2007 – 2009 REPORT

OF

THE MUNICIPAL COURT PRACTICE COMMITTEE

Submitted January 15, 2009

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I. RULE AMENDMENTS RECOMMENDED

A. Proposed Amendment to R. 7:2-1. Contents of Complaint, Arrest Warrant and Summons

The first proposed amendment to this rule would separately state the requirement that the municipal court accept for filing every complaint made by any person. This amendment is intended to emphasize the procedural requirement that is grounded in the First Amendment's guarantee of the right of the people to petition their government for redress of grievances.

The second proposed amendment to R. 7:2-1 will enable judicial officers to harness the power of the internet in order to efficiently communicate with law enforcement personnel who seek the issuance of complaints and process from the municipal court. The proposal would establish judicial recognition of electronic signatures on complaints submitted to the court and process issued by the court. The use of electronic signatures is currently authorized under this rule and is generally used in conjunction with the issuance of parking tickets via electronic device. The proposal would broaden the use of electronic signatures.[1]

Finally, the proposed change in paragraph (f)(3) is technical in nature and is intended to conform the rule to the Motor Vehicle Security and Customer Service Act of 2003 as set forth under N.J.S.A. 39:2A-1 et seq.

It is recommended that R. 7:2-1 be amended as follows:

[1] The use of non-original signatures is currently authorized when complaints and process are transmitted to and from judicial officers via fax machine. See R. 7:2-6.

R. 7:2-1. Contents of Complaint, Arrest Warrant and Summons

(a) Complaint: General. The complaint shall be a written statement of the essential facts constituting the offense charged made on a form approved by the Administrative Director of the Courts. Except as otherwise provided by paragraphs (e) (Traffic Offenses), (f) (Special Form of Complaint and Summons), and (g) (Use of Special Form of Complaint and Summons in Penalty Enforcement Proceedings), the complaining witness shall attest to the facts contained in the complaint by signing a certification or signing an oath before a judge or other person so authorized by N.J.S.A. 2B:12-21. **[**, all complaints shall be by certification or by oath before a judge or other person so authorized by N.J.S.A. 2B:12-21. The municipal court administrator or deputy court administrator shall accept for filing every complaint made by any person.**]**

If the complaining witness is a law enforcement officer, the complaint may be signed by an electronic entry secured by a Personal Identification Number (hereinafter referred to as an electronic signature) on the certification, which shall be equivalent to and have the same force and effect as an original signature.

(b) Acceptance of Complaint. The municipal court administrator or deputy court administrator shall accept for filing every complaint made by any person.

(c) **[**(b)**]** Summons: General. The summons shall be on a Complaint-Summons form (CDR-1) or other form prescribed by the Administrative Director of the Courts and shall be signed by the officer issuing it. An electronic **[**entry of the**]** signature **[**(hereinafter referred to as an electronic signature)**]** of any law enforcement officer or any other person authorized by law to issue a Complaint-Summons shall be equivalent to and have the same force and effect as an original signature. The summons shall be directed to the defendant named in the complaint, shall require defendant's appearance at a stated time and place before the court in which the complaint is made, and shall inform defendant that an arrest warrant may be issued for a failure to appear.

(d) **[**(c)**]** Arrest Warrant: General. The arrest warrant shall be made on a Complaint-Warrant form (CDR-2) or other form prescribed by the Administrative Director of the Courts and shall be signed by the judge or, when authorized by the judge, by the municipal court administrator or deputy court administrator after a determination of probable cause. An electronic [entry of an] signature **[**(hereinafter referred to as an electronic signature)**]** by the judge, authorized municipal court administrator or deputy court administrator shall be equivalent to and have the same force and effect as an original signature. The warrant shall contain the defendant's name or, if unknown, any name or description that identifies the defendant with reasonable certainty. It shall be directed to any officer authorized to execute it and shall order that the defendant be arrested and brought before the court issuing the warrant. The judicial officer issuing a warrant may specify therein the amount and conditions of bail, consistent with R. 7:4, required for defendant's release.

(e) **[**(d)**]** Arrest Warrant: By Telephone. A judge may issue an arrest warrant upon sworn oral testimony of a law enforcement applicant who is not physically present. Such sworn oral testimony may be communicated by the applicant to the judge by telephone, radio or other means of electronic communication.

The judge shall administer the oath to the applicant. Subsequent to taking the oath, the applicant must identify himself or herself and read verbatim the Complaint-Warrant (CDR-2) and any supplemental affidavit that establishes probable cause for the issuance of an arrest warrant. If the facts necessary to establish probable cause are contained entirely on the Complaint-Warrant (CDR-2) and/or supplemental affidavit, the judge need not make a contemporaneous written or electronic recordation of the facts in support of probable cause. If the law enforcement applicant provides additional sworn oral testimony in support of probable cause, the judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine, if such is available; otherwise, adequate longhand notes summarizing the contents of the law enforcement applicant's testimony shall be made by the judge. This sworn testimony shall be deemed to be an affidavit or a supplemental affidavit **[**or a supplemental affidavit,**]** for the purposes of issuance of an arrest warrant.

An arrest warrant may issue if the judge is satisfied that probable cause exists for issuing the warrant. Upon approval, the judge shall memorialize the date, time, defendant's name, complaint number, the basis for the probable cause determination, and any other specific terms of the authorization. That memorialization shall be either by means of a tape-recording device, stenographic machine or by adequate longhand notes. Thereafter, the judge shall direct the applicant to print his or her name, the date and time of the warrant, followed by the phrase "By Officer ---------- , per telephonic authorization by ----------" on the Complaint-Warrant (CDR-2) form. Within 48 hours, the applicant shall deliver to the judge, either in person or via facsimile transmission, the signed Complaint-Warrant (CDR-2) and supporting affidavit. The judge shall verify the accuracy of these documents by affixing his or her signature to the Complaint-Warrant (CDR-2).

(f) **[**(e)**]** Traffic Offenses: (1) Form of Complaint and Process. The Administrative Director of the Courts shall prescribe the form of Uniform Traffic Ticket to serve as the complaint, summons or other process to be used for all parking and other traffic offenses. On a complaint and summons for a parking or other non-moving traffic offense, the defendant need not be named. It shall be sufficient to set forth the license plate number of the vehicle, and its owner or operator shall be charged with the violation.

(2) Issuance. The complaint may be made and signed by any person, but the summons shall be signed and issued only by a law enforcement officer or other person authorized by law to issue a Complaint-Summons, the municipal court judge, municipal court administrator or deputy court administrator of the court having territorial jurisdiction. An electronic signature of any law enforcement officer or other person

authorized by law to issue a Complaint-Summons shall be equivalent to and have the same force and effect as an original signature.

(3) Records and Reports. Each court shall be responsible for all Uniform Traffic Tickets printed and distributed to law enforcement officers or others in its territorial jurisdiction, for the proper disposition of Uniform Traffic Tickets and for the preparation of such records and reports as the Administrative Director of the Courts prescribes. The provisions of this subparagraph shall apply to the **[**Director of the Division of Motor Vehicles**]** Chief Administrator of the Motor Vehicle Commission, the Superintendent of State Police in the Department of Law and Public Safety, and to the responsible official of any other agency authorized by the Administrative Director of the Courts to print and distribute the Uniform Traffic Ticket to its law enforcement personnel.

(g) **[**(f)**]** Special Form of Complaint and Summons. A special form of complaint and summons for any action, as prescribed by the Administrative Director of the Courts, shall be used in the manner prescribed in place of any other form of complaint and process.

(h) **[**(g)**]** Use of Special Form of Complaint and Summons in Penalty Enforcement Proceedings. The Special Form of Complaint and Summons, as prescribed by the Administrative Director of the Courts, shall be used for all penalty enforcement proceedings in the municipal court, including those that may involve the confiscation and/or forfeiture of chattels. If the Special Form of Complaint and Summons is made by a governmental body or officer, it may be certified or verified on information and belief by any person duly authorized to act on its or the State's behalf.

