be amended to require fingerprinting and a

criminal background check be completed prior to the court authorizing a legal name change. The Committee again discussed the constraints of *N.J.S.A.* 2A:52-1 and determined that a statutory change would be required before the Rule could be amended to require fingerprinting and criminal background checks.

The proposed amendments to *Rules* 4:72-3 and 4:72-4 follow.

4:72-3. Notice of Application

The court by order shall fix a date for hearing not less than 30 days after the date of the order. Notice of application shall then be published in a newspaper of general circulation in the county of plaintiff's residence once, at least two weeks preceding the date of the hearing. Notice of application must be served by certified and regular mail, at least 20 days prior to the hearing to the Director of the Division of Criminal Justice to the attention of the Records and Identification Section. The court shall also require, in the case of a minor plaintiff, that notice be served by registered or certified mail, return receipt requested, upon a non-party parent at that parent's last known address.

Note: Source — *R.R.* 4:91-3. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended _____ to be effective _____.

4:72-4. Hearing; Judgment; Publication; Filing

On the date fixed for hearing the court, if satisfied from the filed papers, with or without oral testimony, that there is no reasonable objection to the assumption of another name by plaintiff, shall by its judgment authorize plaintiff to assume such other name from and after the time fixed therein, which shall be not less than 30 days from the entry thereof. At the hearing, plaintiff must present adequate proof of his or her current name. Within 20 days after entry of judgment, a copy thereof, from which plaintiff's social security number shall be redacted, shall be published in a newspaper of general circulation in the county of plaintiff's residence, and within 45 days after entry of judgment, the unredacted judgment and affidavit of publication of the judgment shall be filed with the deputy clerk of the Superior Court in the county of venue and a certified copy of the unredacted judgment shall be filed with the appropriate office within the Department of Treasury. If plaintiff has been convicted of a crime or if criminal charges are pending, the clerk shall mail a copy of the judgment to the State Bureau of Identification.

Note: Source — *R.R.* 4:91-4; amended July 24, 1978 to be effective September 11, 1978; amended July 11, 1979 to be effective September 10, 1979; amended July 22, 1983 to be effective September 12, 1983; amended July 14, 1992 to be effective September 1, 1992; amended July 13, 1994 to be effective September 1, 1994; amended June 20, 2003 to be effective immediately; amended _____ to be effective _____.

Q. Proposed Amendments to R. 4:86 — Action for Guardianship of a Mentally Incapacitated Person or for the Appointment of a Conservator

The New Jersey Judiciary Guardianship Monitoring Program (GMP) launched in January 2013 with volunteers and program coordinator staff working in all 21 county Surrogate's Offices to create the statewide Guardianship Monitoring System database and to review reports of the well-being and financial affairs of incapacitated individuals submitted by guardians. To date, the GMP has not been codified by court rule or Administrative Directive. The proposed amendments to *Rule* 4:86 codify the GMP and formalize its operations at the Central Office and Vicinage levels, clarify the role of the Surrogates as Deputy Clerks of the Probate Part for the guardianship case type, and otherwise clarify and update guardianship procedures.

The proposed amendments to *Rule* 4:86 have been reviewed and endorsed by the Probate Part Judges Committee, the Judiciary-Surrogates Liaison Committee, the Conferences of General Equity Presiding Judges, Civil Presiding Judges and Civil Division Managers, the Administrative Council, the Judiciary Management and Operations Committee, and the Judicial Council.

The Committee unanimously approved the proposed amendments to *Rule* 4:86.

The proposed amendments to *Rule* 4:86 follow.

4:86-1. [Complaint] Action; Records; Guardianship Monitoring Program

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

(b) Judiciary records of all actions set forth in *R.* 4:86-1(a) shall be maintained by the Surrogate and shall be accessible pursuant to *R.* 1:38-3(e).

(c) Each vicinage shall operate a Guardianship Monitoring Program through the collaboration of the Superior Court, Chancery Division, Probate Part; the County Surrogates; and

the Administrative Office of the Courts, Civil Practice Division.

(1) The functions of guardianship support and monitoring shall be established by the Administrative Director of the Courts. Such functions shall include review of inventories and periodic reports of well-being and financial accounting filed by guardians as required by *R*. 4:86-6(e).

(2) Post-adjudicated case issues identified through monitoring may be forwarded for further action by the County Surrogate; the Superior Court, Chancery Division, Probate Part; and/or the Administrative Office of the Courts.

(3) Case monitoring issues referred to the attention of the Superior Court, Chancery Division, Probate Part shall be promptly reviewed and such further action taken as deemed appropriate in the discretion of the court.

Note: Source — *R.R.* 4:102-1. Amended July 22, 1983 to be effective September 12, 1983; former R. 4:83-1 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; *R.* 4:86 caption amended, and text of *R.* 4:86-1 amended July 12, 2002 to be effective September 3, 2002; caption to *Rule* 4:86 amended, and text of *Rule* 4:86-1 amended July 9, 2008 to be effective September 1, 2008; amended and new paragraphs (a), (b) and (c) added _____ to be effective _____.

4:86-2. Complaint; Accompanying Documents; Alternative Affidavits

(a) Complaint. The allegations of the complaint shall be verified as prescribed by *R.* 1:4-7. [and shall have annexed thereto] The complaint shall state:

(1) the name, age, domicile and address of the plaintiff, of the alleged incapacitated person and of the alleged incapacitated person's spouse, if any;

(2) the plaintiff's relationship to the alleged incapacitated person;

(3) the plaintiff's interest in the action;

(4) the names, addresses and ages of the alleged incapacitated person's children, if any, and the names and addresses of the alleged incapacitated person's parents and nearest of kin, meaning at a minimum all persons of the same degree of relationship to the alleged incapacitated person as the plaintiff;

(5) the name and address of the person or institution having the care and custody of the alleged incapacitated person;

(6) if the alleged incapacitated person has lived in an institution, the period or periods of time the alleged incapacitated person has lived therein, the date of the commitment or confinement, and by what authority committed or confined; and

(7) the name and address of any person named as attorney-in-fact in any power of attorney executed by the alleged incapacitated person, any person named as health care representative in any health care directive executed by the alleged incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged incapacitated person.

(b) Accompanying Documents. The complaint shall have annexed thereto:

(1) An affidavit or certification stating the nature, [location] description, and fair market value [(1)] of the following, in such form as promulgated by the Administrative Director of the Courts:

(A) all real estate in which the alleged incapacitated person has or may have a present or future interest, stating the interest, describing the real estate fully [or by metes and bounds,] and stating the assessed valuation thereof; [and (2) of]

(B) all the personal estate which he or she is, will or may in all probability become entitled to, including stocks, bonds, mutual funds, securities and investment accounts; money on hand, annuities, checking and savings accounts and certificates of deposit in banks and notes or other indebtedness due the alleged incapacitated person; pensions and retirement accounts, including annuities and profit sharing plans; miscellaneous personal property; and the nature and total monthly [or annual] amount of any [compensation, pension, insurance, or] income which may be payable to the alleged incapacitated person[. If the plaintiff cannot secure such information, the complaint shall so state and give reasons therefor, and the affidavit submitted shall in that case contain as much information as can be secured in the exercise of reasonable diligence]; and

(C) The encumbrance amount of any debt including any secured associated debt related to the real estate or personal estate of the alleged incapacitated person;

[(b)](2) Affidavits or certifications of two physicians[,] having qualifications set forth in *N.J.S.A.* 30:4-27.2t, or the affidavit or certification of one such physician and one licensed practicing psychologist as defined in *N.J.S.A.* 45:14B-2, in such form as promulgated by the Administrative Director of the Courts. Pursuant to *N.J.S.A.* 3B:12-24.1(d), the affidavits or certifications may make disclosures about the alleged incapacitated person. If an alleged

incapacitated person has been committed to a public institution and is confined therein, one of the affidavits or certifications shall be that of the chief executive officer, the medical director, or the chief of service providing that person is also the physician with overall responsibility for the professional program of care and treatment in the administrative unit of the institution. However, where an alleged incapacitated person is domiciled within this State but resident elsewhere, the affidavits or certifications required by this rule may be those of persons who are residents of the state or jurisdiction of the alleged incapacitated person's residence. Each affiant shall have made a personal examination of the alleged incapacitated person not more than 30 days prior to the filing of the complaint, but said time period may be relaxed by the court on an ex parte showing of good cause. To support the complaint, each affiant shall state:

[(1)](A) the date and place of the examination;

[(2)](B) whether the affiant has treated or merely examined the alleged incapacitated individual;

[(3)](C) whether the affiant is disqualified under *R.* 4:86-3;

[(4)](D) the diagnosis and prognosis and factual basis therefor;

[(5)](E) for purposes of ensuring that the alleged incapacitated person is the same individual who was examined, a physical description of the person examined, including but not limited to sex, age and weight;

[(6)](F) the affiant's opinion of the extent to which the alleged incapacitated person is unfit and unable to govern himself or herself and to manage his or her affairs and shall set forth with particularity the circumstances and conduct of the alleged incapacitated person upon which this opinion is based, including a history of the alleged incapacitated person's condition; [and]

[(7)](G) if applicable, the extent to which the alleged incapacitated person retains sufficient capacity to retain the right to manage specific areas, such as[,] residential, educational, medical, legal, vocational or financial decisions; and [. The affidavit should also include]

(H) an opinion on whether the alleged incapacitated person is capable of attending or otherwise participating in the hearing and, if not, the reasons for the individual's inability[.]; and

(3) A Case Information Statement in such form as promulgated by the Administrative Director of the Courts. Said Case Information Statement shall include the date of birth and Social Security number of the alleged incapacitated person.

(c) Alternative Affidavits.

(1) If the plaintiff cannot secure the information required in paragraph (b)(1), the complaint shall so state and give the reasons therefor, and the affidavit or certification submitted shall in that case contain as much information as can be secured in the exercise of reasonable diligence[;].

(2) In lieu of the affidavits or certifications provided for in paragraph (b)(2), an affidavit or certification of one affiant having the qualifications as required therein shall be submitted, stating that he or she has endeavored to make a personal examination of the alleged incapacitated person not more than 30 days prior to the filing of the complaint but that the alleged incapacitated person or those in charge of him or her have refused or are unwilling to have the affiant make such an examination. The time period herein prescribed may be relaxed by the court on an ex parte showing of good cause.

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

paragraphs (b) and (c) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a), (b) and (c) amended July 9, 2008 to be effective September 1, 2008; paragraphs (a), (b) and (c) amended _____ to be effective _____.

4:86-3. Disqualification of Affiant

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

Note: Source — *R.R.* 4:102-3; former *R.* 4:83-3 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 28, 2004 to be effective September 1, 2004; amended July 9, 2008 to be effective September 1, 2008; amended _____ to be effective _____.

4:86-3A. Action on Complaint

(a) Review of Complaint Prior to Docketing. Prior to docketing, the Surrogate shall review the complaint to ensure that proper venue is laid and that it contains all information required by *R*. 4:86-2.

(b) Docketing.

(1) Upon the filing of a complaint for the determination of incapacity of a person and for the appointment of a guardian, if it appears that there is jurisdiction and that the complaint is substantially complete in all respects, the complaint shall be docketed.

(2) If, after docketing, there is a lack of jurisdiction, the court shall dismiss the complaint forthwith. If a complaint is not substantially complete in all respects, the Surrogate shall process the complaint in accordance with *R*. 1:5-6.

(c) Availability of Guardianship File. The Surrogate shall make the complete guardianship file available to the court upon request.

Note: New Rule adopted _____ to be effective _____.

4:86-4. Order for Hearing

(a) Contents of Order.

(1) If the court is satisfied with the sufficiency of the complaint and supporting affidavits and that further proceedings should be taken thereon, it shall enter an order fixing a date for hearing. [and requiring]

(2) The order shall require that at least 20 days' notice thereof be given to the alleged incapacitated person, any person named as attorney-in-fact in any power of attorney executed by the alleged incapacitated person, any person named as health care representative in any health care directive executed by the alleged incapacitated person, and any person acting as trustee under a trust for the benefit of the alleged incapacitated person, the alleged incapacitated person's spouse, children 18 years of age or over, parents, the person having custody of the alleged incapacitated person, the attorney appointed pursuant to *R*. 4:86-4(b), and such other persons as the court directs. Notice shall be effected by service of a copy of the order, complaint and supporting affidavits upon the alleged incapacitated person personally and upon each of the other persons in such manner as the court directs.

