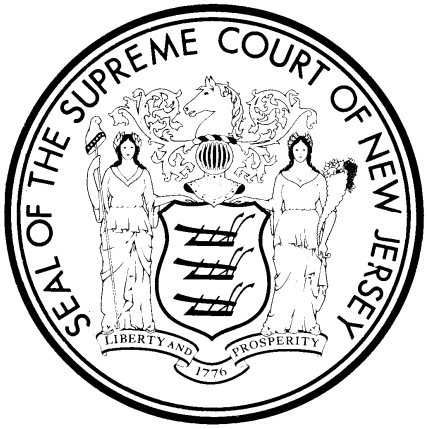
2010 Report of the Supreme Court Civil Practice Committee



January 25, 2010

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *Rules* 1:5-2, 4:4-7, 4:64-1, and 4:65-2

The Supreme Court issued an order relaxing and supplementing *Rules* 1:5-2, 4:4-7, 4:64-1, and 4:65-2 and asked the Committee to develop proposed conforming rule amendments. The specifics of the order are as follows:

- *Rule* 1:5-2 — to provide that filing of papers with the clerk shall be deemed to satisfy the service requirement of *R*. 1:5-1 and that there need be no separate service upon the clerk.

- *Rule* 4:47 — to permit the filed printout of the electronic return receipt provided by the U.S. Post Office to act as proof of service. **N.B**.: This rule relaxation is intended to apply only to Law Division — Civil Part matters and does not extend to Special Civil Part or General Equity.

- *Rule* 4:64-1 — to require that prior to entry of judgment in uncontested foreclosure matters (other than in rem tax foreclosures), the plaintiff must serve on all residential tenants the Notice to Residential Tenants of Rights During Foreclosure as set forth in newly adopted Appendix XII-K.

- *Rule* 4:65-2 — to require that a notice of sale posted on foreclosed premises be accompanied by the Notice to Residential Tenants of Rights During Foreclosure as set forth in newly adopted Appendix XII-K.

The conforming amendments were developed by the Committee. In doing so, the Committee also proposes a restructuring of *R*. 4:64-1.

See Section I.V. of this Report for a housekeeping amendment to *R*. 4:64-1 that the Committee recommends.

The proposed amendments to *Rules* 1:5-2, 4:4-7, 4:64-1 and 4:65-2 follow.

1:5-2. Manner of Service

Service upon an attorney of papers referred to in *R*. 1:5-1 shall be made by mailing a copy to the attorney at his or her office by ordinary mail, by handing it to the attorney, or by leaving it at the office with a person in the attorney's employ, or, if the office is closed or the attorney has no office, in the same manner as service is made upon a party. Service upon a party of such papers shall be made as provided in *R*. 4:4-4 or by registered or certified mail, return receipt requested, and simultaneously by ordinary mail to the party's last known address[;]. [or i]If no address is known, despite diligent effort, [by ordinary mail to the clerk of the court] the filing of papers with the clerk shall be deemed to satisfy that service requirement and there need be no separate service upon the clerk. Mail may be addressed to a post office box in lieu of a street address only if the sender cannot by diligent effort determine the addressee's street address or if the post office does not make street-address delivery to the addressee. The specific facts underlying the diligent effort required by this rule shall be recited in the proof of service required by *R*. 1:5-3. If, however, proof of diligent inquiry as to a party's whereabouts has already been filed within six months prior to service under this rule, a new diligent inquiry need not be made provided the proof of service required by *R*. 1:5-3 asserts that the party making service has no knowledge of any facts different from those recited in the prior proof of diligent inquiry.

Note: Source — *R R*. 1:7-12(d), 1:10-10(b), 1:11-2(c), 2:11-2(c), 3:11-1(b), 4:5-2(a) (first four sentences); amended July 16, 1981 to be effective September 14, 1981; amended July 13, 1994 to be effective September 1, 1994; amended July 28, 2004 to be effective September 1, 2004; amended _____ to be effective _____.

4:4-7. Return

The person serving the process shall make proof of service thereof on the original process and on the copy. Proof of service shall be promptly filed with the court within the time during which the person served must respond thereto either by the person making service or by the party on whose behalf service is made. The proof of service, which shall be in a form prescribed by the Administrative Director of the Courts, shall state the name of the person served and the place, mode and date of service, and a copy thereof shall be forthwith furnished plaintiff's attorney by the person serving process. If service is made upon a member of the household pursuant to *R*. 4:4-4 that person's name shall be stated in the proof or, if such name cannot be ascertained, the proof shall contain a description of the person upon whom service was made. If service is made by a person other than a sheriff or a court appointee, proof of service shall be by similar affidavit which shall include the facts of the affiant's diligent inquiry regarding defendant's place of abode, business or employment. If service is made by mail, the party making service shall make proof thereof by affidavit which shall also include the facts of the failure to effect personal service and the facts of the affiant's diligent inquiry to determine defendant's place of abode, business or employment. With the proof shall be filed the affidavit or affidavits of inquiry, if any, required by *R*. 4:4-4 and *R*. 4:4-5. Where service is made by registered or certified mail and simultaneously by regular mail, the return receipt card, or the printout of the electronic confirmation of delivery provided by the U.S. Postal Service, or the unclaimed registered or certified mail shall be filed as part of the proof. Failure to make proof of service does not affect the validity of service.

Note: Source — *R.R.* 4:4-7. Amended July 14, 1972 to be effective September 5, 1972; amended June 29, 1990 to be effective September 4, 1990; amended July 14, 1992 to be effective

September 1, 1992; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; amended July 12, 2002 to be effective September 3, 2002; amended _____ to be effective _____.

4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

(a) …no change.

(b) …no change.

(c) …no change.

(d) Procedure to Enter Judgment.

(1) Prejudgment notices; responses.

(A) Notice of motion for entry of judgment shall be served within the time prescribed by subparagraph (d)(2) of this rule on mortgagors and all other named parties obligated on the debt and all parties who have appeared in the action including defendants whose answers have been stricken or rendered noncontesting. The notice shall have annexed a copy of the affidavit of amount due filed with the court. If the premises are residential, the notice shall be served on each tenant, by personal service or registered or certified mail, return receipt requested, accompanied by the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. Said notice of tenants' rights shall be contained in an envelope with the following text in bold and in at least 14 point type: "Important Notice about Tenants Rights." If the name of the tenant is unknown, the notice may be addressed to Tenant. Any party having the right of redemption who disputes the correctness of the affidavit may file an objection stating with specificity the basis of the dispute and asking the court to fix the amount due.

(B) Defaulting parties shall be noticed only if application for final judgment is not made within six months of the entry of default.

(2) Application for judgment; entry.

If the action is uncontested as defined by paragraph (c) the court, on motion on 10 days notice if there are no other encumbrancers and on 30 days notice if there are other encumbrancers, and subject to paragraph (h) of this rule, may enter final judgment upon proof establishing the amount due. The application for entry of judgment shall be accompanied by proofs as required by *R*. 4:64-2 and in lieu of the filing otherwise required by *R*. 1:6-4 shall be only filed with the Office of Foreclosure in the Administrative Office of the Courts. The Office of Foreclosure may recommend entry of final judgment pursuant to *R*. 1:34-6.

(e) …no change.

(f) Tax Sale Foreclosure; Strict Mortgage Foreclosures. If an action to foreclose or reforeclose a tax sale certificate in personam or to strictly foreclose a mortgage where provided by law is uncontested as defined by paragraph (c), the court, subject to paragraph (h) of this rule, shall enter an order fixing the amount, time and place for redemption upon proof establishing the amount due. The order of redemption in tax foreclosure actions shall conform to the requirements of *N.J.S.A*. 54:5-98 and *R*. 4:64-6(b). The order for redemption or notice of the terms thereof shall be served by ordinary mail on each defendant whose address is known at least 10 days prior to the date fixed for redemption. Notice of the entry of the order of redemption, directed to each defendant whose address is unknown, shall be published in accordance with *R*. 4:4-5(c) at least 10 days prior to the redemption date and, in the case of an unknown owner in a tax foreclosure action joined pursuant to *R*. 4:26-5, a copy of the order or notice shall be posted on the subject premises at least 20 days prior to the redemption date in accordance with *N.J.S.A*. 54:5-90. The court, on its own motion and on notice to all appearing parties including parties whose answers have been stricken, may enter final judgment upon proof of service of the order of redemption as herein required and the filing by plaintiff of an affidavit of non-

redemption. The Office of Foreclosure may, pursuant to *R* 1:34-6, recommend the entry of both the order for redemption and final judgment.

(g) …no change.

(h) …no change.

(i) …no change.

Note: Source — *R.R.* 4:82-1, 4:82-2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; new paragraphs (a) and (b) adopted, and former paragraphs (a), (b), (c), (d), (e), (f), and (g) redesignated as paragraphs (c), (d), (e), (f), (g), (h), and (i) July 27, 2006 to be effective September 1, 2006; paragraph (b) caption and text amended September 11, 2006 to be effective immediately; paragraphs (d) and (f) amended October 10, 2006 to be effective immediately; paragraph (d) amended July 9, 2008 to be effective September 1, 2008; paragraph (d) amended and restructured and (f) amended _____ to be effective _____.

4:65-2. Notice of Sale; Posting and Mailing

If real or personal property is authorized by court order or writ of execution to be sold at public sale, notice of the sale shall be posted in the office of the sheriff of the county or counties where the property is located, and also, in the case of real property, on the premises to be sold, but need not be posted in any other place. If the premises are residential, the notice of sale shall have annexed thereto, in bold type of at least 14-point, the notice of tenants' rights during foreclosure in the form prescribed by Appendix XII-K of the rules of court. The party who obtained the order or writ shall, at least 10 days prior to the date set for sale, serve a notice of sale by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action, and (3) except in mortgage foreclosure actions, every other person having an ownership or lien interest that is to be divested by the sale and is recorded in the office of the Superior Court Clerk, the United States District Court Clerk or the county recording officer, and in the case of personal property, recorded or filed in pertinent public records of security interests, provided, however, that the name and address of the person in interest is reasonably ascertainable from the public record in which the interest is noted. The notice of sale shall include notice that there may be surplus money and the procedure for claiming it. The party obtaining the order or writ may also file the notice of sale with the county recording officer in the county in which the real estate is situate, pursuant to *N.J.S.A.* 46:16A-1 et seq., and such filing shall have the effect of the notice of settlement as therein provided.

Note: Source — *R.R.* 4:83-2; caption and rule amended July 13, 1994 to be effective September 1, 1994; amended July 3, 1995, to be effective immediately; amended July 9, 2008 to be effective September 1, 2008; amended _____ to be effective _____.

B. Proposed Amendments to *R.* 1:6-2 — re: Requests to Extend Discovery

Rule 4:24-1(c) was amended in the last rules cycle to require the attachment of "copies of all previous orders granting or denying an extension of discovery" with a motion to extend the time for discovery. For the sake of consistency, it was suggested that the language of *R.* 1:6-2(c) be amended to mirror the requirement of *R.* 4:24-1(c). The Committee agreed with this suggestion and recommends the rule amendment as proposed.

See Section II.A. of this Report for proposed amendments to *R.* 1:6-2 that the Committee does not recommend.

The proposed amendments to *R.* 1:6-2 follow.

1:6-2. Form of Motion; Hearing

(a) …no change.

(b) …no change.

(c) Civil and Family Part Discovery and Calendar Motions. Every motion in a civil case or a case in the Chancery Division, Family Part, not governed by paragraph (b), involving any aspect of pretrial discovery or the calendar, shall be listed for disposition only if accompanied by a certification stating that the attorney for the moving party has either (1) personally conferred orally or has made a specifically described good faith attempt to confer orally with the attorney for the opposing party in order to resolve the issues raised by the motion by agreement or consent order and that such effort at resolution has been unsuccessful, or (2) advised the attorney for the opposing party by letter, after the default has occurred, that continued non-compliance with a discovery obligation will result in an appropriate motion being made without further attempt to resolve the matter. A motion to extend the time for discovery shall have annexed thereto either a copy of all prior orders [extending] granting or denying an extension of the discovery period or a certification that there have been no such prior orders. The moving papers shall also set forth the date of any scheduled pretrial conference, arbitration proceeding scheduled pursuant to *R*. 4:21A, calendar call or trial, or state that no such dates have been fixed. Discovery and calendar motions shall be disposed of on the papers unless, on at least two days notice, the court specifically directs oral argument on its own motion or, in its discretion, on a party's request. A movant's request for oral argument shall be made either in the moving papers or reply; a respondent's request for oral argument shall be made in the answering papers.

(d) …no change.

(e) …no change.

(f) …no change.

Note: Source — *R.R.* 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (f) amended January 21, 1999 to be effective April 5, 1999; paragraphs (c) and (d) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraphs (b), (c), and (f) amended July 27, 2006 to be effective September 1, 2006; paragraph (b) caption amended, former text of paragraph (b) captioned and redesignated as subparagraph (b)(1), and new subparagraph (b)(2) adopted July 9, 2008 to be effective September 1, 2008; paragraph (c) amended _____ to become effective _____.

C. Proposed Amendments to *R.* 1:13-7 — Dismissal of Civil Cases for Lack of Prosecution

The Committee considered two proposed amendments to *R.* 1:13-7:

1. In the 2006-2008 rules cycle, the Committee recommended and the Supreme Court approved an amendment to subsection (a) of *R.* 1:13-7 to provide for General Equity cases to receive dismissal notices after 60 days of inactivity, and for the court to dismiss them 30 days thereafter if none of the required actions listed in subsection (c) have been taken. Paragraph (c), however, in its introductory sentence, refers to specific time periods that are applicable Civil Part cases only (60 days in which to take one of the required actions). These time periods, however, are not applicable to General Equity cases.

To remediate this drafting problem, the Committee determined that paragraph (c) of *R.* 1:13-7 should be amended to eliminate the references to specific time periods. The Committee agreed to the following language: "The order for dismissal required by paragraph (a) shall not be entered if, during the period following the notice of dismissal as therein prescribed, one of the following actions is taken."

2. A practitioner representing plaintiffs in personal injury cases pointed out a situation that she has encountered with *R.* 1:13-7. In two separate cases in which there were multiple defendants, the answers of one defendant were stricken based on a motion by a co-defendant for failure to comply with discovery. The Order striking the answer triggered a dismissal notice in each case for plaintiff's failure to prosecute, requiring the plaintiff's attorney to file a motion to remove the case

from the dismissal list or to strike the defendant's answer with prejudice. She asked the Committee to review this issue as she does not believe that *R.* 1:13-7 was designed to penalize the plaintiff by placing the case on the dismissal list as a result of co-defendants' motion practice against each other.

The Committee was made aware that the automated docketing system is not equipped to distinguish where a plaintiff in one case is a defendant in another case that has been consolidated with the first case. The judges on the Committee agreed that where it is clear that a case has been placed on the dismissal list in error, a letter to the Presiding Judge should be sufficient and an ACMS error could be corrected by an order reinstating the case. The Committee members speculated that practitioners might not be aware of this procedure unless it was captured in a court rule. The consensus was to add a provision to the rule, being careful to draft it in such a way to avoid its being abused by those whose cases are properly on the dismissal list.

The proposed amendments to *R.* 1:13-7 follow.

1:13-7. Dismissal of Civil Cases for Lack of Prosecution

(a) …no change.

(b) …no change.

(c) [An] The order of dismissal [will enter 60 days from the date of the notice referred to in subsection (a) unless one of the following actions is taken within said 60-day period] required by paragraph (a) shall not be entered if, during the period following the notice of dismissal as therein prescribed, one of the following actions is taken:

(1) a proof of service or acknowledgment of service is filed, if the required action not timely taken was failure to file proof of service or acknowledgment of service with the court;

(2) an answer is filed or a default is requested, if the required action not timely taken was failure to answer or enter default;

(3) a default judgment is obtained, if the required action not timely taken was failure to convert a default request into a default judgment;

(4) a motion is filed by or with respect to a defendant noticed for dismissal. If a motion to remove the defendant from the dismissal list is denied, the defendant will be dismissed without further notice.

(d) …no change.

(e) Dismissal in error. A party who reasonably believes that the order of dismissal was entered in error and who has either completed service of process on the dismissed defendant or taken other steps of record to protect the viability of the action against that defendant may seek an order of vacation of the dismissal by letter to the presiding judge of the vicinage in which venue is laid explaining the circumstances and enclosing a form of order of vacation. All parties

shall be copied, and if there is no objection to the order of vacation, it shall be entered within 10 days after its receipt by the court.