Note: Source – Paragraph (a): R. (1969) 7:2, 7:3-1, 3:2-1; paragraph (b): R. (1969) 7:2, 7:3-1, 7:6-1, 3:2-2; paragraph (c): R. (1969) 7:2, 7:3-1, 7:6-1, 3:2-3; paragraph (d): R. (1969) 7:6-1; paragraph (e): R. (1969) 4:70-3(a); paragraph (f): new. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) caption added, former paragraph (a) amended and redesignated as paragraph (a)(1), former paragraph (b) amended and redesignated as paragraph (a)(2), former paragraph (c) redesignated as paragraph (a)(3), former paragraph (d) redesignated as paragraph (b), former paragraph (e) caption and text amended and redesignated as paragraph (c), and former paragraph (f) redesignated as paragraph (d) July 12, 2002 to be effective September 3, 2002; caption for paragraph (a) deleted, former paragraphs (a)(1) and (a)(2) amended and redesignated as paragraphs (a) and (b), former paragraph (a)(3) redesignated as paragraph (c), new paragraph (d) adopted, former paragraph (b) amended and redesignated as paragraph (e), former paragraph (c) deleted, former paragraph (d) amended and redesignated as paragraph (f), and new paragraph (g) adopted July 28, 2004 to be effective September 1, 2004. Paragraph R. 7:2-1(a) amended July __. 2009 to be effective _____. Paragraph R. 7:2-1(b) added July __. 2009 to be effective _____. Former paragraph R. 7:2-1(c) amended and redesignated as paragraph (d), former paragraph (d) redesignated paragraph (e) and former paragraph (e) amended and redesignated (f), former paragraph (f) redesignated (g), former paragraph (g) redesignated (h) amended July __. 2009 to be effective _____.

B. Proposed Amendments to R. 7:2-2. Issuance of Arrest Warrant or Summons

The Committee recommended two amendments to R. 7:2-2. The first proposed amendment concerns the issuance of process after the statute of limitations for the issuance of process on the complaint had passed. It was reported that in a number of cases, citizen complainants file traffic complaints against defendants after the statute of limitations for prosecuting the complaint had passed. As a result, defendants must appear in court to defend against traffic matters where the statute of limitations has run. The Committee recognized that although the assertion that the statute of limitations has passed is an affirmative defense, most defendants (who represent themselves *pro se*) are unaware of the procedure. The Committee also opined that it was unfair to have a citizen come into court to defend against a traffic matter where the statute of limitations has passed. The proposed amendment to R. 7:2-2(a)(1) would allow municipal court judges to decline to issue process on a complaint that has been filed within the statutory time limitation but the arrest warrant or summons has not been. Although this change would, in effect, bar a prosecution argument that the limitation period in a particular case has been tolled, New Jersey law, under N.J.S.A. 39:5-3 and N.J.S.A. 2C:1-6d, does not provide for the tolling of a statutory time limitation for the issuance of an arrest warrant or summons.

By way of background, the Supreme Court has specifically reserved on the issue of whether N.J.S.A. 39:5-3 constitutes a true statute of limitation. State v. Celmer, 80 N.J. 405, 419 (1979), ("Whether N.J.S.A. 39:5-3 does indeed constitute a 30 day statute of limitations is a difficult question which we need not decide.") This point was not lost on the Law Division in a case decided a few years later. In State v. Wallace, 201 N.J. Super. 608 (Law Div. 1985), the Court analyzed N.J.S.A. 39:5-3 as follows:

> In general, statutes of limitations serve the purpose of forcing actions to be prosecuted diligently and insuring that individuals will not be burdened with defending stale claims. [Citations Omitted], N.J.S.A. 39:5-3 has a similar effect. It encourages municipal officials to issue process on motor vehicle offenses within a reasonable period of time. Without such a rule, a motorist might be subjected to the hazards of defending actions based on violations occurring many months previous to the date a summons was issued.
>
> Whether the failure to issue a summons within 30 days on a motor vehicle violation bars the prosecution of the action is a question addressed briefly by the County Court in State v. Celmer, 143 N.J.Super. 371, (Cty.Ct.1976), rev'd 157 N.J.Super. 242, 384 (App.Div.1978), rev'd 80 N.J. 405 (1979). In an opinion by Judge Shebell, it was noted, "The charge in question being a motor vehicle violation and not having been filed with a Court of competent jurisdiction within 30 days of the offense would be defective." Citation omitted. The basis of Judge Shebell's decision, however, was a First Amendment analysis. The Court did not explain its reasoning for its statement regarding N.J.S.A. 39:5-3. On appeal from an appellate

> division reversal of the County Court decision, the Supreme Court chose to rely on Constitutional grounds and declined to decide whether N.J.S.A. 39:5-3 constitutes a statute of limitations.
>
> This Court finds the position of defense counsel and Judge Shebell's dicta in State v. Celmer, supra, persuasive. For reasons enumerated previously, N.J.S.A. *39*:5-3 serves as a reasonable limitation on the issuance of summonses from municipal court in cases where a summons is not issued at the scene of an accident or violation. The question of whether N.J.S.A. *39*:5-3 is technically a statute of limitations is largely academic. An action founded on a motor vehicle violation requires a summons to be issued within 30 days where one is not issued at the scene of the incident. The sanction for failure to do so can only be dismissal. To hold that such a sanction is not mandated would render N.J.S.A. *39*:5-3 meaningless as a municipal court thus need never issue a summons. The Legislature could not have intended N.J.S.A. *39*:5-3 to be merely advisory.
>
> This Court finds that N.J.S.A. *39*:5-3 bars the issuance of a summons on violations within its purview beyond 30 days from which the violation occurred. Therefore, the municipal court action against the defendant is dismissed.
>
> [Id. 610-612]

The second proposed amendment to Rule 7:2-2 would permit code enforcement officers to issue complaint/summonses without judicial review. Currently, the rule permits law enforcement officers to issue complaint/summonses without judicial review. Technically, the exemption in the current Rules of Court that permits law enforcement officers to make their own probable cause determinations when issuing a complaint/summons does not apply to code enforcement officers, as they are not sworn law enforcement personnel. Instead, code enforcement officers must file complaints with the municipal court and the court subsequently issues the complaint/summons. The Committee observed that because code enforcement officers are only issuing summonses in code violation cases, the current procedure offers no meaningful safeguard to the defendant. Rather, it adds an unnecessary and inefficient step to the process of issuing a summons by code enforcement officers.

The proposed amendment, R. 7:2-2(a)(3), would authorize municipal, district, county and state code enforcement officials to make their own probable cause determinations and issue process in the form of a summons when charging code violations. The public policy expressed by the Supreme Court in State v. Gonzales, 114 N.J. 592 (1989), which authorized law enforcement officers to issue complaint/summons without initial judicial review would also apply to code enforcement officers who typically act in a quasi-law enforcement capacity.

The proposed amendments to R. 7:2-2(a) are as follows:

R. 7:2-2. Issuance of Arrest Warrant or Summons

(a) Authorization for Process

(1) Citizen Complaint. An arrest warrant or a summons on a complaint charging any offense made by a private citizen may be issued only by a judge or, if authorized by the judge, by a municipal court administrator or deputy court administrator of a court with jurisdiction in the municipality where the offense is alleged to have been committed within the statutory time limitation. The arrest warrant or summons may be issued only if it appears to the judicial officer from the complaint, affidavit, certification or testimony that there is probable cause to believe that an offense was committed, the defendant committed it, and an arrest warrant or summons can be issued. The judicial officer's finding of probable cause shall be confirmed by the signature issuing the arrest warrant or summons. If, however, the municipal court administrator or deputy court administrator finds that no probable cause exists to issue an arrest warrant or summons, or that the applicable statutory time limitation to issue the arrest warrant or summons has expired, that finding shall be reviewed by the judge. A judge finding no probable cause to believe that an offense occurred or that the statutory time limitation to issue an arrest warrant or summons has expired shall dismiss the complaint.

(2) Complaint by Law Enforcement Officer or Other Statutorily Authorized Person. A summons on a complaint made by a law enforcement officer charging any offense may be issued by a law enforcement officer or by any person authorized to do so by statute without a finding by a judicial officer of probable cause for issuance. A law enforcement officer may personally serve the summons on the defendant without making a custodial arrest.

(3) Complaint by Code Enforcement Officer. A summons on a complaint made by a Code Enforcement Officer charging any offense within the scope of the Code Enforcement Officer's authority and territorial jurisdiction may be issued without a finding by a judicial officer of probable cause for issuance. A Code Enforcement Officer may personally serve the summons on the defendant. Otherwise, service shall be in accordance with these rules. For purposes of this rule, a Code Enforcement Officer shall be a public employee who is responsible for enforcing the provisions of any state, county or municipal law, ordinance or regulation which the public employee is empowered to enforce.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

Note: Source – R. (1969) 7:2, 7:3-1, 3:3-1. Adopted October 6, 1997 to be effective February 1, 1998; paragraphs (b) and (c) amended July 10, 1998 to be effective September 1, 1998; paragraph (a)(1) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended, new paragraph (b)(5) added, and former paragraph (b)(5) redesignated as paragraph (b)(6) July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended, and paragraph (a)(2) caption and text amended July 28, 2004 to be effective September 1, 2004. Paragraph (a)(1) amended July __ 2009 to be effective _____. Paragraph (a)(3) adopted July __ 2009 to be effective _____.