(3) The order for hearing shall expressly provide that appointed counsel for the alleged incapacitated person is authorized to seek and obtain medical and psychiatric information from all health care providers.

(4) The court [, in the order, may, for good cause, allow shorter notice or dispense with notice, but in such case the order shall recite the ground therefor, and proof shall be submitted at the hearing that the ground for such dispensation continues to exist] may allow shorter notice or waive notice upon a showing of good cause. In such case, the order shall recite

the basis for shortening or waiving notice, and proof shall be submitted at the hearing that such basis continues to exist.

(5) A separate notice shall[, in addition,] be personally served on the alleged incapacitated person stating that if he or she desires to oppose the action, he or she may appear either in person or by attorney, and may demand a trial by jury.

(6) The order for hearing shall require that any proposed guardian complete guardianship training as promulgated by the Administrative Director of the Courts; however, agencies authorized to act pursuant to P.L.1985, c. 298 (C.52:27G-20 et seq.), P.L.1985, c. 145 (C.30:6D-23 et seq.), P.L.1965, c. 59 (C.30:4-165.1 et seq.) and P.L.1970, c. 289 (C.30:4-165.7 et seq.) and public officials appointed as limited guardians of the person for medical purposes for individuals in psychiatric facilities listed in R.S.30:1-7 shall be exempt from this requirement.

[(b)](7) Appointment and Duties of Counsel.

(A) The order shall include the appointment by the court of counsel for the alleged incapacitated person. Counsel shall (i) personally interview the alleged incapacitated person; (ii) make inquiry of persons having knowledge of the alleged incapacitated person's circumstances, his or her physical and mental state and his or her property; (iii) make reasonable inquiry to locate any will, powers of attorney, or health care directives previously executed by the alleged incapacitated person or to discover any interests the alleged incapacitated person may have as beneficiary of a will or trust.

(B) At least [three] ten days prior to the hearing date, counsel shall file a report with the court and serve a copy thereof on plaintiff's attorney and other parties who have formally appeared in the matter. The report shall [contain] include the following:

(i) the information developed by counsel's inquiry;

(ii) [shall make] recommendations concerning the court's determination on the issue of incapacity;

(iii) [may make] any recommendations concerning the suitability of less restrictive alternatives such as a conservatorship or a delineation of those areas of decision-making that the alleged incapacitated person may be capable of exercising;

(iv) [and] whether a case plan for the incapacitated person should thereafter be submitted to the court;[. The report shall further state]

(v) whether the alleged incapacitated person has expressed dispositional preferences and, if so, counsel shall argue for their inclusion in the judgment of the court; and[. The report shall also make]

(vi) recommendations concerning whether good cause exists for the court to order that any power of attorney, health care directive, or revocable trust created by the alleged incapacitated person be revoked or the authority of the person or persons acting thereunder be modified or restricted.

(C) If the alleged incapacitated person obtains other counsel, such counsel shall notify the court and appointed counsel at least [five] ten days prior to the hearing date.

[(c)](b) Examination. If the affidavit or certification supporting the complaint is made pursuant to *R.* 4:86-2(c), the court may, on motion and upon notice to all persons entitled to notice of the hearing under paragraph (a), order the alleged incapacitated person to submit to an examination. The motion shall set forth the names and addresses of the physicians who will conduct the examination, and the order shall specify the time, place and conditions of the examination. Upon request, the report thereof shall be furnished to either the examined party or his or her attorney.

[(d)](c) …no change.

[(e)](d) …no change.

Note: Source — *R.R.* 4:102-4(a) (b). Paragraph (b) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; caption of former *R.* 4:83-4 amended, caption and text of paragraph (a) amended and in part redesignated as paragraph (b) and former paragraph (b) redesignated as paragraph (c) and amended, and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended and paragraphs (d) and (e) added June 28, 1996 to be effective September 1, 1996; paragraphs (a), (b), (c), (d), and (e) amended July 12, 2002 to be effective September 3, 2002; paragraph (e) amended July 27, 2006 to be effective September 1, 2006; paragraphs (a), (b),(c),(d) and (e) amended July 9, 2008 to be effective September 1, 2008; paragraph (a) amended, former paragraph (b) becomes paragraph (a)(7); former paragraph (c) becomes paragraph (b); former paragraph (d) becomes paragraph (c); and former paragraph (e) becomes paragraph (d) to be effective _____.

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

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

(b) Prior to the hearing, unless good cause shown, but no later than prior to qualification, any proposed guardian must complete guardianship training as promulgated by the Administrative Director of the Courts. Agencies authorized to act pursuant to P.L.1985, c. 298 (C.52:27G-20 et seq.), P.L.1985, c. 145 (C.30:6D-23 et seq.), P.L.1965, c. 59 (C.30:4-165.1 et seq.) and P.L.1970, c. 289 (C.30:4-165.7 et seq.) and public officials appointed as limited guardians of the person for medical purposes for individuals in psychiatric facilities listed in R.S.30:1-7 shall be exempt from this requirement.

(c) The plaintiff or appointed counsel shall produce the alleged incapacitated person at the hearing, unless the plaintiff and the court-appointed attorney certify that the alleged incapacitated person is unable to appear because of physical or mental incapacity.

(d) If the alleged incapacitated person or any person receiving notice of the hearing intends to appear by an attorney, such person shall, not later than ten days before the hearing, serve and file an answer, affidavit, or motion in response to the complaint.

Note: Source — *R.R.* 4:102-5; caption and text of former *R.* 4:83-5 amended and rule redesignated June 29, 1990 to be effective September 4. 1990; amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 9, 2008 to be effective September 1, 2008; amended _____ to be effective _____.

4:86-6. Hearing; Judgment

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

(b) …no change.

(c) Appointment of General or Limited Guardian. If a general or limited guardian of the person or of the estate or of both the person and estate is to be appointed, the court shall appoint and letters shall be granted to any of the following:

(1) the incapacitated person's spouse, if the spouse was living with the incapacitated person as husband or wife at the time the incapacity arose[, or to];

(2) the incapacitated person's next of kin[,]; or

(3) the Office of the Public Guardian for Elderly Adults [for adults] within the statutory mandate of that office[, or if].

If none of them will accept the appointment, or if the court is satisfied that no appointment from among them will be in the best interests of the incapacitated person or estate, then the court shall appoint and letters shall be granted to such other person who will accept appointment as the court determines is in the best interests of the incapacitated person. [including] Such persons may include registered professional guardians or surrogate decision-

makers chosen by the incapacitated person before incapacity by way of a durable power of attorney, health care proxy, or advanced directive.

(d) Judgment.

(1) The judgment of legal incapacity and appointment of guardian shall be in such form and include all such provisions as promulgated by the Administrative Director of the Courts, except to the extent that the court explicitly directs otherwise.

(2) Unless expressly waived therein, the judgment appointing the guardian shall fix the amount of the bond. If there are extraordinary reasons justifying the waiver of a bond, that determination shall be set forth in a decision supported by appropriate factual findings.

(3) A proposed judgment of legal incapacity and appointment of guardian shall be filed with the Surrogate not later than ten days prior to the hearing. A Judgment Cover Sheet in such form as promulgated by the Administrative Director of the Courts shall accompany the proposed judgment.

[(d)](e) Duties of Guardian.

(1) [Before letters of guardianship shall issue] Not later than 30 days after entry of the judgment of legal incapacity and appointment of guardian, the guardian shall qualify and accept the appointment in accordance with *R*. 4:96-1. [The judgment appointing the guardian shall fix the amount of the bond, unless dispensed with by the court. The order of appointment shall require the guardian of the estate to file with the court within 90 days of appointment an inventory specifying all property and income of the incapacitated person's estate, unless the court dispenses with this requirement. Within this time period, the guardian of the estate shall also serve copies of the inventory on all next of kin and such other interested parties as the court may direct. The order shall also require the guardian to keep the Surrogate continuously advised

of the whereabouts and telephone number of the guardian and of the incapacitated person, to advise the Surrogate within 30 days of the incapacitated person's death or of any major change in his or her status or health and to report on the condition of the incapacitated person and property as required by *N.J.S.A.* 3B:12-42.] The acceptance of appointment shall include an acknowledgment that the guardian has completed guardianship training as promulgated by the Administrative Director of the Courts in accordance with *R.* 4:86-5(b).

(2) Unless expressly waived in the judgment, the guardian of the estate shall file with the Surrogate, and serve on all interested parties, within 90 days of appointment an inventory in such form as promulgated by the Administrative Director of the Courts specifying all property and income of the incapacitated person's estate.

(3) Unless expressly waived in the judgment, the guardian of the estate shall file with the Surrogate reports of the financial accounting of the incapacitated person as required by *N.J.S.A.* 3B:12-42 and in such form as promulgated by the Administrative Director of the Courts. The report shall be filed annually unless otherwise specified in the judgment.

(4) Unless expressly waived in the judgment, the guardian of the person shall file with the Surrogate reports of the well-being of the incapacitated person as required by *N.J.S.A.* 3B:12-42 and in such form as promulgated by the Administrative Director of the Courts. The report shall be filed annually unless otherwise specified in the judgment.

(5) The judgment shall also require the guardian to keep the Surrogate continuously advised of the whereabouts and telephone number of the guardian and of the incapacitated person, and to advise the Surrogate within 30 days of the incapacitated person's death or of any major change in his or her status or health. As to the incapacitated person's death, the guardian

shall provide written notification to the Surrogate and shall provide the Surrogate with a copy of the death certificate within seven days of the guardian's receipt of the death certificate.

(6) A guardian shall cooperate fully with any Court or Surrogate staff or volunteers until the guardianship is terminated by the death or return to capacity of the incapacitated person, or the guardian's death, removal or discharge.

(7) The guardian shall monitor the capacity of the incapacitated person over time and take such steps as are necessary to protect the interests of the incapacitated person, including but not limited to initiating an action for return to capacity as provided in *N.J.S.A.* 3B:12-28.

(f) Duties of Surrogate.

(1) The Surrogate shall provide the entire complete guardianship file to the court for review no later than seven days before the hearing.

(2) At the time of qualification and issuance of letters of guardianship, the Surrogate shall review the acceptance of appointment and letters of guardianship with the guardian in such form as promulgated by the Administrative Director of the Courts.

(3) The Surrogate shall issue letters of guardianship following the guardian's qualification. The Surrogate shall record issuance of all letters of guardianship. Letters of guardianship shall accurately reflect the provisions of the judgment.

(4) The Surrogate shall record receipt of all inventories, reports of financial accounting, and reports of well-being filed pursuant to paragraphs (e)(3) thru (e)(5) above.

(5) The Surrogate shall notify the court, and shall issue notices to the guardian in such form as promulgated by the Administrative Director of the Courts, in the event that:

(A) the guardian fails to qualify and accept the appointment within 30 days after entry of the judgment of legal incapacity and appointment of guardian in accordance with paragraph (e)(1) above; or

(B) the guardian fails to timely file inventories, reports of financial accounting, and/or reports of well-being filed in accordance with paragraphs (e)(3) thru (e)(5) above.

(6) The Surrogate shall immediately notify the court of emergent allegations of substantial harm to the physical or mental health, safety and well-being, and/or the property or business affairs, of an alleged or adjudicated incapacitated person.

(7) The Surrogate shall record the death of the incapacitated person.

Note: Source — *R.R.* 4:102-6(a) (b) (c), 4:103-3 (second sentence). Paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraphs (a) and (c) of former *R.* 4:83-6 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) amended, text of paragraph (c) redesignated as paragraphs (c) and (d) and amended, paragraph (c) caption amended, and paragraph (d) caption adopted July 9, 2008 to be effective September 1, 2008; paragraphs (a) and (c) amended, new paragraph (d) added, paragraph (d) amended and redesignated as paragraph (e), and new paragraph (f) added _____ to be effective _____.

