NOTICE TO THE BAR

RULE AMENDMENTS ADOPTED BY THE SUPREME COURT IMPLEMENTING THE PRE-INDICTMENT AND POST-INDICTMENT RECOMMENDATIONS OF THE JOINT COMMITTEE ON CRIMINAL JUSTICE

On April 12, 2016, the Supreme Court entered an order amending and adopting rules recommended in the November 19, 2015 Criminal Practice Committee Report on Implementing Pre-Indictment and Post-Indictment Recommendations of the Joint Committee on Criminal Justice ("JCCJ"). That order and the adopted rule amendments have been published earlier, as have the Criminal Practice Committee Report and the JCCJ Report.

Most of the amendments adopted by the Court's April 12, 2016 order will become effective on May 20, 2016 for indictments filed on or after that date. Two of the amendments (R. 3:4-2 and new R. 3:4-6) will become effective for complaints filed on or after September 1, 2016.

The rule amendments and adoptions covered by the Supreme Court's April 12, 2016 order are summarized as follows:

R. 3:4-2. First Appearance After Filing Complaint

The amendments to this rule are effective September 1, 2016 and will apply to complaints filed on or after that date.

Paragraph (a) of Rule 3:4-2 has been amended to implement JCCJ Recommendation 17 regarding the timing of first appearances. Paragraph (a) requires that when the defendant remains incarcerated after his or her arrest, the first appearance must be held within 72 hours of arrest. That requirement has not changed. For non-incarcerated defendants, i.e., those arrested on a complaint-summons, R. 3:4-2, consistent with JCCJ Recommendation 17, requires that first appearances for these defendants, who generally face less serious charges and are therefore more likely to have their initial charges downgraded or dismissed, be conducted within 60 days after arrest or the issuance of a complaint-summons. Given that more specific timeframe, the phrase "[w]ithout unnecessary delay" is superfluous and has been deleted.

New paragraph (b) codifies JCCJ Recommendation 16. That amendment was based in part on assurances from the Public Defender that, upon completion of an application for public defender services, his staff would provisionally represent defendants at their first appearances if they do not have an attorney at that time. The last sentence of paragraph (b) is similar to language in R. 3:21-10(c) governing when the court may assign the Public Defender to represent a defendant for purposes of a motion to change or reduce a sentence.

Former paragraph (b), "Procedure in Indictable Offenses," has been redesignated as paragraph (c). Substantive changes have been made to subparagraph (c)(5).

Redesignated paragraph (c)(5) has been amended to add language that the court shall provide the defendant with an application for public defender services, which is to be completed at that time for immediate processing by the court. This amendment codifies JCCJ Recommendation 18, which was intended to streamline the process for the appointment of counsel and jumpstart pre-indictment plea negotiations.

New paragraph (c)(7) codifies JCCJ Recommendation 20 regarding informing defendants about Pretrial Intervention (PTI) and Drug Court as early as possible. Redesignated paragraph (c)(6) already requires judges to notify defendants about PTI at the first appearance. New paragraph (c)(7) will require that judges also inform defendants about drug court at that time. This amendment will also require current paragraphs (c)(7) and (c)(8) to be redesignated as paragraphs (c)(8) and (c)(9), respectively.

New paragraph (c)(10) is intended to aid in the implementation of JCCJ Recommendation 21, which would require every county to develop a pre-indictment program to enable the parties to discuss and finalize any pre-indictment dispositions. This paragraph would require the court to schedule a date for the pre-indictment disposition conference at the defendant's first appearance. The date for that conference would be no later than 45 days from the time of the first appearance.

Redesignated paragraph (f) has been amended to require that when the written statement waiving the first appearance is filed with the court, the court is to notify defense counsel of the date of the pre-indictment disposition conference, which shall occur no later than 45 days from the originally scheduled date of the defendant's first appearance. This provision is intended to ensure that defendants receive notice of the date of the pre-indictment disposition conference even if they waive their first appearance.

R. 3:4-6. Pre-Indictment Disposition Conference

This new rule was adopted to be effective September 1, 2016 and will apply to complaints filed on or after that date. It is intended to implement JCCJ Recommendation 21. The rule requires the court to hold a pre-indictment disposition conference, on the record and in open court, to discuss and/or finalize pre-indictment dispositions. Under R. 3:4-2(c)(10), that conference must be held no later than 45 days after the date of the defendant's first appearance.

All of the remaining rule amendments, as described below, have a May 20, 2016 effective date.