C. Proposed Amendment to R. 7:3-2 Hearing on First Appearance; Right to Counsel

The following proposed amendment is intended to conform this rule with the proposed new rule, R. 7:8-10. At present, Rule 7:3-2 does not require that a judge inform a defendant of the penal consequences associated with his or her charges, although many judges do this as a matter of course. The proposed amendment will provide additional, important information to unrepresented defendants that they may utilize to make an informed decision as to the conduct of their defense (see general plea entry at first appearance under R. 7:6-1(a)).

The use of the words "penal consequences" is intended to make clear that a municipal court judge is not required to advise a defendant as to possible collateral consequences that may result from a plea or finding of guilty. State v. Heitzman, 107 N.J. 603 (1987).

The amendment to R. 7:3-2 follows:

R. 7:3-2. Hearing on First Appearance; Right to Counsel

(a) Hearing on First Appearance. At the defendant's first appearance, the judge shall inform the defendant of the charges and shall furnish the defendant with a copy of the complaint or copy of the electronic ATS/ACS record of the complaint, if not previously provided to the defendant. The judge shall also inform the defendant of the range of penal consequences for each offense charged, the right to remain silent and that any statement made may be used against the defendant. The judge shall inform the defendant of the right to retain counsel or, if indigent, to have counsel assigned pursuant to paragraph (b) of this rule. The defendant shall be specifically asked whether legal representation is desired and defendant's response shall be recorded on the complaint. If the defendant is represented at the first appearance or then affirmatively states the intention to proceed without counsel, the court may, in its discretion, immediately arraign the defendant pursuant to R. 7:6-1.

(b) No change.

Note: Source – R. (1969) 7:2, 7:3-1, 3:4-2(b). Adopted October 6, 1997 to be effective February 1, 1998; paragraph (b) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended July 28, 2004 to be effective September 1, 2004. Amended July ___ 2009 to be effective _____.

D. Proposed Amendment to R. 7:6-2(d) Pleas, Plea Agreements

Presently, R. 7:6-2(d) requires the prosecutor to consult the complaining witness about a proposed plea agreement. In most cases, the complaining witness is a police officer. In an effort to permit police to continue with their duties and avoid unnecessary court appearances, many municipal prosecutors will engage in plea bargaining of routine cases without consulting the complainant officer. By contrast, prosecutors must consult with victims as a matter of course in order to assure their rightful participation in the proceedings. (See generally N.J.S.A. 39:4-50.9 et *seq*. and N.J.S.A. 39:5-52.) The proposed amendment will eliminate the need for prosecutors to consult with complainants in every case.

It should be noted that the municipal court judge maintains the authority to require consultation by the prosecutor in any case prior to authorizing disposition of the case via a negotiated plea or sentence.

Below is the proposed amendment to R. 7:6-2(d).

R. 7:6-2. Pleas, Plea Agreements

(a) No Change.

(b) No Change.

(c) No Change.

(d) Plea Agreements. Plea agreements may be entered into only pursuant to the Guidelines and accompanying Comment issued by the Supreme Court, both of which are annexed as an Appendix to Part VII, provided, however, that:

(1) the complaint is prosecuted by the municipal prosecutor, the county prosecutor, or the Attorney General; and

(2) the defendant is either represented by counsel or knowingly waives the right to counsel on the record; and

(3) the prosecuting attorney represents to the court that the **[**complaining witness and the**]** victim, if the victim is present at the hearing, **[**have**]** has been consulted about the agreement; and

(4) the plea agreement involves a matter within the jurisdiction of the municipal court and does not result in the downgrade or disposition of indictable offenses without the consent of the county prosecutor, which consent shall be noted on the record; and

(5) the sentence recommendations, if any, do not circumvent minimum sentences required by law for the offense.

Pursuant to paragraph (a)(1) of this rule, when a plea agreement is reached, its terms and the factual basis that supports the charge(s) shall be fully set forth on the record personally by the prosecutor, except as provided in Guideline 3 for Operation of Plea Agreements. If the judge determines that the interests of justice would not be served by accepting the agreement, the judge shall so state, and the defendant shall be informed of the right to withdraw the plea if already entered.

Source-Paragraph (a): R. (1969) 7:4-2(b); paragraph (b): R. (1969) 3:21-1; paragraph (c): R. (1969) 3:9-3(f); paragraph (d): R. (1969) 7:4-8. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(1) amended June 15, 2007 to be effective September 1, 2007. Paragraph (d) amended July __ 2009 to be effective _____.

E. Proposed Amendment to R. 7:7-5 Pretrial procedure

The Committee noted that on occasion, it is in the interest of judicial economy to permit the parties to an action to conduct a pretrial conference via telephone or video link. The Committee proposed that R. 7:7-5(a), Pretrial Conference, be amended to authorize such a procedure with the consent of the parties and by leave of the court. The conference may be conducted on the record in the court's discretion. Suggested factors that the court might consider when deciding whether to authorize a remote pretrial conference may include age and complexity of the case, distance that the parties need to travel, the parties' scheduling conflicts with other courts, and the inconvenience to the witnesses, victims, police and other interested persons.

The proposed amendment to R. 7:7-5(a) would provide the following:

R. 7:7-5. Pretrial procedure

(a) Pretrial Conference. At any time after the filing of the complaint, the court may order one or more conferences with the parties to consider the results of negotiations between them relating to a proposed plea or to other matters that will promote a fair and expeditious disposition or trial. With the consent of the parties or counsel for the parties, the court may permit any pretrial conference to be conducted by means of telephone or video link.

(b) No change.

Note: Source – Paragraph (a): new; paragraph (b): R. (1969) 7:4-2(d), 3:9-1(d). Adopted October 6, 1997 to be effective February 1, 1998. Paragraph (a) amended July __ 2009 to be effective _____.

F. Proposed Amendment to Rule 7:7-7(f)

The Committee was advised that the Office of the Attorney General and a number of municipal prosecutors have begun to make discovery available by computer online. In an effort to accommodate this form of discovery, the Committee recommended an amendment to R. 7:7-7(f). This amendment will allow the exchange of discovery by the parties through the use of e-mail, publicly available internet or other electronic other means. The Rule also contains three technical amendments which clarify current practice.

The amendment to the rule is as follows:

R. 7:7-7. Discovery and inspection

(a) No change.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

(f) Time and Procedure. A defense request for discovery shall be made contemporaneously with the entry of appearance by the defendant's attorney, who shall submit a copy of the appearance and demand for discovery directly to the municipal prosecutor. If the defendant is not represented, any requests for discovery shall be made in writing and submitted by the defendant directly to the municipal prosecutor. The municipal prosecutor shall respond to the discovery request in accordance with paragraph (b) of this rule within 10 days after receiving the request. Unless otherwise ordered by the judge, the defendant shall provide the **[**government**]** prosecutor with discovery, as provided by paragraph (c) of this rule, within 20 days of the prosecuting attorney's compliance with the defendant's discovery request. Unless otherwise ordered by the judge, the parties may exchange discovery through the use of e-mail, internet or other electronic means.

(g) No change.

Source-Paragraph (a): new; paragraph (b): R. (1969) 7:4-2(h), 3:13-3(c); paragraph (c): R. (1969) 7:4-2(h), 3:13-3(d); paragraph (d): R. (1969) 7:4-2(h), 3:13-3(e); paragraph (e): R. (1969) 7:4-2(h), 3:13-3(f); paragraph (f) new; paragraph (g): R. (1969) 7:4-2(h), 3:13-3(g). Adopted October 6, 1997 effective February 1, 1998; paragraph (c) amended July 5, 2000 to be effective September 5, 2000. Paragraph (f) amended July __ 2009 to be effective _____.

G. Proposed Amendment to R. 7:7-8. Form of Subpoena

As a result of the Appellate Division decision in State v. Reid, 389 N.J. Super. 563 (App. Div. 2007) in March 2007, the Committee undertook a study of the practice of the issuance of subpoenas in municipal court. In Reid, the municipal court administrator issued a subpoena *duces tecum* related to an offense over which the court had no trial jurisdiction. Moreover, the return date on the subpoena was established for a date when the municipal court was not in session. The holding of the Appellate Division was later modified and affirmed by the Supreme Court without change to the question related to the improvident issue of the subpoena by the municipal court. State v. Reid, 194 N.J. 386 (2008).