4:86-7. [Regaining Full or Partial Capacity] Rights of an Incapacitated Person; Proceedings for Review of Guardianship

(a) An individual subject to a general or limited guardianship shall retain:

(1) The right to be treated with dignity and respect;

(2) The right to privacy;

(3) The right to equal treatment under the law;

(4) The right to have personal information kept confidential;

(5) The right to communicate privately with an attorney or other advocate;

(6) The right to petition the court to modify or terminate the guardianship, including the right to meet privately with an attorney or other advocate to assist with this legal procedure, as well as the right to petition for access to funds to cover legal fees and costs; and

(7) The right to request the court to review the guardian's actions, request removal and replacement of the guardian, and/or request that the court restore rights as provided in *N.J.S.A.* 3B:12-28.

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

person on his or her behalf, may seek a return to full or partial capacity by commencing a separate summary action by verified complaint. The complaint shall be supported by affidavits as described in *Rule* 4:86-2(b)(2), and shall set forth facts evidencing that the previously incapacitated person no longer is incapacitated or has returned to partial capacity. The court shall, on notice to the persons who would be set forth in a complaint filed pursuant to *Rule* 4:86-1, set a date for hearing and take oral testimony in open court with or without a jury. The court may render judgment that the person no longer is fully or partially incapacitated, that his or her guardianship be modified or discharged subject to the duty to account, and that his or her person and estate be restored to his or her control, or may render judgment that the guardianship be modified but not terminated.

(c) An incapacitated person, or an interested person on his or her behalf, may seek review of a guardian's conduct and/or review of a guardianship by filing a motion setting forth the basis for the relief requested.

Note: Source — *R.R.* 4:102-7; former *R.* 4:83-7 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption and text amended July 12, 2002 to be effective September 3, 2002; caption and text amended July 9, 2008 to be effective September 1, 2008; new paragraphs (a) and (c) added and original text amended and designated as paragraph (b) to be effective .

4:86-9. Guardians for Incapacitated Persons Under Uniform Veterans Guardianship Law

(a) Complaint for Appointment. An action for the appointment of a guardian under *N.J.S.A.* 3B:13-1 *et seq*. for [a ward] an alleged [to be a] incapacitated person shall be brought in the Superior Court by any person entitled to priority of appointment. If there is no person so entitled or if the person so entitled fails or refuses to commence the action within 30 days after the mailing of notice by a federal agency to the last known address of such person entitled to priority of appointment, indicating the necessity for the appointment, the action may be brought by any person residing in this State, acting on the [ward's] alleged incapacitated person's behalf.

(b) Complaint. The complaint shall state (1) the name, age and place of residence of the [ward] alleged incapacitated person; (2) the name and place of residence of the nearest relative, if known; (3) the name and address of the person or institution, if any, having custody of the [ward] alleged incapacitated person; (4) that such [ward] alleged incapacitated person is entitled to receive money payable by or through a federal agency; (5) the amount of money due and the amount of probable future payments; and (6) that the [ward] alleged incapacitated person has been rated [a] an incapacitated person on examination by a federal agency in accordance with the laws regulating the same.

(c) Proof of Necessity for Guardian of [Mentally] Incapacitated Person. A certificate by the chief officer, or his or her representative, stating the fact that the [ward] alleged incapacitated person has been rated [a mentally] an incapacitated person by a federal agency on examination in accordance with the laws and regulations governing such agency and that appointment is a condition precedent to the payment of money due the [ward] alleged incapacitated person by such agency shall be prima facie evidence of the necessity for making an appointment under this rule.

(d) Determination of [Mental] Incapacity. [Mental i]Incapacity may be determined on the certificates, without other evidence, of two medical officers of the military service, or of a federal agency, certifying that by reason of [mental] incapacity the [ward] alleged incapacitated person is incapable of managing his or her property, or certifying to such other facts as shall satisfy the court as to such [mental] incapacity.

(e) Appointment of Guardian; Bond. Upon proof of notice duly given and a determination of [mental] incapacity, the court may appoint a proper person to be the guardian and fix the amount of the bond. The bond shall be in an amount not less than that which will be due or become payable to the [ward] incapacitated person in the ensuing year. The court may from time to time require additional security. Before letters of guardianship shall issue, the guardian shall accept the appointment in accordance with *R.* 4:96-1.

(f) Termination of Guardianship When [Ward] Incapacitated Person Regains [Mental] Capacity. If the court has appointed a guardian for the estate of [a ward] an incapacitated person, it may subsequently, on due notice, declare the [ward] incapacitated person to have regained [mental] capacity on proof of a finding and determination to that effect by the medical authorities of the military service or federal agency or based on such other facts as shall satisfy the court as to the [mental] capacity of the [ward] incapacitated person. The court may thereupon discharge the guardian without further proceedings, subject to the settlement of his or her account.

(g) Complaint in Action to Have Guardian Receive Additional Personalty. The complaint in an action to authorize the guardian, pursuant to law, to receive personal property from any source other than the United States Government shall set forth the amount of such

property and the name and address of the person or institution having actual custody of the [ward] incapacitated person.

(h) …no change.

Note: Source — *R.R.* 4:102-9(a) (b) (c) (d) (e) (f) (g) (h), 4:103-3 (second sentence). Paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraphs (a) through (f) and (h) of former R. 4:83-9 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; caption amended, paragraphs (a) and (b) amended, paragraphs (c) and (d) captions and text amended, paragraph (e) amended, and paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; paragraphs (a) through (g) amended _____ to be effective _____.

4:86-10. Appointment of Guardian for Persons Eligible for and/or Receiving Services from the Division of Developmental Disabilities

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

(a) …no change.

(b) In lieu of the affidavits prescribed by *R*. 4:86-2, the verified complaint shall have annexed thereto two [affidavits] documents. One [affidavit] document shall be an affidavit submitted by a practicing physician or a psychologist licensed pursuant to P.L. 1966, c.282 (C: 45:14B-1 *et seq*.) who has made a personal examination of the alleged incapacitated person not more than six months prior to the filing of the verified complaint. The other document shall be one of the following: (1) an affidavit from the chief executive officer, medical director or other officer having administrative control over a Division of Developmental Disabilities program from which the individual is receiving functional or other services; (2) an affidavit from a designee of the Division of Developmental Disabilities having personal knowledge of the functional capacity of the individual who is the subject of the guardianship action; (3) a second affidavit from a practicing physician or psychologist licensed pursuant to P.L. 1966, c.282 (C: 45:14B-1 *et seq*.); (4) a copy of the Individualized Education Program, including any medical or other reports, for the individual who is subject to the guardianship action, which shall have been prepared no more than two years prior to the filing of the verified complaint; or (5) an affidavit from a licensed care professional having personal knowledge of the functional capacity of the individual who is the subject of the guardianship action. The documents [servicing the alleged

mentally incapacitated person and the other shall be submitted by a physician licensed to practice in New Jersey or a psychologist licensed pursuant to *N.J.S.A.* 45:14B-1, *et seq*. The affidavit] shall set forth with particularity the facts supporting the belief that the alleged incapacitated person suffers from a significant chronic functional impairment to such a degree that [alleged mentally incapacitated person's significant chronic functional impairment, as that item is defined in *N.J.S.A.* 30:4-165.8, and the facts supporting the affiant's belief that as a result thereof,] the person lacks the cognitive capacity either to make decisions or to communicate, in any way, decisions to others.

(c) If the petition seeks guardianship of the person only, the Division of Mental Health Advocacy, in the Office of the Public Defender, if available, shall be appointed as attorney for the alleged [mentally] incapacitated person, as required by *R*. 4:86-4. If the Division of Mental Health Advocacy, in the Office of the Public Defender, is unavailable or if the petition seeks guardianship of the person and the estate, the court shall appoint an attorney to represent the alleged [mentally] incapacitated person. The attorney for the alleged [mentally] incapacitated person may where appropriate retain an independent expert to render an opinion respecting the [mental] incapacity of the alleged [mentally] incapacitated person.

(d) The hearing shall be held pursuant to *R*. 4:86-6 except that a guardian may be summarily appointed if the attorney for the alleged [mentally] incapacitated person, by affidavit, does not dispute either the need for the guardianship or the fitness of the proposed guardian and if a plenary hearing is not requested either by the alleged [mentally] incapacitated person or on his or her behalf.

Note: Adopted July 7, 1971 to be effective September 13, 1971; amended July 24, 1978 to be effective September 11, 1978. Former rule deleted and new rule adopted November 5, 1986

to be effective January 1, 1987; caption amended and paragraphs (b), (c) and (d) of former R. 4:83-10 amended and rule redesignated June 29, 1990 to be effective September 4, 1990; paragraphs (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; paragraphs (b), (c) and (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; paragraph (c) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) amended July 22, 2014 to be effective September 1, 2014; introductory paragraph and paragraphs (b), (c) and (d) amended _____ to be effective _____ .

R. Proposed Amendments to Appendix I — Life Expectancy Tables

The life expectancy tables were last updated in 2006, based upon 2004 statistics. In the November 2014 National Vital Statistics Report, life expectancy tables were issued based upon 2010 statistics. The Committee agreed that Appendix I should be amended to reflect the 2010 statistics set forth in the tables of the November 2014 National Vital Statistics Report.

The proposed amendments to Appendix I follow.

APPENDIX I

Life Expectancies for All Races and Both Sexes[1]

Age	Expectancy	Age	Expectancy	Age	Expectancy
0-1	78.7	34-35	46.2	68-69	16.9
1-2	78.1	35-36	45.2	69-70	16.2
2-3	77.2	36-37	44.3	70-71	15.5
3-4	76.2	37-38	43.3	71-72	14.8
4-5	75.2	38-39	42.4	72-73	14.1
5-6	74.2	39-40	41.5	73-74	13.4
6-7	73.2	40-41	40.5	74-75	12.7
7-8	72.2	41-42	39.6	75-76	12.1
8-9	71.3	42-43	38.7	76-77	11.4
9-10	70.3	43-44	37.7	77-78	10.8
10-11	69.3	44-45	36.8	78-79	10.2
11-12	68.3	45-46	35.9	79-80	9.6
12-13	67.3	46-47	35.0	80-81	9.1
13-14	66.3	47-48	34.1	81-82	8.5
14-15	65.3	48-49	33.2	82-83	8.0
15-16	64.3	49-50	32.3	83-84	7.5
16-17	63.3	50-51	31.4	84-85	7.0
17-18	62.4	51-52	30.6	85-86	6.5
18-19	61.4	52-53	29.7	86-87	6.1
19-20	60.4	53-54	28.9	87-88	5.7
20-21	59.5	54-55	28.0	88-89	5.3
21-22	58.5	55-56	27.2	89-90	4.9
22-23	57.6	56-57	26.3	90-91	4.6
23-24	56.6	57-58	25.5	91-92	4.3
24-25	55.7	58-59	24.7	92-93	4.0
25-26	54.7	59-60	23.9	93-94	3.7
26-27	53.8	60-61	23.1	94-95	3.4
27-28	52.8	61-62	22.3	95-96	3.2
28-29	51.9	62-63	21.5	96-97	3.0
29-30	50.9	63-64	20.7	97-98	2.8
30-31	50.0	64-65	19.9	98-99	2.6
31-32	49.0	65-66	19.1	99-100	2.5
32-33	48.1	66-67	18.4	100+	2.3
33-34	47.1	67-68	17.6		

[1] Source: National Vital Statistics Reports, Vol. 52, No. 14, February 18, 2004. Previous table deleted and new table adopted November 7, 1988, to be effective January 2, 1989. Previous table deleted and new table adopted July 14, 1992 to be effective September 1, 1992. Previous table deleted and new table adopted July 27, 2006 to be effective September 1, 2006; table updated _____ to be effective _____.

S. Proposed Amendments to Appendix II - Form A Interrogatories

An attorney suggests amending the Form A Interrogatories in Appendix II to include the following twelve questions from Form C1 Interrogatories: 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19 and 20. The attorney contends that all parties to an auto accident case should be required to answer those twelve questions, not only defendants. Defendants should have the same freedom and ability to ask more case-specific questions in the ten supplemental interrogatories as plaintiffs who gain the information in Form C1 Interrogatories.

