REPORT OF THE

SUPREME COURT COMMITTEE ON

MUNICIPAL COURT PRACTICE

2015 - 2017 TERM

February 1, 2017

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I. INTRODUCTION

The Municipal Court Practice Committee ("Committee") recommends that the Supreme Court adopt the proposed rule amendments and new rules contained in this report. The Committee also reports on other issues reviewed in which it concluded no rule change was appropriate or in which the issue was continued until a later report. Where rule changes are proposed, deleted text is bracketed **[as such],** and added text is underlined **as such**. No change to a paragraph of the rule is indicated by ". . . **no change**."

II. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Limitations on Plea Agreements in Municipal Courts - Proposed Amendments to the Appendix to the Part VII Court Rules

Administrative Director Glenn A. Grant, J.A.D., forwarded a letter from the American Civil Liberties Union (ACLU) to the Municipal Court Practice Committee (the Committee). In its letter, the ACLU requested that the Court reconsider the portions of Guideline 4 of the Appendix to Part VII of the Rules of Court that prohibit municipal courts from accepting plea agreements in possession of marijuana cases (N.J.S.A. 2C:35-10(a)(4) ("Possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish is a disorderly person.")).

Guideline 4, "Limitation," currently provides:

> No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses. Those offenses are:
>
> A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and
>
> B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).
>
> No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).
>
> If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.

Except in cases involving an accident or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.

If a defendant is charged with more than one violation under Chapter 35 or 36 of the Code of Criminal Justice arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge under N.J.S.A. 2C:36A-1, all remaining Chapter 35 or 36 charges arising from the same factual transaction may be dismissed by the judge on the recommendation of the prosecutor.

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any of the above enumerated offenses in Sections A and B of this Guideline.

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice requires the acceptance of a plea to a lesser offense.

History

Plea bargaining is the process in which the accused and the prosecutor in a case work out a mutually satisfactory disposition of the case subject to court approval, usually involving the defendant pleading guilty to a lesser offense in return for a lighter sentence than that possible for the more serious charge. See, generally, State v. Taylor, 80 N.J. 353, 360-61 (1979) ("Plea bargaining has become firmly institutionalized in this State as a legitimate, respectable and pragmatic tool in the efficient and fair administration of criminal justice.").[1]

[1] Cases decided by guilty pleas make up more than 90 percent of those processed through the judicial system. Bureau of Justice Statistics, 2005; Lindsey Devers, U.S. Dep't of Justice, Plea and Charge Bargaining 3 (2011).

In 1974, plea agreements were expressly prohibited in municipal courts in New Jersey via a Bulletin Letter from the Supreme Court.[2] The ban was based on a concern about the lack of professionalism and oversight in certain municipal courts. See, State v. Hessen, 145 N.J. 441, 446-47 (1996); State v. Rastogi, 403 N.J. Super. 581, 583-586 (Law. Div. 2008).

In 1985, the Supreme Court Task Force on Improvement in the Municipal Courts recommended that plea agreements be permitted, subject to certain conditions. Shortly after, similar recommendations were made by the New Jersey State Bar Association, the County Prosecutors Association, the Supreme Court Criminal Practice Committee, and the Supreme Court Committee on Municipal Courts (now the Municipal Court Practice Committee). See, Notice to the Bar, June 15, 2005, "Amendments to Guideline 4 of Guidelines for Operation of Plea Agreements in the Municipal Courts."

In 1988, the Supreme Court found that circumstances had changed and authorized a one-year limited test of regulated plea bargaining in Municipal Courts, noting that the former lack of professionalism that had permeated most aspects of the municipal courts had significantly changed; that the quality and tradition of the judges had improved; that municipal prosecutors were now in place in most municipal courts and public defenders in some; and that verbatim records of proceedings were being

[2] Municipal Court Bulletin Letter #3-74 stated: "No plea agreements are permitted in municipal courts on non-indictable offenses. A judge may not accept a plea of guilty to a lesser charge where it appears that a violation of N.J.S.A. 39:4-50 (a) or (b) may have occurred. In such cases, the judge should hear the matter. Where a judge is not satisfied that the prosecution has proven a case under (a), he may find the defendant guilty of (b) as a result of the hearing." Municipal Court Bulletin Letter #9/10-75 stated: "The Supreme Court has recently reaffirmed its policy prohibiting plea bargaining in the municipal courts. The rules in Part III dealing with plea bargaining (Rule 3:25A) are not applicable to the municipal courts. Refer to the item Plea Bargaining in Municipal Court Bulletin Letter # 3-74, page 2."

made. Ibid. The report preserved the ban on plea bargaining drunk-driving cases. Ibid.