Note: Source — *R.R.* 1:30-3(a) (b) (c) (d), 1:30-4. Amended July 7, 1971 to be effective September 13, 1971; former rule redesignated as paragraph (a) and paragraph (b) adopted July 15, 1982 to be effective September 13, 1982; paragraph (b) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; caption and paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a) and (b) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended, former paragraph (b) deleted, and new paragraphs (b), (c), and (d) adopted July 28, 2004 to be effective September 1, 2004; paragraph (a) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) amended and new paragraph (e) added to be effective .

D. Proposed Amendments to *R.* 1:21-1 — Who May Practice; Appearance in Court

A Civil Division Manager asked whether a member of a church can file papers on behalf of the church or if an attorney is required. With limited exceptions, *R.* 1:21-1(c) prohibits a business entity from appearing or filing any paper in any court of this State except through an attorney licensed to practice in New Jersey. The Committee determined that a church is an entity for which representation by an attorney is required. The Committee agreed that the rule should be amended to clarify that any entity regardless of its purpose or organization must be represented in court by an attorney.

The proposed amendments to *R.* 1:21-1 follow.

1:21-1. Who May Practice; Appearance in Court

(a) …no change.

(b) …no change.

(c) Prohibition on [Business] Entities. Except as otherwise provided by paragraph (d) of this rule and by *R*. 1:21-1A (professional corporations), *R*. 1:21-1B (limited liability companies), *R*. 1:21-1C (limited liability partnerships), *R*. 6:10 (appearances in landlord-tenant actions), *R*. 6:11 (appearances in small claims actions), *R*. 7:6-2(a) (pleas in municipal court), *R*. 7:8-7(a) (presence of defendant in municipal court) and by *R*. 7:12-4(d) (municipal court violations bureau), an [business] entity, however formed and for whatever purpose, other than a sole proprietorship shall neither appear nor file any paper in any action in any court of this State except through an attorney authorized to practice in this State.

(d) …no change.

(e) …no change.

(f) …no change.

Note: Source — *R.R.* 1:12-4(a) (b) (c) (d) (e) (f). Paragraph (c) amended by order of December 16, 1969 effective immediately; paragraphs (a) and (c) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 24, 1978 to be effective September 11, 1978; paragraph (a) amended September 21, 1981 to be effective immediately; paragraph (c) amended and paragraph (d) adopted July 15, 1982 to be effective September 13, 1982; paragraph (a) amended August 13, 1982 to be effective immediately; paragraph (e) adopted July 22, 1983 to be effective September 12, 1983; paragraph (c) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (b) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (c) amended and paragraph (e)(8) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e), and (e)(7) amended, and paragraph (e)(9) added July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (e) amended June 28, 1996 to be effective September 1, 1996; paragraph (c) amended November 18, 1996 to be effective January 1, 1997; paragraph (c) amended January 5, 1998 to be effective February 1, 1998; paragraph (a) amended, former paragraphs (d) and (e) redesignated as paragraphs (e) and (f), and new

paragraph (d) adopted July 10, 1998 to be effective September 1, 1998; closing paragraph amended July 5, 2000 to be effective September 5, 2000; paragraph (f) amended and new paragraph (f)(11) added July 12, 2002 to be effective September 3, 2002; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraph (e) caption and text amended July 27, 2006 to be effective September 1, 2006; paragraph (c) amended _____ to become effective _____.

E. Proposed Amendments to *R.* 1:36-3 — Unpublished Opinions

Two practitioners requested an amendment to *R.* 1:36-3 to limit the circumstances in which unpublished opinions can be cited to a court. They asserted that the current requirement of having to supply copies of an unpublished opinion and "of all other relevant unpublished opinions known to counsel including those adverse to the position of the client" is unwieldy and not reflective of the current world of unlimited Internet access to unpublished opinions. It was suggested that the citation of unpublished opinions be limited to those situations where the citation is absolutely necessary, such as those cases dealing with *res judicata*, the law of the case, the single controversy doctrine, or the like. The Committee rejected this proposal, reasoning that there were a great number of worthwhile unpublished opinions that can and should be cited to the court. They did agree, however, that having to supply copies of all other relevant opinions could be onerous. Accordingly, the Committee recommends that "relevant" should be replaced with "contrary," leaving the last sentence of the rule to read, "No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel."

The proposed amendments to *R.* 1:36-3 follow.

1:36-3 Unpublished Opinions

No unpublished opinion shall constitute precedent or be binding upon any court. Except for appellate opinions not approved for publication that have been reported in an authorized administrative law reporter, and except to the extent required by *res judicata*, collateral estoppel, the single controversy doctrine or any other similar principle of law, no unpublished opinion shall be cited by any court. No unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all [other relevant] contrary unpublished opinions known to counsel [including those adverse to the position of the client].

Note: Adopted July 16, 1981 to be effective September 14, 1981; caption and rule amended July 13, 1994 to be effective September 1, 1994; amended July 12, 2002 to be effective September 3, 2002; amended _____ to be effective _____.

F. Proposed Amendments to *R*. 2:2-3 — Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

In *Wein v. Morris*, 194 *N.J*. 364 (2008), the Supreme Court held that an order compelling arbitration is a final order appealable as of right, regardless of whether the judge stays the underlying suit or dismisses it. The Court referred the matter to the Committee to prepare the amendatory language necessary to bring *R*. 2:2-3 in line with the holding in *Wein*. Pursuant to the Court's direction the Committee recommends amendatory language to *R*. 2:2-3 to add an order of the court compelling arbitration to the list of orders that shall be deemed final judgments for appeal purposes. This proposed amendment was endorsed by the Appellate Rules Committee.

See Section II.C. of this Report for proposed amendments to *R*. 2:2-3 that the Committee does not recommend.

The proposed amendments to *R*. 2:2-3 follow.

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by *R.* 2:2-1(a)(3) (final judgments appeallable directly to the Supreme Court), and except for appeals from a denial by the State Police of an application to make a gun purchase under a previously issued gun purchaser card, which appeals shall be taken to the designated gun permit judge in the vicinage, appeals may be taken to the Appellate Division as of right

(1) …no change.

(2) …no change.

(3) in such cases as are provided by law. Final judgments of a court, for appeal purposes, shall also include those referred to by *R.* 3:28(f) (order enrolling defendant into the pretrial intervention program over the objection of the prosecutor), *R.* 3:26-3 (material witness order), *R.* 4:42-2 (certification of interlocutory order), *R.* 4:53-1 (order appointing statutory or liquidating receiver), R. 5:8-6 (final custody determination in bifurcated matrimonial action), and *R.* 5:10-6 (order on preliminary hearing in adoption action). An order granting or denying a motion to extend the time to file a notice of tort claim pursuant to *N.J.S.A.* 59:8-9, whether entered in the cause or by a separate action, and an order compelling arbitration, whether the action is dismissed or stayed, shall also be deemed a final judgment of the court for appeal purposes.

(b) …no change.

Note: Source — *R.R.* 2:2-1(a) (b) (c) (d) (f) (g), 2:2-4, 2:12-1, 3:10-11, 4:88-7, 4:88-8(a) (first sentence), 4:88-10 (first sentence), 4:88-14, 6:3-11(a). Paragraph (a) amended July 14, 1972 to be effective September 5, 1972; paragraph (b) amended November 27, 1974 to be effective April 1, 1975; caption and paragraph (a) amended June 20, 1979 to be effective July 1,

1979; paragraph (a) amended July 8, 1980 to be effective July 15, 1980; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(1) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (b) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 27, 2006 to be effective September 1, 2006; paragraph (a)(3) amended _____ to be effective _____.

G. Proposed Amendments to *R*. 2:5-6 — Appeals from Interlocutory Orders, Decisions and Actions

A practitioner suggested that New Jersey adopt a rule similar to the Pennsylvania statute that allows a court or agency to state in an interlocutory order that the appeal "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the matter." This suggestion was referred to the Appellate Division Rules Committee (ADRC) for its consideration. The ADRC noted that *R*. 2:5-6(c) already permits a trial court or agency to comment on whether a motion for leave to appeal should be granted, thus obviating the need for a rule amendment. However, the ADRC opined that it would not be averse to adding the specific language from the Pennsylvania statute, if the Committee was inclined to recommend its inclusion. The Committee concluded that adding the language would provide additional clarity to the rule, but suggested that, where the Pennsylvania statute refers to "termination" of the matter, the language of the proposed rule amendment should refer instead to "resolution."

The proposed amendments to *R*. 2:5-6 follow.

2:5-6. Appeals From Interlocutory Orders, Decisions and Actions

(a) …no change.

(b) …no change.

(c) Notice to the Trial Judge or Officer; Findings. A party filing a motion for leave to appeal from an interlocutory order shall serve a copy thereof on the trial judge or officer who entered the order. If the judge or officer has not theretofore filed a written statement of reasons or if no verbatim record was made of any oral statement of reasons, the judge or officer shall, within 5 days after receiving the motion, file and transmit to the clerk of the Appellate Division and the parties a written statement of reasons for the disposition [and may also, within said time, comment on whether the motion for leave to appeal should be granted]. The statement may also comment on whether the motion for leave to appeal should be granted on the ground, among others, that a controlling question of law not theretofore addressed by an appellate court of this state is involved and that the grant of leave to appeal may materially advance the ultimate resolution of the matter. Any statement of reasons previously made may also be amplified.

Note: Source — *R.R.* 1:2-3(b), 2:2-3(a) (second sentence), 4:53-1 (sixth sentence), 4:61-1(d). Paragraphs (a) and (c) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (c) amended July 16, 1981 to be effective September 14, 1981; paragraph (c) amended November 1, 1985 to be effective January 2, 1986; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended _____ to be effective _____.

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

In *Rutgers v. Fogel*, 403 *N.J. Super*. 389 (App. Div. 2008), the Appellate Division held that the state court rule governing venue in the Superior Court, *R*. 4:3-2, was preempted by the venue provision of the federal Fair Debt Collection Practices Act (the Act), 15 *U.S.C.S*. §1692i, to the extent that actions subject to the Act must be brought in either the county of the defendant's residence or the county in which the contract was signed. The Committee discussed whether *R*. 4:3-2 should be amended to include this provision. It recognized that there may be other federal laws that preempt New Jersey's rule governing venue and agreed accordingly to recommend adding the following prefatory language to the rule — "Subject to contrary provisions of federal law,.."

The proposed amendments to *R*. 4:3-2 follow.

4:3-2. Venue in the Superior Court

(a) Where Laid. Subject to contrary provisions of federal law, [V]venue shall be laid by the plaintiff in Superior Court actions as follows: (1) actions affecting title to real property or a possessory or other interest therein, or for damages thereto, or appeals from assessments for improvements, in the county in which any affected property is situate; (2) actions not affecting real property which are brought by or against municipal corporations, counties, public agencies or officials, in the county in which the cause of action arose; (3) except as otherwise provided by *R.* 4:44A-1 (structured settlements), *R.* 4:53-2 (receivership actions), *R.* 4:60-2 (attachments), *R.* 5:2-1 (family actions), *R.* 4:83-4 (probate actions), and *R.* 6:1-3 (Special Civil Part actions), the venue in all other actions in the Superior Court shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant; and (4) actions on and objections to certificates of debt for motor vehicle surcharges that have been docketed as judgments by the Superior Court Clerk pursuant to *N.J.S.A.* 17:29A-35 shall be brought in the county of residence of the judgment-debtor.

(b) …no change

(c) …no change.

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

I. Proposed Amendments to *R*. 4:4-2 and Appendix XII-A — re: Legal Services Hotline

At the request of Legal Services of New Jersey (LSNJ), the Committee recommends the inclusion of LSNJ's Hotline number 1-888-LSNJ-LAW (1-888-576-5529) in the information regarding the form of the summons in *R*. 4:4-2 and on the summons form itself, Appendix XII-A. LSNJ proposed this amendment to provide more information to individuals needing their services, especially to those facing foreclosure, as the hotline directs access to LSNJ's Statewide Anti-Predatory Lending Project, which provides a foreclosure defense to qualified victims of predatory lending practices.

The proposed amendments to *R*. 4:4-2 and Appendix XII-A follow.

4:4-2. Summons: Form

Except as otherwise provided by *R*. 5:4-1(b) (summary proceedings in family actions), the face of the summons shall be in the form prescribed by Appendix XII-A to these Rules. It shall be in the name of the State, signed in the name of the Superior Court Clerk and directed to the defendant. It shall contain the name of the court and the plaintiff and the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve an answer upon the plaintiff or plaintiff's attorney, and shall notify the defendant that if he or she fails to answer, judgment by default may be rendered for the relief demanded in the complaint. It shall also inform the defendant of the necessity to file an answer and proof of service thereof with the deputy clerk of the Superior Court in the county of venue, except in mortgage and tax foreclosure actions an answer shall be filed with the Clerk of the Superior Court in Trenton unless and until the action is deemed contested and the papers have been sent by the Clerk to the county of venue in which event an answer shall be filed with the deputy clerk of the Superior Court in the county of venue. If the defendant is an individual resident in this state, the summons shall advise that if he or she is unable to obtain an attorney, he or she may communicate with the Lawyer Referral Service of the county of his or her residence, or the county in which the action is pending, or, if there is none in either county, the Lawyer Referral Service of an adjacent county. The summons shall also advise defendant that if he or she cannot afford an attorney, he or she may communicate with the Legal Services Office of the county of his or her residence or the county in which the action is pending or the Legal Services of New Jersey statewide toll free hotline at 1-888-LSNJ-LAW (1-888-576-5529). If the defendant is an individual not resident in this State, the summons shall similarly advise

him or her, directing the defendant, however, to the appropriate agency in the county in which the action is pending. The reverse side or second page of the summons shall contain a current listing, by county, of telephone numbers of the Legal Services Office and the Lawyer Referral Office serving each county and the Legal Services of New Jersey statewide toll free hotline at 1-888-LSNJ-LAW (1-888-576-5529), which list shall be updated regularly by the Administrative Office of the Courts and made available to legal forms publishers and to any person requesting such list.

Note: Source — *R.R.* 4:4-2; amended November 27, 1974 to be effective April 1, 1975; amended July 29, 1977 to be effective September 6, 1977; amended July 21, 1980 to be effective September 8, 1980; amended July 16, 1981 to be effective September 14, 1981; amended December 20, 1983 to be effective December 31, 1983; amended June 29, 1990 to be effective September 4, 1990; amended July 13, 1994 to be effective September 1, 1994; amended June28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; amended _____ to be effective _____.

APPENDIX XII-A. SUMMONS

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

_____

SUPERIOR COURT OF NEW JERSEY
_____COUNTY
_____DIVISION

Plaintiff(s) Docket No._____

vs. CIVIL ACTION

Defendant(s) SUMMONS

_____

From The State of New Jersey To The Defendant(s) Named Above:

The plaintiff, named above, has filed a lawsuit against you in the Superior Court of New Jersey. The complaint attached to this summons states the basis for this lawsuit. If you dispute this complaint, you or your attorney must file a written answer or motion and proof of service with the deputy clerk of the Superior Court in the county listed above within 35 days from the date you received this summons, not counting the date you received it. (The address of each deputy clerk of the Superior Court is provided.) If the complaint is one in foreclosure, then you must file your written answer or motion and proof of service with the Clerk of the Superior Court, Hughes Justice Complex, P.O. Box 971, Trenton, NJ 08625-0971. A filing fee payable to the Treasurer, State of New Jersey and a completed Case Information Statement (available from the deputy clerk of the Superior Court) must accompany your answer or motion when it is filed. You must also send a copy of your answer or motion to plaintiff's attorney whose name and address appear above, or to plaintiff, if no attorney is named above. A telephone call will not protect your rights; you must file and serve a written answer or motion (with fee of $135.00 and completed Case Information Statement) if you want the court to hear your defense.

If you do not file and serve a written answer or motion within 35 days, the court may enter a judgment against you for the relief plaintiff demands, plus interest and costs of suit. If judgment is entered against you, the Sheriff may seize your money, wages or property to pay all or part of the judgment.