The Committee agreed that common questions of fact should be answered by both plaintiffs and defendants, and recommends that the Form A Interrogatories be amended to add the specified 12 questions from the Form C1 Interrogatories.

The proposed amendments to the Form A Interrogatories in Appendix II 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. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …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.

TO BE ANSWERED ONLY IN AUTOMOBILE ACCIDENT CASES

25. State on what street, highway, road or other place (designate which) and in what general direction (north, south, east or west) your vehicle was proceeding immediately prior to the collision. (You may include a sketch for greater clarity.)

26. With respect to fixed objects at the location of the collision, state as nearly as possible the point of impact. If you included a sketch, place an X thereon to denote the point of impact.

(Note: The term "point of impact" as used in this and other questions has reference to the exact point on the street, highway, road or other place where the vehicles collided or where any pedestrian was struck.)

27. State whether there were any traffic control devices, signs or police officers at or near the place of the collision. If there were, describe them (*i.e.*, traffic lights, stop sign, police officers, etc.) and state the exact location of each.

28. If you contend that there was a malfunction of a motor vehicle or equipment, state: (a) make, model and year of the motor vehicle and whether or not that vehicle was equipped with power brakes and steering; (b) the nature of the malfunction; (c) the date the

motor vehicle was purchased and the name and address of the person from whom the motor vehicle was purchased; (d) the date that that portion of the motor vehicle in which the malfunction occurred was last inspected and the name and address of the person inspecting same; (e) the last date prior to the accident that that portion of the motor vehicle was repaired or replaced, the nature and extent of the repairs, the name and address of the person repairing or replacing same; (f) if the motor vehicle was repaired after the accident, state the name and address of the person repairing same and the nature of the repairs; and (g) attach a copy of any repair bills.

29. If the collision occurred at an uncontrolled intersection, state: (a) which vehicle entered the intersection first; (b) whether your vehicle came to a full stop before entering the intersection; and (c) if your vehicle did not come to a full stop before entering the intersection, state the speed of your vehicle when it entered the intersection.

30. For each other vehicle or pedestrian collided with, state, at the time you first observed the other vehicle or pedestrian, (a) your speed and (b) the speed of the other vehicle or the movement, if any, of the pedestrian, and the distance in feet between (c) the front of your vehicle and the point of impact; (d) the front of the other vehicle or pedestrian and the point of impact, and (e) the front of your vehicle and the other vehicle or pedestrian.

31. State where each vehicle came to rest after the impact. Include the distance in terms of feet from the point of impact to the point where each vehicle came to rest.

32. For each other vehicle or pedestrian involved, state (a) which part of your vehicle; and (b) which part of the other vehicle or pedestrian came into contact.

33. State the following facts with respect to the collision: (a) time; (b) condition of weather; (c) condition of visibility; and (d) condition of roadway.

34. For each other vehicle or pedestrian involved, state whether you observed the vehicle or 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 vehicle or pedestrian until the impact occurred.

35. At the time of the impact, state the speeds of all vehicles involved in the collision.

36. Were you charged with a motor vehicle violation as a result of the collision? YES ( ) or NO ( ). If the answer is "yes", state: (a) charge; (b) plea; and (c) disposition.

37. Do you have insurance coverage and/or PIP benefits under an applicable policy or policies of automobile insurance? As to each such policy provide the name and address of the insurance carrier, policy number, the named insured and attach a copy of the declaration sheet.

If you are making a claim for property damage to a motor vehicle, provide answers to the uniform interrogatories contained in Form B, questions 1 through 18.

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

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: 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 July 19, 2012 to be effective September 4, 2012; number 25 renumbered as 37, and new numbers 26 through 36 added to become effective .

T. Proposed Amendments to Appendices XI-I and XI-J

Northeast New Jersey Legal Services, Inc. suggested to the Supreme Court Special Civil Part Practice Committee that the wage forms in Appendices XI-I (Notice of Application for Wage Execution) and XI-J (Wage Execution) be amended to clarify the minimum income amounts required before an execution can take place. Those amounts depend on how frequently the individual is paid — weekly, every two weeks or twice monthly. The Special Civil Part Practice Committee agreed with the suggestion.

A vast majority of the Committee agreed that the Appendices should be amended to clarify the income amounts and approved of the proposed language.

The proposed amendments to Appendices XI-I and XI-J follow.

APPENDIX XI-I

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

v.

Docket No. _____
_____
Defendant(s)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SPECIAL CIVIL PART
_____ COUNTY

CIVIL ACTION
NOTICE OF APPLICATION
FOR WAGE EXECUTION

To: _____
Name of Judgment-Debtor
_____
_____
Address

TAKE NOTICE that an application is being made by the judgment-creditor to the above-named court, located at _____, New Jersey for a Wage Execution Order to issue against your salary, to be served on your employer, _____ (name and address of employer), for: (a) 10% of your gross salary when the same shall equal or exceed the amount of $217.50 per week; or (b) 25% of your disposable earnings for that week; or (c) the amount, if any, by which your disposable weekly earnings exceed $217.50, whichever shall be the least. Disposable earnings are defined as that portion of the earnings remaining after the deduction from the gross earnings of any amounts required by law to be withheld. In the event the disposable earnings so defined are $217.50 or less, <u>if paid weekly, or $435.00 or less, if paid every two weeks, or $471.25 or less, if paid twice per month, or $942.50, or less, if paid monthly then</u> no amount shall be withheld under this execution. In no event shall more than 10% of gross salary be withheld and only one execution against your wages shall be satisfied at a time. Your employer may not discharge, discipline or discriminate against you because your earnings have been subjected to garnishment.

You may notify the Clerk of the Court and the attorneys for judgment-creditor, whose address appears above, in writing, within ten days after service of this notice upon you, why such

an Order should not be issued, and thereafter the application for the Order will be set down for a hearing of which you will receive notice of the date, time and place.

If you do not notify the Clerk of the Court and judgment-creditor's attorney, or the judgment-creditor if there is no attorney, in writing of your objection, you will receive no further notice and the Order will be signed by the Judge as a matter of course.

You also have a continuing right to object to the wage execution or apply for a reduction in the amount withheld even *after* it has been issued by the Court. To object or apply for a reduction, file a written statement of your objection or reasons for a reduction with the Clerk of the Court and send a copy to the creditor's attorney or directly to the creditor if there is no attorney. You will be entitled to a hearing within 7 days after you file your objection or application for a reduction.

CERTIFICATION OF SERVICE

I served the within Notice upon the judgment-debtor _____, on this date by sending it simultaneously by regular and certified mail, return receipt requested, to the judgment-debtor's last known address, set forth above. I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to the punishment.

Date: _____, 20___

_____
Attorney for Judgment-Creditor
or Judgment-Creditor Pro Se

Note: Adopted July 13, 1994, effective September 1, 1994; amended September 27, 1996, effective October 1, 1996; amended July 30, 1997, effective September 1, 1997; amended July 28, 2004, to be effective September 1, 2004; amended July 3, 2007, to be effective July 24, 2007; amended July 2, 2008, to be effective July 24, 2008; amended July 9, 2009 to be effective July 24, 2009; amended November 6, 2013 to be effective November 25, 2013; amended July 22, 2014 to be effective September 1, 2014; amended _____ to be effective _____ _____.

APPENDIX XI-J. WAGE EXECUTION

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SPECIAL CIVIL PART
_____ County Tel. _____

ORDER AND EXECUTION AGAINST EARNINGS
PURSUANT TO 15 U.S.C. 1673 and N.J.S.A. 2A:17-56

Docket No.:_____

Judgment No.: _____
Writ Number : ___ Issued _____

Name and Address of Employer Ordered to Make Deductions:
_____
_____
_____

Plaintiff

vs.

Designated Defendant
(Address)

Unless the designated defendant is currently subject to withholding under another wage execution, the employer is ordered to deduct from the earnings which the designated defendant receives and to pay over to the court officer named below, the lesser of the following: (a) 10% of the gross weekly pay; or (b) 25% of disposable earnings for that week; or (c) the amount, if any, by which the designated defendant's disposable weekly earnings exceed $217.50 per week, until the total amount due has been deducted or the complete termination of employment. Upon either of these events, an immediate accounting is to be made to the court officer. Disposable earnings are defined as that portion of the earnings remaining after the deduction from gross earnings of any amounts required by law to be withheld. In the event the disposable earnings so defined are $217.50 or less, if paid weekly, or $435.00 or less, if paid every two weeks, or $471.25 or less, if paid twice per month, or $942.50, or less, if paid monthly then no amount shall be withheld under this execution. In no event shall more than 10% of gross salary be withheld and only one execution against the wages of the designated defendant shall be satisfied at a time. Please refer to Page 2: How to Calculate Proper Garnishment Amount.

The employer shall immediately give the designated defendant a copy of this order. The designated defendant may object to the wage execution or apply for a reduction in the amount withheld at any time. To object or apply for a reduction, a written statement of the objection or reasons for a reduction must be filed with the Clerk of the Court and a copy must be sent to the creditor's attorney or directly to the creditor if there is no attorney. A hearing will be held within 7 days after filing the objection or application for a reduction. According to law, no employer may terminate an employee because of a garnishment.

Judgment Date ....._____
Judgment Award..... $ ____
Court Costs & Stat Atty. Fees ...$ ____
Total Judgment Amount. .....$ ____
Interest From Prior Writs…. .....$ ____
Costs From Prior Writs..... $ ____
Subtotal A ..... $ ____
Credits From Prior Writs ……. $ ____
Subtotal B ……..…. $ ____
New Miscellaneous Costs.....$ ____
New Interest On This Writ.. ..... $ ____
New Credits On This Writ……..$ ____
Execution Fees & Mileage..... ..$ ____
Subtotal C ……..$ ____
Court Officer Fee…….. $ ____
Total due this date ..... $ ____

Date_____

_____
Judge

_____
Jane B. Doe
Clerk of the Special Civil Part

Make payments at least monthly to Court Officer as set forth:

_____
Court Officer

Plaintiff's Attorney and Address:
_____
_____
_____
_____

I RETURN this execution to the Court
( ) Unsatisfied ( ) Satisfied ( ) Partly Satisfied
Amount Collected .....$ ____
Fee Deducted .....$ ____
Amount Due to Atty .....$ ____
Date: _____
_____
Court Officer

HOW TO CALCULATE PROPER GARNISHMENT AMOUNT

(1) Gross Salary per pay period ..... _____
(2) Less:
Amounts Required by Law to be Withheld:
(a) U.S. Income Tax ..... _____
(b) FICA (social security) ..... _____
c) State Income Tax, ETT, etc..... _____
(d) N.J. SUI ..... _____
(e) Other State or Municipal Withholding..... _____
(f) TOTAL ..... _____ - _____
(3) Equals "disposable earnings" ..... = _____
(4) If salary is paid:
-- weekly, then subtract $217.50
-- every two weeks, then subtract $435.00
-- twice per month, then subtract $471.25
-- monthly, then subtract $942.50
(Federal law prohibits any garnishment when "disposable earnings" are smaller than the amount on line 4) ..... - _____
(5) Equals the amount potentially subject to garnishment (if less than zero, enter zero) ..... = _____
(6) Take "disposable earnings" (Line 3) and multiply by .25:
$_____ x .25 = $_____ ..... _____
(7) Take the gross salary (Line 1) and multiply by .10:
$_____ x .10 = $_____ ..... _____
(8) Compare lines 5, 6, and 7--the amount which may lawfully be deducted is the smallest amount on line 5, line 6, or line 7, i.e., ... _____

Source: 15 U.S.C. 1671 *et seq.*; 29 C.F.*R.* 870; *N.J.S.A.* 2A:17- 50 *et seq.*

Note: Former Appendix XI-I adopted effective January 2, 1989; amended June 29, 1990, effective September 4, 1990; amended July 14, 1992, effective September 1, 1992; redesignated as Appendix XI-J and amended July 13, 1994, effective September 1, 1994; amended September 27, 1996, effective October 1, 1996; amended July 30, 1997, effective September 1, 1997; amended July 28, 2004 to be effective September 1, 2004; amended July 3, 2007, to be effective July 24, 2007; amended July 2, 2008, to be effective July 24, 2008; amended July 9, 2009 to be effective July 24, 2009; amended November 6, 2013 to be effective November 25, 2013; amended July 22, 2014 to be effective September 1, 2014; amended _____ to be effective _____.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to R. 1:4-8 – Frivolous Litigation

A practitioner contends that many defense attorneys are sending frivolous litigation letters at the beginning of cases, in his opinion, to "scare off" the plaintiffs, especially in class action matters. While he responds to such opposing counsel demanding that they retract the frivolous litigation letters, he alleges a tremendous risk to both his client and himself if the letters are not retracted. The practitioner suggests that the Committee review the process by which frivolous litigation letters are sent and provide in the Rule for "a detriment or cause-and-effect for a frivolous litigation letter being sent and determined that the litigation was not in fact frivolous." He suggests the Rule be revised to create a countervailing fee shifting effect on the party sending the frivolous litigation letter, and require a certification from the attorney sending the letter that he has reviewed the relevant law and pleadings, and he deems the litigation frivolous.

