

**RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY**  
**RULE 4:11. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL OR FOR USE**  
**IN OTHER JURISDICTIONS**

**4:11-1. Before Action**

(a) Petition. A person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents pursuant to R. 4:18-1 may file a verified petition, seeking an appropriate order, entitled in the petitioner's name, showing: (1) that the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought; (2) the subject matter of such action and the petitioner's interest therein; (3) the facts which the petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it; (4) the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known; (5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and (6) the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof. The court may also grant a pre-complaint petition for depositions filed pursuant to this rule by a person asserting that due to extraordinary circumstances, which shall be explained in detail by affidavit, such depositions are necessary to enable compliance with N.J.S.A. 2A:53a-27 to -29 (Affidavit of Merit Statute).

(b) Notice and Service. At least 20 days before the date of hearing the petitioner shall serve upon each person named in the petition as an expected adverse party, in the manner provided by R. 4:4-4 and R. 4:4-5(a)(1), a notice, with a copy of the petition attached, stating the time and place of the application for the order described in the petition. If it appears to the court after diligent inquiry that such service cannot be made, the court may order service by publication or otherwise, and shall appoint an attorney to represent persons so served, who, if such persons are not otherwise represented, may cross-examine the deponent. Such attorney's compensation may be fixed by the court and charged to the petitioner. The provisions of R. 4:26-2 apply if any expected adverse party is a minor or mentally incapacitated person.

(c) Order and Examination. If the court finds that the perpetuation of the testimony or evidence or the inspection may prevent a failure or delay of justice, it shall make an order designating or describing the evidence to be preserved, or the documents or property to be inspected or the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions or inspection may then be taken in accordance with these rules; and the court may make such orders as are provided for by R. 4:18 and R. 4:19.

(d) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or of the state in which it is taken, it may, in accordance with the

provisions of R. 4:16-1 and R. 4:16-2, be used in any action between the same parties or their privies involving the same subject matter, which is subsequently brought in any court of this State having cognizance thereof.

Note: Source-R.R. 4:17-1. Paragraphs (c) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (c) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; paragraph (b) amended July 23, 2010 to be effective September 1, 2010.

#### **4:11-2. Pending Appeal**

If an appeal has been taken from a trial court judgment or before the taking of such an appeal if the time therefor has not expired, the trial court, on motion, may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further trial court proceedings. The motion shall show the names and addresses of the persons to be examined, the substance of the testimony which is expected to be elicited from each, and the reasons for perpetuating their testimony. If the court finds that perpetuation of the testimony may prevent a failure or delay of justice, it may make an order allowing the depositions to be taken and may make such orders as are provided for by R. 4:18-1 and R. 4:19. Depositions so taken may be used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the court.

Note: Source-R.R. 4:17-2. Amended July 7, 1971 to be effective September 13, 1971.

#### **4:11-3. Perpetuation of Testimony**

R. 4:11-1 and R. 4:11-2 do not limit the court's power to entertain an action to perpetuate testimony or to enter an order in any pending action for the taking of a deposition to perpetuate testimony.

Note: Source-R.R. 4:17-3. Amended July 26, 1984 to be effective September 10, 1984.

#### **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 and shall be designated "petition pursuant to R. 4:11-4(a)" and shall be filed

with the Clerk of the Superior Court. It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to 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, in the name of the Clerk of the Superior Court, which complies with subparagraph (3) to an attorney authorized to practice in this State or to the Clerk of the Superior Court or designee. 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 with the Clerk of the Superior Court. It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to R. 1:43.

(2) Request Does Not Constitute Appearance. A request for the issuance of a subpoena does not constitute an appearance in the courts of this State. A request for the issuance of a subpoena does create the necessary jurisdiction in this State to enforce the subpoena; to quash or modify the subpoena; to issue any protective order or resolve any other dispute relating to the subpoena; to impose sanctions on the attorney or party requesting the issuance of the subpoena for any action which would constitute a violation of the Rules Governing the Courts of the State of New Jersey, including the Rules of Professional Conduct; and to take such other action as may be appropriate.

(3) Contents of Subpoena. A subpoena under this subsection shall:

(A) state the name of the New Jersey court issuing it and comply with the requirements of R. 4:14-7;

(B) incorporate the terms and conditions used in the foreign subpoena to the extent those terms and conditions do not conflict with R. 4:14-7;

(C) advise the person to whom the subpoena is directed of that person's right to move to quash or modify the subpoena or otherwise move under R. 4:10-3, R. 4:14-4, R. 4:23-1 or any other Rules Governing the Courts of the State of New Jersey that are applicable to discovery;

(D) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel; and

(E) bear the caption and case number of the foreign case to which it relates, identifying the foreign jurisdiction and the court where the case is pending.

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

(5) Deposition, Production, and Inspection. The provisions of R. 1:9-2 apply to a subpoena issued under this section. As required by R. 4:14-7(c), a subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled. The subpoena shall state that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action. The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties. Depositions and other discovery taken pursuant to the rule shall be conducted consistent with and subject to the limitations in the Rules Governing the Courts of the State of New Jersey, including the Rules of Professional Conduct, and all other applicable laws of this State.

(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 the Clerk of the Superior Court 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.

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 August 1, 2016 to be effective September 1, 2016.

#### **4:11-5. Depositions Outside the State**

A deposition for use in an action in this state, whether pending, not yet commenced, or pending appeal, may be taken outside this state either (a) on notice pursuant to R. 4:14-2, or, in the case of a foreign country, pursuant to R. 4:12-3; (b) in accordance with a commission or letter rogatory issued by a court of this state, which shall be applied for by motion on notice; or (c) pursuant to a subpoena issued to the person to be deposed in accordance with R. 4:14-7 and in accordance with the procedures authorized by the foreign state; or (d) in any manner stipulated by the parties. Depositions within the United States taken on notice shall be taken before a person designated by R. 4:12-2. Commissions and letters rogatory shall be issued in

accordance with R. 4:12-3. If the deposition is to be taken by stipulation, the person designated by the stipulation shall have the power by virtue of the designation to administer any necessary oath.

Note: Adopted July 22, 1983 to be effective September 12, 1983; amended July 26, 1984 to be effective September 10, 1984; amended July 22, 2014 to be effective September 1, 2014.