On October 31, 1989, the Supreme Court Committee to Implement Plea Agreements in Municipal Courts issued its Final Report evaluating the one-year experiment. The report recommended that plea agreements be permitted, subject to certain conditions. Ibid.

On June 29, 1990, the Court issued its Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey (Guidelines), which adopted the Committee's recommendation. State v. Hessen, 145 N.J. at 448.

Rule 7:6-2 was adopted on June 29, 1990 and authorized generally plea bargaining in municipal courts subject to specific standards, pursuant to the Guidelines. In turn, Guideline 4 currently states that no plea agreements whatsoever will be allowed in drunken driving or certain drug offenses: possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4); being under the influence of a controlled dangerous substance or its analog, N.J.S.A. 2C:35-10(b); and use possession or intent to use or possess drug paraphernalia, N.J.S.A. 2C:36-2. In 2004, the Court amended Guideline 4 to no longer permit a plea agreement that dismisses a refusal charge, although the Guidelines do permit plea agreements for concurrent sentences on the DWI and the refusal charges. State v. Hessen, 145 N.J. at 448,

Current Proposal

In its request for a reconsideration of the prohibition against plea agreements for violations of N.J.S.A. 2C:35-10(a)(4), the ACLU expressed concern over the numerous consequences faced by those convicted of such a charge, including both

short and long-term ramifications. In its letter, the ACLU emphasized that it was not asking the Judiciary to step into the role of the Legislature but instead asking for a correction of Court Rules in order to stop "exacerbating the problems and collateral consequences" of the marijuana laws by continuing the ban on plea agreements for minor possession cases. The ACLU asserted that marijuana arrests disproportionally impact defendants of color, stating that its studies have indicated white and black people use marijuana at roughly equal rates but African Americans are arrested at a rate 2.8 times higher than white people.

As with other disorderly persons offenses, defendants convicted under N.J.S.A. 2C:35-10(a)(4) are subject to a fine of up to $1,000.00, N.J.S.A. 2C:43-3(c), and a term of incarceration of up to six (6) months, N.J.S.A. 2C:43-8. These defendants are also assessed a $500 Drug Enforcement and Demand Reduction fee, N.J.S.A. 2C:35-15a(l)(c); and a $50 Laboratory fee, N.J.S.A. 2C:35-20a. Defendants convicted under N.J.S.A. 2C:35-10(a)(4) may also be subject to a driver's license suspension of between six months and two years, N.J.S.A. 2C:35-16; a loss of student financial aid; 20 U.S.C. 1091(r); a five-year ban from adoption, N.J.A.C. 10:122C-5.4(a)(8)(iii); deportation, 8 U.S.C. 1227(a)(2)(B)(i)[3]; eviction from public housing, Dep't of Hous. v. Rucker, 535 U.S. 125, 130 (2002); and immigration inadmissibility, 8 U.S.C. 1182(a)(2)(A)(i)(II).

Statistics from the Administrative Office of the Courts indicate that statewide in 2015 there were 26,207 case dispositions for N.J.S.A. 2C:35-10(a)(4) charges.

[3] Note that while there is an exception for 30 grams or less of marijuana possessed for personal use, this limit is lower than the 50 gram threshold under state law and the exception only applies to a first offense. 8 U.S.C. 1227(a)(2)(B)(i).

The Committee engaged in an extensive discussion of whether to recommend amending the appendix to permit plea agreements in minor marijuana possession cases. Several Committee members argued strongly that there is a need for more flexibility in these types of cases. One discussion focused on whether this modification of the appendix could be construed as undercutting the intent of the marijuana possession statute. A longtime Committee member, however, argued that the prohibition against plea bargaining is a procedural matter, not a substantive issue; it was the Supreme Court which originally enacted the ban on plea bargain and the Supreme Court which would reconsider this procedural issue once again.[4]

The Committee members also discussed Guideline 4's additional prohibitions against plea bargaining in other minor matters: being under the influence of a controlled dangerous substance or its analog, N.J.S.A. 2C:35-10(b), and use, possession or intent to use or possess drug paraphernalia, N.J.S.A. 2C:36-2. Both of these are disorderly persons offenses. The Committee considered recommending the removal of the prohibition against plea agreements in regard to these charges as well.

One member suggested that being under the influence of marijuana could perhaps be analogized to driving under the influence of alcohol and questioned whether this could begin a slippery slope toward allowing plea bargaining in DWI matters. However, numerous other members pointed out that the legislature has decriminalized being under the influence of alcohol. See, N.J.S.A. 26:2B-7, *et seq.* They noted that, further, the prohibition against being under the influence of marijuana is different from the prohibition in N.J.S.A. 39:4-50 against operating a vehicle under

[4] Note: The Court in State v. Hessen stated: "This Court has the prerogative and the power to limit plea bargaining in the municipal courts." State v. Hessen, 145 N.J. at 450 (1996). See also, State v. Brimage, 271 N.J. Super. 369, 379 (App. Div. 1994).

the influence, since the latter involves significant potential harm to others on the roadway.