If you cannot afford an attorney, you may call the Legal Services office in the county where you live or the Legal Services of New Jersey Statewide Hotline at 1-888-LSNJ-LAW (1-888-576-5529). A list of these offices is provided. If you do not have an attorney and are not eligible for free legal assistance, you may obtain a referral to an attorney by calling one of the Lawyer Referral Services. A list of these numbers is also provided.

_____
Clerk of the Superior Court

DATED:
Name of Defendant to Be Served:
Address of Defendant to Be Served:

ATLANTIC COUNTY:
Deputy Clerk of the Superior Court
Civil Division, Direct Filing
1201 Bacharach Blvd., First Fl.
Atlantic City, NJ 08401
LAWYER REFERRAL
(609) 345-3444
LEGAL SERVICES
(609) 348-4200

BERGEN COUNTY:
Deputy Clerk of the Superior Court
Case Processing Section, Room 119
Justice Center, 10 Main St.
Hackensack, NJ 07601-0769
LAWYER REFERRAL
(201) 488-0044
LEGAL SERVICES
(201) 487-2166

BURLINGTON COUNTY:
Deputy Clerk of the Superior Court
Central Processing Office
Attn: Judicial Intake
First Fl., Courts Facility
49 Rancocas Rd.
Mt. Holly, NJ 08060
LAWYER REFERRAL
(609) 261-4862
LEGAL SERVICES
(800) 496-4570

CAMDEN COUNTY:
Deputy Clerk of the Superior Court
Civil Processing Office
1st Fl., Hall of Records
101 S. Fifth St.
Camden, NJ 08103
LAWYER REFERRAL
(856) 964-4520
LEGAL SERVICES
(856) 964-2010

CAPE MAY COUNTY:
Deputy Clerk of the Superior Court
9 N. Main Street
Box DN-209
Cape May Court House, NJ 08210
LAWYER REFERRAL
(609) 463-0313
LEGAL SERVICES
(609) 465-3001

CUMBERLAND COUNTY:
Deputy Clerk of the Superior Court

Civil Case Management Office
Broad & Fayette Sts., P.O. Box 615
Bridgeton, NJ 08302
LAWYER REFERRAL
(856) 692-6207
LEGAL SERVICES
(856) 451-0003

ESSEX COUNTY:
Deputy Clerk of the Superior Court
50 West Market Street
Room 131
Newark, NJ 07102
LAWYER REFERRAL
(973) 622-6207
LEGAL SERVICES
(973) 624-4500

GLOUCESTER COUNTY:
Deputy Clerk of the Superior Court
Civil Case Management Office
Attn: Intake
First Fl., Court House
1 North Broad Street, P.O. Box 750
Woodbury, NJ 08096
LAWYER REFERRAL
(856) 848-4589
LEGAL SERVICES
(856) 848-5360

HUDSON COUNTY:
Deputy Clerk of the Superior Court
Superior Court, Civil Records Dept.
Brennan Court House--1st Floor
583 Newark Ave.
Jersey City, NJ 07306
LAWYER REFERRAL
(201) 798-2727
LEGAL SERVICES
(201) 792-6363

HUNTERDON COUNTY:
Deputy Clerk of the Superior Court
Civil Division
65 Park Avenue
Flemington, NJ 08822
LAWYER REFERRAL
(908) 263-6109
LEGAL SERVICES
(908) 782-7979

MERCER COUNTY:
Deputy Clerk of the Superior Court
Local Filing Office, Courthouse
175 S. Broad Street, P.O. Box 8068
Trenton, NJ 08650

LAWYER REFERRAL
(609) 585-6200
LEGAL SERVICES
(609) 695-6249

MIDDLESEX COUNTY:
Deputy Clerk of the Superior Court
Administration Building
Third Floor
1 Kennedy Sq., P.O. Box 2633
New Brunswick, NJ 08903-2633
LAWYER REFERRAL
(732) 828-0053
LEGAL SERVICES
(732) 249-7600

MONMOUTH COUNTY:
Deputy Clerk of the Superior Court
Court House
71 Monument Park
P.O. Box 1269
Freehold, NJ 07728-1269
LAWYER REFERRAL
(732) 431-5544
LEGAL SERVICES
(732) 866-0020

MORRIS COUNTY:
Deputy Clerk of the Superior Court
Civil Division
30 Schuyler Pl., P.O. Box 910
Morristown, NJ 07960-0910
LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 285-6911

OCEAN COUNTY:
Deputy Clerk of the Superior Court
Court House, Room 119
118 Washington Street
Toms River, NJ 08754
LAWYER REFERRAL
(732) 240-3666
LEGAL SERVICES
(732) 341-2727

PASSAIC COUNTY:
Deputy Clerk of the Superior Court
Civil Division
Court House
77 Hamilton St.
Paterson, NJ 07505
LAWYER REFERRAL
(973) 278-9223
LEGAL SERVICES

(973) 523-2900

SALEM COUNTY:
Deputy Clerk of the Superior Court
92 Market St., P.O. Box 18
Salem, NJ 08079
LAWYER REFERRAL
(856) 678-8363
LEGAL SERVICES
(856) 451-0003

SOMERSET COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
New Court House, 3rd Fl.
P.O. Box 3000
Somerville, NJ 08876
LAWYER REFERRAL
(908) 685-2323
LEGAL SERVICES
(908) 231-0840

SUSSEX COUNTY:
Deputy Clerk of the Superior Court
Sussex County Judicial Center
43-47 High Street
Newton, NJ 07860
LAWYER REFERRAL
(973) 267-5882
LEGAL SERVICES
(973) 383-7400

UNION COUNTY:
Deputy Clerk of the Superior Court
1st Fl., Court House
2 Broad Street
Elizabeth, NJ 07207-6073
LAWYER REFERRAL
(908) 353-4715
LEGAL SERVICES
(908) 354-4340

WARREN COUNTY:
Deputy Clerk of the Superior Court
Civil Division Office
Court House
413 Second Street
Belvidere, NJ 07823-1500
LAWYER REFERRAL
(908) 387-1835
LEGAL SERVICES
(908) 475-2010

Note: Adopted July 13, 1994, effective September 1, 1994; amended June 28, 1996, effective September 1, 1996; address/phone information updated July 1, 1999, effective September 1, 1999; amended July 12, 2002 to be effective September 3, 2002; amended July 27, 2006 to be effective September 1, 2006; address/phone information updated October 10, 2006 to be effective immediately; address/phone information updated November 1, 2006 to be effective immediately; address/phone information updated November 17, 2006 to be effective immediately; amended _____ to be effective _____.

J. Proposed Amendments to *R.* 4:4-3 — By Whom Served; Copies

Rule 4:4-3 states, "Summonses shall be served, together with a copy of the complaint, by the sheriff, or by a person specially appointed by the court for that purpose, or by plaintiff's attorney or the attorney's agent, or by any other competent adult not having a direct interest in the litigation." A practitioner questioned whether this language gives a sheriff the authority to delegate his/her service of a summons and complaint to a private process server. Reportedly, this practice is becoming widespread. The Committee agreed that a practitioner should be able to choose whether the sheriff or a private process server should be used. If a practitioner chooses to have the sheriff serve a summons in a case, it is generally because it is less expensive than a private process server and because the practitioner wants the authority of the sheriff's office behind the case. The Committee recognized that time constraints and staffing inadequacies may make it difficult for the sheriff to attend to the service of process requests, but was adamant that the practitioner's choice should be honored. Accordingly, the Committee recommends that the rule be amended to prohibit a sheriff from delegating the service of process to a private process server.

The proposed amendments to *R.* 4:4-3 follow.

4:4-3. By Whom Served; Copies

(a) Summons and Complaint. Summonses shall be served, together with a copy of the complaint, by the sheriff, or by a person specially appointed by the court for that purpose, or by plaintiff's attorney or the attorney's agent, or by any other competent adult not having a direct interest in the litigation. If a party opts for service by the sheriff, service shall be made by a sheriff's officer, but if such service is not effected within 30 days, the party may request the return of process and then elect private service. If personal service cannot be effected after a reasonable and good faith attempt, which shall be described with specificity in the proof of service required by *R.* 4:4-7, service may be made by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, to the usual place of abode of the defendant or a person authorized by rule of law to accept service for the defendant or, with postal instructions to deliver to addressee only, to defendant's place of business or employment. If the addressee refuses to claim or accept delivery of registered or certified mail, service may be made by ordinary mail addressed to the defendant's usual place of abode. The party making service may, at the party's option, make service simultaneously by registered or certified mail and ordinary mail, and if the addressee refuses to claim or accept delivery of registered mail and if the ordinary mailing is not returned, the simultaneous mailing shall constitute effective service. Mail may be addressed to a post office box in lieu of a street address only as provided by *R.* 1:5-2. Return of service shall be made as provided by *R.* 4:4-7.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 4:4-3, 5:5-1(c), 5:2-2; amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994;

captions and text of paragraphs (a) and (b) deleted and replaced with new captions and text July 5, 2000 to be effective September 5, 2000; paragraph (c) added July 12, 2002 to be effective September 3, 2002; paragraph (a) amended _____ to be effective _____.

K. Proposed Amendments to *R.* 4:12-4 — Disqualification for Interest

At its June 2009 meeting, the Committee rejected a proposal to amend *R.* 4:12-4 expressly to permit the use of in-house, rather than third-party, videographers to record video depositions. The Committee was subsequently asked if the rule should be amended to expressly prohibit this practice. The Committee agreed that the general prohibition against recording a deposition by a certified shorthand reporter "who is a relative, employee or attorney of a party or relative or employee of such attorney or is financially interested in the action" should apply to videographers as well. Therefore, the Committee recommends adding the word "videographed" to the opening sentence of the rule to accomplish this purpose.

See Section II.H. of this Report for proposed amendments to *R.* 4:12-4 that the Committee does not recommend.

The proposed amendments to *R.* 4:12-4 follow.

4:12-4 Disqualification for Interest

No deposition shall be taken before or videographed or recorded by a person, whether or not a certified shorthand reporter, who is a relative, employee or attorney of a party or a relative or employee of such attorney or is financially interested in the action. Any regulations of the State Board of Shorthand Reporters respecting disqualification of certified shorthand reporters shall apply to all persons taking or recording a deposition.

Note: Source — *R.R.* 4:18-4. Amended July 17, 1975 to be effective September 8, 1975; amended July 12, 2002 to be effective September 3, 2002; amended _____ to be effective _____.

L. Proposed Amendments to *R.* 4:17-5 ─ Objections to Interrogatories

A plaintiff's attorney had suggested that the discovery rules be amended to add a section addressing the general objections found in the preamble to the answers to most interrogatories. The practitioners on the Committee agreed overwhelmingly that the rule governing the manner in which objections to interrogatory questions should be made is abused all the time. Because the practice of stating boilerplate general objections is widespread and in seeming contradiction to *R.* 4:17-4, which appears to contemplate that there should be nothing in the answers to interrogatories but answers, not disclaimers, the matter was referred to the Discovery Subcommittee. A majority of the subcommittee concluded that the routine practice of prefacing all answers to interrogatories with a lengthy list of general objections that do not identify to which of the numbered interrogatories they apply is implicitly prohibited by *R.* 4:17-5(a). They agreed that this implicit prohibition is inadequate to address the problem and recommended that the rule be amended to state that general objections are not permitted and that specific objections to each question should be stated. The subcommittee further recommended that the provisions of *R.* 4:23-1(c) (award of expenses of a motion for an order compelling discovery) should be made applicable to *R.* 4:17-5 to complement the "good-faith effort to resolve" requirement of *R.* 1:6-2(c) by providing an incentive for parties to thoroughly evaluate the merits of their positions before resorting to motion practice. Such a rule change would provide an award of reasonable expenses, including attorney's fees, to a party prevailing on such a motion, unless the court finds that the party's conduct in making or opposing the motion was substantially justified or that an award would be unjust in the circumstances presented. The Committee supported both recommendations and further suggested that the rule be restructured to distinguish among the

three concepts — the prohibition against general objections, grounds for specific objections and the award of expenses under *R*. 4:23-6(c).

The Sanctions Subcommittee, charged with making recommendations as to whether attorney's fees should be included as a sanction, also reviewed *R*. 4:17-5(d). It recommended that the provisions of *R*. 4:23-1(c) apply to the award of expenses incurred in relation to motions made pursuant to this rule — namely, that if the motion is granted, the court shall, after opportunity for a hearing, require the party or defendant whose conduct necessitated the motion to pay the moving party's reasonable expenses, including attorney's fee, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust; similarly, if the motion is denied, the objecting party would be awarded expenses. Such an amendment would be consistent with other rules, specifically *R*. 4:10-3, *R*. 4:14-4 and *R*. 4:22-1, which already incorporate the sanction provisions of *R*. 4:23-1(c). The full Committee endorsed the recommendations of the Discovery and Sanctions Subcommittee.

The proposed amendments to *R*. 4:17-5 follow.

4:17-5. Objections to Interrogatories

(a) [Objections to Questions; Motions. A party upon whom interrogatories are served who objects to any questions propounded therein may either answer the question by stating, "The question is improper" or may, within 20 days after being served with the interrogatories, serve a notice of motion, to be brought on for hearing at the earliest possible time, to strike any question, setting out the grounds of objection. The answering party shall make timely answer, however, to all questions to which no objection is made. Interrogatories not stricken shall be answered within such unexpired period of the 60 days prescribed by *R*. 4:17-4(b) as remained when the notice of motion was served or within such time as the court directs. The propounder of a question answered by a statement that it is improper may, within 20 days after being served with the answers, serve a notice of motion to compel an answer to the question, and, if granted, the question shall be answered within such time as the court directs.]

General Objections. General objections to the interrogatories as a whole are not permitted and shall be disregarded by the court and adverse parties.

(b) Specific Objections. A party served with interrogatories who objects to any specific question propounded therein may either state with specificity the ground of objection and answer the question subject to the stated objection, or, within 20 days after being served with the interrogatories, serve a notice of motion returnable at the earliest possible time to strike any question setting forth the grounds of the objection. The answering party shall, however, answer all questions not objected to as herein provided. The propounder of the question objected to may, within 20 days after service of the answer, move to strike the objection and compel an answer. Questions not stricken or to which an answer is compelled shall be answered within the time fixed by the court.

[(b)](c) …no change.

[(c)](d) …no change.

[(d)](e) [Costs and Fees] Award of Expenses on Motion. [If the court finds that a motion made pursuant to this rule was made frivolously or for the purpose of delay or was necessitated by action of the adverse party that was frivolous or taken for the purpose of delay, the court may order the offending party to pay the amount of reasonable expenses, including attorney's fees, incurred by the other party in making or resisting the motion.] The provisions of *R.* 4:23-1(c) apply to expenses incurred on motions made pursuant to this rule.

Note: Source — *R.R.* 4:23-8 (first, second, third, fourth and seventh sentences). Paragraph (c) adopted July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended, new paragraph (b) added, former paragraph (b) becomes new paragraph (c), former paragraph (c) becomes new paragraph (d), and former paragraph (d) becomes new paragraph (e) as amended _____ to be effective _____.

M. Proposed Amendments to *R.* 4:18-1 — Production of Documents

In conjunction with its recommendation to recommend a prohibition against general objections to interrogatories in *R.* 4:17-5, the Committee also agreed that the prohibition should be included in *R.* 4:18-1 and that the rule should require a certification that all documents relevant to the request were produced. This matter had been initially considered by the Discovery Subcommittee, which unanimously recommended that *R.* 4:18-1(b) be restructured to address four aspects of the procedure for production of documents: (1) the procedure for the request; (2) the procedure for response to the request; (3) the continuing obligation with respect to the request; and (4) the procedure for dealing with objections and the failure to respond. The restructuring is intended to clarify and segregate the specific subparts of the rule. The Committee endorsed this proposal. Additionally, the subcommittee drafted a form certification to be completed by the person fulfilling the document request. The Committee rejected the proposed form certification as being overly complicated. The Committee agreed that it would be sufficient for the individual to certify that, as of that date, the production is complete and accurate to the best of his/her knowledge and information, based on either personal knowledge or information provided by others. The Committee proposes that the language of the certification be included in the rule.

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

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

(a) …no change.

(b) Procedure; Continuing Obligation; Failure to Respond; Objections; Motions.