In order to provide some degree of uniformity in the process of issuing subpoenas from the municipal courts and with an eye toward accommodating the special needs of municipal court case administration, the Committee initiated a comprehensive revision to R. 7:7-8. The proposed amendments generally track Rule 1:9-1 *et seq*., but contain specialized provisions that are uniquely applicable to present municipal court practice.

Paragraph (a) of proposed R. 7:7-8 is based upon R. 1:9-1. The proposed rule specifies that with the exception of investigative subpoenas in DWI cases, the triggering authority for the issuance of a municipal court subpoena is the issuance of process on a complaint. This will assure that the issued subpoena will be based upon an active case within the jurisdiction of the municipal court. In order to ensure uniform practice throughout the state, the form of subpoena will be on a form to be approved by the Administrative Director of the Courts.[(2)] The proposed new Rule continues the current practice of permitting a subpoena to be prepared and issued by either a judicial officer or by a New Jersey attorney in the name of the municipal court administrator. A *pro se* defendant would be required to have his or her subpoena prepared and issued by the court administrator. The responsibility for the service of subpoenas would continue to rest with the party seeking the appearance of the witness and not with the court administrator. [(3)] The current practice authorizing the issuance of subpoenas by law enforcement officers in non-indictable cases would continue as well. The proposed rule would also require that the person who causes the subpoena to be issued to take the necessary steps to alert the court administrator so that a supplemental ATS/ACS notice may be sent to the witness.

[(2)] There are three basic forms of subpoena that need to be considered by the Administrative Director: *Subpoena Ad Testficandum* (Subpoena to Testify under Rule proposed Rule 7:7-8(b)), *Subpoena Duces Tecum* (Subpoena to produce documents under proposed Rule 7:7-8(d)) and the police/witness subpoena issued under the authority of proposed rule 7:7-8(c). The current form of these subpoenas have not been updated for many years.

[(3)] Court Administrator is a judicial officer who may prepare and issue subpoenas but may not serve them. See State v. Perkins, 219 N.J. Super. 121 (Law Div. 1987); State v. Prickett, 240 N.J. Super. 139 (App. Div. 1990).

Paragraph (b) is also based upon Rule 1:9-1. Out of consideration to the *pro se* individuals who utilize the Part VII Rules, we have attempted to avoid the use of Latin terms. Accordingly, the *subpoena ad testificandum* is referred to in the proposed rule as a subpoena to testify. The proposed rule creates a new procedure that permits either a precise time or date to be set forth in the subpoena or a notation that the date will be set by the court administrator. This option is necessary in order to avoid inconvenience to witnesses related to court events that do not require the attendance of the witness such as first appearances or pre-trial conferences. Finally, the proposed rule continues the procedures relative to witness fees as provided in Rule 1:9-1 and cites the statutory authority for the payment of these fees. [4]

Paragraph (c) of the proposed rule continues the provisions of the current R. 7:7-8 without change. The procedures outlined in this rule will likely be subject to future amendments as the use of electronic tickets and the so-called "e-filing" of traffic complaints goes into effect around the state.

Paragraph (d) of proposed R. 7:7-8 is based upon R. 1:9-2. Out of consideration to the *pro se* individuals who utilize the Part VII Rules, an attempt was made to avoid the use of Latin terms. Accordingly, the *subpoena duces tecum* is referred to in the proposed rule as a subpoena to produce items set forth in the subpoena or electronically stored documents. Under the proposed rule, a return of subpoenaed items at a date and time other than a scheduled session of court would have to be authorized by a supplemental order of the municipal court judge.

Paragraph (e) of the proposed rule is intended to accommodate the investigative procedures authorized by the Supreme Court in State v. Dyal, 97 N.J. 229 (1984).

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[4] N.J.S.A. 22A:1-4. Fees and mileage of witnesses and others:
Witnesses and others hereinafter mentioned shall be entitled to the following fees: Each witness attending any of the following, in his own county, per day of attendance, $2.00; a court; a joint committee of the Legislature, a standing committee of either house or any special committee, which shall have been, by resolution, directed to enter upon any investigation or inquiry, the purpose of which shall necessitate sending for persons and papers and the examination of witnesses; a commissioner or commissioners; a master; a referee; an arbitrator; an officer taking a deposition; or any proceeding issuing out of any court.

Each witness so attending from a foreign county, at the rate of $2.00 a day, together with, for each day of attendance, an allowance of $2.00 for every 30 miles of travel in going to the place of attendance from his place of residence and in returning.

For the Secretary of State, or any clerk attending on subpoena, with records, wills or other written evidence, at the rate of $2.00 a day, and mileage as aforesaid.

Please note that this statute was construed in Buccinna v. Micheletti, 311 N.J.Super. 557 (App. Div.1998).

These specialized, investigative subpoenas *duces tecum* are the functional equivalent of a search warrant. At present they are issued on an *ex parte* basis by a municipal court judge based upon a showing by the State of a reasonable basis to believe that a person has operated a motor vehicle in violation of N.J.S.A. 39:4-50(a). The proposed rule expands the category of substances that may be sought under the investigative subpoena to include all of the prohibited substances under N.J.S.A. 39:4-50(a). It also expands the types of offenses to include intoxicated operation of vessels, aircraft and commercial motor vehicles. The rule also changes the issuing procedure by vesting authority for the issuance of these subpoenas in a municipal court judge having jurisdiction where the alleged offense occurred, as opposed to the current practice involving a judge where the documents are located. This change has been suggested in recognition of the fact that municipal court judges currently have statewide jurisdiction to issue subpoenas under the current R. 1:9-4. Moreover the use of modern emergency medical transportation techniques and critical care trauma centers can result in the relevant records being held in a hospital that is remote from the municipal court where the case will be heard. The proposed change to the issuing procedure addresses these two issues. Finally, the caption to be utilized when no case is pending was specifically authorized in the Dyal case.

Paragraph (f) of proposed R. 7:7-8 is based upon R. 1:9-3. The practice of paying the witness fee at the conclusion of a trial continues, although the statutory authority for the payment of the fee is cited in the proposed rule. Paragraph (g) is based upon R. 1:9-4 and tracks current procedures.

The purpose of paragraph (h) is to clarify that once a witness has been served, his or her obligation to attend court sessions continues indefinitely without the need to be re-served until such time as the witness has been released by the judge. The rule anticipates that future Notices to Appear following personal service will be sent through the Statewide ATS/ACS system by regular mail.

Paragraph (i) of proposed R. 7:7-8 is based upon Rule 1:9-5. The statutory authority for a municipal court judge to issue an arrest warrant in a contempt of court proceeding is cited in the body of the proposed Rule.[5] Paragraph (j) is based upon R.1:9-2 and covers each type of subpoena that may be issued in municipal court.

The amendment to R. 7:7-8 follows.

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[5] N.J.S.A. 2A:10-8. Issuance of warrant
Any court may issue a warrant for the arrest of any person subject to punishment for a contempt pursuant to the provisions of chapter 10 of Title 2A of the New Jersey Statutes, directed to any officer or person authorized by law to serve process, who shall be empowered to serve such warrant in any county of this State and to produce the person subject to punishment for contempt as herein provided before the judge of such court issuing said warrant.

R. 7:7-8. Subpoenas

[In cases involving non-indictable offenses, the law enforcement officer may issue and serve subpoenas to testify in the form prescribed by the Administrative Director of the Courts. Courts having jurisdiction over such offenses, the Division of State Police, the Division of Motor Vehicles and any other agencies so authorized by the Administrative Director of the Courts may supply subpoena forms to their law enforcement officers. After service of a subpoena, the officer shall attach a copy of the subpoena to the complaint and promptly file those documents with the court.**]**

(a) Issuance. Except as otherwise provided in paragraph (e) (Investigative Subpoenas in Drunk Driving Cases), upon the issuance of process on a complaint within the trial jurisdiction of the municipal court, a subpoena may be issued by a judicial officer, by an attorney in the name of the court administrator or, in cases involving a non-indictable offense, by a law enforcement officer or other authorized person. The subpoena shall be in the form approved by the Administrative Director of the Courts. A person who causes a subpoena to issue shall immediately inform the court administrator of the name and address of the person subject to the subpoena. The court administrator shall then cause a Notice to Appear to be sent by regular mail to the person subject to the subpoena. In cases involving non-indictable offenses, the law enforcement officer may issue subpoenas to testify in the form prescribed by the Administrative Director of the Courts. Courts having jurisdiction over such offenses, the Division of State Police, the Motor Vehicle Commission and any other agency so authorized by the Administrative Director of the Courts may supply subpoena forms to law enforcement officers.