One member noted that the suggestion to remove the ban on plea agreements for defendants charged with violations of N.J.S.A. 2C:35-10(b) and N.J.S.A. 2C:36-2 was broader than the initial request from the ACLU, which only addressed minor marijuana possession charges. In response, other members stated that it would be inconsistent to remove the prohibition against plea agreements for those charged with possession of small amounts of marijuana but to retain such a prohibition in charges involving being under the influence and possession of paraphernalia[5]. They pointed out that, unlike a DWI charge, these other charges did not involve operation of a vehicle and the attendant safety concerns. Several members posited that the ACLU may not have realized how similar these offenses were to possession of 50 grams or less of marijuana.

A judge on the Committee noted that the current plea bargaining restriction means that the court, prosecutor, and defendant are 'beholden' to the original charge, even if it would be more appropriate to prosecute a lower level charge, based on the facts and the law. A prosecutor on the Committee advocated for a lifting of the restriction on plea bargaining on all three charges, stating that fewer such restrictions would enable greater opportunities for justice.

[5] Some of the same consequences exist for convictions for these charges as for minor marijuana possession charges, e.g., convictions for violations of N.J.S.A. 2C:36-2, possessing drug paraphernalia, was found removable under 8 U.S.C.S. § 1227(a)(2)(B)(i). A "disorderly persons offense" under New Jersey law qualified as a "conviction" under the Immigration and Nationality Act, and the crime "related to" a controlled substance, as it was closely linked to the offense of possessing drugs. Hussein v. AG of the United States, 413 Fed. Appx. 431, 2010 U.S. App. LEXIS 25731 (3d Cir. 2010).

After a thorough and thoughtful discussion, the Committee members voted in favor of removing the ban against plea bargaining from Guideline 4 for N.J.S.A. 2C:35-10(a) (4), N.J.S.A. 2C:35-10(b), and N.J.S.A. 2C:36-2.

In a separate issue, one member noted that Guideline 4 had not previously been amended to expressly include the holding of State v. Hessen, in which the Court determined that a ban on plea bargaining on DWI matters in Guideline 4 should also include a ban on plea bargaining for defendants who permit an intoxicated person to drive. State v. Hessen, 145 N.J. at 459. The DWI statute, N.J.S.A. 39:4-50(a), includes permitting within the description of DWI:

> "…a person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.08% or more by weight of alcohol in the defendant's blood or ***permits*** another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or ***permits*** another to operate a motor vehicle with a blood alcohol concentration of 0.08% …" [emphasis added]

The Court stated in State v. Hessen, 145 N.J. at 459:

> The policies behind our prohibition on plea agreements are as readily applicable to those who allow an intoxicated person to drive as they are to the driver. Both are responsible for the "senseless havoc" of drunk driving. In the eyes of the law there is no distinction in culpability or punishment between drunk drivers and those who allow the drunk to drive. The Guideline that prohibits plea bargaining in all drunk-driving cases recognizes no distinction between the two offenders.

The members voted in favor of amending Guideline 4 to include a ban against plea bargaining in 'permitting DWI' matters. The full text of the approved language is provided below.

APPENDIX TO PART VII

GUIDELINES FOR OPERATION OF PLEA AGREEMENTS IN THE MUNICIPAL COURTS OF NEW JERSEY

GUIDELINE 1. No change.

GUIDELINE 2. No change.

GUIDELINE 3. No change.

GUIDELINE 4. Limitation. No plea agreements whatsoever will be allowed in [drunken driving or certain drug offenses.

Those offenses are:

A. D]driving or permitting another to drive while under the influence of liquor or drugs (N.J.S.A. 39:4-50) offenses. [and

B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).]

No plea agreements will be allowed in which a defendant charged for a violation of N.J.S.A. 39:4-50 with a blood alcohol concentration of 0.10% or higher seeks to plead guilty and be sentenced under section a(1)(i) of that statute (blood alcohol concentration of .08% or higher, but less than 0.10%).

If a defendant is charged with a second or subsequent offense of driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and refusal to provide a breath sample (N.J.S.A. 39:4-50.2) arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50 offense, the judge, on recommendation of the prosecutor, may dismiss the refusal charge. A refusal charge in connection with a first offense N.J.S.A. 39:4-50 charge shall not be dismissed by a plea agreement, although a plea to a concurrent sentence for such charges is permissible.