R. 3:6-2. Objections to Grand Jury and Grand Jurors

Pursuant to the rule, the prosecutor or defendant may, on certain grounds, challenge the array of the grand jury, which has returned or is expected to return an indictment. The rule formerly provided that, "[a]ll such challenges shall be made within 30 days of the service of the complaint or no later than at the arraignment status conference." However, pursuant to the revisions to R. 3:9-1(b)(1), the arraignment will occur no later than 14 days after the return or unsealing of the indictment. Additionally, new paragraph (e) of R. 3:9-1 (see below) provides for a sequence of status conferences;

in particular the scheduling of two post-indictment status conferences: the Initial Case Disposition Conference (ICDC) and the Final Case Disposition Conference (FCDC). The rule also provides for a third discretionary status conference, the Discretionary Case Disposition Conference (DCDC), to be scheduled only if necessary.

In light of the revisions to R. 3:9-1(b)(1) and (e), R. 3:6-2 has been amended to require that an objection to the grand jury or grand jurors must be filed no later than the Initial Case Disposition Conference (ICDC). In practice, the amendment to R. 3:6-2 will require that an objection to the grand jury or grand jurors must be filed no later than the first status conference that occurs after arraignment. The rule retains the "good cause" provision that allows the court to permit such motions to be brought at any time.

R. 3:8-2. Joint Representation

This rule addresses motions filed by an attorney or law firm to represent more than one defendant in a multi-defendant indictment. R. 3:8-2 formerly provided that such motions shall be filed as early as practicable, but no later than the date of the arraignment/status conference. Pursuant to amended R. 3:9-1(b)(1), the arraignment will occur no later than 14 days after the return or unsealing of the indictment. In light of those amendments, the second paragraph of R. 3:8-2 has been revised to refer to the "arraignment," rather than the "arraignment/status conference." In practice, R. 3:8-2 will require that a motion for joint representation shall be made no later than the arraignment (e.g., no later than 14 days after indictment). The rule retains the "good cause" provision that allows the court to permit such motions to be brought at any time.

R. 3:8-3. Representation by the Public Defender

Former R. 3:8-3 provided that an indigent defendant shall be referred to the Office of the Public Defender no later than the prearraignment interview that would occur within 21 days of indictment. Consistent with JCCJ Recommendation 22, R. 3:9-1(a) has been revised to merge the prearraignment conference with the arraignment. As such, a "prearraignment interview" will no longer be scheduled by the court. Instead, under R. 3:9-1(b)(1), the arraignment will occur no later than 14 days after the return or unsealing of an indictment.

R. 3:8-3 has been revised to provide that an indigent defendant be referred to the Office of the Public Defender no later than the arraignment. In practice, the amendment to R. 3:8-3 requires that an indigent defendant shall be referred to the Office of the Public defender no later than 14 days after indictment (e.g., at the arraignment). It should be noted, however, that with the new procedures for bail reform, centralized first appearances and pre-indictment disposition programs, it is likely that an indigent defendant will be referred to the Office of the Public Defender well before the arraignment, i.e., at the first appearance or the pre-indictment disposition conference.

R. 3:9-1. Post Indictment Procedure; Meet and Confer; Plea Offer; Conferences; Pretrial Hearings; Pretrial Conference.

Amendments to R. 3:9-1, with the exception of the change to paragraph (f), implement JCCJ Recommendations 22, 23, and 27. The caption for paragraph (a) has been revised to replace the reference to the prearraignment conference with "Post-Indictment Procedure." The text of paragraph (a) has also been revised to reflect the elimination of the prearraignment conference. The procedures for the prearraignment conference are therefore being deleted from paragraph (a) and are being incorporated into paragraph (b) (formerly paragraph (c)), which governs the procedures for the arraignment.

Paragraph (a) of R. 3:9-1 has also been revised to incorporate JCCJ Recommendation 27. These amendments are designed to make clear that all available discovery should be made available to the defendant when an indictment is returned or unsealed, and that if the prosecutor is tendering a plea offer, it must be in writing and included in the discovery package. While JCCJ Recommendation 27 allows for a caveat with respect to discovery being available in extraordinary cases, that language is not included in this rule. Rather, R. 3:9-1(a) has been amended to include a cross-reference to R. 3:13-3(b)(1), which presently includes a "good cause" exception for the availability of discovery by a defendant. Specifically, pursuant to R. 3:13-3(b)(1), "[g]ood cause shall include, but is not limited to, circumstances in which the nature, format, manner of collation or volume of discoverable materials would involve an extraordinary expenditure of time and effort to copy."

Paragraph (a) has also been amended to provide that when an indictment is returned or unsealed, the criminal division manager's office shall notify the defendant, in writing, of the date, time and location to appear for the arraignment. Consistent with JCCJ Recommendation 22, the arraignment shall occur within 14 days of the return or unsealing of the indictment, so it is important that the criminal division manager's office promptly notify the defendant and defense counsel of the date, time and location of the arraignment.