(b) Subpoena to Testify. A subpoena to testify shall state the name of the municipal court and the title of the action. It shall contain the appropriate case docket number and shall command each natural person or authorized agent of an entity to whom it is directed to attend and give testimony at a specific time and date when the court will be in session. The subpoena may also specify that the specific time and date to attend court will be established at a later time by the court. If the witness is to testify in an action for the State or for an indigent defendant, the subpoena shall so note and shall contain an order to appear without the prepayment of any witness fee as otherwise required under N.J.S.A. 22A:1-4.

(c) Subpoena to produce documents or electronically stored information. A subpoena may require on the date of the scheduled court appearance, production of books, papers, documents, electronically stored information or other items. The court may enter a supplemental order directing that the items designated in the subpoena be produced in court at a time prior to the scheduled court appearance or at another location. The order of the Court may also specify that the designated items may, upon their production, be inspected by the parties and their attorneys.

(d) Investigative Subpoenas in Operating while under the Influence Cases. When the State demonstrates to the court through sworn testimony and/or supporting

documentation that there is a reasonable basis to believe that a person has operated a motor vehicle, in violation of N.J.S.A. 39:4-50 or N.J.S.A. 39:10-13, a vessel in violation of N.J.S.A. 12:7-46, or an aircraft in violation of N.J.S.A. 6:1-18, a municipal court judge with jurisdiction over the municipality where the alleged offense occurred may issue an investigative subpoena directing an authorized agent of a medical facility located in New Jersey to produce medical records related to the presence of alcohol, narcotics, hallucinogens, habit-producing drugs or chemical inhalants in the operator's body. If no case is pending, the subpoena may be captioned "In the Matter" under investigation.

(e) Personal Service. A subpoena may be served at any place within the State of New Jersey by any person 18 or more years of age. Service of a subpoena shall be made by personally delivering a copy to the person named, together with the fee allowed by law, except if the person is a witness in an 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 municipal court administrator as otherwise required by N.J.S.A. 22A:1-4. After service of a subpoena, the person serving the subpoena shall promptly file a copy of the subpoena and proof of service with the court.

(f) Continuing Duty to Appear. A witness who has been personally served with a subpoena shall remain under a continuing obligation to appear until released by the court.

(g) Failure to Appear. In the absence of an adequate excuse, any person who fails to obey a personally served subpoena, as evidenced by an executed return of service, is subject to punishment for contempt of court. The Court may issue a warrant for the arrest of the person subject to contempt as authorized by N.J.S.A. 2A:10-8.

(h) Motion to Quash. The Court, on motion made prior to the scheduled court date, may quash or modify a subpoena to testify or a subpoena to produce writings or electronically stored information if compliance would be unreasonable, oppressive or not in compliance with the procedures required under this rule.

Note: Source – R. (1969) 7:3-3. Adopted October 6, 1997 to be effective February 1, 1998; amended July __ 2009 to be effective _____.

H. Proposed Amendment to R. 7:8-9. Procedures on Failure to Appear

On January 13, 2008 the Governor signed into law P.L. 2007, c 280. This law amended N.J.S.A. 39:4-139.10(b) and N.J.S.A. 39:4-139.11(a) and was enacted in response to a report from the Motor Vehicles Affordability and Fairness Task Force.[6] The Task Force recommended that due to the harsh consequences associated with a license suspension, judges should be afforded the option of suspending either the driver's license or registration of the offending vehicle when a defendant has failed to appear or pay a parking ticket. The proposed amendments to R. 7:8-9 are intended to conform the rule to a new statutory amendment that expands the powers of the municipal court to suspend a vehicle's registration when the owner/operator fails to appear in response to a parking ticket or fails to timely pay a parking ticket fine.

Finally, the proposed change in paragraph (b)(1) is technical in nature and is intended to conform the Rule to the Motor Vehicle Security and Customer Service Act of 2003 as set forth under N.J.S.A. 39:2A-1 *et seq*.

[6] N.J.S.A. 39:2A-30.

R. 7:8-9. Procedures on failure to appear

(a) Warrant or Notice.

(1) Non-Parking Motor Vehicle Cases. If a defendant in any non-parking case before the court fails to appear or answer a complaint, the court may either issue a warrant for the defendant's arrest in accordance with R. 7:2-2(c) or issue and mail a failure to appear notice to the defendant on a form approved by the Administrative Director of the Courts. If a failure to appear notice is mailed to the defendant and the defendant fails to comply with its provisions, a warrant may be issued in accordance with R. 7:2-2(c).

(2) Parking Cases. In all parking cases, an arrest warrant shall only be issued if the defendant has failed to respond to two or more pending parking tickets within the jurisdiction. A warrant shall not issue when the pending tickets have been issued on the same day or otherwise within the same 24-hour period.

(b) Driving Privileges; Report to Division of Motor Vehicles.

(1) Non-Parking Motor Vehicle Cases. If the court has not issued an arrest warrant upon the failure of the defendant to comply with the court's failure to appear notice, the court shall report the failure to appear or answer to the Chief Administrator of the Motor Vehicle Commission **[**Division of Motor Vehicles**]** on a form approved by the Administrative Director of the Courts within 30 days of the defendant's failure to appear or answer. The court shall then mark the case as closed on its records, subject to being reopened pursuant to subparagraph (e) of this rule. If the court elects, however, to issue an arrest warrant, it may simultaneously report the failure to appear or answer to the Division of Motor Vehicles on a form approved by the Administrative Director of the Courts. If the court does not simultaneously notify the Division of Motor Vehicles and the warrant has not been executed within 30 days, the court shall report the failure to appear or answer to the Division of Motor Vehicles on a form approved by the Administrative Director of the Courts. Upon the notification to the Division of Motor Vehicles, the court shall then mark the case as closed on its records subject to being reopened pursuant to subparagraph (e) of this rule.

(2) All Other Cases. In all other cases, whether or not an arrest warrant is issued, the court may order the suspension of the defendant's driving privileges or of defendant's nonresident reciprocity privileges or prohibit the person from receiving or obtaining driving privileges until the pending matter is adjudicated or otherwise disposed of. The court shall then mark the case as closed on its records, subject to being reopened pursuant to subparagraph (e) of this rule.

(c) Unexecuted Arrest Warrant. If an arrest warrant is not executed, it shall remain open and active until the court either recalls, withdraws or discharges it. If bail has been posted after the issuance of the arrest warrant and the defendant fails to appear or answer, the court may declare a forfeiture of the bail, report a motor vehicle

bail forfeiture to the Division of Motor Vehicles and mark the case as closed on its records subject to being reopened pursuant to subparagraph (e) of this rule. The court may set aside any bail forfeiture in the interest of justice.

(d) Parking Cases; Un-served Notice. In parking cases, no arrest warrant may be issued if the initial failure to appear notice is returned to the court by the post office marked to indicate that the defendant cannot be located. The court then may order a suspension of the registration of the motor vehicle or of the defendant's driving privileges or defendant's nonresident reciprocity privileges or prohibit the person from receiving or obtaining driving privileges until the pending matter is adjudicated or otherwise disposed of. The court shall forward the order to suspend to the Division of Motor Vehicles on a form approved by the Administrative Director of the Courts. The court shall then mark the case as closed on its records, subject to being reopened pursuant to subparagraph (e) of this rule.

(e) Reopening. A case marked closed shall be reopened upon the request of the defendant, the prosecuting attorney or on the court's own motion.

(f) Dismissal of Parking Tickets. In any parking case, if the municipal court fails, within three years of the date of the violation, to either issue a warrant for the defendant's arrest or to order a suspension of the registration of the vehicle or the defendant's driving privileges or the defendant's non-resident reciprocity privileges or prohibit the person from receiving or obtaining driving privileges, the matter shall be dismissed and shall not be reopened.

Note: Source – Paragraphs (a), (b), (c), (d), (e): R. (1969) 7:6-3; paragraph (f): new. Adopted October 6, 1997 to be effective February 1, 1998; paragraph (a) text deleted, and new paragraphs (a)(1) and (a)(2) adopted July 28, 2004 to be effective September 1, 2004. Paragraphs (b)(1), (d) and (f) amended July __ 2009 to be effective _____.