Except in cases involving an accident or those that occur when school properties are being utilized, if a defendant is charged with driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50(a)) and a school zone or school crossing violation under N.J.S.A. 39:4-50(g), arising out of the same factual transaction, and the defendant pleads guilty to the N.J.S.A. 39:4-50(a) offense, the judge, on the recommendation of the prosecutor, may dismiss the N.J.S.A. 39:4-50(g) charge.

[If a defendant is charged with more than one violation under Chapter 35 or 36 of the Code of Criminal Justice arising from the same factual transaction and pleads guilty to one charge or seeks a conditional discharge under N.J.S.A. 2C:36A-1, all remaining Chapter 35 or 36 charges arising from the same factual transaction may be dismissed by the judge on the recommendation of the prosecutor.]

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any [of the above enumerated offenses in Sections A and B of this Guideline] driving or permitting another to drive under the influence of alcohol or drugs offense. (N.J.S.A. 39:4-50).

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice requires the acceptance of a plea to a lesser offense.

Note: Guidelines and Comment adopted June 29, 1990, simultaneously with former Rule 7:4-8 ("Plea Agreements") to be effective immediately; as part of 1997 recodification of Part VII rules, re-adopted without change as Appendix to Part VII and referenced by Rule 7:6-2 ("Pleas, Plea Agreements"), October 6, 1997 to be effective February 1, 1998; Guideline 4 amended July 5, 2000 to be effective September 5, 2000; Guidelines 3 and 4 amended July 28, 2004 to be effective September 1, 2004; Guideline 4 amended June 7, 2005 to be effective July 1, 2005; Guideline 4 amended June 15, 2007 to be effective September 1, 2007; Guideline 3 amended July 16, 2009 to be effective September 1, 2009; Guideline 4 amended _____ to be effective _____.

B. Contempt of Court, Rules 7:8-12; 7:9-5; 1:2-4

The Committee was asked to consider a report ("Contempt Report") drafted by the Contempt of Court Work Group, comprised of members of the Conference of Presiding Judges – Municipal Courts, the Conference of Municipal Division Managers and representatives from the AOC on the issue of contempt of court sanctions in municipal courts. The Contempt Report addressed the practice in many municipal courts of judges imposing monetary sanctions on defendants who fail to appear in court for a hearing or fail to pay penalties imposed after conviction. An evaluation of the practice in municipal courts by the members of the Contempt of Court Working Group indicated that municipal court judges who impose monetary sanctions for failure to appear or pay oftentimes do not follow the procedures outlined in Court Rules 1:10-1 and -2 and therefore, these rules do not provide a legal basis for the practice.

Additionally, the Contempt Report explained that while Rule 1:2-4 permits a court to impose a monetary sanction on an attorney or party who, without just excuse, fails to appear for a court proceeding, that rule states that the amount should be paid to the "Treasurer, State of New Jersey." However, in practice, amounts collected for 'contempt of court' in the municipal courts are distributed to the municipality. The Contempt Report also noted that Rule 1:2-4 provides inadequate direction to the municipal courts in imposing monetary sanctions on defendants in that it provides no standards by which a judge should determine the amount of the sanction, nor any limit on that sanction.

The Contempt Report acknowledged that municipal courts have an interest in ensuring that defendants appear for their court dates and satisfy their monetary

obligations in a timely manner. The report noted that the majority of defendants attend their court hearings and pay their fines as ordered; however, the municipal courts spend much time and money tracking defendants who fail to appear or fail to pay. It was deemed appropriate that municipal courts impose modest sanctions to encourage defendants to appear when ordered and pay their fines and assessments when due, as part of the orderly administration of the municipal courts. The Contempt Report asserted, however, that excessive and unregulated sanctions disadvantage low-income defendants and can create a cycle of court debt, from which low-income defendants may find it difficult to extricate themselves. Such sanctions can also discourage defendants from appearing in court, fearing the imposition of heavy penalties.

To rectify these concerns, the Contempt Report included recommendations for the adoption of two new Part VII court rules: Rule 7:8-X, 'Sanctions; Failure to Appear;' and Rule 7:8-Y, 'Failure to Pay.' These draft rules authorized sanctions for failure to appear and to pay, but regulated the amount that may be assessed. The maximum sanctions recommended for failure to appear were: $25 for parking matters and $50 for all other matters, except for consequence of magnitude cases, where the aggregate sanction cannot exceed $100. The maximum sanction for failure to pay would be capped at $50. The Contempt Report also included a recommended conforming amendment to Rule 1:2-4, 'Sanctions.'