(1) Procedure for Request. The request may, without leave of court, be served on the plaintiff after commencement of the action and on any other party with or after service of the summons and complaint on that party. A copy of the request shall also be simultaneously served on all other parties to the action. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

(2) Procedure for Response. The party on whom the request is served shall serve a written response within 35 days after the service of the request, except that a defendant may serve a response within 50 days after service of the summons and complaint on that defendant. On motion, the court may allow a shorter or longer time. The written response[, without documentation annexed but which shall be made available to all parties on request, shall be served by the party to whom the request was made on all other parties to the action. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the reasons for objection. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms

for producing electronically stored information or if no form was specified in the request, the responding party shall state the form or forms it intends to use. The party submitting the request may move for an order of dismissal or suppression or an order to compel pursuant to *R*. 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. If a party who has furnished a written response to a request to produce or who has supplied documents in response to a request to produce thereafter obtains additional documents that are responsive to the request, an amended written response and production of such documents, as appropriate, shall be served promptly.] shall be made by the party upon whom it is served if an individual, or, if a governmental, commercial, or charitable entity, by an officer or agent thereof. The person making the response shall swear or certify in the form prescribed by paragraph (c) of this rule that it is complete and accurate based on personal knowledge and/or upon information if provided by others, whose identity and source of knowledge shall be disclosed. The written response shall be served on the requesting party and a copy on all other parties. The written response shall either include the requested documents or other material or state, with respect to each item or category, that inspection and related activities will be permitted as requested. If the written response provides documents to the requesting party, those documents shall be provided to or made available to any other party upon request.

Unless the parties otherwise agree, or the court otherwise orders:

[(1)](A) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

[(2)](B) if a request does not specify the form or forms for producing electronically stored information, a responding party shall produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

[(3)](C) a party need not produce the same electronically stored information in more than one form.

(3) Continuing Obligation. If a party who has furnished a written response to a request to produce or who has supplied documents in response to a request to produce thereafter obtains additional documents that are responsive to the request, a supplemental written response and production of such documents, as appropriate, shall be served promptly.

(4) Objections; Failure to Respond; Motions. General objections to the request as a whole are not permitted and shall be disregarded by the court and adverse parties. The party upon whom the request is served may, however, object to a request on specific grounds and, if on the ground of privilege or accessibility of electronically stored information, the objection shall be made in accordance with *R*. 4:10-2(e) and (f) respectively. The requesting party may move for an order of dismissal or suppression or an order to compel pursuant to *R*. 4:23-5 with respect to any objection to or other failure to respond to the request or any part thereof or any failure to permit inspection as requested. The provisions of *R*. 4:23-1(c) apply to the award of expenses incurred in relation to motions made pursuant to this rule.

(c) Certification or Affidavit of Completeness. The person responding to the request shall submit with the response a certification stating or affidavit averring as follows:

I hereby certify (or aver) that I have reviewed the document production request and that I have made or caused to be made a good faith search for documents responsive to the request. I further certify (or aver) that as of this date, to the best of my knowledge and information, the

production is complete and accurate based on ( ) my personal knowledge and/or ( ) information provided by others. The following is a list of the identity and source of knowledge of those who provided information to me:

(d) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land. Pre-litigation discovery within the scope of this rule may also be sought by petition pursuant to *R.* 4:11-1.

Note: Source — *R.R.* 4:24-1. Former rule deleted and new *R.* 4:18-1 adopted July 14, 1972 to be effective September 5, 1972; rule caption and paragraph (c) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a) and (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (b) amended July 12, 2002 to be effective September 3, 2002; caption and paragraphs (a) and (b) amended July 27, 2006 to be effective September 1, 2006; paragraph (b) amended, new paragraph (c) added, and former paragraph (c) becomes new paragraph (d) _____ to be effective _____.

N. Proposed Amendments to *R.* 4:24-1 — Time for Completion of Discovery

The Civil Presiding Judges and Civil Division Managers raised two issues concerning rule amendments recommended and adopted during the last rules cycle:

1. In a prior iteration, *R.* 4:24-1(c) mandated that orders for an extension of discovery describe the discovery to be completed. In the last rules cycle, the Discovery Subcommittee recommended, the Committee endorsed and the Supreme Court adopted an amendment to *R.* 4:24-1(c) to require the court to enter an order extending discovery for good cause shown upon the restoration of a pleading dismissed or suppressed pursuant to *R.* 1:13-7 or *R.* 4:23-5(a)(1), with the order specifying the discovery to be completed and the time for completion. As part of that rule amendment, the requirement that the order describe the discovery to be completed was changed from the mandatory "shall" to the permissive "may." The Civil Presiding Judges and Civil Division Managers requested that the language be changed back to mandate the inclusion of a description of the discovery to be completed.

2. The amendments to *R.* 4:24-1(c) that were adopted in the last rules cycle address the entry of an order extending discovery when a pleading has been restored. As the rule currently reads, it appears that the last two sentences of subsection (c), addressing the extension order and the prohibition of a further extension of discovery unless exceptional circumstances are shown, apply only when a pleading has been restored. It was requested that the rule be amended to clarify that the contents of the extension order and the limitation on further extensions apply to all cases, not just those where a pleading has been restored.

The Committee agreed with the suggestions but recognized that the drafting issue had to address two situations — one in which the pleading is restored following a dismissal under *R*. 1:13-7 or *R*. 4:23-5(a)(1) and where the extent and degree of outstanding discovery may not be known by the restored party, and the other in which the pleading is restored following a showing of good cause and where the outstanding discovery is known. In the first case, the Committee agreed that the order extending discovery may specify the discovery to be completed. In the second situation, the Committee determined that the order extending discovery must specify the discovery to be completed. Accordingly, the Committee proposes amendments to *R*. 4:24-1(c) to clarify what may and what must be contained in the order extending discovery in both these situations.

The Committee further proposes to amend the rule to allow motions to extend discovery to be filed and served prior to the discovery end date rather than to require such motions to be made returnable before that date, as now.

See Section II.K. of this Report for proposed amendments to *R*. 4:24-1 that the Committee does not recommend.

The proposed amendments to *R*. 4:24-1 follow.

4:24-1. Time for Completion of Discovery

(a) …no change

(b) …no change

(c) Extensions of Time. The parties may consent to extend the time for discovery for an additional 60 days by stipulation filed prior to the expiration of the discovery period. If the parties do not agree or a longer extension is sought, a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases and with the designated managing judge in Track IV cases, and [made returnable] filed and served prior to the conclusion of the applicable discovery period. The movant shall append to such motion copies of all previous orders granting or denying an extension of discovery or a certification stating that there are none. On restoration of a pleading dismissed pursuant to *R.[ule]* 1:13-7 or *R.[ule]* 4:23-5(a)(1) [or if good cause is otherwise shown,] the court shall enter an order extending discovery and specifying the date by which discovery shall be completed and may describe the discovery to be completed. If the time for discovery is extended for other good cause, [T]the [extension] court's order [may] shall specify the date by which discovery shall be completed and describe the discovery to be completed. Any order of extension may include [and] such other terms and conditions as may be appropriate. No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.

(d) … no change.

Note: Source — *R.R.* 4:28(a)(d); amended July 13, 1994 to be effective September 1, 1994; amended January 21, 1999 to be effective April 5, 1999; caption amended, text amended and designated as paragraph (a), new paragraphs (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (d) adopted February 26, 2001 to be effective immediately; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 27, 2006 to be effective September 1, 2006; paragraphs (b)

and (c) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) amended _____ to be effective _____.

O. Proposed Amendments to *R.* 4:36-3 — Trial Calendar

An Assignment Judge pointed out that there may be some confusion with regard to how this rule is read and applied. Subsection (b) — Adjournments, Generally — deals with an initial request for an adjournment to accommodate a scheduling conflict or the unavailability of an attorney, a party or a witness. Presumably, "witness" includes expert witnesses. Subsection (c) — Adjournments, Expert Unavailability— deals only with expert witnesses. It states, "[i]f the reason stated for the initial request for an adjournment was the unavailability of an expert witness…", and seems to imply that if the initial request for an adjournment was based on something other than the unavailability of a witness, the rest of the sentence does not apply. Thus, one could make a subsequent request for an adjournment, this time based on the unavailability of a witness, and the exceptional circumstances standard as well as the requirement that the expert appear would not apply. He suggested that the first sentence of (c) be amended to read, "If the reason stated for a prior request for an adjournment was the unavailability of an expert witness…" Such an amendment would then make any request for an adjournment based on witness unavailability, not just the initial one, subject to the requirements of subsection (c).

The Committee agreed with the proposal to change "initial" request to "prior" request for an adjournment, thus eliminating an unintended loophole that would have allowed a party to make subsequent requests for adjournments based on the unavailability of an expert witness and circumvent the exceptional circumstances standard and the requirement that the witness appear if the initial request for an adjournment was not based on the witness's unavailability.

The proposed amendments to *R.* 4:36-3 follow.

4:36-3. Trial Calendar

(a) …no change.

(b) …no change.

(c) Adjournments, Expert Unavailability. If the reason stated for [the initial] a prior request for an adjournment was the unavailability of an expert witness, no further adjournment request based on that expert's unavailability shall be granted, except upon a showing of exceptional circumstances, but rather that expert shall be required to appear in person or by videotaped testimony taken pursuant to *R*. 4:14-9 or, provided all parties consent, the expert's *de bene esse* deposition shall be read to the jury in lieu of the expert's appearance. If appropriate, given the circumstances of the particular case, the court may order that no further adjournments will be granted for the failure of any expert to appear.

Note: Adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (c) adopted September 12, 2000 to be effective immediately; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 27, 2006 to be effective September 1, 2006; paragraph (c) amended _____ to be effective _____.

P. Proposed Amendments to *R.* 4:42-9 — Counsel Fees

Judge Pressler brought the question of counsel fees for protesters in strategic litigation against public participation (SLAPP) suits to the Committee's attention. SLAPP suits are employed by businesses to stifle the exercise by protesting citizens of First Amendment rights to free speech and to petition government for redress. The lawsuits against protesters allege causes of action sounding in defamation, various business torts, conspiracy and nuisance. Although SLAPP suits are often dismissed on the ground that the activities of the protesters are protected by the First Amendment, such suits are nonetheless effective to the extent that they typically require the protester-defendants to incur very substantial counsel fees. Recently, the Supreme Court held that SLAPP plaintiffs are protected if they brought the suit on advice of counsel and that counsel giving the advice is protected unless proved to have been actuated by malice. *See LoBiondo v. Schwartz* (*LoBiondoII*), 199 *N.J.* 62 (2009). The protester-defendants were vindicated on the merits, but were left without a remedy for the litigation expenses and other damages. Judge Pressler suggested that *R.* 4:49-9(a) be amended to provide that if a suit against SLAPP defendants is dismissed on First Amendment grounds, the protesters will be entitled to an award of all costs of suit, including attorney's fees. The Committee agreed with the proposal.

See Section I.V. of this Report for a housekeeping amendment to *R.* 4:64-1 that the Committee recommends.

The proposed amendments to *R.* 4:42-9 follow.

4:42-9 [Counsel] Attorney's Fees

(a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except

(1) …no change.

(2) …no change.

(3) …no change.

(4) …no change.

(5) In an action to foreclose a tax certificate or certificates, the court may award [a counsel] attorney's fees not exceeding $500 per tax sale certificate in any *in rem* or *in personam* proceeding except for special cause shown by affidavit. If the plaintiff is other than a municipality no [counsel] attorney's fees shall be allowed unless prior to the filing of the complaint the plaintiff shall have given not more than 120 nor fewer than 30 days' written notice to all parties entitled to redeem whose interests appear of record at the time of the tax sale, by registered or certified mail with postage prepaid thereon addressed to their last known addresses, of intention to file such complaint. The notice shall also contain the amount due on the tax lien as of the day of the notice. A copy of the notice shall be filed in the office of the municipal tax collector.

(6) …no change.

(7) …no change.

(8) In all cases where [counsel] attorney's fees are permitted by statute.

(9) In a SLAPP suit (strategic litigation against public participation) which terminates in favor of the defendant on the ground that the activity complained of is protected by the free

speech clause or the right to petition clause of the First Amendment of the federal and state constitutions.

(b) …no change.

(c) …no change.

(d) …no change.

Note: Source — *R.R.* 4:55-7(a) (b) (c) (d) (e) (f), 4:55-8, 4:98-4(c). Paragraphs (a) and (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)(1) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a)(1) and (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended January 19, 1989 to be effective February 1, 1989; paragraph (a)(4) amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(5) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a)(1), (2) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(5) amended June 28, 1996 to be effective September 1, 1996; paragraph (a)(1) amended January 21, 1999 to be effective April 5, 1999; paragraph (a)(5) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(3) amended July 27, 2006 to be effective September 1, 2006; paragraphs (a)(5) and (8) amended, and new paragraph (a)(9) added _____ to be effective _____.

Q. Proposed Amendments to *R.* 4:58 — Offer of Judgment

The Offer of Judgment Subcommittee was reconstituted to consider several issues regarding offer of judgment procedures:

1. The Committee asked the subcommittee to review the offer of judgment rule as it applies to the situation where the offer meets the standard for relief when compared to the jury verdict, but is less than the 120% threshold of the final judgment when molded to the limit of an insurance policy. The subcommittee determined that the issue arises most frequently in connection with UM/UIM cases, and then only when the insured has made an offer of judgment at or below policy limits. If the rule applies to the judgment, and not to the jury's verdict, the insurer has little incentive for settlement since its exposure cannot exceed the molded judgment. The subcommittee agreed that the rule should be amended to permit comparison of the jury award to the offer of judgment, but that the remaining conditions for recovery of attorney's fees set forth in *R.* 4:58-2 should remain the same, including the 20% spread contained in that rule.

The Committee endorsed the recommendation of the subcommittee to amend *R.* 4:58-2.

2. The subcommittee reviewed a proposal from a practitioner to clarify the language of *R.* 4:58-2(a)(3) which requires, under specified circumstances, an award of "a reasonable attorney's fee, <u>which shall belong to the client</u>, for such subsequent services as are compelled by the non-acceptance" of the offer of judgment (emphasis added). Research revealed no reason for the phrase and the subcommittee proposed to eliminate it, leaving the disposition of the funds up to

the discretion of the court or to negotiations between the parties and their attorneys.

The Committee agreed with the subcommittee's position.

3. The subcommittee discussed the issue raised in *Negron v. Melchiorre*, 389 *N.J. Super*. 70 (2006), *certif. denied*, 190 *N.J*. 256 (2007) regarding the application/survival of the offer of judgment when mistrials have occurred. In that case, the Appellate Division held that the offer of judgment survived two mistrials. A majority of the subcommittee was of the opinion that the rule should be amended to require renewal of the offer in the event of a retrial and proposed a rule amendment so requiring.

The Committee recognized that the passage of time and intervening events between trials warrant the refiling of an offer to put parties on notice that an offer extended but was not accepted. The Committee took the position that the onus should be on the offeror to refile the offer with notice to the parties. The Committee considered the situation where two offers were made and both met the 20% "fudge" factor when the final judgment was entered. It determined that, in such a case, the award of fees should be retroactive to the first offer. Accordingly the Committee proposes a new section to the rule to detail the effect of a new trial on a previously tendered offer of judgment. Inserting the provisions relating to a new trial requires the redesignation of current *R*. 4:58-5 as *R*. 4:58-6.

The proposed amendments to *R*. 4:58-2, new rule *R*. 4:58-5, and redesignated *R*. 4:58-6 follow.

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

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

(b) …no change.

(c) In cases in which recovery, in the absence of bad faith, cannot exceed insurance policy limits, including but not limited to UM/UIM disputes, recovery by the claimant as set forth in paragraph (a) shall be measured by considering the difference between the jury's verdict and the claimant's offer.

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

4:58-5. New Trial

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve a notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

Note: Adopted July 27, 2006 to be effective September 1, 2006; new caption and text to *R*. 4:58-5 adopted _____ to be effective _____.

4:58-[5]6. Application for Fee; Limitations

Applications for allowances pursuant to *R*. 4:58 shall be made in accordance with the provisions of *R*. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

Note: Adopted July 27, 2006 to be effective September 1, 2006; former *R*. 4:58-5 redesignated as *R*. 4:58-6 to be effective _____.