The Committee discussed that the current Rules provide sufficient disincentives for abusive practices. The Committee determined that a rule amendment is unwarranted at this time.

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

During the last rules cycle, an attorney suggested that *Rule* 1:11-2 be amended to include a requirement that the form of substitution include the mailing address and telephone number of a self-represented litigant who is substituting into a case. The attorney states that there is nothing in the Rule that ensures that the contact information is available from pleadings or other sources. The attorney also suggested that the Committee consider whether the Rule should explicitly require self-represented litigants to agree to accept service of documents by regular mail at the address set forth in the substitution. The Committee agreed in concept that the Rule should be amended to require that the form of substitution include the mailing address and telephone number of a self-represented litigant substituting into a case. The proposed amendments, however, may have impact on other rule proposals that have been held over for consideration. Thus, the Committee deferred its recommendation on this item to this rules cycle.

During this rules cycle, Committee members discussed that the proposed amendments to the Rule would apply not only to Civil matters, but to all other practice areas. Initially, Committee members agreed that if an individual is substituting as a self-represented litigant, the individual should be required to provide a street address and a phone number. It was noted that *Rule* 1:4-1(b) already requires that a self-represented litigant provide his or her residence address on filings.

Committee members also discussed the issue of the need for contact information for self-represented litigants where a court order is entered relieving counsel in a case. A subcommittee was formed to draft the proposed amendments to *Rule* 1:11-2. The subcommittee considered exemptions to the requirement that the self-represented litigant would have to provide his or her contact information, such as parties to domestic violence matters which are subject to certain

confidentiality protections. See also *R.* 1:38-3. The subcommittee recommended that *Rule* 1:11 2 be amended to provide that the address of the substituted attorney or substituted *pro se* party be set forth in the body of the substitution. The subcommittee also suggested that *Rule* 1:4-1(b) be amended to provide that no paper shall bear an attorney's or *pro se* party's post office box number in lieu of a street address.

In considering the draft amendments to the Rules prepared by the subcommittee, Committee members expressed concern that they may disproportionately affect domestic violence victims and homeless individuals. The Committee declined to recommend amendments to *Rules* 1:4-1(b) and 1:11-2.

A separate subcommittee, however, was formed to review use of the term *pro se* in Parts I, II and IV of the Court Rules and consider replacing that term with the term "self-represented" or some other term that would be more likely understood by court users. The subcommittee discussed that the terms *pro se*, "unrepresented," "not represented" and "self-represented" are used in various Court Rules, appendices to the Court Rules and Judiciary forms. "Unrepresented" and "not represented" are used more often in those documents than "self-represented." The subcommittee split on whether to recommend replacing *pro se* with (a) "self-represented" if the individual has appeared in a matter and "unrepresented" if there has been no appearance, or (b) "unrepresented."

Committee members discussed their perceptions that litigants are commonly not confused by use of the term *pro se* and, in fact, some litigants may feel disadvantaged if another term is utilized. The Committee also did not have a strong preference about the suggested alternative terms. Accordingly, an overwhelming majority of the Committee was not in favor of replacing the term *pro se* in the Court Rules.

C. Proposed Amendments to R. 1:36-2 — Publication

A Committee member suggests amending paragraph (d) of *Rule* 1:36-2 to require publication whenever a member of an Appellate Division panel writes a separate opinion. Paragraph (a) of *Rule* 1:36-2 provides that the Appellate Division panel that issues the opinion determines whether the opinion should be published. The Committee member submits that this requires that two members of the panel vote in favor of publication, and that it permits a majority of the panel to prevent publication over the objection of a colleague who believes that the majority has erroneously decided the case. He notes that this played out in *State v. Reece*, 2013 *N.J. Super. Unpub. LEXIS* 2138 (App. Div. 2013), where three separate opinions were written but not published because two members voted against publication over the objection of a third. The Supreme Court subsequently issued an opinion in this case, but did not decide the dissent-publication issue. *See Reece*, 222 *N.J.* 154 (2015). The Committee member suggests that the rule be amended to make clear that a panel majority cannot unilaterally preclude publication when a separate opinion is filed.

A majority of the Presiding Judges of the Appellate Division disfavored the proposed rule change, concluding that the subject should continue to be addressed internally within the Appellate Division.

While some Committee members argued that labeling an opinion as "unpublished" implies that it is not important, others argued that unpublished opinions are readily available such that the dissenting judge's opinion is not suppressed from public access. Such opinions are frequently brought to the court's attention by the bar, although the court cannot cite to them in opinions except for the limited exceptions set forth in *Rule* 1:36-3.

By a slight margin, the Committee determined that no amendment to paragraph (d) of *Rule* 1:36-2 is necessary at this time.

D. Proposed Amendments to R. 2:5-1(b) — Notice to Trial Judge or Agency

During the last rules cycle, the Judicial Council suggested amending paragraph (b) of *Rule* 2:5-1 to extend the time from 15 days to 30 days for a judge, agency or officer to amplify a non-interlocutory prior decision, opinion or memorandum. The Committee discussed extending the time for amplification of trial court decisions versus administrative agency decisions, and the effect on the parties' ability to brief the issues. It was noted that there was a pending legislative bill (S-2555) that may reform the Office of Administrative Law (OAL) and may limit agency decisions. As a result, the item was held over for consideration in this rules cycle.

On January 17, 2014, the Legislature approved various changes to the process used for contested case OAL hearings. See *N.J.S.A.* 52:14B-9 to -10; N.J.S.A. 52:14F-5. The legislation provides an administrative law judge may: (1) engage in pre-hearing conferences, and consider motions and hear witness testimony by means of telephone or video conference calls; (2) issue oral decisions in certain appropriate contested cases if one of the parties orders a transcript of the proceedings and the State agency does not request a written decision; and (3) issue decisions in the form of a checklist in certain appropriate contested cases, after consultation with each State agency. The legislation authorizes the head of each State agency to issue an order that provides, in certain contested cases, for the recommended report and decision of the ALJ to be deemed adopted, immediately upon filing with the agency, as the final decision of the agency head. It also expands the responsibilities of the Director and Chief Administrative Law Judge.

Some Committee members indicated that amplification letters can be useful to the reviewing court and extending the time for such amplification would be beneficial to providing a fuller understanding of the basis for the decision being appealed. Even so, most Committee members concluded that the current rule provides sufficient time for judges, agencies and

officers to amplify a prior statement, opinion or memorandum. Further, it could be unfair to litigants to increase the time frame.

The vast majority of the Committee opposed amending *Rule* 2:5-1 to extend the time from 15 to 30 days for a judge, agency or officer to amplify a prior final decision, opinion or memorandum.

E. Proposed Amendments to Rules 2:2-3, 2:2-3 and 2:9-5 re: Class Certification

In a prior rules cycle, the New Jersey Civil Justice Institute (formerly the New Jersey Lawsuit Reform Alliance) suggested amending *Rules* 2:2-2, 2:2-3 and 2:9-5 to permit litigants to contest judicial determinations as to certification or decertification of class action lawsuits by appealing the rulings to Appellate Division as of right. The Civil Justice Institute contends that the proposed amendments would ensure that plaintiffs and defendants have an effective opportunity to correct errors in class certification, and would facilitate the development of case law on requirements for class certification. It asserts that decisions on motions to certify a class are not final decisions within the meaning of the Court Rules, but often lead to settlements and therefore are final. The Civil Justice Institute contends that when class certification is reviewable only after litigation to final judgment, it is effectively unreviewable. A bill has been permitting such interlocutory appeals has been approved by the Assembly Judiciary Committee, but no action has taken place thus far in the Senate.

A subcommittee was been formed to review this issue during this rules cycle. The subcommittee considered the request of the Civil Justice Institute; relevant case law; information from the Appellate Division Clerk's Office of a minute number of motions for leave to appeal involving decisions granting or denying class certification; and input from the New Jersey State Bar Association Class Actions Committee. Given the small number of cases, coupled with the lack of any anecdotal evidence of delay or denial of ready access to the Appellate Division, the subcommittee ultimately determined that no rule change was needed. Further, a rule change for so few cases in the absence of any evidence of a real problem could well appear as if our courts were tilting the playing field in favor of defendants. Moreover, the subcommittee noted that any need for a rule change was obviated by the recent published opinion in *Daniels v. Hollister Co.*,

440 *N.J. Super*. 359, 362 (App. Div. 2015), which instructs that leave to appeal orders on actions for class certification should be "liberally indulge[d]," and identifying criteria for the disposition of such motions for interlocutory review. A copy of the subcommittee report is attached to this report at Appendix 2.

The Committee adopted the subcommittee's report and rejected the proposal to amend *Rules* 2:2-2, 2:2-3 and 2:9-5 to permit a determination on class certification or decertification motion be appealable as of right.

F. Proposed Amendments to *R.* 4:14-9(g)

The Certified Court Reporters Association – New Jersey, Inc. (CCRA-NJ) suggests clarifying paragraph (g) of *Rule* 4:14-9 to make it consistent with *Rule* 4:14-6(c) with respect to copying of transcripts. CCRA-NJ contends that in multi-party cases, some attorneys have taken the position that the phrases "all out-of-pocket expenses" and "including making required copies and edits" within *Rule* 4:14-9(g) to extend to copies of transcripts made by a shorthand reporter. Thus, attorneys have demanded the reporter at a videotaped deposition to provide each party with a copy of the transcript at the expense of the party noticing the videotape deposition. CCRA-NJ contends that there is no difference between a "traditional" deposition transcript and a videotaped deposition transcript. It does not believe *Rule* 4:14-9(g) was intended to mean that at a videotaped deposition one party should pay the copying costs for all attorneys, as distinguished from the way copies are handled pursuant to *R.* 4:14-6(c).

After reviewing the proposal, the Committee determined that the proposed amendment to paragraph (g) of *Rule* 4:14-9 is unwarranted at this time.

G. Proposed Amendments to R. 4:24-1(b) – Added Parties

In *Gi v. Dugar*, 2014 *N.J. Super*. Unpub. LEXIS 1984 (App. Div. August 11, 2014), the Appellate Division upheld the trial court's ruling that the plaintiff's late expert report was in violation of *Rule* 4:17-7. The panel also discussed the issue of granting extensions of discovery when a new party is added. A Committee member inquires whether *Rule* 4:24-1(b) should be amended to clarify that "the scheduled discovery end date" (DED) shall be automatically extended for 60 days "unless reduced or enlarged by the court for good cause shown" when a new party is added. A related question is how the rule should be applied and construed if no discovery end date is presently "scheduled," because the new party was added after the prior DED had expired.

The Conference of Civil Presiding Judges considered this issue and determined that no rule amendment was necessary. The Conference as well as the Committee noted that the trial court and the attorneys normally address the issue of adjusting the DED when a new party is added.

Thus, the Committee concluded that no change to paragraph (b) of *Rule* 4:24-1 is warranted at this time.