The Committee members engaged in an extensive discussion of the Contempt Report and the draft rules proposed therein. The members acknowledged that statewide variability in the application of contempt sanctions, conducted without proper procedural protections for defendants, was a matter of significant concern and

should be addressed. However, several members advocated that the draft rule language in the Contempt Report be modified to permit judges to retain discretion to impose higher contempt amounts for failure to appear in serious cases such as DWI, rather than set a monetary limit. In response, others explained that the overuse of contempt sanctions and the variability in the amount of such sanctions imposed on defendants for failure to appear and failure to pay were engendered by the use of unfettered discretion by municipal court judges in this area. Consequently, clear limits were required.

After a thorough analysis, the Committee voted to recommend two new Part VII Court Rules, as well as a conforming Part I Court Rule amendment. These two new rules and amended rule are provided below.

Failure to Appear

Rule 7:8-12 Sanctions; Failure to Appear (new rule)

(a) Failure to Appear--Attorneys. If without just cause or excuse or because of failure to give reasonable attention to the matter, an attorney fails to appear on behalf of a party at a trial, hearing or other scheduled municipal court proceeding, or if the attorney fails to make a timely application for adjournment, the municipal court judge may order any one or more of the following: (a) the attorney to pay a monetary sanction in such an amount as the court shall fix, to the municipal court administrator made payable to the municipality in which the offense occurred; (b) the attorney to pay the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counter-claim or motion or the granting of the motion; or (d) such other action as it deems appropriate.

(b) Failure to Appear --Defendants.

(1) In General. If without just cause or excuse, a defendant, who is required to appear at a trial, hearing or other scheduled municipal court proceeding, fails to appear, the municipal court judge may order defendant to pay a monetary sanction based on the following factors:

a) defendant's history of failure to appear

b) defendant's criminal and offense history

c) the seriousness of the offense

d) the inconvenience to the defendant's adversary and to witnesses called by the parties.
The judge shall state the reasons for the sanction on the record.

(2) Maximum Sanction. For non-consequence of magnitude cases, the aggregate sanction per case shall not exceed $25 for parking offenses and $50 for all other matters. For consequence of magnitude cases, the aggregate sanction per case shall not exceed $100. If, however, the defendant failed to appear and refused to explain or offered a frivolous or clearly inadequate explanation, the judge may impose a greater monetary sanction by holding the defendant in contempt of court under R. 1:10-2, and according the defendant all the protections outlined in that rule.

(3) Calculation of Sanction. When a case includes multiple offenses, the maximum sanction shall be calculated solely on the most serious offense charged. Only one sanction may be imposed per case.

(4) Payment of Sanction. The sanction shall be submitted to the municipal court administrator made payable to the municipality where the offense occurred.

Adopted _____ to be effective _____.

Failure to Pay

Rule 7:9-5, Failure to Pay (new rule)
Failure to Pay. If without just cause or excuse, a defendant defaults on payment of a municipal court imposed financial obligation, the judge, on the record, may order the defendant to pay an aggregate monetary sanction per time payment order not to exceed $50. The sanction shall be submitted to the municipal court administrator made payable to the municipal court. This sanction shall be in addition to any other penalty imposed by statute or rule for failure to pay.

Adopted _____ to be effective _____.

Conforming Rule Amendment

Rule 1:2-4. Sanctions: Failure to Appear; Motions and Briefs

(a) Failure to Appear. Except as provided in R. 7:8-12, [I]if without just excuse or because of failure to give reasonable attention to the

matter, no appearance is made on behalf of a party on the call of a calendar, on the return of a motion, at a pretrial conference, settlement conference, or any other proceeding scheduled by the court, or on the day of trial, or if an application is made for an adjournment, the court may order any one or more of the following: (a) the payment by the delinquent attorney or party or by the party applying for the adjournment of costs, in such amount as the court shall fix, to the Clerk of the Court made payable to "Treasurer, State of New Jersey," or to the adverse party; (b) the payment by the delinquent attorney or party or the party applying for the adjournment of the reasonable expenses, including attorney's fees, to the aggrieved party; (c) the dismissal of the complaint, cross-claim, counterclaim or motion, or the striking of the answer and the entry of judgment by default, or the granting of the motion; or (d) such other action as it deems appropriate.

(b) No change

Note: Source - R.R. 1:8-5, 4:5-5(b) (second sentence), 4:5-10(e), 4:6-3(b), 4:29-1(c), 4:41-6. Amended June 20, 1979 to be effective July 1, 1979; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 27, 2006 to be effective September 1, 2006; paragraph (a) amended to be effective .

III. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Motion to suppress, Rule 7:5-2

An attorney who frequently practices in municipal court wrote to the Committee requesting the members consider an amendment to Rule 7:5-2(b) which would require briefs be filed by the attorneys where there is a motion to suppress when a search has been conducted without a warrant.

Currently, Rule 7:5-2(b) provides that if a search was made without a warrant, "written briefs in support of and in opposition to the motion to suppress shall be filed either voluntarily or in the discretion of the judge, who shall determine the briefing schedule." In his request, the attorney noted that the Part VII rule on motions to suppress differs from the Part III Criminal Rule, Rule 3:5-7, in that Rule 3:5-7(b) requires briefs from the State and defense counsel in motions to suppress both in matters where there is a search warrant and matters where there is not.

The Committee recognized that the rule as currently drafted permits judges to request briefs in cases in which they would be deemed helpful. The Committee noted that most municipal prosecutors still serve on a part-time basis and adding a mandatory brief in all motions to suppress would create an undue and unnecessary burden.

Accordingly, the Committee voted unanimously to reject a rule change that would require briefs to be filed in municipal court on all motions to suppress.

B. Personal service, Rule 7:7-8(e)

An attorney who practices in Municipal Court asked the Committee to consider an amendment to the personal service for subpoenas rule, Rule 7:7-8, to allow for alternative methods of service to law enforcement officials. In support of his request, the attorney explained that law enforcement officers and their families may not appreciate personal service to the law enforcement officer's home. He suggested that such service could subject that officer and his/her family to unwanted attention by defendants and others who may have an interest in some particular case the law enforcement officer is handling.

The attorney suggested that Rule 7:7-8(e), "Personal Service" be amended to add the following: "<u>If the person being subpoenaed to testify is a law enforcement or governmental official, said person may be served by delivering a copy of the subpoena to the law enforcement agency or office employing said person</u>."

The Committee members determined that it would not be advisable to abandon direct personal service for a certain category of individuals. The members concluded that there would be significant concerns involved in leaving a subpoena at anyone's place of business, particularly that of a law enforcement officer. State law enforcement officers, for example, move frequently between different barracks.

Accordingly, the Committee unanimously voted to deny the request to amend Rule 7:7-8(e) to permit a subpoena to be served by delivering a copy to the office of the law enforcement officer.

C. Appearance of a defendant, Rule 7:8-7(a)

An attorney wrote to the Committee asking for an amendment to Rule 7:8-7(a), the first appearance rule. He suggested that waiver be permitted upon a showing of good faith made in writing by defense counsel that the matter will not be able to be moved on the day in question and the reason(s) why. He suggested that if the court refuses to grant the requested waiver of the defendant's appearance, that the State should likewise be required to have any and all witnesses present so the matter may be moved on the scheduled court date.

The Committee considered how Rule 7:8-7(a) incorporates a defendant's right to be present, one of the means by which the witness-confrontation guarantees of the United States and New Jersey Constitutions are implemented. See State v. Hudson, 119 N.J. 165, 171 (1990). In general, therefore, the municipal judge may not conduct a trial in the absence of the defendant.

Court Rule 7:8-7(a) provides that a defendant shall appear at a municipal court proceeding through his/her attorney, unless otherwise permitted by the court:

> Except as otherwise provided by Rules 7:6-1(b), 7:6-3, or 7:12-3, the defendant shall be present, either in person, or by means of a video link as approved by the Administrative Office of the Courts, at every stage of the proceeding and at the imposition of sentence.

After discussion of State v. Hudson concerns in light of the attorney's letter, the Committee voted unanimously to not recommend such an amendment.

D. Form of process, Rule 7:2-1(b)

A private citizen requested that the Committee recommend a modification to Rule 7:2-1(b) that would expressly require municipal courts to use a standard form for citizen complaints. The citizen stated that he recently asked a municipal court for a copy of a citizen complaint against a police officer for which no probable cause was found. He said he was told there was no official complaint (a CDR or special form of complaint) on file, but rather a locally produced form with handwritten notations. The citizen asserted that a Court Rule amendment could prevent a situation in which a court official received a citizen complaint but does not fill out an official complaint form if no probable cause was found by the judge and suggested the following addition to Rule 7:2-1(b):

> (b) Acceptance of Complaint. The municipal court administrator or deputy court administrator shall accept for filing every complaint made by any person[.] upon a CDR-1, CDR-2 or other form prescribed by the Administrative Office of the Courts.

Several Committee members stated that the required procedure in municipal courts, pursuant to guidance issued by the Acting Administrative Director of the Courts, is for the judicial officer to complete a complaint form for every citizen complaint submitted to the court, before the complaint has a probable cause determination made. As such, if this particular municipal court did not follow the required procedure regarding the filling out of that complaint, this is an issue which should be addressed through mentorship and training.