In addition to the amendments noted above, R. 3:9-1(a) has been amended to require that the criminal division manager's office ascertain whether the defendant is represented by counsel and if an appearance has been filed pursuant to R. 3:8-1. If the defendant is unrepresented, the criminal division manager's office is to ascertain whether the defendant has completed an application for Public Defender services and, if so, the status of that application. This language is designed to ensure that if the defendant is eligible for representation by the Office of the Public Defender, the appropriate paperwork has been completed and processed before the arraignment.

In the event that the defendant has not yet completed an application for Public Defender Services and is unrepresented at arraignment, language in paragraph (b)(3) provides the court with discretion to assign the Office of the Public Defender to represent the defendant for purposes of the arraignment. See N.J.S.A. 2A:158A-14 (provisional representation by the Office of the Public Defender).

The Criminal Practice Committee was of the view that because former paragraph (b) was being amended to require the prosecutor and defense attorney to meet and discuss the case prior to the Initial Case Disposition Conference (ICDC), rather than the arraignment/status conference, it should be placed after former paragraph (c), which will govern arraignment procedures. Consequently, former paragraph (b) is now paragraph (c), and former paragraph (c) is now paragraph (b). In addition, in order to incorporate certain procedures from the former prearraignment conference into the arraignment, paragraph (b) is being separated into three subsections.

Consistent with JCCJ Recommendation 22, paragraph (b)(1) has been amended to require that the arraignment be held no later than 14 days after the return or unsealing of the indictment. Previously, the arraignment was scheduled no later than 50 days after indictment or, in certain situations, within 28 days of indictment. Moving up the date of the arraignment, in conjunction with a change to the discovery rule in accordance with JCCJ Recommendation 27, will ensure that a defendant has counsel and discovery within 14 days of indictment. It will also allow the court to address any discovery issues earlier in the process.

As JCCJ Recommendation 22 merges the prearraignment conference with the arraignment, paragraph (b)(2) incorporates certain procedures from the former prearraignment conference into the procedures for the arraignment. Paragraph (b)(2) requires that the court shall advise the defendant at the arraignment of the substance of the charge, confirm that the defendant has reviewed the indictment and discovery with counsel, and inform the parties of the obligation to redact confidential personal identifiers from documents submitted to the court in accordance with R. 1:38-7(b). The paragraph also requires that the judge confirm that "if the defendant is represented by the public defender discovery has been obtained, or if the defendant has retained private counsel, discovery has been requested pursuant to R. 3:13-3(b)(1), or counsel has affirmatively stated that discovery will not be requested," and allow the defendant to apply for pretrial intervention.

Paragraph (b)(3) has been amended to require that, "[a]bsent good cause, all motions shall be filed with the court with the brief by the scheduled Initial Case Disposition Conference (ICDC) unless the opposing party bears the burden", and that the parties "shall meet and confer on motions, or other matters, as instructed by the court."

As noted above, the Criminal Practice Committee resequenced paragraphs (b) and (c) of R. 3:9-1 so that former paragraph (c) is now paragraph (b) and vice versa. Paragraph (c) has been amended to provide that prior to the Initial Case Disposition Conference (ICDC), the prosecutor and defense attorney shall discuss the case, including any plea offer and any outstanding and anticipated motions; attempt to reach an agreement on any discovery issues; and be prepared to report thereon at the Initial Case Disposition Conference (ICDC). The last sentence of paragraph (c) has also been amended, consistent with JCCJ Recommendation 27, to provide that if a plea offer is made, it shall be in writing and included in the post-indictment discovery package.

Paragraph (d) has been amended to require that certain pretrial motions and hearings be held prior to the pretrial conference and revised to clarify that, upon the

request of the moving party, the court may order motions to be reserved until the time of trial. Under N.J.S.A. 2A:162-22a(2)(b)(i), which becomes effective on January 1, 2017, a trial is deemed to commence when the court directs the parties "to proceed to .... the hearing of any motions that had been reserved for the time of trial." Thus, motions reserved for the time of trial would not be considered excludable time for speedy trial purposes.

New paragraph (e) implements JCCJ Recommendation 23, which provides that "[t]he number of status conferences should be limited to two absent good cause, in which case, a third conference would be allowed at the judge's discretion." Consistent with that recommendation, paragraph (e) lists those three status conferences as the Initial Case Disposition Conference (ICDC), the Final Case Disposition Conference (FCDC), and the Discretionary Case Disposition Conference (DCDC). Paragraph (e) also requires that at the Initial Case Disposition Conference (ICDC), the court is to set a date by when all pretrial motions must be filed with the court, and schedule another status conference, if necessary. In addition, the parties are required to discuss the case before each conference, including any plea offer and any outstanding or anticipated motions, and report on those items at the conference. The parties must also confer and attempt to reach an agreement on any discovery issues. At the conclusion of the status conference, the court may in its discretion set a trial date, schedule any necessary pretrial hearings, or schedule another status conference. The paragraph also requires that each status conference shall be held in open court with the defendant present.