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

Two attorneys propose amending *Rule* 4:25-4 with respect to the provision regarding the presumptive expiration of the designation of trial counsel in medical malpractice cases after three years. The attorneys suggest that the Rule be amended to provide that at the end of the three year expiration, an attorney wishing to continue the designation must file a motion and show cause why the designation should be continued. The attorneys contend that this amendment will provide guidance to the bar and will lead to consistent application of the Rule statewide. They suggest that the Rule provide a list of considerations for the court and provide examples of the types of considerations. The attorneys would like regionalized recall judges experienced at the trial level and with medical malpractice cases to handle all such motions filed.

While acknowledging that the factors suggested by the attorneys would be useful in determining whether to continue the designation, Committee members concluded that case law needs to be developed before the Committee considers proposals to amend the Rule again.

The Committee does not recommend the proposed amendments to *R*. 4:25-4.

I. Proposed Amendments to R. 4:25-7 and Appendix XXIII

In footnote 13 of the unpublished opinion, *Harrison Redevelopment Agency v. FER Boulevard Realty Corp.*, 2015 *N.J. Super*. Unpub. LEXIS 781 (App. Div. Apr. 9, 2015), the Appellate Division panel suggested that the Committee "might wish to consider amplifying *Rule* 4:25-7 and the related Appendix XXIII of the Rules of Court to require litigants to disclose in advance of trial any statutes, regulations, or ordinances that they plan at trial to use, or to assert their violation, or question their validity."

While noting that some attorneys do not comply with the requirements of the Rule, Committee members observed that *Rule* 4:25-7 is sufficiently clear as to what is required to be disclosed in advance of trial.

The Committee determined that no amendments to *Rule* 4:25-7 and Appendix XXIII are necessary at this time.

J. Proposed Amendments to Rules 4:64-1(a)(2) and 4:64-2(d)

A Special Master was tasked with reviewing the foreclosure processes of six receivers subject to the order to show cause issued in December 2010 in response to "robo-signing" problems in foreclosure cases. As part of the second phase of his review, the Special Master raised some concerns regarding compliance with the recent amendments to *Rules* 4:64-1(a)(2) and 4:64-2(d). Those Rules require the attorney representing a bank or mortgage servicer to "communicate" with an employee of the plaintiff bank or mortgage servicer who has personally reviewed the complaint and supporting documents to ensure accuracy. Moreover, plaintiff's counsel must state "the date and mode of communication employed" as proof of communication in a certification of diligent inquiry. The Special Master notes that his review has revealed that counsel for plaintiff banks and mortgage servicers in New Jersey typically do not "communicate" with the plaintiff's staff responsible for the maintaining the foreclosure documentation. The plaintiff's staff typically completes a Statement of Review that the employee has reviewed the documents to be submitted to the court and confirmed their accuracy. There is no person-to-person contact. The Special Master suggests that the Rules clarify the nature of the required "communication" between the foreclosure attorney and the bank or mortgage servicer.

The Committee referred this item to the Conference of General Equity Presiding Judges for consideration. The Conference discussed the meaning of "communication" and concluded that the means of communication typically employed by lenders' counsel and employees of the servicers complies with the pertinent rule provisions, and that no rule change is necessary. The Conference concluded that the Rules should not be amended to interfere with attorney-client privilege or further burden plaintiffs beyond the Certification of Diligent Inquiry (CODI).

The Committee agreed with the Conference that changes to *Rules* 4:64-1(a)(2) and 4:64-2(d) are unwarranted at this time.

K. Proposed Amendments to *R.* 4:86-6(a) — Hearing; Judgment

Paragraph (a) of *Rule* 4:86-6 provides that the court shall, after taking testimony, determine the issue of incapacity in all actions for guardianship of an incapacitated person. A retired judge suggests that the language "shall" be changed to "may" so that the conduct of a hearing is permissive rather than mandatory. The retired judge states that in the 250 incapacity matters he has handled approximately 90 to 95% are uncontested and "the entitlement to the relief sought [is] beyond peradventure." He states when the matters are contested, a hearing is conducted. The retired judge suggests that if the matter is uncontested, the court should be able to set forth on the record in each matter that a comprehensive review of the file and the reasons why relief requested has been granted so as to afford litigants the opportunity to avoid discomfort and the expense of attorney's fees for appearing in court.

Initially, the Committee discussed that the proposed rule amendment is not consistent with the practices of most Probate Part judges and has not been endorsed by the Conference of General Equity Presiding Judges. Section (e) of *N.J.S.A.* 3B:12-24.1 provides that the alleged incapacitated person must appear in court for a hearing, as does *Rule* 4:86-6. Some Committee members stated that it is significant to deprive the individual of the right to hearing especially under circumstances in which alleged incapacitated persons have the ability to make some decisions. Other Committee members stated that hearings are waived at times because the attorneys are generally reliable in reporting on the capabilities of the alleged incapacitated persons and the doctors' opinions are generally thorough. A subcommittee was formed to review this item.

The subcommittee concluded that the suggestion to change "shall" to "may" in *Rule* 4:86-6(a) so as to afford probate judges the discretion to dispense with a formal hearing when

appropriate with respect to declaring an individual as incapacitated is within the purview of the Legislature rather than the Judiciary, given the legislative history of *N.J.S.A.* 3B:12-24.1(e). The Subcommittee determined that there should be no change to *Rule* 4:86-6(a).

The Committee agreed, and unanimously rejected the proposal to amend paragraph (a) of *Rule* 4:86-6. See Section I. Q. for amendments to *Rule* 4:86 recommended by the Committee.

L. Proposed Amendments to Appendix XII-A — Summons

A practitioner has expressed concern with the second sentence of the second paragraph of the Summons set forth in Appendix XII-A to the Court Rules, which provides: "If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment." She states: (1) the sentence is not accurate in a foreclosure action because a judgment in foreclosure is not a money judgment and money, wages or other property are not subject to seizure by the Sheriff, and (2) the language puts a foreclosure plaintiff at risk of violating a bankruptcy discharge injunction. The practitioner suggests that the Committee recommend an alternate form of Summons for a foreclosure action or modifying the current Summons form to express the fact that foreclosure action only seeks a sheriff's sale of the property securing the subject mortgage and not a money judgment where an individual's money, wages or other property is subject to seizure.

The Committee referred this item to the Conference of General Equity Presiding Judges for review and consideration of possible revisions to the Summons form. After discussing this item, the Conference noted that use of the word "may" in the Summons with respect to the consequences of entry of a judgment against a defendant as well as the Summons form's explanation of the significance of the complaint. The Conference determined that no change to Summons form is required.

After discussion, the Committee agreed with the Conference of General Equity Presiding Judges that a change to the Summons form is unwarranted at this time.

M. Rule Proposal re: Appellate Division Denial of Motions

A state inmate requests adoption of "a new Court Rule mandating the Appellate Division provide an opinion, memorandum or at minimum supplemental specifically stating its reasons for dismissing or denying all motions, especially, civil actions appealed directly to the Appellate Court from [a] state agency."

The Management Committee of the Appellate Division opposes the adoption of such a rule. The Appellate Division considered a similar proposal in 2008 and determined that the proposed requirement would impose a significant burden upon the appellate courts. The Management Committee urged that the inclusion or omission of explicit reasons for a motion ruling should continue to be left to the court's discretion. It was noted that there were over 10,000 motions filed in the Appellate Division in 2013. Requiring an opinion or memorandum setting for the reasons for the rulings on motions would be highly time-consuming and would greatly slow down motion practice in the Appellate Division. Moreover, a motion for clarification can always be filed.

After discussion, the Committee determined not to recommend a rule requiring an opinion or memorandum specifically stating its reasons for dismissing or denying all motions in the Appellate Division.

N. Proposed Amendments — re: Anonymously Filing Complaints involving OPRA

During the last rules cycle, a non-attorney who has been involved in several New Jersey Open Public Records Act ("OPRA") cases requested that the Court Rules be amended to resolve a perceived conflict between the Court Rules and a provision of OPRA that permits citizens to request records anonymously. In an unpublished opinion, *Anonymous v. Borough of Longport*, Dkt. No. ATL-L-9552-11 (Law Div. Aug. 17, 2012), the court noted that while OPRA allows a person to request records anonymously, the statute is silent as to whether a lawsuit may be brought anonymously for a violation of OPRA. The court further noted that the Court Rules require that parties be identified. The proponent of a Rule change believes that because an OPRA provision, *N.J.S.A.* 47:1A-12, provides that the Supreme Court may adopt rules necessary to effectuate OPRA's purposes, the Committee should consider amending the Court Rules to permit anonymous filings of complaints to enforce OPRA. This item was held over for consideration by a subcommittee during this rules cycle.

Earlier in this rules cycle, the legal issue was the subject of an appeal pending in the Appellate Division. On September 17, 2015, the Appellate Division issued a decision in *A.A. v. Gramiccioni*, 442 *N.J. Super*. 276 (App. Div. 2015), finding that there is no statutory authorization, rule authorization or compelling reason permitting the plaintiff to prosecute a matter in Superior Court anonymously.

After discussion of the decision in *A.A.*, a vast majority of the Committee rejected the rule proposal that would allow anonymous filing of complaints regarding OPRA.

O. Proposal re: Objecting to the Docketing of Foreign Country Money Judgments

The New Jersey Foreign Country Money Judgment Recognition Act, *N.J.S.A.* 2A:49A-16, *et seq*., provides that a foreign country money judgment is entitled to recognition and enforcement in the same manner as a judgment of another state subject to it meeting certain criteria. A *New Jersey Law Journal* editorial questions how to object to the docketing of a foreign country judgment when there are no court rules or procedures to do so. The author's suggested solution is for instructions on the Judiciary's website to "state clearly that an objection should be filed with the Judgment Processing Services Team [of the Superior Court Clerk's Office in Trenton] and that such objection should state the county where the objecting party (judgment debtor) maintains a place of business or has assets, and the clerk will then send the matter to the appropriate county. At that time, upon assignment by a judge, a schedule for reply and hearing will be set." The author contends that adding this language will streamline the process and avoid inconsistent handling of such matters statewide. A Committee member suggests that the Committee consider the proposed procedure for handling objections to the docketing of foreign country judgments, specifically requiring a motion be filed to object to the docketing of a foreign judgment.

The Superior Court Clerk reported that less than one percent of docketed judgments are foreign judgments, and no objections have been filed. The Superior Court Clerk's Office current process is sufficient to handle these matters.

A vast majority of the Committee agreed with the Superior Court Clerk, and does not recommend any change to the Superior Court Clerk's Office's process at this time.

P. Proposal re: Inmate Filings

A state inmate suggests that the a rule be amended or adopted, similar to Federal Rule of Appellate Procedure 4(c)(1), to provide that mail properly deposited in the institutional mail system be recognized by the court as "filed" on the date it is deposited.

After discussion, the Committee concluded that there is no evidence of a significant problem with inmate filings being rejected by the Appellate Division. Thus, the Committee determined that such a rule amendment is unwarranted at this time.

III. RULES WITHDRAWN FROM CONSIDERATION

A. Proposed Amendments to *R.* 4:42-9(d) — Prohibiting Separate Orders for Allowances of Fees

During the last rules cycle, a Committee member inquired whether the Committee should explore amending paragraph (d) of *Rule* 4:42-9 to conform it to case law and what he perceives to be common practice. The Rule has the inflexible-sounding title "Prohibiting Separate Orders for the Allowance of Fees" and the perception is that the simultaneous-inclusion requirement of the Rule is impractical, particularly in cases where a fee application is contested. The Committee member suggested that paragraph (d) of the Rule be reworded to provide that the fee application be made either at the time of judgment or within 20 days of the entry of judgment, unless the court finds that exceptional circumstances justify a longer time period. A subcommittee was formed to consider the issue in this rules cycle.

Prior to the subcommittee commencing its work, the Conference of Civil Presiding Judges reviewed this issue and determined that an amendment to the Rule is unwarranted.

As a result, the Committee member withdrew the rule proposal.