An AOC representative noted that under Rule 1:38, such complaints for which no probable cause are found are retained and open to public access. See, Administrative Determinations by the Supreme Court on the Report and

Recommendations of the Supreme Court Special Committee on Public Access to Court Records 7 (July 22, 2009)[6].

Moreover, the members noted that the lone situation described by the letter-writer has not been reported as a matter of concern in the municipal courts.

Accordingly, the members unanimously voted to not amend Rule 7:2-1(b) as requested.

[6] The Administrative Determinations by the Supreme Court on the Report and Recommendations of the Supreme Court Special Committee on Public Access to Court Records may be found at https://www.judiciary.state.nj.us/pressrel/AlbinCommitteeRule_138AdministrativeDeterminations_by_the_Supreme_Court.pdf

E. Rule to parallel Rule 3:10-3, allowing an expert who did not conduct a test to testify at trial

A Municipal Presiding Judge who is a former member of the Committee asked the members to consider drafting a Part VII Court Rule to parallel Rule 3:10-3, which would provide a procedure to allow an expert witness who did not conduct a test submitted into evidence to testify at trial. Rule 3:10-3 is set forth below:

> Rule 3:10-3. Notice by the State -- Expert Witness Testimony When Testifying Expert Did Not Participate in Underlying Tests
>
> (a) Notice by the State. Whenever the State intends to call an expert witness to testify at trial and that expert witness did not conduct, supervise, or participate in a scientific or other such test about which he or she will testify, the State shall serve written notice upon the defendant and counsel of intent to call that witness, along with a proffer of such testimony, all reports pertaining to such testimony, and any underlying tests, at least 20 days before the pretrial proceeding begins, or at least 20 days before the pretrial conference. If extenuating circumstances exist, the State may file the notice after this deadline. For purposes of this rule the term "test" shall include any test, demonstration, forensic analysis or other type of expert examination.
>
> (b) Objection by the Defendant. If the defendant intends to object to the expert testimony, the defendant shall serve written notice upon the State of any objection within 10 days of receiving the State's notice of intent. In the defendant's notice of objection, he or she must specify the grounds for such objection, including any Confrontation Clause grounds under either the United States or New Jersey State Constitution.
>
> (c) Determination. Whenever a defendant files a notice of objection specifying the grounds for objection, the court shall decide admissibility of the testimony on the grounds alleged no later than seven days before the beginning of trial.
>
> (d) Failure to Comply With Time Limitations. The defendant's failure to file a notice of objection within the timeframe required by this rule shall constitute a waiver of any objection to the admission of the expert testimony. The defendant's failure to specify a particular ground for such objection shall constitute a waiver of any ground not specified. The State's failure to file a notice of intent within the timeframe required by this rule shall for good cause shown extend the time for defendant to object pursuant to paragraph (b) and for the court to decide admissibility of the testimony pursuant to paragraph (c). In any event, the court may take such action as the interest of justice requires.
>
> (e) Time Limitations. The time limitations set forth in this rule shall not be relaxed except upon a showing of good cause.

Several members expressed concern regarding constitutional confrontation issues involved in allowing a witness who did not prepare a report to testify as to the substance of the report. See, U.S. Const. amend. VI; N.J. Const., art. I, para. 10; Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004) (Court held that cross-examination is required to admit prior testimonial statements of witnesses who have since become unavailable).

Several members questioned whether allowing a witness who did not conduct a test to testify could limit the ability to conduct a meaningful cross-examination. Another member countered with the suggestion that if such a rule were passed, a N.J.R.E. 104(a)[7] hearing conducted on the day of trial could resolve any evidentiary issues regarding the testifying witness. In response, other members suggested that increased use of N.J.R.E. 104(a) hearings could extend and unnecessarily complicate municipal court proceedings, perhaps turning one-day trials into multi-day events.

The members discussed recent case law involving testimonial evidence by experts, including State v. Michaels, 219 N.J. 1 (2014); State v. Roach, 219 N.J. 58 (2014), cert. denied, 135 S. Ct. 2348, 192 L. Ed. 2d 148 (2015); State v. Bass, 224 N.J. 285 (2016); and State v. Kuropchak, 221 N.J. 368 (2015).

The consensus of the members was that in light of the very recent case law involving various aspects of this issue, which may further evolve, it would not be the appropriate time to craft a Municipal Court Rule on the topic. The members therefore voted to not draft or amend a rule addressing this issue.

[7] N.J.R.E. 104(a) provides: "When the qualification of a person to be a witness, or the admissibility of evidence, or the existence of a privilege is subject to a condition, and the fulfillment of the condition is in issue, that issue is to be determined by the judge."