Paragraph (f) has been amended to specify that the court is to inform the defendant at the pretrial conference, and determine that he or she understands, that ordinarily a negotiated plea should not be accepted after the pretrial conference and a trial date has been set; and the nature, meaning and consequences of the fact that a negotiated plea may not be accepted after the pretrial conference has been conducted and a trial date has been set.

R. 3:10-2. Time and Manner of Making Motion; Hearing on Motion

As previously noted, R. 3:9-1(b)(1) has been amended so that the arraignment will be held no later than 14 days after the return or unsealing of an indictment. Thereafter, the court may schedule two status conferences, the Initial Case Disposition Conference (ICDC) and the Final Case Disposition Conference (FCDC). For good cause, a third status conference, the Discretionary Case Disposition Conference (DCDC) may be scheduled at the court's discretion. The presumption is that in most cases, after the ICDC and the FCDC, the case should be scheduled for a pretrial conference.

In order to meet these scheduling parameters, R. 3:10-2 has been amended to provide that, unless otherwise instructed by the court, at the arraignment counsel shall advise the court of their intention to make motions. The rule has also been amended to include a time frame for the filing of motions; "[a]bsent good cause, all motions shall be filed with the court with the brief by the scheduled Initial Case Disposition Conference (ICDC) unless the opposing party bears the burden. Lastly, the rule has been revised to provide that the court shall set the dates for filing, briefing and hearing of such motions either before or at the Initial Case Disposition Conference (ICDC).

R. 3:12-1. Notice Under Specific Criminal Code Provisions

As previously noted, R. 3:9-1(b)(1) has been amended to provide that the arraignment will be held no later than 14 days after the return or unsealing of the indictment. In light of that amendment, the second paragraph of R. 3:12-1 was amended to provide that no later than seven days before the Initial Case Disposition Conference (ICDC), the defendant shall serve the prosecutor with notice of intent to claim a defense listed in the rule. The "good cause" provision in the last paragraph of the rule allows the court to extend the time of service of any notice or make such other orders as the interest of justice requires.

R. 3:13-3. Discovery and Inspection

The amendments to this rule are intended to implement JCCJ Recommendation 27. Paragraph (b)(1) governs post-indictment discovery by the defendant. The first sentence of R. 3:13-3(b)(1) formerly provided that "[e]xcept for good cause shown, the prosecutor's discovery for each defendant named in the indictment shall be delivered to the criminal division manager's office, or shall be available through the prosecutor's office, within seven days of the return or unsealing of the indictment." The sentence has been revised to require that, consistent with JCCJ Recommendation 27, at the return or unsealing of the indictment, the state must provide or make available to the defendant all available discovery.

The second paragraph of subsection (b)(1) has been revised to replace the reference to the prearraignment conference with the arraignment. This revision will therefore require that if the defendant is represented by the public defender, the attorney "shall obtain a copy of the discovery from the prosecutor's office or the criminal division manager's office prior to the arraignment." If the defendant is represented by private counsel, the rule retains the current procedure for the private attorney to submit a written request for discovery, except that, as proposed, the request must be received by the prosecutor's office prior to the date of the arraignment. Finally, this paragraph has been revised to remove the references to waiver of the prearraignment conference.

Paragraph (b)(2) governs discovery by the state. The rule retains the current time parameters, in which "defense counsel shall provide a copy of the discovery materials to the prosecuting attorney by a date to be determined by the trial judge, except in no event later than 14 days after the date of the arraignment." Both the first sentence of paragraph (b)(2), and the beginning of the second sentence, which references situations where the arraignment/status conference is held within 28 days of indictment, have been deleted.

The March 10, 2014 JCCJ Report, including the pre-indictment and post-indictment recommendations covered here, is on the Judiciary's website at http://www.judiciary.state.nj.us/pressrel/2014/FinalReport_3_20_2014.pdf.

The November 19, 2015 Criminal Practice Committee Report on Implementing the Recommendations of the Joint Committee on Criminal Justice is on the Judiciary's website at http://www.judiciary.state.nj.us/reports2016/CriminalReportJCCJ.pdf.

Questions regarding this notice or the rule amendments and adoptions effected by the Court's April 12, 2016 order may be directed to the Criminal Practice Division in the Administrative Office of the Courts at 609-292-4638.

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