R. Proposed Amendments to *R.* 4:59-1 ─ Execution

The Committee considered several proposals to amend this rule:

1. In the last rules cycle, the Committee had recommended an amendment to *R.* 4:59-1 to indicate that the Notice to Debtor should be mailed to the debtor's residence or, if the debtor is an entity, to the debtor's principal place of business. The purpose of this proposed amendment was to clarify to whom the Notice to Debtor should be mailed when the debtor is a corporation. During the comment period, it was pointed out that, although the due process concerns of *Finberg v. Sullivan*, 634 *F.2d* 93 (3d Cir. 1981) regarding notice and an opportunity to be heard must be considered, the exemptions identified with the Notice to Debtor are not applicable to corporate entities pursuant to *N.J.S.A.* 2A:17-19. The proposed amendment was withdrawn from consideration by the Supreme Court and referred back to both this Committee and the Special Civil Part Practice Committee for further review.

The Committee revisited the issue and reiterated its concern that all debtors should be noticed of a pending execution, regardless of whether they were entitled to an exemption or not. Accordingly, the Committee recommends the inclusion of language so stating in *R.* 4:59-1.

2. A judge reported that she was receiving motions in which a judgment creditor seeks an Order that will compel a judgment debtor to permit a sheriff's officer to enter the debtor's residence to conduct an inventory of non-exempt personal property that might be available to satisfy the judgment. The judge asserted that *R.* 4:59-1 does not authorize this practice and that it is contrary to the procedure

identified in *Spiegel, Inc. v. Taylor*, 148 *N.J. Super*. 79 (Cty. Ct. 1977) that imposes a burden on the judgment creditor to identify property subject to the levy and to establish a reasonable basis for the belief that such property is actually present before an order allowing an inventory will issue. *N.J.S.A.* 2A: 17-1 requires that personal property must be levied upon before the judgment creditor can look to real estate to satisfy a judgment. The problem arises when the judgment debtor has failed to cooperate with discovery requests and the creditor needs to know what non-exempt personal property may be available before going after real estate.

The Committee members agreed that there is no authority for the sheriff to enter a debtor's residence merely to see if there is any personal property that might be sold to satisfy the judgment. On the other hand, they realized that if the debtor refuses to cooperate with discovery, it becomes impossible for the creditor to determine what property might be available to satisfy the judgment. They were of the opinion that the debtor's lack of cooperation with the post-judgment discovery process should have a consequence.

Initially, the Committee considered whether the lack of cooperation could itself be deemed a waiver of *N.J.S.A.* 2A: 17-1. Legal Services of New Jersey objected strongly to this, asserting that there is no authority that would allow a court rule to provide a waiver to a statutory provision requiring judgment creditors to exhaust the personalty of judgment debtors before executing on real estate. Legal Services alleged that virtually every other state has a statutory homestead exemption that applies to judgment executions and that *N.J.S.A.*

2A:17-1 has functioned as a *de facto* homestead exemption from collection in New Jersey. The Committee agreed with arguments advanced by Legal Services.

In considering the same issue, the Conference of Civil Presiding Judges had suggested that *R*. 4:59-1 be amended to require a motion to execute on real property accompanied by a certification listing in detail the steps taken to satisfy the debt by other means. The Committee endorsed this proposal, reasoning that such a procedure would act as an incentive to encourage the debtor's cooperation while providing a measure of protection against having a home sold for the payment of what might well be a relatively small credit card debt. Legal Services requested that the notice of motion be required to include a statement that failure to respond to the motion may result in the loss of a home and a listing of Legal Services Offices and Lawyer Referral Offices, as required by *R*. 4:4-2. The Committee supported this position and recommends that the rule be amended accordingly.

The proposed amendments to *R*. 4:59-1 follow.

4:59-1. Execution

(a) …no change.

(b) …no change.

(c) [Execution First Made Out of Property of Party Primarily Liable] Order of Property Subject to Execution; Required Motion.

(1) Execution First Made Out of Personal Property; Motion. The execution shall be made out of the judgment debtor's personal property before the judgment creditor may have recourse to the debtor's real property. If the debtor's personal property is insufficient or cannot be located, the judgment creditor shall file a motion, on notice, for an order permitting execution to be made out of real property. The motion, which shall not be joined with any other application for relief, shall be supported by a certification specifying in detail the actions taken by the judgment creditor to locate and proceed against personal property. The notice of motion shall state that if the motion is not successfully defended, the judgment debtor's real property will be subject to execution and sale. The notice shall have annexed the listing of Legal Services Offices and Lawyer Referral Offices as required by *R*. 4:4-2. No execution out of real property shall proceed unless an order granting the motion has been entered.

(2) Execution First Made Out of Property of Party Primarily Liable. If a writ of execution is issued against several parties, some liable after the others, the court before or after the levy may, on application of any of them and on notice to the others and the execution creditor, direct the sheriff or other officer that, after levying upon the property liable to execution, he or she raise the money, if possible, out of the property of the parties in a designated sequence.

(d) …no change.

(e) …no change.

(f) …no change.

(g) Notice to Debtor. Every court officer or other person levying on a debtor's property shall, on the day the levy is made, mail a notice to the last known address of the person whose assets are to be levied on stating that a levy has been made and describing exemptions from levy and how such exemptions may be claimed. The notice shall be in the form prescribed by Appendix VI to these rules and copies thereof shall be promptly filed by the levying officer with the clerk of the court and mailed to the person who requested the levy. If the clerk or the court receives a claim of exemption, whether formal or informal, it shall hold a hearing thereon within 7 days after the claim is made. If an exemption claim is made to the levying officer, it shall be forthwith forwarded to the clerk of the court and no further action shall be taken with respect to the levy pending the outcome of the exemption hearing. No turnover of funds or sale of assets may be made, in any case, until 20 days after the date of the levy and the court has received a copy of the properly completed notice to debtor.

(h) …no change.

Note: Source — *R.R.* 4:74-1, 4:74-2, 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (f), and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (e), and (g) amended July 5, 2000 to be effective September 5, 2000; paragraph (d) amended July 12, 2002 to be effective September 3,

2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (d) amended, and new paragraph (h) adopted July 27, 2006 to be effective September 1, 2006; paragraphs (a) and (f) amended July 9, 2008 to be effective September 1, 2008; paragraphs (c) and (g) amended _____ to be effective _____.

S. Proposed Amendments to *R.* 4:74-3 — Appeals from Penalties Imposed by Municipal Courts

The Committee was asked to consider whether the provision of *R.* 4:74-3 requiring, on appeal from a penalty imposed by the municipal court, the posting of cash or a bond in double the amount of the penalty was penal in nature. The Committee agreed that it appeared to be an onerous requirement. Research disclosed that the doubling requirement was in the rule (*R.* 5:2-6) at the time it was originally adopted in 1948 and, at that time, derived from a statute, *R.S.* 2:72A-25, part of the penalty enforcement statute. The doubling provision was not, however, carried over into the 2A revision, which replaced the Title 2 penalty enforcement act with *N.J.S.A.* 2A:58-1 *et seq*. That statute was repealed in 1999 and was in turn replaced by *N.J.S.A.* 2A: 58-10 to -12, which also makes no reference to a double deposit. Accordingly, there being no statutory impediment and it appearing that the doubling provision is both unfair and unnecessary, the Committee voted unanimously to replace that provision with the requirement of a deposit on appeal in the amount of the municipal court judgment plus costs.

The proposed amendments to *R.* 4:74-3 follow.

4:74-3. Appeals From Penalties Imposed by Municipal Courts

(a) Notice of Appeal; Bond or Deposit. A party appealing from a judgment of a municipal court imposing a penalty shall file a notice of appeal with the clerk of the municipal court describing the judgment, stating that an appeal is being taken therefrom to the Law Division of the Superior Court in the county of venue and stating whether or not a verbatim record was made in the municipal court. A copy of the notice of appeal shall be served upon the opposing party, and a copy filed with the deputy clerk of the Superior Court in the county of venue. On appeal from a judgment imposing a penalty, appellant shall deliver to the municipal court a deposit in cash or a bond with at least one sufficient surety, [in double the amount of the judgment;] in the amount of the judgment plus costs or if the judgment imposes no money penalty or imposes imprisonment with a money penalty, then in such sum as the court fixes, conditioned upon the prosecution of the appeal and compliance with such further order or judgment as may be entered. If the bond is forfeited, it may be prosecuted by the obligee, and if the obligee is the State, then by the State at the relation of the person authorized by law to prosecute the penalty proceeding. The appeal shall be deemed perfected upon service and filing of the notice of appeal and the delivery of the cash deposit or bond.

(b) …no change.

(c) …no change.

(d) …no change.

(e) ...no change.

(f) …no change.

(g) …no change.

Note: Source — *R.R.* 5:2-6(b). Paragraphs (a) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a)(c)(e) and (g) amended November 22, 1978 to be effective December 7, 1978; paragraphs (a) (c) and (e) amended July 11, 1979 to be effective September 10, 1979; paragraphs (a) (b) and (g) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) (c) and (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended _____ to be effective _____.

T. Proposed Amendments to Appendix II Interrogatory Forms A and A(1)

A practitioner alleged that the requirements of Uniform Interrogatories A and A(1)are duplicative and unnecessary relative to medical malpractice cases. He noted that the introductory heading to Appendix II provides that Form A uniform interrogatories are to answered by plaintiffs in all personal injury cases. At the conclusion of Form A is a statement that for medical malpractice cases, Form A(1) interrogatories must also be answered, thus requiring plaintiffs in medical malpractice cases to answer both Form A and A(1), despite the fact that all the information sought in Form A is included in A(1). The only area where there is a difference is in Form A, No.6, which asks for diagnostic tests while Form A(1) asks in question No. 19 for the dates of every treatment and examination and the nature of the medical treatment. He suggested that Form A(1) Interrogatory No. 19 could be amended to include diagnostic tests, thus eliminating the only item in Form A that is not in Form A(1). The Discovery Subcommittee considered this suggestion, agreed with the proposal and recommended amendments to the Interrogatory forms. The Committee endorsed the proposed changes. Accordingly, it is recommended that Appendix A be amended to exempt medical malpractice cases from the requirement to complete Form A currently applicable to all personal injury actions. Additionally, it is recommended that Form A(1) Interrogatory No. 19 be amended to include a new subpart regarding diagnostic tests. With that change, medical malpractice plaintiffs would be required to answer only Form A(1) interrogatories.

Proposed amendments to Appendix II Interrogatory Forms A and A(1) follow.

APPENDIX II. — INTERROGATORY FORMS

Form A. Uniform Interrogatories to be Answered by Plaintiff in All Personal Injury Cases (Except Medical Malpractice Cases): Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with *R*. 4:17-1(b)(3).

(Caption)

1. …no change.

2. …no change.

3. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

16. …no change.

17. …no change.

18. …no change.

19. …no change.

20. …no change.

21. …no change.

22. …no change.

23. …no change.

24. …no change.

TO BE ANSWERED ONLY IN AUTOMOBILE ACCIDENT CASES

25. …no change.

[FOR MEDICAL MALPRACTICE CASES, ALSO ANSWER FORM A(1)]

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

CERTIFICATION

…no change.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 23 and certification amended July 28, 2004 to be effective September 1, 2004; caption and final instruction amended _____ to be effective _____.

APPENDIX II. — INTERROGATORY FORMS

Form A(1). Uniform Interrogatories to be Answered by Plaintiff in Medical Malpractice Cases Only: Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with *R*. 4:17-1(b)(3).

(Caption)

1. …no change.
2. …no change.
3. …no change.
4. …no change.
5. …no change.
6. …no change.
7. …no change.
8. …no change.
9. …no change.
10. …no change.
11. …no change.
12. …no change.
13. …no change.
14. …no change.
15. …no change.
16. …no change.
17. …no change.

18. …no change.

19. If you were treated, attended or examined by any physician(s) or others for the injuries identified in response to Question 18, state:

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) If any diagnostic tests were performed, state the type of test performed, name and address of place where performed, date each test was performed and what each test disclosed. Attach a copy of the test results.

20. …no change.

21. …no change.

CERTIFICATION

…no change.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 9 and certification amended July 28, 2004 to be effective September 1, 2004; new paragraph 19. (e) added _____ to be effective _____.

U. Proposed Amendments to Appendix XI-M ─ Notice of Motion Enforcing Litigant's Rights; and Appendix XI-O ─ Order to Enforce Litigant's Rights

A practitioner reported to the Committee that judges were changing the mandatory "shall" to the permissive "may" with respect to the issuance of an arrest warrant in the Order in Aid of Litigant's Rights in Appendix XI─O. This appeared to violate *R.* 6:7-2(f) which mandates that the Order be in the form set forth in the Appendix. *Rule* 4:59-1(e) states, however, that "[t]he court may make any appropriate order in aid of execution," appearing to give judges discretion to change the form orders in the Appendix. It was the consensus of the Committee that "may" is more appropriate than "shall," as there were situations in which mandatory issuance of an arrest warrant would be inappropriate, such as if the defendant were in the hospital and unable to comply with the discovery request. Accordingly, the Committee voted overwhelmingly in favor of changing the language of the Order in Appendix XI-O and also in the Notice of Motion for Order Enforcing Litigant's Rights in Appendix XI-M. Proposed changes were drafted and endorsed and forwarded to the Special Civil Part (SCP) Practice Committee for its review.

In considering the Civil Practice Committee's recommendations, the SCP Practice Committee recognized that although there may be times when substitution of the word "may" for "shall" is appropriate, a change in the verbiage for every case would weaken the court's position that answers to the Information Subpoena <u>must</u> be provided and would result in inconsistent practices from county to county. It was pointed out that a battery of protections for the judgment-debtor were built into the process so that by the time the arrest warrant is actually issued it is the last resort to force compliance with the information subpoena and the court's order to enforce it. These protections include:

- A statement in the required form of the Information Subpoena itself (Appendix XI-L) warning the judgment-debtor that failure to comply with it "may result in your arrest and incarceration."

- A requirement in *R*. 6:7-2 that the Information Subpoena be served personally or simultaneously by regular and certified mail return-receipt requested.

- Requirements in *R*. 6:7-2(e) that the notice of motion to enforce litigant's rights (a) be in the form set forth in Appendix XI-M, (b) warn the debtor that s/he may be arrested and held until s/he has complied with the Information Subpoena, (c) state that a court appearance can be avoided by compliance with the Information Subpoena and (d) be served either personally or simultaneously by regular and certified mail return-receipt-requested.

- Requirements in *R*. 6:7-2 that the order to enforce litigant's rights be in the form set forth in Appendix XI-O, be served personally or simultaneously by regular and certified mail return-receipt-requested and warn the debtor that upon failure to comply with the Information Subpoena within 10 days, "the court will issue an arrest warrant."

- Requirements in *R*. 6:7-2(g) that in order to get an arrest warrant, the judgment-creditor must certify that the debtor has not complied with the order to enforce litigant's rights, that the warrant be executed only between the hours of 7:30 and 3:00 p.m. on a day when court is in session, that if the debtor was served with the notice of motion and order by mail the warrant must be executed only at the address to which they were sent and that the debtor be brought before a judge forthwith and released immediately upon the completion of the Information Subpoena. The SCP Practice Committee voted overwhelmingly <u>not</u> to support the Civil Practice Committee's recommendations and to leave the forms as currently constituted.

The Committee discussed this issue at length. The judges on the Committee were unanimously in favor of the change to the permissive "may." Several judges indicated that they routinely change the "shall" to "may" in an exercise of their discretion under *R*. 1:1-2. The judges felt that use of the mandatory "shall" was a clear impingement on their judicial discretion. Practitioners noted that not every post-judgment effort to collect a debt begins with the Information Subpoena. Some creditors already have information about bank accounts and go

right for the bank levy. In so doing, many of the protections cited by the SCP Practice Committee would not come into play. The Committee members, with few exceptions, agreed to reaffirm their recommendation to change the language from mandatory to permissive in both appendices.

The proposed recommendations to Appendices XI-M and XI-O follow.

Appendix XI-M

NOTICE OF MOTION FOR ORDER ENFORCING LITIGANT'S RIGHTS

Name:
Address:

Telephone No.:

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: SPECIAL CIVIL PART

_____ COUNTY

DOCKET NO _____
CIVIL ACTION
Notice of Motion for Order
Enforcing Litigant's Rights

Plaintiff,
_____v.
Defendant.