IV. RULES HELD FOR CONSIDERATION

A. Proposed Amendments to *R.* 1:7-1 – Opening and Closing Statements

A Committee member suggests amending *Rule* 1:7-1 to permit attorneys to suggest a specific dollar sum in opening and closing arguments. The Committee member contends that in light of *Brodsky v. Grinnell Haulers*, 181 *N.J.* 102 (2004), there is no legitimate distinction between being able to argue percentages of liability and a specific dollar sum. He argues that the sum-specific argument by both advocates will reduce aberrational verdicts, motions for additur or remittitur, and possible appellate issues. He notes that focus groups that he conducts cannot comprehend why a dollar sum cannot be suggested and how to arrive at an award of non-economic damages.

The Committee member requested that this item be held over to the next rules cycle so that a more formal proposal can be submitted for the Committee's consideration. The Committee agreed to hold this issue over.

B. Proposed Amendments to *R.* 1:36-2 — Publication

During a prior rules cycle, a Committee member suggested that paragraph (a) or (c) of *Rule* 1:36-2 be amended to prohibit the publication of two-judge opinions unless by directive of the Supreme Court. The Judiciary's current policy is that two-judge opinions are not eligible for publication. During initial discussions, some Committee members felt that some two-judge opinions should be approved as precedential and therefore eligible for publication. At times it might not be readily apparent before a case is argued and submitted for appellate review that the opinion in the case will be of widespread significance. On the other hand, a Committee member stated his belief that no other state's intermediate appellate court allows two-judge opinions to be precedential. In light of the discussion and to provide the Appellate Division Rules Committee (ADRC) with an opportunity to comment on the proposal, this item was held over for further consideration during this rules cycle.

The ADRC considered this suggestion during this rules cycle, and opposed the proposal to codify the Supreme Court's current policy restricting publication of Appellate Division opinions to those issued by three-judge panels. The ADRC concluded that such a rule amendment is unnecessary.

Some Committee members wondered if the Court might be willing to revisit its policy and allow the publication of two-judge opinions. The Committee deferred this item to the next rules cycle to seek input from the Court.

C. Proposed Amendments to *R.* 4:14-7(c) — Notice; Limitations

A practitioner suggests that paragraph (c) of *Rule* 4:14-7 be amended to require that where the records of an individual who is not a party to litigation are being sought by subpoena from another nonparty, the individual whose records are being sought should be served with a copy of the subpoena as well as the witnesses and parties to the litigation. The practitioner states that in a particular case a defendant sought cell phone records of three individuals who were not parties to the litigation by subpoenaing three cell phone companies. The practitioner notes that *Rule* 4:14-7(c) only requires notice to all witnesses and parties to litigation. He contends that the Rule deprives the individual whose records are being sought of their constitutional rights to privacy and to due process. The practitioner requests that the Rule be amended to cover all situations in which a subpoena seeks to compel production of records from a business that has an individual's private personal information.

Initially, the Committee agreed that the issue raises privacy concerns of nonparties to litigation. A subcommittee was formed to consider the rule proposal. This item has been held over to the next rules cycle.

D. Proposed Amendments to *R.* 4:16-1 — Use of Depositions

In a *New Jersey Law Journal* article, the author discusses the use of deposition testimony for an out-of-state witness at trial and the perceived ambiguity of paragraph (c) of *Rule* 4:16-1. The author contends that although *Rule* 4:16-1(c) generally follows Federal Rule of Civil Procedure 32(a)(4)(D), the language of the Rule creates ambiguity when the witness is "out of state" and also is unclear regarding the "exercise of reasonable diligence" that must be shown in trying to procure the witness's attendance by subpoena. The author suggested a simplification of *Rule* 4:16 to permit use of such deposition testimony at trial when the party offering the testimony does not "control" the witness. The author contends that the simplification will reduce unnecessary motion practice and avoid the harm to a party that takes an out-of-state deposition on the belief that testimony will be admissible at trial. On a related aspect, a Committee member inquired whether paragraph (c) of the Rule should be clarified to state that the admissibility and the deposition testimony should still be subject to the limitations of the evidence rules on relevance, hearsay, embedded hearsay, undue prejudice, character, and so forth.

This item has been referred to the discovery subcommittee and will be held over to the next rules cycle.

E. Proposed Amendments to *Rules* 4:24-1, 4:25-4 and 4:36-3

Two practitioners suggest that *Rules* 4:24-1, 4:25-4 and 4:36-3 be amended to aid in the prompt adjudication of civil cases. The practitioners contend that discovery extensions and adjournments are slowing down the resolution of civil cases. They state that in a particular case there were numerous discovery extensions, the case was listed eight times and the case was not tried until 15 months after the first trial listing. The practitioners suggest amending:

- *Rule* 4:24-1(c) – to add the following language: "No non-consensual extension of the discovery period will be permitted without the moving party demonstrating good faith effort to complete discovery in the discovery period and good cause for the extension."
- *Rule* 4:25-4 – to replace the last sentence of the Rule with the following: "Designations of trial counsel will be waived by the Court in all cases pending for more than three years." They contend that the recent amendments to *Rule* 4:25-4 (Designation of Trial Counsel) are inadequate because they only apply to Track III medical malpractice cases.
- *Rule* 4:36-3 – to add new paragraphs:

  (d) Adjournments, Conflicting Trial Listings. No request for adjournments shall be granted where the party requesting the adjournment previously agreed to the listing date they are seeking to have adjourned.

  (e) Adjournments, Number of Requests. After an adjournment request has been granted, all trial counsel designations shall be waived by the Court.

The Committee discussed that the Supreme Court recently amended *Rule* 4:25-4, which provide that the designation of trial counsel in medical malpractice cases will presumptively expire after three years. That amendment did not become effective until January 2015. The Committee determined to hold over this item to the next rules cycle so that the effect of the new rule amendment can be measured.

F. Proposed Amendments to *R.* 4:58 – Offer of Judgment

The New Jersey Physicians United Reciprocal Exchange (NJ PURE), a writer of medical malpractice insurance in New Jersey, suggests that the offer of judgment rule be amended to address what it perceives as "paradoxical sections that lead to unjust results for defendants." NJ PURE proposes that paragraph (c) of *Rule* 4:58-3 should be amended to delete the following exceptions to the award of counsel fees and costs to a defendant who has made an offer of judgment: (1) the claimant's claim is dismissed; (2) a no-cause verdict is returned; (3) only nominal damages are awarded; and (5) an allowance would impose undue hardship. NJ PURE argues that these exceptions lead to an unjust result for a defendant who is "too successful" and plaintiffs are incentivized to reject reasonable offers of judgment without fear of consequences.

NJ PURE further contends that paragraph (b) of *Rule* 4:58-4 should be amended it "precludes effective use of the [offer of judgment rule] in multi-defendant litigation where the offering defendant is less culpable than its co-defendants. The Rule in its present form can preclude an award of fees and costs for a defendant that has offered at least 20% above its ultimate share of the damages." NJ PURE suggests that the Rule be amended to ensure that reasonable offers made by single defendants may be effective against "unreasonable" plaintiffs that reject them.

The Committee determined that there should be a reexamination of the offer of judgment rule, including the Rule's long-standing feature that plaintiffs should be insulated from fee-shifting in no-cause verdict situations. A subcommittee was formed to take a comprehensive review of *Rule* 4:58. To ensure that the subcommittee has sufficient time to review this Rule, this issue has been deferred until the next rules cycle.

G. Proposal re: Affidavits of Merit and/or Expert Qualification in Medical Malpractice Cases

An attorney submitted a proposal for procedural rules regarding affidavits of merit and experts in medical malpractice cases. The proposal contains three rules to supplement the early screening and later testimonial restrictions in *N.J.S.A.* 2A:53A-41 and three rules to supplement the expert testimony section of the statute. The attorney contended that the proposed rules would eliminate the need for *Ferreira* conferences, free up judicial resources, and eliminate most of the reported and unreported decisions involving late technical objections to affidavits of merit or expert qualifications.

A subcommittee was formed to review this issue. However, the Committee considered that the Supreme Court has granted certification in the affidavits of merit cases: *Hill International v. Atlantic City Board of Education*, 438 *N.J. Super*. 562 (App. Div. 2014) and in *Meehan v. Antonellis*, 2014 *N.J. Super*. Unpub. LEXIS 2066 (App. Div. Aug. 21, 2014). As a result, a report from the subcommittee on the issue has been tabled pending a decision of the Supreme Court in these affidavit of merit cases.

H. Proposal to Adopt a Proportional Discovery Rule for Complex Business Litigation Program

The Judiciary's Complex Business Litigation Program commenced in January 2015. Some New Jersey attorneys have suggested that the Complex Business Litigation Program would be enhanced with the adoption of a "proportional discovery" rule similar to Federal Rule of Civil Procedure 26(b). The changes to the federal rule became effective on December 1, 2015. This item was referred to the discovery subcommittee and will be held over to the next rules cycle.

Respectfully submitted,

Hon. Jack M. Sabatino, P.J.A.D., Chair
Justice Peter G. Verniero, (Ret.), Vice-Chair
Meredith A. Accoo, Esq.
Hon. Allison E. Accurso, J.A.D.
Joy Anderson, Esq.
Professor John S. Beckerman
Hon. Dennis F. Carey, III, P.J.Cv.
Hon. Karen M. Cassidy, A.J.S.C.
Hon. Heidi W. Currier, J.A.D.
Philip J. Espinosa, Esq., DAG
John M. Falzone, III, Esq.
Hon. Clarkson S. Fisher, Jr., P.J.A.D.
Lloyd Freeman, Esq.
Amos Gern, Esq.
Hon. Kenneth J. Grispin, P.J.Cv.
Hon. Jamie D. Happas, P.J.Cv.
Professor Edward A. Hartnett
Robert B. Hille, Esq.
Craig S. Hilliard, Esq.
Hon. Paul Innes, P.J.Ch.
Hon. Deborah Silverman Katz, A.J.S.C.
Herbert Kruttschnitt, III, Esq.
Hon. Anne McDonnell, P.J.Ch.
Mary McManus-Smith, Esq.
Hon. Margaret Mary McVeigh, P.J.Ch.
Hon. Robert G. Millenky, P.J.Cv.
John R. Parker, Esq.
Elizabeth A. Pascal, Esq.
Hon. Robert L. Polifroni, P.J.Cv.
Hon. Joseph P. Quinn, P.J.Cv.
Arthur J. Raimon, Esq.
Dean Andrew J. Rothman
Hector D. Ruiz, Esq.
Hon. Laura Sanders, Acting Chief A.L.J.
Hon. Barry P. Sarkisian, J.S.C.
Neal L. Schonhaut, Esq.
Thomas Shebell, III, Esq.
Willard C. Shih, Esq.
Michelle M. Smith, Superior Court Clerk
Ahmed M. Soliman, Esq.
Hon. Edwin H. Stern (Ret.)
Nina Thomas, Civil Division Manager
Kevin D. Walsh, Esq.
Jonathan D. Weiner, Esq.
Kevin M. Wolfe, Esq., Staff
Taironda E. Phoenix, Esq., Staff

Dated: January 2016

LMJG
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APPENDIX 1

REPORT OF THE UM/UIM BAD FAITH SUBCOMMITTEE

In Wadeer v NJM the Civil Practice Committee was asked by the Supreme Court to review three issues:

1) Should Rule 4:30A (entire controversy rule) be modified so an insured can bring a bad faith action against its insurer after the underlying UM/UIM case has been resolved?

2) Should the Offer of Judgment Rule 4:58-2 be modified to make it more relevant to UM/UIM cases?

3) Should Rule 4:42-9(a)6) provide for a fee award to a prevailing insured for a direct suit against its insurer to enforce coverage?

Our subcommittee was tasked to look at these issues. The members of the subcommittee voted unanimously to modify Rule 4:30A and Rule 4:58-2 and -3 as attached here. The members voted by a 3/4 majority in favor of amending Rule 4:42-9(a)(6) in the form attached.

As to the entire controversy doctrine (Rule 4:30A) the members felt that the bad faith issues are separate and distinct from the issues in the underlying UM/UIM matter. Historically, these issues, when pled, have been severed from the complaint and stayed until the underlying matter has been resolved. In the great majority of cases, the bad faith claim is not pursued. The members felt that not requiring the claim to be pled at all is the most practical way to handle these matters.