I. Proposed New Rule 7:8-10. Waiver of Right to Counsel at Trial

In State v. Dubois, 189 N.J. 454 (2007), the Supreme Court determined that before a defendant is permitted to represent him or herself pro se in a trial court, he or she must be fully informed of the consequence of self-representation. In Dubois, the Court lists nine items which should be included when advising a defendant of the hazards associated with self-representation. The proposed waiver language is based upon the Appellate Division's holdings in State v. Guerin, 208 N.J.Super. 527 (App.Div.1986), and State v. Abbondanzo, 201 N.J.Super. 181 (App.Div.1985), and State v. Lach, 213 N.J.Super. 466, (App. Div. 1986). The waiver language is specific to municipal courts and is less detailed than the nine waiver factors required in the Superior Court under Dubois, *supra*, State v. Crisafi, 128 N.J. 499 (1992), and State v. Reddish, 181 N.J. 553 (2004). (See generally State v. DuBois, 189 N.J. 454 (2007)). In addition, the proposed language relaxes the requirement in Lach that the judge inform the defendant as to possible defenses he or she might have to the charge.

The complementary proposed amendment to Rule 7:3-2(a) is intended to make sure that during their first contact with the judge in open court defendants are advised of both the nature of the charges they face and the possible penal consequences to which they are potentially exposed.

After reviewing proposed R. 7:8-10, the Committee recommended that the proposed rule be amended as follows.

R. 7:8-10. Waiver of Right to Counsel at Trial

In all cases other than parking cases, a request by a defendant to proceed to trial without an attorney shall not be granted until the judge is satisfied from an inquiry on the record that the defendant has knowingly and voluntarily waived the right to counsel following an explanation by the judge of the range of penal consequences, an advisement that the defendant may have defenses and that there are dangers and disadvantages inherent in defending oneself.

J. Proposed New Rule 7:10-3. Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Conviction

In September 2007, the Supreme Court approved an amendment to Rule 7:10-2 which provided a procedure for petitioners to follow when seeking relief from the enhanced custodial term of a sentence based upon a prior un-counseled conviction in municipal court. This procedure was originally established by the Court in State v. Laurick, 120 N.J. 1 (1990). (See also State v. Hrycak, 184 N.J. 351 (2005)). The procedure for seeking this type of relief, commonly referred to as a "Laurick" application, is currently set forth under R. 7:10-2(g). The Rule includes a provision that the five year limitation applicable to the filing of post-conviction relief applications generally apply to this type of application as well.

The nature of the relief sought in a Laurick application is qualitatively different than the relief sought in a conventional post-conviction relief proceeding. In the latter category of applications, the relief sought is a vacating of the conviction. In a Laurick application, the conviction is left in place, however it may not be used to enhance the custodial component of a sentence related to a future conviction for a violation of the same statute.

Because of the differing types of relief sought under these two post-conviction applications, the Committee felt it would be better to have a rule that specifically addressed the procedural issues associated with a Laurick application. That proposed rule is set forth under R. 7:10-3. It is a "stand-alone" rule in that it provides the complete procedure to be utilized in a Laurick application in one place.

One modification to current procedure would remove the time limitation for the filing of this type of petition. The underlying reason for this relates to the fact that the petitioners were not represented during their previous convictions and thus were not aided by counsel. Moreover, there would be no grounds for filing this petition following the previous conviction unless or until the petitioner has been arrested for a new violation of the same statute. This particular issue was recently addressed by the Appellate Division in State v. Bringhurst, 401 N.J. Super. 421, 432-433 (App. Div. 2008). There, the Court ruled that a Laurick application that has been filed outside of the 5-year limitation period should not be automatically dismissed. Rather, a municipal court judge may properly relax the requirements of R. 3:22-12(a) (in municipal court R. 7:10-2(b)(2)). Such a relaxation of the time limitation is appropriate if the petitioner can demonstrate a reasonable likelihood that the asserted claim will ultimately succeed on the merits. Simply stated, relaxation is appropriate when the petitioner can establish through the pleadings a *prima facie* case. Since a pleading that does not state a *prima facie* case is subject to dismissal regardless of when it was filed, the proposed amendment eliminating the time limitation essentially implements the holding of the Appellate Division in Bringhurst.

A second modification would set the venue for the petition in the municipal court where the current drunk driving case is pending, as opposed to the court where the prior

conviction occurred. Numerous factors militate in favor of the revised practice. For example, while the court adjudicating the current drunk driving case will attempt to resolve its matter within sixty days (see generally Directive 1-84), the court where the Laurick application has been filed is under no particular time limitation to hear and decide the petition. This can lead to delays in the disposition and imposition of sentence on the current drunk driving case. Apart from case management issues, current practice dictates that the appeal from a denial of the Laurick application be combined with an appeal of the current drunk driving case. The consolidation of the Laurick petition with the current drunk driving case will assure that the Law Division will be deciding one appeal from one municipal court judge instead of two cases from judges who may be in different counties. Finally, in order to assure that the municipal court judge hearing the Laurick petition will have access to the necessary court records, the proposed rule requires that the petitioner secure and pay for a complete copy and transmittal to the motion judge of the file where the prior conviction was entered.

The Committee requests that the Court adopt proposed 'New Rule 7:10-3, Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Conviction.' In the alternative, the Committee asks the Court to adopt the proposed amendment to R. 7:10-2, i.e., 'K. Proposed Amendment to R. 7:10-2, Post-Conviction Relief.' This amendment immediately follows this recommendation.

R. 7:10-3. Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Conviction

(a) On motion of the defendant filed pursuant to requirements of this Rule, a municipal court may grant an order barring the use of a conviction from being utilized to enhance the custodial aspect of a sentence in a subsequent conviction for the same offense.

(1) Venue. A petition to obtain relief from an enhanced custodial term based on a prior conviction shall be brought in the court where the current case is pending.

(2) Time Limitations. A petition seeking relief under this Rule may be filed at any time.

(b) Procedure. A petition seeking relief under this Rule shall be in writing and shall conform to the following requirements.

(1) Burden of proof. This application shall be considered civil in nature. The petitioner shall have the burden of proving the facts upon which the claim for relief is based. The burden of proof shall be by a preponderance of the evidence.

(2) Notice. An attorney or *pro se* petitioner filing this petition shall serve a copy, together with all related moving papers, transcripts and exhibits on the municipal prosecutor at the same time the petition is filed with the municipal court.

(3) Contents of Petition. The petition shall be certified by defendant and shall set forth with specificity the facts upon which the claim for relief is based, the legal grounds of the complaint asserted. The petition shall include the following information:

(A) the date, docket number and contents of the complaint upon which the conviction is based and the municipality where filed;

(B) the sentence or judgment complained of, the date it was imposed or entered, and the name of the municipal court judge then presiding;

(C) any appellate proceedings brought from the conviction, with copies of the appellate opinions attached;

(D) any prior post-conviction relief proceedings relating to the same conviction, including the date and nature of the claim and the date and nature of disposition, and whether an appeal was taken from those proceedings and, if so, the judgment on appeal;

(E) the name of counsel, if any, representing defendant in any prior proceeding relating to the conviction, and whether counsel was retained or assigned; and

(F) whether and where defendant is presently confined.

(G) The petitioner shall arrange for the mailing of a copy of the entire court file by the court administrator from the municipal court where the challenged conviction occurred to the municipal court administrator where the petition is pending. The costs of copying and transferring the file shall be paid by the petitioner. The moving papers in support of such an application shall include, if available, all other records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings relating to the conviction being challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the police custodian of records, as the case may be.

(H) A separate memorandum of law may be submitted.

(c) Amendments**.** Amendments of the petitions shall be liberally allowed. Assigned counsel may, as a matter of course, serve and file an amended petition within 25 days after assignment.

(d) Answer. The judge may permit the prosecutor to make a written or oral response to the petition.

(e) Judgment. In making a final determination on a petition, the court shall state separately its findings of fact and conclusions of law and shall thereafter enter an order either granting or denying the relief sought. A final order issued under this section shall be accepted by all other municipal courts.

(f) Appeal. Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under R. 3:23-2(a).

K. Proposed Amendment to R. 7:10-2. Post-Conviction Relief

In developing new rules and amendments, the Committee implements three elements of style in its drafting procedures. First, in recognition of the large number of *pro se* litigants that appear in municipal court, the rules and amendments are written in language that can be readily understood by lay people. Secondly, the committee strives to draft rules and amendments that are gender neutral. Finally, in keeping with the idea of maintaining the integrity of a separate, "stand-alone" Part VII Rules for the municipal courts, the draft of rules and amendments avoids cross-references to rules located in other parts of the Rules of Court.[7] This last drafting procedure is to eliminate the confusion that can occur when Rules governing other practice areas are cited as applicable to the municipal courts. (See generally, State v. Gonzalez, 114 N.J. 592 (1989)).

The time limitation related to the filing of post-conviction relief applications under Rule 7:10-2(g) was inserted into this Rule by the Supreme Court. In keeping with the style utilized for drafting Part VII Rules, the proposed amendment will eliminate the cross-reference to Part III and substitute a complementary Part VII Rule.