TO: _____. Defendant

PLEASE TAKE NOTICE that on _____. 19___ at _____ __.m, I will apply to the above-named court, located at _____, New Jersey, for and Order:

(1) Adjudicating that you have violated the litigant's rights of the plaintiff by failure to comply with the (check one) □ order for discovery, □ information subpoena served upon you;

(2) Compelling you to immediately furnish answers as required by the (check one) □ order for discovery, □ information subpoena;

(3) Directing that, if you fail to appear in court on the date written above, you [shall] <u>may</u> be arrested by an Officer of the Special Civil Part or the Sheriff and confined in the county jail until you comply with the (check one) □ order for discovery, □ information subpoena;

(4) Directing that, if you fail to appear in court on the date written above, you [shall] <u>may be held liable to</u> pay the plaintiff's attorney fees in connection with this motion;

(5) Granting such other relief as may be appropriate.

If you have been served with an information subpoena, you may avoid having to appear in court by sending written answers to the questions attached to the information subpoena to me no later than three (3) days before the court date.

I will rely on the certification attached hereto.

Date:_____

_____
Attorney for Plaintiff or Plaintiff, Pro Se

Former Appendix XI-L adopted July 14, 1992, effective September 1, 1992; redesignated as Appendix XI-M July 13, 1994, effective September 1, 1994; amended _____ to be effective _____.

APPENDIX XI-O

ORDER TO ENFORCE LITIGANT'S RIGHTS

FAILURE TO COMPLY WITH THIS ORDER MAY RESULT IN YOUR ARREST
Name: _____

Address: _____
Telephone No. _____

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, SPECIAL CIVIL PART

County
Docket No. _____

_____, Plaintiff

v.

_____, Defendant

CIVIL ACTION
ORDER TO ENFORCE LITIGANT'S RIGHTS

This matter being opened to the court by _____ on plaintiff's motion for an order enforcing litigant's rights and the defendant having failed to appear on the return date and having failed to comply with the (check one) G order for discovery previously entered in this case, G information subpoena;

It is on the _____ day of _____, 20_____, ORDERED and adjudged:

1. Defendant _____ has violated plaintiff's rights as a litigant;

2. Defendant _____ shall immediately furnish answers as required by the (check one) G order for discovery, G information subpoena;

3. If defendant _____ fails to comply with the (check one) G order for discovery, G information subpoena within ten (10) days of the certified date of personal service or mailing of this order, a warrant for the defendant's arrest [shall] <u>may</u> issue out of this Court without further notice;

4. Defendant shall pay plaintiff's attorney fees in connection with this motion, in the amount of $ _____.

_____, J.S.C.

PROOF OF SERVICE

On _____, 20___, I served a true copy of this Order on defendant _____ (check one) _____ personally, _____ by sending it simultaneously by regular and certified mail, return receipt requested to: (Set forth address)

_____

_____

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Date: _____

Note: Former Appendix XI-N adopted July 14, 1992, effective September 1, 1992; redesignated as Appendix XI-O July 13, 1994, effective September 1, 1994; amended July 12, 2002 to be effective September 3, 2002; amended July 28, 2004 to be effective September 1, 2004; amended _____ to be effective _____.

V. Housekeeping Amendments

R. 4:4-4 — to correct an incorrect citation to the rule referencing the affidavit of diligent inquiry.

R. 4:4-5 — to correct the internal numbering of the subsections of the rule.

R. 4:6-2 — to clarify that some defenses must first be asserted in an answer before they can be raised in a motion.

R. 4:64-1(f) — to clarify that the notice to parties must be in the form of a notice of motion.

Appendix XII-D — Writ of Execution — to replace outdated references to "CR" with current court rule citations.

Rules 4:21A-4(f), 4:23-5(a)(1), 4:23-5(a)(3), 4:32-2(h), 4:42-9(a)(5), 4:42-9(a)(8) and 4:42-11(a) to replace the terms "counsel fees" with "attorney's fees" for clarity and uniformity and to mirror the federal rules, as recommended by the Sanctions Subcommittee.

The proposed amendments to *Rules* 4:4-4, 4:4-5, 4:6-2, 4:64-1(f) and Appendix XII-D, and to *Rules* 4:21A-4(f), 4:23-5(a)(1), 4:23-5(a)(3), 4:32-2(h), 4:42-9(a)(5), 4:42-9(a)(8), and 4:42-11(a) follow.

4:4-4. Summons; Personal Service; *In Personam* Jurisdiction

Service of summons, writs and complaints shall be made as follows:

(a) …no change.

(b) Obtaining *In Personam* Jurisdiction by Substituted or Constructive Service.

(1) By Mail or Personal Service Outside the State. If it appears by affidavit satisfying the requirements of *R*. 4:4-5[(c)(2)](b) that despite diligent effort and inquiry personal service cannot be made in accordance with paragraph (a) of this rule, then, consistent with due process of law, *in personam* jurisdiction may be obtained over any defendant as follows:

(A) …no change.

(B) …no change.

(C) …no change.

(2) … no change.

(3) …no change.

(c) …no change.

Note: Source — *R.R.* 4:4-4. Paragraph (a) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (b) amended July 14, 1972 to be effective September 5, 1972; paragraph (f) amended July 15, 1982 to be effective September 13, 1982; paragraph (e) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a), (f) and (g) amended November 5, 1986 to be effective January 1, 1987; paragraph (i) amended November 2, 1987 to be effective January 1, 1988; paragraph (e) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (b) amended July 14, 1992 to be effective September 1, 1992; text deleted and new text substituted July 13, 1994 to be effective September 1, 1994; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraphs (a)(3), (b)(1)(A), (b)(1)(C), and (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (a) amended July 9, 2008 to be effective September 1, 2008; paragraph (b)(1) amended _____ to be effective _____.

4:4-5. Summons; Service on Absent Defendants; *In Rem* or Quasi *In Rem* Jurisdiction

(a) Methods of Obtaining *In Rem* Jurisdiction. Whenever, in actions affecting specific property, or any interest therein, or any res within the jurisdiction of the court, or in matrimonial actions over which the court has jurisdiction, wherein it shall appear by affidavit of the plaintiff's attorney or other person having knowledge of the facts, that a defendant cannot, after diligent inquiry as required by this rule, be served within the State, service may, consistent with due process of law, be made by any of the following four methods:

[(a)](1) personal service outside this State as prescribed by *R*. 4:4-4(b)(1)(A) and (B); or

[(b)](2) service by mail as prescribed by *R*. 4:4-4(b)(1)(C); or

[(c)](3) by publication of a notice to absent defendants once in a newspaper published or of general circulation in the county in which the venue is laid; and also by mailing, within 7 days after publication, a copy of the notice as herein provided and the complaint to the defendant, prepaid, to the defendant's residence or the place where the defendant usually receives mail, unless it shall appear by affidavit that such residence or place is unknown, and cannot be ascertained after inquiry as herein provided or unless the defendants are proceeded against as unknown owners or claimants pursuant to *R.* 4:26-5(c). If defendants are proceeded against pursuant to *R.* 4:26-5(c), a copy of the notice shall be posted upon the lands affected by the action within 7 days after publication. The notice of publication to absent defendants required by this rule shall be in the form of a summons, without a caption. The top of the notice shall include the docket number of the action, the court, and county of venue. The notice shall state briefly:

[(1)](A) the object of the action the name of the plaintiff and defendant followed by *et al*., if there are additional parties, the name of the person or persons to whom the notice is addressed, and the basis for joining such person as a defendant; and

[(2)](B) if the action concerns real estate, the municipality in which the property is located, its street address, if improved, or the street on which it is located, if unimproved, and its tax map lot and block numbers; and

[(3)](C) if the action is to foreclose a mortgage, tax sale certificate, or lien of a condominium or homeowners association, the parties to the instrument and the date thereof, and the recording date and book and page of a recorded instrument; and

[(4)](D) the information required by *R.* 4:4-2 regarding the availability of Legal Services and Lawyer Referral Services together with telephone numbers of the pertinent offices in the vicinage in which the action is pending or the property is located; or

[(d)](4) as may be provided by court order.

(b) Contents of Affidavit of Inquiry. The inquiry required by this rule shall be made by the plaintiff, plaintiff's attorney actually entrusted with the conduct of the action, or by the agent of the attorney; it shall be made of any person who the inquirer has reason to believe possesses knowledge or information as to the defendant's residence or address or the matter inquired of; the inquiry shall be undertaken in person or by letter enclosing sufficient postage for the return of an answer; and the inquirer shall state that an action has been or is about to be commenced against the person inquired for, and that the object of the inquiry is to give notice of the action in order that the person may appear and defend it. The affidavit of inquiry shall be made by the inquirer fully specifying the inquiry made, of what persons and in what manner, so that by the facts stated therein it may appear that diligent inquiry has been made for the purpose of effecting actual notice.

Note: Source — *R.R.* 4:4-5(a)(b)(c)(d), 4:30-4(b) (second sentence). Paragraph (c) amended July 7, 1971 to be effective September 13, 1971; paragraph (c) amended July 14, 1972

to be effective September 5, 1972; amended July 24, 1978 to be effective September 11, 1978; paragraph (b) amended November 7, 1988 to be effective January 2, 1989; paragraphs (a) (b) (c) (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (c) amended June 28, 1996 to be effective September 1, 1996; introductory paragraph amended, paragraph (c) amended, and portion of paragraph (c) relocated as closing paragraph of rule July 9, 2008 to be effective September 1, 2008; text reorganized and new captions given _____ to be effective _____.

4:6-2. How Presented

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by *R*. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by *R*. 4:28-1. If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion. Special appearances are superseded. If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by *R*. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

Note: Source — *R.R.* 4:12-2 (first, second and fourth sentences); amended _____ to be effective _____.

4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem Tax Foreclosures

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) Tax Sale Foreclosure; Strict Mortgage Foreclosures. If an action to foreclose or reforeclose a tax sale certificate in personam or to strictly foreclose a mortgage where provided by law is uncontested as defined by paragraph (c), the court, subject to paragraph (h) of this rule, shall enter an order fixing the amount, time and place for redemption upon proof establishing the amount due. The order of redemption in tax foreclosure actions shall conform to the requirements of *N.J.S.A.* 54:5-98 and *R.* 4:64-6(b). The order for redemption or notice of the terms thereof shall be served by ordinary mail on each defendant whose address is known at least 10 days prior to the date fixed for redemption. Notice of the entry of the order of redemption, directed to each defendant whose address is unknown, shall be published in accordance with *R.* 4:4-5(c) at least 10 days prior to the redemption date and, in the case of an unknown owner in a tax foreclosure action joined pursuant to *R.* 4:26-5, a copy of the order or notice shall be posted on the subject premises at least 20 days prior to the redemption date in accordance with *N.J.S.A.* 54:5-90. The court, on notice of motion to all appearing parties including parties whose answers have been stricken, may enter final judgment upon proof of service of the order of redemption as herein required and the filing by plaintiff of an affidavit of non-redemption. The Office of Foreclosure may, pursuant to *R* 1:34-6, recommend the entry of both the order for redemption and final judgment.

(g) …no change.

(h) …no change.

(i) …no change.

Note: Source — *R.R.* 4:82-1, 4:82-2. Paragraph (b) amended July 14, 1972 to be effective September 5, 1972; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; caption amended, paragraphs (a) and (b) caption and text amended, former paragraph (c) redesignated paragraph (e), and paragraphs (c), (d) and (f) adopted November 7, 1988 to be effective January 2, 1989; paragraphs (b) and (c) amended and paragraph (g) adopted July 14, 1992 to be effective September 1, 1992; paragraphs (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) caption and text amended July 12, 2002 to be effective September 3, 2002; new paragraphs (a) and (b) adopted, and former paragraphs (a), (b), (c), (d), (e), (f), and (g) redesignated as paragraphs (c), (d), (e), (f), (g), (h), and (i) July 27, 2006 to be effective September 1, 2006; paragraph (b) caption and text amended September 11, 2006 to be effective immediately; paragraphs (d) and (f) amended October 10, 2006 to be effective immediately; paragraph (d) amended July 9, 2008 to be effective September 1, 2008; paragraph (f) amended _____ to be effective _____.

Appendix XII-D

Attorney for Plaintiff
_____

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

_____ **COUNTY**

_____ Plaintiff

DOCKET NO: _____

Vs

WRIT OF EXECUTION

_____ Defendant

THE STATE OF NEW JERSEY

TO THE SHERIFF OF _____

WHEREAS, on the _____ day of _____ judgment was recovered by Plaintiff, _____ in an action in the Superior Court of New Jersey, Law Division, _____ County, against Defendant, for damages of $ _____ and costs of $ _____ ; and

WHEREAS, on _____ , the judgment was entered in the civil docket of the Clerk of the Superior Court, and there remains due thereon $_____.

THEREFORE, WE COMMAND YOU that you satisfy the said Judgment out of the personal property of the said Judgment debtor within your County; and if sufficient personal property cannot be found then out of the real property in your County belonging to the judgment debtor(s) at the time when the judgment was entered or docketed in the office of the Clerk of this Court or at any time thereafter, in whosesoever hands the same may be, and you pay the said monies realized by you from such property to _____, Esq., attorney in this action; and that within twenty-four months after the date of its issuance you return this execution and your proceedings thereon to the Clerk of the Superior Court of New Jersey at Trenton.

WE FURTHER COMMAND YOU, that in case of a sale, you make your return of this Writ with your proceedings thereon before this Court and you pay to the Clerk thereof any surplus in your hands within thirty days after the sale.

WITNESS, HONORABLE _____ a Judge of the Superior Court, at _____ this _____ day of _____ , 20___.

_____,CLERK

ENDORSEMENT

Judgment Amount*:	$_____
Additional Costs:	$_____
Interest thereon:	$_____
Credits:	$_____
Sheriff's Fees:	$_____
Sheriff's Commissions:	$_____
TOTAL	$_____

*"Judgment Amount" includes amount of verdict or settlement, plus pre-judgment court costs, plus any applicable statutory attorney's fee.

Post Judgment Interest applied pursuant to *R* 4:42-11 has been calculated as **simple interest**. As required by *R* 4:59-1, attached is the method by which interest has been calculated, taking into account all partial payments made by the defendant.

_____
Attorney for Plaintiff

Dated: _____ , 200__

Note: Form adopted as Appendix XII-D July 27, 2006 to be effective September 1, 2006; amended September 11, 2006 to be effective immediately; amended July 9, 2008 to be effective September 1, 2008; amended _____ to be effective _____.

4:21A-4 Conduct of Hearing

(a) ...no change.

(b) ...no change.

(c) ...no change.

(d) ...no change.

(e) ...no change.

(f) Failure to Appear. An appearance on behalf of each party is required at the arbitration hearing. If the party claiming damages does not appear, that party's pleading shall be dismissed. If a party defending against a claim of damages does not appear, that party's pleading shall be stricken, the arbitration shall proceed and the non-appearing party shall be deemed to have waived the right to demand a trial de novo. Relief from any order entered pursuant to this rule shall be granted only on motion showing good cause and on such terms as the court may deem appropriate, including litigation expenses and [counsel] attorney's fees incurred for services directly related to the non-appearance.

Note: Adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a) and (b) amended, and new paragraph (f) adopted July 5, 2000 to be effective September 5, 2000; paragraph (f) amended _____ to be effective _____.

4:23-5 Failure to Make Discovery

(a) Dismissal.

(1) Without Prejudice. If a demand for discovery pursuant to *R*. 4:17, *R*. 4:18-1, or *R*. 4:19 is not complied with and no timely motion for an extension or a protective order has been made, the party entitled to discovery may, except as otherwise provided by paragraph (c) of this rule, move, on notice, for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and stating that the moving party is not in default in any discovery obligations owed to the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. Upon being served with the order of dismissal or suppression without prejudice, counsel for the delinquent party shall forthwith serve a copy of the order on the client by regular and certified mail, return receipt requested, accompanied by a notice in the form prescribed by Appendix II-A of these rules, specifically explaining the consequences of failure to comply with the discovery obligation and to file and serve a timely motion to restore. If the delinquent party is appearing pro se, service of the order and notice hereby required shall be made by counsel for the moving party. The delinquent party may move on notice for vacation of the dismissal or suppression order at any time before the entry of an order of dismissal or suppression with prejudice. The motion shall be supported by affidavit reciting that the discovery asserted to have been withheld has been fully and responsively provided and shall be accompanied by payment of a $100 restoration fee to the Clerk of the Superior Court, made payable to the "Treasurer, State of New Jersey," if the motion to vacate is made within 30 days after entry of the order of dismissal or suppression, or a $300 restoration fee if the motion is made thereafter. If, however, the motion is not made within 90 days after entry

of the order of dismissal or suppression, the court may also order the delinquent party to pay sanctions or [counsel] attorney's fees and costs, or both, as a condition of restoration.