IV. MATTERS HELD FOR FURTHER CONSIDERATION

A. Modification of waiver of first appearance and arraignment procedures, Rule 7:6-1

A member of the Committee, an experienced municipal court practitioner, requested that the Committee consider a court rule amendment removing discretion from municipal courts in granting a waiver of first appearance and arraignment. The member explained that in his experience, certain municipal courts would regularly refuse to grant first appearance or arraignment waivers for represented defendants and would instead routinely require defendants to appear in person. The member suggested that Rule 7:6-1(b) be modified to remove the discretion of the court in granting waiver by written statement by deleting the phrase "unless the court otherwise orders," as follows:

> 7:6-1. Arraignment
>
> (a) Conduct of Arraignment. Except as otherwise provided by paragraph (b) of this rule, the arraignment shall be conducted in open court and shall consist of reading the complaint to the defendant or stating to the defendant the substance of the charge and calling upon the defendant, after being given a copy of the complaint, to plead thereto. The defendant may waive the reading of the complaint.
>
> (b) Written Statement. A defendant who is represented by an attorney and desires to plead not guilty may do so[, unless the court otherwise orders,] by the filing, at or before the time fixed for arraignment, of a written statement, signed by the attorney, certifying that the defendant has received a copy of the complaint and has read it or the attorney has read it and explained it to the defendant, that the defendant understands the substance of the charge, and that the defendant pleads not guilty to the charge.

The members discussed whether, if the rule were to be amended, additions should be included to reiterate the rights that should be conveyed to a defendant. The Committee Chair and members also questioned how procedures on waiver of first appearance should be coordinated with other sections of the Part VII Court

Rules which address first appearances, i.e., Rule 7:3-1, 7:3-2, 7:8-10, and whether an amendment of Rule 7:6-1 alone was appropriate.

The Committee agreed to continue discussion of potential amendments to the Part VII Court Rules regarding procedures for waiver of first appearance/arraignment at future meetings, with resolution of the issue carried.

B. Referrals from the Supreme Court – Order of December 6, 2016

By Order dated December 6, 2016, the Court referred the following issues related to Criminal Justice Reform to the Committee[8] for consideration and potential recommendations regarding the Part VII Court Rules:.

1. The Rule 1:38-3 relaxation regarding Pretrial Services Program;
2. The supplemental inclusion of juvenile defendants within the categories of "defendant" and "eligible defendant" when the juvenile defendant's complaint is transferred to adult status and the juvenile defendant is remanded to a juvenile detention facility, jail, or other detention facility;
3. The supplementation and relaxation of the Part VII Court Rules such that no statement or other disclosure, written or otherwise, made or disclosed by the defendant to the Pretrial Services Program may be used at any stage of the matter for any purpose, except (a) for purposes specifically provided for under the Rules of Court, or (b) in the prosecution of fraudulently obtaining pretrial release or the services of the Public Defender.

As it was not possible for the Committee to consider these issues prior to the submission of this report, these matters are carried until a future meeting.

[8] The Court concurrently referred these issues to the Criminal Practice Committee.

V. CONCLUSION

The members of the Municipal Court Practice Committee appreciate the opportunity to serve the Supreme Court in this capacity.

Respectfully submitted:

Robert Zane, P.J.M.C., Chair
Thomas North, P.J.M.C., Vice-Chair
Ma'isha Aziz, J.M.C.
Scott J. Basen, J.M.C.
David S. Bunevich, Esq.
Richard T. Burke, Esq.
Cataldo Fazio, J.M.C.
Elaine B. Frick, J.M.C.
Jeffrey Evan Gold, Esq.
Roger Haley, P.J.M.C.
Carol M. Henderson, A.A.G.
Edward H. Herman, P.J.M.C.
James Ligouri, P.J.M.C.
Dominick M. Manco, Esq.
Marcy M. McMann, Esq.
Robyn B. Mitchell, D.A.G.
Michael Mitzner, Esq.
Richard E.A. Nunes, Esq.
Anthony C. Nwaneri, Esq.
Victoria Pratt, C.J.M.C.
Diene Hernández-Rodríguez, Esq.
Louis S. Sancinito, Esq.
Cassandra T. Savoy, J.M.C.
H. Robert Switzer, J.M.C.
Michael L. Testa, Jr. Esq.
Daniella Trancho, C.M.C.A.
Mary Wiesemann, M.D.M.
Miles S. Winder, III, Esq.

AOC Staff:
Steven A. Somogyi, Assistant Director
Julie A. Higgs, Esq., Chief
Tina LaLena, C.M.C.A., Chief