Below is the proposed amendment to R. 7:10-2.

[7] There are limited exceptions to this procedure. Certain necessary references to Parts I, III, IV and V still exist in Part VII.

R. 7:10-2. Post-Conviction Relief

(a) No change.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

(f) No change.

(g) Petition to Obtain Relief from an Enhanced Custodial Term Based on a Prior Conviction

(1) Venue. A post-conviction petition to obtain relief from an enhanced custodial term based on a prior conviction shall be brought in the court where the prior conviction was entered.

(2) Time Limitations. The time limitations for filing petitions for post-conviction relief under this section shall be the same as those set forth in **[**Rule 3:22-12**]** Rule 7:10-2(b)(2).

(3) Procedure. A petition for post-conviction relief sought under this section shall be in writing and shall conform to the requirements of Rule 7:10-2(f). In addition, the moving papers in support of such an application shall include, if available, records related to the underlying conviction, including, but not limited to, copies of all complaints, applications for assignment of counsel, waiver forms and transcripts of the defendant's first appearance, entry of guilty plea and all other municipal court proceedings related to the conviction sought to be challenged. The petitioner shall account for any unavailable records by way of written documentation from the municipal court administrator or the custodian of records, as the case may be.

(4) Appeal. Appeals from a denial of post-conviction relief from the effect of a prior conviction shall be combined with any appeal from proceedings involving the repeat offense. Appeals by the State may be taken under R. 3:23-2(a).

Note: Source – Paragraph (a): R. (1969) 3:22-1; paragraph (b)(1),(2): R. (1969) 3:22-12; paragraph (b)(3): R (1969) 3:22-3; paragraph (c): R. (1969) 7:8-1, 3:22-2; paragraph (d)(1): R. (1969) 3:22-4; paragraph (d)(2): R. (1969) 3:22-5; paragraph (e): R. (1969) 3:22-6(a),(c),(d); paragraph (f)(1): R. (1969) 3:22-7; paragraph (f)(2): R. (1969) 3:22-8; paragraph (f)(3): R. (1969) 3:22-9; paragraph (f)(4): R. (1969) 3:22-10; paragraph (f)(5): R. (1969) 3:22-11. Adopted October 6, 1997 to be effective February 1, 1998; new subparagraph (f)(2)(G) and new paragraph (g) adopted June 15, 2007 to be effective September 1, 2007. Paragraph (g)(2) amended July __ 2009 to be effective _____.

L. Proposed Amendment to R. 7:12-3. Pleas of Not Guilty and Pleas of Guilty by Mail in Certain Traffic or Parking Offenses

In September 2008, Judge Gallipoli noted that the language of R. 7:12-3 (a) was unclear. Specifically, he noted that the first sentence of R. 7:12-3 (a) provided that "a defendant . . . may plead not guilty and submit a written defense for use at trial by mail.' However, in the very next sentence the rule stated that "[t]he judge may permit the defendant . . . to plead not guilty by mail and submit a written defense for use at trial, if a personal appearance by the defendant would constitute an undue hardship, such as illness, physical incapacity, substantial distance to travel, or incarceration." The language of the rule appeared to be contradictory. It was unclear whether a defendant may enter a plea of not guilty by affidavit by mail without the consent of the court or whether court must give the defendant prior consent before a plea may be entered by mail.

In response to Judge Gallipoli's observation the Committee recommended an amendment to R. 7:12-3 (a) to clarify that a defendant must obtain prior permission to enter a plea by mail.

The recommended amendment of the rule follows:

R. 7:12-3. Pleas of Not Guilty and Pleas of Guilty by Mail in Certain Traffic or Parking Offenses

(a). Use of Pleas by Mail; Limitations. In all traffic or parking offenses, except as limited below, [a defendant may resolve the case by way of a guilty plea by mail or may plead not guilty and submit a written defense for use at trial by mail.] the judge may permit the defendant to enter a guilty plea by mail, or to plead not guilty by mail and submit a written defense for use at trial, if a personal appearance by the defendant would constitute an undue hardship such as illness, physical incapacity, substantial distance to travel, or incarceration. This procedure shall not be available in the following types of cases:

(1) traffic offenses or parking offenses that require the imposition of a mandatory loss of driving privileges on conviction;

(2) traffic offenses or parking offenses involving an accident that resulted in personal injury to anyone other than the defendant;

(3) traffic offenses or parking offenses that are related to non-traffic matters that are not resolved;

(4) any other traffic offense or parking offense when excusing the defendant's appearance in municipal court would not be in the interest of justice.

(b) No change.

(c) No change.

(d) No change.

(e) No change.

Source – R. (1969) 7:7-6. Adopted October 6, 1997 to be effective February 1, 1998; caption amended, paragraph (a) caption and text amended, former paragraph (b) amended and redesignated as paragraph (c), and new paragraph (b) adopted July 28, 2004 to be effective September 1, 2004; caption of rule amended, captions and text of former paragraphs (a) and (b) deleted, former paragraph (c) redesignated as paragraph (e) and amended, and new paragraphs (a), (b), (c), and (d) adopted June 15, 2007 to be effective September 1, 2007. Paragraph (a) amended July __ 2009 to be effective _____.

M. Proposed Amendment to R. 7:13-1. Appeals

Both R. 3:23-2 and R. 1:7-4 contain 20-day time limitations that may not be enlarged. Once an appeal has been filed, the municipal court loses jurisdiction to take further action on the case. The proposed amendment will permit defendants to seek redress under R. 1:7-4 while also being able to exercise the right to seek a trial de novo in the Superior Court.

The proposed amendment to R. 7:13-1 follows:

R. 7:13-1. Appeals

Appeals shall be taken in accordance with R. 3:23, 3:24, and 4:74-3, and in extraordinary cases and in the interest of justice, in accordance with R. 2:2-3(b). The filing of an appeal with the Superior Court in accordance with R. 3:23 shall deprive the municipal court of jurisdiction to take any further action on the case, except for consideration of a timely filed motion pursuant to Rule 1:7-4. Appeals from judgments of conviction and interlocutory orders in municipal court actions heard in the Law Division, Special Civil Part, pursuant to R. 6:1-2(a)(5), shall be taken to the Appellate Division pursuant to Rules 2:2-3(a)(1) and 2:2-4, respectively.

Source-R. (1969) 7:8-1. Adopted October 6, 1997 to be effective February 1, 1998; amended July 28, 2004 to be effective September 1, 2004. Amended July __ 2009 to be effective _____.

N. Proposed Amendment to Guideline 3 of 'Guidelines for the Operation of Plea Agreements in the Municipal Courts of New Jersey'

The Committee recommends the amendment of Guideline 3 of the Guidelines for the Operation of Plea Agreements in the Municipal Courts of New Jersey. The proposed amendment will expand the class of cases that are eligible for disposition before the court without the presence of the municipal prosecutor to include all matters that are capable of resolution by way of plea and sentence agreement. Under the current practice, the municipal prosecutor may only use a plea form in lieu of appearing on the record in cases involving offenses that are set forth on the Statewide Violations Bureau Schedule.

The purpose of expanding the class of cases is to afford municipal prosecutors greater latitude in the plea bargaining process and to free them up to negotiate additional pleas with attorneys and pro se defendants, instead of placing the terms and conditions of routine plea agreements on the record. It should be noted that the municipal court judge may require the personal appearance of the prosecutor in any case.

In conjunction with the proposed amendment to Guideline 3, the Committee has also suggested complementary revised language for use on the plea agreement form.

Below is the proposed amendment to Guideline 3.

GUIDELINE 3. Prosecutor's Responsibilities. Nothing in these Guidelines should be construed to affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the reasons in support of the motion. The prosecutor shall also appear in person to set forth any proposed plea agreement on the record. **[**except when the original charge is listed on the Statewide or local Violations Bureau Schedule. In that event,**]** However, with the approval of the municipal court judge, in lieu of appearing on the record, the prosecutor may submit to the court a Request to Approve Plea Agreement, on a form approved by the Administrative Director of the Courts, signed by the prosecutor and by the defendant. Nothing in this Guideline shall be construed to limit the court's ability to order the prosecutor to appear at any time during the proceedings.