(2) …no change.

(3) General Requirements. All motions made pursuant to this rule shall be accompanied by an appropriate form of order. All affidavits in support of relief under paragraph (a)(1) shall include a representation of prior consultation with or notice to opposing counsel or pro se party as required by *R.* 1:6-2(c). If the attorney for the delinquent party fails to timely serve the client with the original order of dismissal or suppression without prejudice, fails to file and serve the affidavit and the notifications required by this rule, or fails to appear on the return date of the motion to dismiss or suppress with prejudice, the court shall, unless exceptional circumstances are demonstrated, proceed by order to show cause or take such other appropriate action as may be necessary to obtain compliance with the requirements of this rule. If the court is required to take action to ensure compliance or the motion for dismissal or suppression with prejudice is denied because of extraordinary circumstances, the court may order sanctions or [counsel] attorney's fees and costs, or both. An order of dismissal or suppression shall be entered only in favor of the moving party.

(b) …no change.

(c) …no change.

Note: Source — *R.R.* 4:23-6(c)(f), 4:25-2 (fourth sentence); paragraph (a) amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) caption amended and subparagraphs (a)(1) captioned and amended, and (a)(2) and (3) captioned and adopted, June 29, 1990 to be effective September 4, 1990; paragraph (a)(3) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(1) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; caption amended, paragraphs (a)(1) and (a)(2) amended, and new paragraph (a)(4) adopted July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended and new paragraph (c) added July 12, 2002 to be effective September 3, 2002; paragraph (a)(1)

amended and paragraph (a)(4) deleted July 27, 2006 to be effective September 1, 2006; paragraphs (a)(1) and (a)(2) amended July 9, 2008 to be effective September 1, 2008; paragraphs (a)(1) and (3) amended _____ to be effective _____.

4:32-2 Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in the Class; Multiple Classes and Subclasses

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(f) …no change.

(g) …no change.

(h) [Counsel] Attorney's Fees and Litigation Expenses. In an action certified as a class action, an application for the award of [counsel] attorney's fees and litigation expenses, if fees and costs are authorized by law, rule, or the parties' agreement, shall be made in accordance with *R*. 4:42-9. Notice of the motion shall be served on all parties. A motion by class counsel shall be directed to class members in a reasonable manner. A party from whom payment is sought as well as any class member may object to the motion.

Note: Effective September 8, 1969; paragraphs (b) and (c) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; caption amended, paragraphs (a) and (d) caption and text amended, paragraph (b) amended, former R. 4:32-4 deleted and readopted as amended as new paragraph (e), former R. 4:32-3 deleted and adopted as reformatted as new paragraph (f), and new paragraphs (g) and (h) adopted July 27, 2006 to be effective September 1, 2006, paragraph (a) amended October 9, 2007, to be effective immediately; paragraph (e)(4) amended July 9, 2008 to be effective September 1, 2008; paragraph (h) amended _____ to be effective _____.

4:42-9 [Counsel] Attorney's Fees

(a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except

(1) …no change.

(2) …no change.

(3) …no change.

(4) …no change.

(5) In an action to foreclose a tax certificate or certificates, the court may award [a counsel] attorney's fees not exceeding $500 per tax sale certificate in any *in rem* or *in personam* proceeding except for special cause shown by affidavit. If the plaintiff is other than a municipality no [counsel] attorney's fees shall be allowed unless prior to the filing of the complaint the plaintiff shall have given not more than 120 nor fewer than 30 days' written notice to all parties entitled to redeem whose interests appear of record at the time of the tax sale, by registered or certified mail with postage prepaid thereon addressed to their last known addresses, of intention to file such complaint. The notice shall also contain the amount due on the tax lien as of the day of the notice. A copy of the notice shall be filed in the office of the municipal tax collector.

(6) …no change.

(7) …no change.

(8) In all cases where [counsel] attorney's fees are permitted by statute.

(9) In a SLAPP suit (strategic litigation against public participation) which terminates in favor of the defendant on the ground that the activity complained of is protected by the free speech clause or the right to petition clause of the First Amendment of the Constitution.

(b) …no change.

(c) …no change.

(d) …no change.

Note: Source — *R.R.* 4:55-7(a) (b) (c) (d) (e) (f), 4:55-8, 4:98-4(c). Paragraphs (a) and (b) amended July 7, 1971 to be effective September 13, 1971; paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a)(1) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a)(1) and (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended January 19, 1989 to be effective February 1, 1989; paragraph (a)(4) amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(5) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a)(1), (2) and (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(5) amended June 28, 1996 to be effective September 1, 1996; paragraph (a)(1) amended January 21, 1999 to be effective April 5, 1999; paragraph (a)(5) amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(3) amended July 27, 2006 to be effective September 1, 2006; paragraphs (a)(5) and (8) amended, and new paragraph (a)(9) added to be effective .

4:42–11 Interest; Rate on Judgments; in Tort Actions

(a) Post Judgment Interest. Except as otherwise ordered by the court or provided by law, judgments, awards and orders for the payment of money, taxed costs and [counsel] attorney's fees shall bear simple interest as follows:

(i) …no change.

(ii) …no change.

(iii) …no change.

(b) …no change.

Note: Adopted December 21, 1971 to be effective January 31, 1972. Paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (a) and (b) amended July 29, 1977 to be effective September 6, 1977; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended November 2, 1987 to be effective January 1, 1988; paragraph (a)(ii) amended and paragraph (a)(iii) added June 28, 1996 to be effective September 1, 1996; paragraph (b) amended April 28, 2003 to be effective July 1, 2003; paragraph (a) amended _____ to be effective _____.

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to *R.* 1:6-2 — Form of Motion; Hearing

An attorney noted that judges often add clauses or otherwise change the language of proposed forms of order submitted with an uncontested motion. He suggested that language be added to *R*. 1:6-2 to prohibit judges from adding additional relief to the order either absent extraordinary circumstances or on notice to the parties that additional relief is being contemplated, thereby providing the non-moving party an opportunity to oppose the motion and/or to be heard at oral argument. The Committee acknowledged that, while many of the additions or alterations to a proposed form of order are innocuous, the non-moving party nonetheless might object to the terms of an order as changed by the court. The members agreed that if such an amendment were to be proposed, it should be limited to substantive changes to the proposed form of order. In further discussions, however, the Committee recognized that the problem of a changed form of order occurs almost exclusively in discovery motions, suggesting that the issue is idiosyncratic rather than systemic, and concluded that a rule amendment was not the most appropriate way to address the issue.

See Section IV.B. of this Report for a discussion of the Committee's alternate recommendation.

See Section I.B. of this Report for proposed amendments to *R*. 1:6-2 that the Committee recommends.

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

A practitioner requested that *R.* 1:11-2(a) be amended to eliminate the requirement of filing a substitution of attorney for post-judgment applications that are handled by an attorney other than the one who handled the matter to judgment. He noted that parties often change attorneys subsequent to final judgment for purposes of post-judgment applications or responses, especially in family matters and probate situations. He suggested that a new subsection be added to the rule eliminating the requirement of filing a substitution of attorney after the time for filing an appeal from the final judgment had passed or a post-judgment order in the matter had expired. The Committee declined to endorse this proposal, noting that the automated docketing system could not enter the name of the new attorney without a filed substitution and that the rule as currently constituted does not impose an onerous obligation on attorneys by requiring the filing of a substitution.

C. Proposed Amendments to *Rules* 2:2-3 and 2:2-4 — re: Interlocutory Appeals

A practitioner requested that *R*. 2:2-3 be amended to add a standard for granting leave to appeal from an interlocutory order in order to provide uniformity and guard against decisions that cause the parties to incur increased costs and waste of judicial resources as a result of duplicative and unnecessary trials. He suggested that language be added to permit appeals "from interlocutory orders or judgments of the Superior Court trial divisions where decision on an issue presented may substantially assist in the processing or termination of the case." He further suggested that the language of *R*. 2:2-4 be incorporated into *R*. 2:2-3. This matter was referred to the Appellate Division Rules Committee (ADRC) which concluded that there was no need to deviate from the long standing "interests of justice" standard of review, especially since that standard has been interpreted in a substantial body of case law. The Committee endorsed the position of the ADRC. No amendments to *Rules* 2:2-3 and 2:2-4 are recommended.

See Section I.F. of this report for proposed amendments to *R*. 2:2-3 that the Committee recommends.

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

In footnote 7 of *Grow Company, Inc v. Chokshi*, 403 *N.J. Super*. 443, 463(App. Div. 2008), the Appellate Division asked the Civil Practice Committee to consider a mechanism by which attorneys would be obligated to bring to the appellate court's attention any questions or uncertainties about its jurisdiction over a matter currently on appeal. In the *Chokshi* case, the trial judge had granted partial summary judgment to the defendants and held that the defendant was entitled to attorney's fees. He did not quantify the amount due, however, and dismissed the claim without prejudice to its being renewed at a subsequent proceeding. Both parties appealed. The Appellate Division concluded that the disposition of the claim for attorney's fees was an interlocutory, not final, order and commented that the circumstances of the case should have been brought to its attention. In the footnote, the court notes that as officers of the court attorneys are obligated to inform the court of any jurisdictional irregularities and suggests that it might be beneficial to amend the rules to require litigants to provide a statement of appellate jurisdiction, mirroring the provisions of the Federal Rules of Appellate Procedure, *R*. 2:8(a)(4). This issue was referred to the Appellate Division Rules Committee (ADRC). The ADRC expressed its ongoing concern with litigants' attempts to pursue appeals from orders which are not final without seeking leave. It concluded, however, that this issue was being adequately addressed by the revised Appellate Division Case Information Statement and by the internal review procedures by the Appellate Division clerk's office. The Committee agreed with the ADRC's position and, accordingly, does not recommend an amendment to *R*. 2:6-2.

E. Proposed Amendments to *R.* 2:9-6 — Supersedeas Bond; Exceptions

The Committee was presented with several issues regarding supersedeas bonds:

1. An attorney posed two questions on the rules governing supersedeas bonds. First, he asked if *R*. 2:9-6 should be amended to state the purpose of a supersedeas bond, *i.e*. to stay proceedings during the pendency of an appeal. He asserted that clarification is needed to explain that the stay, especially of collection processes, is to protect judgment-creditors from situations in which, during the period of appellate review, a judgment-debtor may transfer assets or grant a security interest in its assets or in which another of the judgment-debtor's creditors secures an attachment, execution, or judgment lien on the judgment-debtor's property that outranks that of the judgment-creditor. The Committee considered this proposition, but determined it to be unnecessary. The Committee looked to *R*. 2:9-5 which states clearly that a supersedeas bond, pursuant to *R*. 2:9-6, acts to stay the judgment or order in a civil action adjudicating liability for a specified sum of money during appeal proceedings. Accordingly, it found there was no need to further amend *R*. 2:9-6 to include this provision.

The attorney's second question was whether the requirement of *R*. 2:9-6 to condition the supersedeas bond on satisfaction of the judgment in full, including post-judgment interest, is too harsh, possibly forestalling some legitimate appeals because the cash amount or surety bond premium is too costly. He suggested that some flexibility should be built into the supersedeas bond amounts. In considering this suggestion, the Committee noted that the rule already provides the court with discretion to fix the amount of the bond after notice on good cause

shown. Furthermore, an appellant always has the option to move to be relieved from the full amount of the bond. The Committee concluded that there was sufficient discretion built into the current rule to allow for flexibility in the fixing of the amount of the bond. The Committee took the position that a plaintiff clearly is entitled to have the judgment protected during the appeal process by the posting of a supersedeas bond, but concluded that the rule, as currently constituted, is sufficiently clear and contains adequate protections. Accordingly, no amendment is recommend.

2. The Committee was asked to review proposed bill S-2116 and provide comments on an expedited basis. S-2116 was designed to limit the amount of an appeal bond in civil actions. The Committee members expressed concern that the proposed legislation intruded on the exclusive rule-making authority of the Court to dictate its practices and procedures, in violation of *Winberry v. Salisbury*, 5 *N.J.* 240, 255 (1950), *cert. denied* 340 *U.S.* 877(1950). The Committee further noted that such a cap is unnecessary as the court rules already give a judge the discretion to fix the amount of the supersedeas bond.

Subsequent to the Committee's stated opposition to the proposed legislation, Judge Grant, Acting Director of the AOC, requested the Committee to revisit a proposal to amend *R.* 2:9-6 in order to provide more guidance as to when and how the judge's discretion might be applied in setting a bond amount and also to specify what forms of security may be presented to protect the interests of the judgment creditor during appeal. Illinois has a court rule embodying these concepts. Judge Grant asked the Committee to consider amending *R.* 2:9-6 to

incorporate some of the provisions of the Illinois rule. The Committee discussed this issue thoroughly and concluded that because the rule as currently constituted vests sufficient discretion with the court, there is no need to include the issues specifically detailed in the Illinois rule. Recognizing that the intent of a proposed rule amendment was to protect a litigant from having to forego an appeal because of the high cost of the supersedeas bond, the Committee nonetheless took the position that adequate relief is available under the language of the current rule to address issues of acceptable forms and amounts of security. Further, the Committee took the position that it is both unnecessary and unwise to attempt to delineate the judge's discretion with specificity. Additionally, the members agreed that it would be difficult to draft a rule amendment that would address all the situations in which discretion could or should be exercised. It was also noted that the interest in capping the amount of a supersedeas bond was driven by large entities such as the tobacco companies facing large judgments and the Committee was opposed to drafting a court rule in response to verdicts in specific lawsuits. The Committee was unanimous in its opposition to proposing an amendment to *R*. 2:9-6.

See Section IV.D. of this Report for a discussion of the Committee's review of S-2116.

F. Proposed Amendments to *R.* 2:12-10 — Granting or Denial of Certification

In the last rules cycle, the Committee considered a submission from a practitioner questioning why more justices were required to grant a motion for reconsideration of a denial of a petition for certification than were required to grant the petition in the first place. He pointed out that *R.* 2:12-10 allows a petition for certification to be granted on the affirmative vote of three or more justices, whereas *R.* 2:11-6 provides that a majority of the Court must agree to grant a motion for reconsideration of a denial of a petition for certification. The Committee took the position that it is intellectually consistent to require more justices to approve a motion for reconsideration of a denial of a petition for certification than to grant a petition for certification, reasoning that if three justices voted to grant the petition on a motion for reconsideration, those same three justices would have voted to grant the petition in the first place. The Committee also found it logical to require more votes to overturn a matter than to grant it. Accordingly, the Committee declined to amend the rule.

The same practitioner, taking exception to the Committee's decision not to recommend the proposed amendment and to the reasoning behind that position, requested the Committee to revisit the issue. He suggested that the Committee's statement that the same three judges would have voted to grant the petition in the first place does not take into consideration that a justice may change his or her mind either on further reflection or because the facts and law of the case are cast in a new light. He also objected to the Committee's finding it logical to require more votes to overturn a matter than to grant it. He asserted that the requirement has no basis in logic and lacks consistency. Consequently, he asked the Committee to consider the issue anew.

The Committee revisited the question, acknowledging that there were merits to both sides of the argument. The rule requires only three votes to grant a petition for certification and that is

the only situation in the rules where less than a majority vote is required. A majority is required to deny a motion for reconsideration. The thought was expressed that if three votes were good enough to grant the petition, only three votes should be required to grant the motion for reconsideration. On the other hand, the Committee recognized that motions for reconsideration are generally disapproved of and are to be discouraged. Making it easier for a petitioner to succeed on a second try for certification on a motion for reconsideration does not make sense. The Committee was also of the opinion that lessening the requirement to pursue a motion for reconsideration would encourage petitioners to file a motion automatically if their petitions were denied. In consideration of these points and in deference to the Court's preference for the rule as currently constituted, the Committee reaffirmed its prior decision not to recommend an amendment to *R*. 2:12-10.