The objection to the current wording of the Offer of Judgment Rule 4:58-2 is its ineffectiveness in UM/UIM cases. For example, in Wadeer NJM rejected the mandatory non-binding UM arbitration award. Plaintiff filed an offer of judgment pursuant to the rule in the

amount of $95,000. (the UM arb award had been $162,000). The UM policy limit was $100,000. At trial, plaintiff was awarded a verdict of $210,000. Plaintiff then argued he was entitled to the Rule 4:58 sanctions because he had exceeded the $95,000 by the required margin. However, the current wording in the Rule requires the offer be assessed against the "judgment". Since the "judgment" against NJM was molded to the $100,000 policy limits, plaintiff was not entitled to the 4:58-2 sanctions. The "verdict" would have triggered the rule but the "judgment" did not.

All agree that UM/UIM carriers are given an unfair advantage in the molding of the judgment to their policy limits thereby avoiding 4:58 repercussions. The Supreme Court recognized that the current iteration of the Rule has no effect on fostering settlements in these type of cases. Therefore the subcommittee proposes the attached language, substituting "verdict or judicial decision" in the place of "judgment" so that all defendants might be in the same position and neither party in this type of case is given an advantage. (Rule 4:58-3 is the flip side and mirrors the language of its predecessor so that both parties are treated alike).

Counsel fees under Rule 4:42-9. This rule has not been extended to authorize a fee award to an insured who brings a direct suit against his insurer to enforce any direct coverage, including UM/UIM. The majority of our members voted to change this rule to allow for this fee shifting. The members understand this is a sea change in our state and an exception to the American Rule under which the prevailing litigant is ordinarily not entitled to collect an attorney's fee from the loser.

Note the majority of the members are recommending the change in this rule applies to any action against an insurer for any first party insurance coverage, not just UM/UIM claims.

The two rationales in favor of the change to this rule are: 1) discouraging groundless disclaimers by assessing against the insurers expenses incurred by their insureds in enforcing

coverage, and 2) a desire to provide more equitably for the insured the benefits bargained for in the contract of insurance without additional expense over and above the premiums paid for insurance protection (particularly for counsel fees spent to obtain the judicial determination that the insurer is entitled to the protection in question). Quite simply, most insureds do not pursue claims against their insurer because it is not economically feasible to obtain a lawyer. The possibility of an award of attorney's fees makes such a case financially worthwhile.

The members opposed to a fee shifting in these cases note that the subcommittee has gone beyond its designated task from the Court. And, in UM/UIM cases we have addressed the Court's concerns in our proposed changes to the Offer of Judgment Rule. Also, if both rules are changed as attached here, UM/UIM claimants are now put into a better position than are plaintiffs in all other automobile negligence cases. The Rule amendment creates a fee shift in automobile negligence cases that involve a "phantom driver" or minimally insured driver. Plaintiffs are treated differently if they are injured by an uninsured or underinsured vehicle as opposed to a plaintiff injured by a negligent driver of a sufficiently insured vehicle. The argument is the one applied to the current 4:58 situation. Plaintiffs in a UM/UIM case will not negotiate fairly with carriers knowing that an award in any amount might give rise to a counsel fee application. A small case could give rise to a counsel fee that eclipses the value of the case or the jury award. The proposed changes to the Offer for Judgment rule take care of the majority's concerns in the UM/UIM context.

We note the states that provide for an award of attorney's fees in coverage cases: Arkansas, Delaware, Florida, Idaho, Kansas, Minnesota, Nebraska, Oklahoma, Oregon, Washington and West Virginia. California, Missouri, New Mexico, North Carolina, Rhode

Island, South Carolina and South Dakota provide for attorney's fees if the failure to provide coverage was unreasonable, in bad faith or the like.

Rule 4:30A

Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except *for bad faith claims which are asserted after an underlying uninsured motorist/underinsured motorist claim is first resolved in a Superior Court action* and as otherwise provided by R. 4:64-5 (foreclosure actions) and R. 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions).

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

- **(a)** *In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits* , if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.
- **(b)** *In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury verdict or judicial decision, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: 1) all reasonable litigation expenses incurred following non-acceptance; 2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R.4:42-11(b), which also shall be allowable; and 3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.*
- **(c)** No allowances shall be granted pursuant to paragraph (a) or (b) if they would impose undue hardship. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

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

- **(a)** If the offer of a party other than the claimant is not accepted, and the claimant obtains a monetary judgment, *or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any),* that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall constitute a prior charge on the judgment *or verdict in uninsured/underinsured motorist actions.*
- **(b)** A favorable determination qualifying for allowances under this rule is a money judgment *or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any*) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.
- **(c)** No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

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 …

(*7) In a direct action by an insured for any first party insurance coverage, in favor of a successful insured.*

APPENDIX 2

May 20, 2015 Report of the Class Certification Subcommittee

The subcommittee has been charged with studying the request by the New Jersey Civil Justice Institute (formerly known as the New Jersey Lawsuit Reform Alliance) to the Civil Practice Committee that Rules 2:2-2 (Appeals to the Supreme Court from Interlocutory Orders), 2:2-3 (Appeals to the Appellate Division from Final Judgments) and 2:9-5 (Stay of Proceedings in Civil Actions) be amended to permit a determination on a class certification or decertification motion to be appealable as of right.

In undertaking its work the subcommittee reviewed the November 25, 2014 letter from the New Jersey Civil Justice Institute and the attached June 25, 2014 opinion, authored by its chief counsel, in the New Jersey Law Journal on the Third Circuit's decision declining to rehear en banc Carrera v. Bayer Corp., 727 F.3d 300 (3d Cir. 2013). The subcommittee also reviewed several recent opinions of the United States Supreme Court and the Third Circuit regarding the maintenance of civil class action lawsuits including Dart Cherokee Basin Operating Co., LLC v. Owens, ___ U.S. ___, 135 S. Ct. 547, 190 L. Ed. 2d 495 (2014); Carrera, supra, 727 F.3d 300; Hayes v. Wal-Mart Stores, Inc., 725 F.3d 349 (3d Cir. 2013); and Marcus v. BMW of

North America, LLC, 687 F.3d 583 (3d Cir. 2012). We obtained from the Appellate Division Clerk's Office information on the number of motions for leave from decisions granting or denying class certification and their disposition from October 23, 2013 through the date of this report. Finally, we solicited input from the co-chairs of the New Jersey State Bar Association Class Actions Committee, Bruce D. Greenberg and Jeffrey J. Greenbaum, both of whom provided valuable information and advice to the subcommittee from their different perspectives as active class action lawyers.

It is worth noting at the outset that the subcommittee was unable to solicit any anecdotal information from its members or others that there exists a problem with either access to the Appellate Division on an application for interlocutory review of a trial court decision on class certification or delay in having those decisions reviewed in that court. Information provided from the Appellate Division Clerk's Office may provide a reason.

The Clerk's Office reports that only three such motions were filed in the 2013-2014 court term. Two of the three challenged orders granted class certification. The Appellate Division granted one of the motions and denied the other. In the third case, plaintiffs sought leave to appeal a sua sponte

order striking plaintiffs' class allegations and dismissing their claims. The Appellate Division denied leave. The Supreme Court, however, granted the plaintiffs' motion for leave and remanded to the Appellate Division for consideration on the merits.

Only two motions for leave have been filed in the Appellate Division this term, both from trial court orders granting certification. That court denied leave in both cases. The Supreme Court granted the motion for leave filed in one of the matters and summarily remanded to the Appellate Division for consideration of the merits.

Notwithstanding the very small number of such motions, both proponents and opponents of a rule change expressed strong views on the subject. Proponents contend that a rule allowing appeals as of right will foster greater clarity in the standards for class certification in New Jersey. Pointing to the Third Circuit's several recent cases addressing the requirement of "ascertainability" of the class to be certified, they argue a rule change will provide an effective opportunity to correct errors and facilitate development of the law, thereby enhancing predictability for litigants and judicial economy for courts.

Some scholars argue that mandating a right to appeal from class certification decisions protects the substantive fairness

of the process for litigants.[2] They argue that the certification decision is interlocutory in form only as its effect is much the same as a final judgment. They contend that if the class is not certified, plaintiffs will often abandon the suit because the value of non-aggregated claims is too small to pursue. Conversely, they contend that a defendant on the losing side of a class certification motion comes under enormous pressure to settle to avoid the possibility of a colossal adverse judgment. Either way, they claim the case is unlikely to be prosecuted to final judgment following a trial, and that the class certification decision more likely than not will be the last substantive ruling in the case. Proponents of a rule change argue the small number of cases involved militates in favor of a rule change as it imposes no burden on the courts.

Opponents of a rule change contend that following enactment of the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), the vast majority of class actions, even those initiated in state court, now proceed in federal

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[2] See, e.g., Earl M. Maltz, The Ghost of *Winberry*: Separation of Powers and Tort Reform Proposals, 44 Rutgers L.J. 39 (2013).

court. Those that remain in state court, they contend, are either under the aggregate amount of $5 million or are between parties not diverse. In either case, they claim these are small cases that do not produce the settlement pressure defendants complain of. Opponents of a rule change argue that the small number of cases does not justify a rule amendment.

In addition to the materials listed above, the subcommittee considered a proposal that would recommend a rule modeled on F.R.C.P. 23(f), which permits the circuit to grant interlocutory review of an order granting or denying class certification if a petition for permission is filed within fourteen days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the circuit so orders.[3] Ultimately, however, the subcommittee voted overwhelmingly to recommend that the current rule not be amended.

The very small number of cases, coupled with the lack of any anecdotal evidence of delay or denial of ready access to the Appellate Division, convinced members of the subcommittee that

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[3] Our existing Rule 2:2-4 permitting interlocutory appeals to the Appellate Division is more generous to such applications than F.R.C.P. 23(f).

no change was needed. The arguments that proponents make as to litigation expense and settlement pressure following the grant of a class certification motion could be made as convincingly by defendants who have lost a summary judgment motion in a fee-shifting case. As the Third Circuit noted in its most recent effort at limning its ascertainability doctrine, "'[b]y their nature, interlocutory appeals are disruptive, time-consuming, and expensive'; thus, it makes sense to allow the 'district court an opportunity to fine-tune its class certification order [before the entry of final judgment] . . . rather than opening the door too widely to interlocutory appellate review.'" Byrd v. Aaron's Inc., No. 14-3050, 2015 U.S. App. LEXIS 6190, at *37 (3d Cir. Apr. 16, 2015) (quoting Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 294 (1st Cir. 2000)).

A liberal approach to granting interlocutory applications from orders on class certification motions (which the Supreme Court would appear to be encouraging and the Appellate Division has recently embraced[4]) would allow the Appellate Division to act as Rule 2:2-4 commands "in the interest of justice" to "restore equilibrium when a doubtful class certification ruling would

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[4] See Daniels v. Hollister Co., ___ N.J. Super. ___, ___ (App. Div. 2015) (slip op. at 1 n.1).

virtually compel a party to abandon a potentially meritorious claim or defense before trial" as well as provide the means for that court to "take earlier-than-usual cognizance of important, unsettled legal questions, thus contributing to both the orderly progress of complex litigation and the orderly development of the law" while not wasting the litigants' time and money and the court's resources on frivolous appeals. Mowbray, supra, 208 F.3d at 293.

Finally, members of the subcommittee became very conscious that this debate, which engendered such strong feelings among the partisans, broke down precisely along party lines. Lawyers and organizations representing defendants were in favor of the change, while those representing plaintiffs were decidedly against. The members of the subcommittee wish to be clear that our recommendation is not a vote in favor of class actions or one against defendants in these cases. Instead, the overwhelming majority of us became convinced that to change the rule for so few cases in the absence of any evidence of a real problem could well appear as if our courts were tilting the playing field in favor of defendants.

Accordingly, the subcommittee respectfully submits that there be no change to Rule 2:2-3 to permit appeals from class certification motions as of right to the Appellate Division.

Subcommittee members:

Allison E. Accurso, J.A.D., Chair
Prof. John Beckerman
John Falzone, Esq.
Clarkson S. Fisher, Jr., P.J.A.D.
Amos Gern, Esq.
Craig Hilliard, Esq.
Edwin Stern, P.J.A.D. (Ret.)
Jonathan Weiner, Esq.