II. OTHER RECOMMENDATIONS

A. Proposed Amendment to the Statewide Violations Bureau Schedule – Removal of N.J.S.A. 39:3-76.2 – Safety belts or restraining devices

It was reported that the State Police in the southern part of New Jersey were participating in a program where persons stopped for not wearing a seat belt were issued traffic summonses with the box marked for mandatory court appearance. N.J.S.A. 39:3-76.2 (Safety Belts or restraining devices) is included as a payable offense on the Statewide Violations Bureau Schedule (SVBS), however, the issuing officers felt that by requiring the offender to go to court, the importance of wearing seat belts would be impressed upon them. The Highway Traffic Safety Committee requested the Committee to consider removing N.J.S.A. 39:3-76.2 from the SVBS so that this procedure could be used statewide for all violations of N.J.S.A. 39:3-76.2.

The Committee discussed this request. It was pointed out that in 2006 there were 299,690 violations of N.J.S.A. 39:3-76.2. Based upon this figure, it was the consensus of the Committee that given the large number of violations of this offense, a requirement that a court appearance be mandatory for every violation would place an undue burden on the courts. Therefore, the Committee concluded that N.J.S.A. 39:3-76.2 should not be removed from the SVBS. However, the Committee felt that law enforcement officers should continue to have the discretion to require court appearances because there are circumstances that warrant an appearance in court (for example, if an adult does not put a child in any type of restraint).

B. Voluntary Deportation of Undocumented Alien Defendants

An inquiry was made by one of the members of the Committee as to whether Part VII should be amended to include a procedure for handling cases where an undocumented alien who is a defendant seeks to be voluntarily deported. He asked also whether such a request could be uploaded in the computer so that US Immigration and Customs Enforcement (ICE) would be aware of the deportation request. Administrative Office of the Courts' staff advised that technically this was possible, but would require a contact at ICE. It was concluded that this topic should be referred to the Conference of Presiding Judges for further discussion.

III. PREVIOUSLY APPROVED RECOMMENDATIONS

There were no recommendations previously approved by the Supreme Court during the 2007–2009 term.

IV. RULES PROPOSED BUT NOT RECOMMENDED

A. Proposed Amendment to R. 7:2-1. Contents of complaint, arrest warrant and summons – Traffic Warrants

On August 22, 2008, the Attorney General promulgated Directive 2007-03 which requires law enforcement inquiry into the immigration status of a person who has been arrested for drunk driving. Information related to a suspect's undocumented status is now required to be communicated to the judicial officer who will set bail or conditions of pretrial release.

Subsequently, on October 25, 2007, the Administrative Director of the Courts released Directive 11-07 which complements the Attorney General's Directive. In addition to establishing procedures for the judiciary in indictable matters involving undocumented immigrants, the Directive reminded judicial officers that the Rules of Court not do permit at this time the preparation of an arrest warrant in a drunk driving case. Instead, process in these cases must be prepared on a summons.

Several members of the Municipal Court Practice Committee opined that a number of recent events, coupled with the directives of the Attorney General and the Administrative Director of the Courts, suggested that Rules of Court should be amended to permit arrest warrants to be issued in drunk driving cases. The statutory authority to prepare an arrest warrant in a drunk driving case has long existed under N.J.S.A. 39:5-25. Consistent with Rule 7:2-2(b)(2), an intoxicated driver is a danger to himself, others and property. Similar authority to prepare an arrest warrant exists by statute in cases involving the intoxicated operation of a vessel under N.J.S.A. 12:7-81(a). However, at present no such complementary authority exists in the Rules of Court for the preparation of an arrest warrant in these types of cases. Moreover, when such a person is not legally in the United States, he has an added incentive to avoid appearing at required court events. Thus, there may be reason to suspect that such a DWI defendant may not appear in response to a summons. (See Rule 7:2-2(b)(6).)

Other members of the Committee argued against adopting a Court Rule authorizing arrest warrants in DWI cases was based upon concerns that such a procedure would violate the Interstate Drivers License Compact under N.J.S.A. 39:5D-1 *et seq*.

On May 12, 2008, after considering a motion to adopt an amendment to permitted arrest warrants on violations of N.J.S.A. 39:4-50, the proposed amendment was voted down by the full Committee, based upon the concern that the judges and other judicial officers around the state may improperly exercise their discretion under the Rules of Court and would authorize the use of this warrant in all cases as a matter of convenience.

B. Proposed Amendment to R. 7:2-1. Contents of Complaint, Arrest Warrant and Summons – Obtaining Police Reports Prior to Filing Complaints

The Committee received a letter from a private citizen concerning R. 7:2-1. Specifically the citizen asked the Committee to reconsider the provision of the rule that requires the court to accept all complaints for filing. The citizen was of the opinion that private citizens should not be permitted to file a complaint without first filing a police report. Moreover, she felt that judge rather than the court administrator should determine probable cause on complaints. She also opined that the facts on the complaint should be accurate with the correct charging statute, otherwise it should be dismissed. The Committee discussed the citizen's concerns and concluded that to require defendant to obtain police reports before filing a complaint would discourage citizens from pursuing a legal recourse to disputes. The court administrators act as a safeguard to prevent frivolous complaints from being filed. The Committee rejected this proposed change in the rule.

C. Proposed Amendment to R. 7:7-7. Discovery – Discovery of Birthdates

During the 2004 – 2006 term the Criminal Practice Committee amended its discovery rule, R. 3:13-3(c)(6). The rule permitted defendants to discover the birthdates of witnesses. The purpose of this new requirement was to assist parties in doing background checks on witnesses. A question was raised whether the Committee should conform the analogous Part VII rule, R. 7:7-7(b)(7), to the Part III rule. The Committee expressed concern that this information may be misused because unlike Superior Court, where the parties are represented by attorneys, most parties in municipal court appear pro se. After further discussion, it was the consensus of the Committee that there was no compelling reason to amend R. 7:7-7(b)(7) to make it conform to , R. 3:13-3(c)(6).

D. Proposed Amendment to R. 7:8-5. Dismissal

It was proposed that R. 7:8-5 be amended to clarify that the ultimate authority to dismiss a case in municipal court on the application of a party rests with the court and may be denied if the judge is satisfied that the dismissal would not be in the interests of justice.

This amendment was initially presented to the full committee on June 11, 2007 and was again reconsidered in January and February 2008 at which time it was rejected by vote of the full committee. The controversy related to this proposed amendment arose from the inherent tension that exists between the judicial and executive branches of government. In general, the judges on the committee took the position that the final determination to grant a dismissal rests with the court. The prosecutors took the position that the decision to prosecute or dismiss a case is solely an executive branch function. There are conflicting statements of law on this issue. The Supreme Court's June 29, 1990 commentary to the Guidelines Governing Plea Agreements in Municipal Court

suggests that the responsibilities of the prosecutor include a grant of discretion to unilaterally move to dismiss, amend or otherwise dispose of a matter. This is in keeping with the latitude necessary to exercise prosecutorial discretion. By contrast, in drunk driving cases, the same Guidelines generally prohibit plea bargaining. Accordingly, an application by the State to amend or dismiss a drunk driving charge is subject to painstaking judicial review. (See Judge Carchman's December 2, 2004 memorandum related to sample questions for use in drunk driving cases.) The policy behind this level of scrutiny is to assure that the prosecutor will not dismiss an otherwise meritorious case. (See generally State v. Hessen, 145 N.J. 441 (1996)).

The committee was sharply divided on this proposed rule amendment. In voting to reject the proposed amendment, the majority recognized that although a dispute could arise between the executive and judicial branches on a dismissal application in a given case rather than amend the rule, the better course is to let the resolution to this controversy develop over time through the published case law.

E. Proposed Amendment to R. 7:2-4(a)(1). Summons; Personal Service Under R. 4:4-4 or By Ordinary Mail

In 2007, the Appellate Court decided State v. Buczkowski, 395 N.J. Super. 40 (App. Div. 2007). In that case, the court held that N.J.S.A. 39:5-3 (Appearance, arrest process; complaint; venue) requires service of process on a defendant within 30 days from its issuance. The Committee noted that the current Part VII Rules of Court permit the service of complaint/summonses by mail. The decision in Buczkowski requires personal service of motor vehicle summonses within the statutory periods established by law for the offense. Adherence to the holding in Buczkowski will likely result in the dismissal of complaints that were otherwise filed in the municipal court on a timely basis due to delays in mailing, bad addresses and/or other mail delivery issues. In an effort to address the difficulty posed by Buczkowski, the Committee proposed an amendment to R. 7:2-4(a)(1) which was intended to modify the Appellate Division holding in that case. However, after much discussion the Committee concluded that the proposed amendment would not solve the dilemma that resulted from the holding in Buczkowski. It therefore withdrew the proposed amendment in order to further refine the language.

V. CONCLUSION:

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

Respectfully submitted:

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The Committee makes special note of the dedication and professionalism of AOC staff assigned to the Committee.