G. Proposed Amendments to *Rules* 4:10-3, 4:14-4, 4:22-1, 4:23-1, 4:23-2, 4:23-3, 4:23-4 and 4:37-4 — re: Sanctions

As part of its mandate, the Sanctions Subcommittee reviewed each of the Part IV Rules that provide for attorney's fees or sanctions. *Rules* 4:10-3, 4:14-4, 4:22-1, 4:23-1, 4:23-2, 4:23-3, 4:23-4 and 4:37-4 contain provisions for the award of reasonable expenses to the prevailing party. The subcommittee determined, and the full Committee agreed, that these rules contain adequate provisions for recompense and that no changes are necessary.

H. Proposed Amendments to *R.* 4:12-4 — Disqualification for Interest

An attorney proposed amendments to *R.* 4:12-4 expressly to permit what he characterized as a growing practice among attorneys to record video depositions themselves, *i.e.* without a third-party videographer. He indicated that the presence of a certified court reporter to take the deposition precludes any question of the veracity or accuracy of the video. He further claimed that the use of the video is cost-efficient and simple and any objection to the video can be resolved by motion to edit or bar the video, similar to *de bene esse* testimony on video. The Committee was divided on this issue. Some members felt that requiring a third-party videographer was an antiquated provision that failed to recognize the technological advances made since the rule was adopted. Similarly, members in favor of attorneys' videoing the proceeding cited the cost advantages of doing it in-house. They also claimed that having the transcript made by a certified shorthand reporter is a safeguard against any mischaracterization of the proceeding and that with ten days notice the adversary could produce a videographer of its own as well. On the other side, some members claimed that using in-house videoing presents a greater risk leading to problems and objections as to accuracy and veracity, and saw no reason to change the rule. They suggested that in-house videographers would have a built-in bias and could (even if inadvertently) film in such a way that would adversely prejudice the party being deposed. Further, they noted that the current rule is working well and that there is no need to amend it. Moreover, if it were to be amended, they feared there would be an onslaught of motions on the admissibility, veracity, prejudicial value, etc. of the videotapes. On the question of whether the rule should be amended to permit attorneys to use in-house personnel to videotape, the Committee voted 8 in favor and 13 against. Accordingly, the Committee does not recommend amending *R.* 4:12-4 at this time.

See Section I.K. of this Report for proposed amendments to *R*. 4:12-4 that the Committee recommends.

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

An attorney requested on behalf of a New Jersey based court reporting service that *R.* 4:14-6(c) be amended to provide that each party pay for its own copy of a deposition transcript. The rule, as currently constituted, states that the party taking the deposition must furnish a copy of the transcript to the witness or adverse party. This provision, as asserted by the attorney, is contrary to the federal rule [*F.R. Civ.P.* 30(f)(3)] and to the rules of other states, which provide that any party ordering a copy of the transcript shall pay for that copy. The attorney cited several reasons why the rule should be amended:

- The rule dates back to 1948 and, while originally proposed to conform to the federal rule, was revised without apparent explanation or rationale for the change.
- There is no good reason to diverge from federal practice; allocation of costs of depositions should not depend upon whether an action was filed at the federal courthouse or the state courthouse.
- Modern litigation with its multiplicity of lengthy depositions can represent a huge expense and a huge burden on the party seeking the discovery.
- New Jersey is in a small minority of states that place the burden on the party taking the deposition.
- The rule is inequitable when one side takes more depositions than the other and superfluous if both sides take approximately the same number of depositions.
- The rule encourages waste because, even if the deposition yields nothing relevant or worthwhile, the adversary is not likely to decline a free copy.
- The rule is not a fair or effective means of controlling litigation cost because the "free" copy is reflected either in direct billing, absorbed by the court reporter, or incorporated in the per page rate that court reporters charge their clients.

The attorney suggested that *R.* 4:14-6(c) be amended to mirror the federal rule, *i.e.* "When paid reasonable charges, the officer must furnish a copy of the transcript or recording to

any party or the deponent." Appended to the letter requesting the change were letters from out-of-state court reporting services submitted in support of the proposed rule amendment.

In discussing this suggestion, the Committee acknowledged that New Jersey's rule differed from the federal rule but expressed concern that the proposed amendment would create an imbalance of power in that a party with deeper pockets could order many depositions thus burdening the poorer party with the financial obligation of obtaining the transcripts at its own expense. The Committee was of the opinion that it was fairer to make the party ordering the depositions pay for them and provide a copy to the adversary at no cost. It was recognized that the court reporters were being paid to provide the adversary's copy and thus were not being adversely affected financially. The Committee further acknowledged that there is a variation in the practice of providing a copy of the transcript of a deposition to the party deposed. Some attorneys provide the copy themselves; others have the transcriber send the copy directly to the individual deposed. In either case, the copy provided to the person deposed is paid for and is thus "provided" by the party requesting the deposition. As long as the transcriber is being paid for the copies it provides by the party taking the deposition and the deposed party is being provided with a copy of the transcript at no expense to him/her, the rule is being complied with. Practitioners on the Committee saw no reason to change the current practice, which is working well. On the question of whether the rule should be changed to mirror the federal rule, the Committee voted overwhelmingly in favor of keeping the rule as is.

J. Proposed Amendments to *R.* 4:23-5 — Failure to Make Discovery

Two issues were considered:

1. The Sanctions Subcommittee recommended that *R.* 4:23-5 be amended to require the payment of reasonable expenses, including attorney's fees, to compensate the party who engages in motion practice to obtain discovery to which it is entitled under the rules, even if the sought-after discovery is provided before the date on which opposition to the motion is due. The subcommittee reasoned that non-compliance with the rules to the point where the adversary is compelled to make a motion increases the cost of litigation both in time and money. As a precondition to filing a motion, a party must make a good-faith effort to resolve the dispute. Often, *R.* 4:23-5(a)(1) motions are unopposed and a pleading is dismissed or stricken without prejudice. Frequently, a delinquent party responds to the motion by serving the requested discovery a day before the return date of the motion. Then, before the requesting party has the opportunity to determine whether the discovery produced is fully responsive, the producing party seeks to have the motion withdrawn or denied, based on the fact that the discovery request has (finally) been complied with. The moving party has incurred additional expense and fees on the motion. The subcommittee was of the opinion that it was better practice to award reasonable expenses, including fees, to the moving party when discovery is provided after the motion has been filed.

The Committee rejected this recommendation, adopting the reasoning of a minority of the subcommittee, namely, that *R.* 4:23-5 motions are a routine part of litigation practice and to shift the expenses and fees of such motions is not fair or

practical. There was concern that a single practitioner with a lower hourly rate than a lawyer with a large firm may be forced to pay the expenses of a large firm if the larger firm files a discovery motion. Furthermore, it was noted that the proposed amendments would be likely to decrease civility among practitioners and increase judicial workload on non-substantive matters, while not improving the practice of law to any significant degree.

2. A Committee member suggested that *R*. 4:23-5(a)(2) be amended to provide that a plaintiff be permitted to enter default judgment at the same time the motion to strike an answer is filed, similar to the procedure wherein a complaint is dismissed with prejudice for failure to answer interrogatories and the entry of the order granting the motion ends the case. Such an amendment would avoid the necessity of having to file additional motion or other papers to enter default judgment, but would be limited to cases where the sum due and owing is liquidated. The Committee rejected this proposal, explaining that a motion to strike an answer is the first step in obtaining a default judgment. Pursuant to *R*. 4:43-1, if an answer is stricken with prejudice, the clerk shall enter a default against the delinquent party. A final judgment by default cannot be entered simultaneously, *R*. 4:43-2. The Committee recognized that the existing court rules have contemplated the situation where an answer is stricken and have provided the process whereby a final judgment may be entered. Accordingly, the Committee does not endorse the proposal.

K. Proposed Amendments to *R.* 4:24-1 — Time for Completion of Discovery

An attorney proposed that all discovery end dates be consistent with motion days. Such a change, he argued, would benefit both the bar and the Judiciary. He claimed that under his proposal, the longest a discovery end date would be extended would be 13 days, but most extensions would not be more than a day or two. The Committee discussed this issue, noting that the different tracks for discovery may complicate what the attorney characterized as a simple calculation and that if this suggestion were adopted many cases actually be getting longer discovery periods than now provided for. The members agreed that the current system is working well and should not be altered. Accordingly, they rejected the proposal to make all discovery end dates consistent with motion days.

See Section I.N. of this Report for proposed amendments to *R.* 4:24-1 that the Committee recommends.

L. Proposed Amendments to *R.* 4:38-1 — Consolidation

The Conference of Civil Presiding Judges proposed that *R.* 4:38-1 be amended to make it clear that when cases are consolidated, the docket numbers of all the individual cases (not just the one number denoting the consolidation) should appear on all pleadings so that the court can track all the cases. In response, the Committee noted that paragraph (c) requires that, unless otherwise directed in the order for consolidation, all papers filed in the consolidated action shall include the caption and docket number of each separate action, with the earliest instituted action to be listed first. Accordingly, the Committee determined that no amendment to the rules is needed.

III. MATTERS HELD FOR CONSIDERATION

A. Proposed Amendments to *Rules* 4:74-7 and 4:74-7A — re: Civil Commitments

The Public Advocate had asked for an in-depth review and revision of the existing court rules governing the commitment of adults and children and for the development of rules governing the commitment of individuals designated as sexually violent predators. He noted that the rules have not been revised comprehensively since 1988 and that there have been case law and statutory developments since that time that should be incorporated into the court rules. He also suggested certain procedural issues that should be addressed, such as the procedures for review hearings for patients on Conditional Extension Pending Placement (CEPP). A subcommittee, chaired by Judge Allison Accurso, was established in March 2009. It is composed of Committee members and representatives from the Office of the Public Advocate, the County Adjusters, the Division of Mental Health, the Office of the Attorney General, the Division of Criminal Justice and other interested parties. The subcommittee met and began to address the issues raised by the Public Advocate.

Two events subsequently occurred that have caused the subcommittee to pause in its deliberations. The first is the signing of a settlement agreement between Disability Rights of New Jersey, Inc. (formerly, New Jersey Protection and Advocacy, Inc.) and Jennifer Velez, Commissioner of the Department of Human Services. The settlement agreement aims to ensure that individuals who are on CEPP status will be placed in the community within a defined time period. The goal is that, at the end of five years, 93% of the individuals placed on CEPP will be in that status for four months or less. The settlement was designed with the current court rule, *R.* 4:74-7, in place. The consensus was that there is no need to recommend rule changes to

incorporate the terms of the settlement agreement, although the hope is that with the changes to CEPP status, the time values in the court rule will become meaningless.

The second event was the signing into law of S-735, now P.L. 2009, c. 112, creating a new commitment status, namely, involuntary commitment to outpatient treatment. This law will go into effect incrementally, with seven as yet unidentified counties piloting the new, as yet undeveloped procedures, in August 2010. The legislation does not contemplate any changes to the hearing process, but substantial changes to the regulations, especially those dealing with the screening centers, will have to be made. These will, of necessity, affect the judicial hearing process. The Division of Mental Health is responsible for drafting regulations to implement the new law. The subcommittee determined that there is nothing in the legislation that would necessitate an immediate rule change and recognized that the process of drafting and adopting new regulations must precede any rule changes. Accordingly, it was agreed that no amendments to *R*. 4:74-7 should be proposed during this rules cycle. Instead, the matter should be carried forward and, if necessary, any future proposed rule amendments could be presented to the Supreme Court out-of-cycle.

The subcommittee will continue to work on a recommendation regarding rules governing the commitment of Sexually Violent Predators, as neither the settlement agreement nor the new legislation affects this issue. The subcommittee will also address the question of whether the electronic transfer of commitment papers to a judge should be permitted in lieu of the current requirement of *R*. 4:74-7 that originals of the application and clinical certificates be filed with the court.

IV. MISCELLANEOUS MATTERS

A. Proposed Amendments to *R.* 1:1-2 — Construction and Relaxation

In the last rules cycle, the Committee proposed amendments to Part I, Part II and Part IV rules to take into account the existence of civil unions and domestic partnerships. The Committee recommended use of the term "statutory union" to reflect those two statutorily authorized relationships and "statutory partner" to refer to an individual in such a relationship. The Committee intended that these terms would be used in conjunction with the words "marriage" and "spouse" when those words appear in the rules. The Professional Responsibility Rules Committee made a similar recommendation in its report for amendments to RPC 1.8.

The Supreme Court in discussing the proposed amendments considered whether it might be preferable to have one definitional rule in Part I of the Rules, rather than having to amend every rule that uses the terms "marriage" or "spouse." The Court determined to defer any action on these particular recommendations until the next rules cycle, since the Family Practice Committee was in the process of amending its rules to address civil unions and domestic partnerships.

In a memo dated 7/15/08, Judge Carchman directed staff to all the rules committees "to advise those committees of the Court's desire to address any and all such amendments to their rules at one time as part of the 2009 rules cycle." Pursuant to that mandate, staff to the various rules committees met and developed a proposed amendment to *R.* 1:1-2 and presented it to their respective rules committees. This Committee endorsed the proposed amendment overwhelmingly. This result was reported to the Family Practice Committee which presented their proposed rule amendment to the Supreme Court. The Court adopted the proposed rule amendment on July 16, 2009 and it became effective September 1, 2009.

B. Proposed Amendments to *R.* 1:6-2 — Form of Motion; Hearing

The Committee had rejected a proposal to amend *R*. 1:6-2 to prohibit judges from amending attorneys' proposed form orders so as to provide additional relief, absent extraordinary circumstances or on notice to the parties that additional relief is being contemplated. The Committee recognized that the problem of a changed form of order occurs almost exclusively in discovery motions, suggesting that the issue is idiosyncratic rather than systemic, and concluded that a rule amendment may not be the most appropriate way to address the issue. Judge Pressler indicated that she would address the issue in her comments to *R*. 1:6-2. The Committee endorsed this approach.

See Section I.B. of this Report for proposed amendments to *R*. 1:6-2 that the Committee recommends.

See Section II.A. of this Report for proposed amendments to *R*. 1:6-2 that the Committee does not recommend.

C. Proposed Amendments to *R.* 7:7-8 — Form of Subpoena

The Municipal Court Practice Committee proposed amendments to *R*. 7:7-8 to provide a degree of uniformity in the process of issuing subpoenas from municipal courts. That Committee asked the Civil Practice Committee to review and comment on the proposed amendments. The Committee recognized that the proposed amendments generally track *R*. 1:9-1 and were a direct consequence of the Court's decision in *State v. Reid*, 389 *N.J. Super*. 563 (App. Div. 207), *aff'd* in part, *modified* in part, 194 *N.J*. 386 (2008). Judge Pressler forwarded the comments of the Committee to the Municipal Court Practice Committee. The proposed amendments were subsequently adopted by the Supreme Court and became effective September 1, 2009.

D. Proposed Legislation — S-2116— Limits Amount of Supersedeas Bond in Civil Actions

At the request of the Administrative Office of the Courts, the Committee reviewed proposed legislation intended to limit the total amount of an appeal bond or other form of security required of all appellants collectively in a civil action to the lesser of the total value of the monetary judgment or $50 million, in addition to trial costs. The bill also provided that it shall not be construed to eliminate the discretion of the court to lower the amount of the appeal bond, after notice and hearing and upon a showing of good cause. Further, the bill also provided that if the judgment creditor proves by a preponderance of the evidence that an appellant is concealing assets or is dissipating or diverting assets outside the ordinary course of business to avoid payment of the judgment, a court may enter orders to protect the respondent and require the appellant to post a supersedeas bond in an amount up to the total amount of the judgment. The Committee members expressed concern that the proposed legislation intruded on the exclusive rule-making authority of the Court to dictate its practices and procedures, in violation of *Winberry v. Salisbury*, 5 *N.J.* 240, 255(1950), *cert. denied* 340 *U.S.* 877(1950). The Committee further noted that such a cap was unnecessary as the court rules already give a judge the discretion to fix the amount of the supersedeas bond. *Rule* 2:9-6, as currently constituted, provides that with few exceptions the amount of the supersedeas bond shall be fixed by the court and shall be presented for approval to the court or agency from which the appeal is taken.

The Committee was unanimous in its strong opposition to this proposed legislation.

See Section II.E. of this Report for proposed amendments to *R.* 2:9-6 regarding supersedeas bonds that the Committee rejected.

Respectfully submitted,

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