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**2009 – 2011 REPORT**

**OF**

**THE MUNICIPAL COURT PRACTICE**

**COMMITTEE**



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*January 24, 2011*

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## I. RULE AMENDMENTS RECOMMENDED

### A. Proposed Amendments to R. 7:7-7. Discovery and Inspection.

As proposed, the rule amendment to R. 7:7-7, the municipal court's discovery rule, is designed to accomplish more than one objective. This rule was first adopted by the Supreme Court in 1997 along with the adoption of the entire stand-alone Part VII Rules. At that time, Title 2B had not been enacted into law and there were some, albeit few, municipal courts which did not have a municipal prosecutor. Thus the rule had to be written to accommodate the procedure for the distribution of discovery in those courts that did not have a prosecutor. Since the enactment of Title 2B, all municipal courts have a prosecutor, making some of the language unnecessary. That unnecessary language has been deleted.

Pursuant to R. 7:8-7, the only time a public prosecutor would not be involved in the discovery process would be if a private prosecutor were appointed, pursuant to State v. Storm, 141 N.J. 245 (1995), to represent the State in a cross-complaint case. See R. 7:8-7(b). The language of the rule was also amended to mirror the requirements of R. 7:8-7(b).

When the rule was originally adopted by the Court in 1997, the Court changed the scope of the rule to limit discovery to cases "involving a consequence of magnitude or when ordered by the Court." In the recently decided case, State v. Green 417 N.J. Super. 190 (App Div. 2010), the defendant was charged with going 63 m.p.h. in a 45 m.p.h. zone, which did not appear to be a consequence of magnitude case. Nevertheless, the Appellate Division ruled that the defendant was entitled to discovery. Since 1997, the technical requirements of the rule have been honored more in their breach than in their observance. Throughout the State, prosecutors routinely honor discovery requests in mundane cases of speeding, careless driving, and first offense criminal cases, where no consequence of magnitude in terms of sentencing is even contemplated and there has been no prior court order granting defendant's request for discovery. Accordingly, the holding in State v. Green reflects the current practice of discovery on minor matters. Therefore, the Committee is requesting that the Court amend the discovery rule to make discovery applicable to all cases in municipal court. Of course, that would also apply to reciprocal discovery by the defendant to the prosecutor.

Finally, in Constantine v. Township of Bass River, 406 N.J. Super. 305, 331 (App. Div.), certif. denied, 200 N.J. 208 (2009), the Committee was asked to render an opinion on the cost of discovery fees and who should be the responsible government party for disseminating said fees. The Committee deliberated at length on this issue. Ultimately, the Committee decided that since discovery in municipal court emanated first from the State, it was essentially an executive function and no fee should appear in the rule for routine discovery promulgated by the judiciary on a separation of powers analysis. However, the

Committee recommends that if a request for supplemental discovery were made by the parties and the demand for cost of the supplemental discovery were deemed by one of the parties to be excessive, that issue could be brought before the court and decided by the judge pursuant to the proposed amendment to R. 7:7-7(e)(1).

**R. 7:7-7. Discovery and Inspection.**

a) Scope. If the government is represented by the municipal prosecutor or a private prosecutor in a cross complaint case, discovery shall be available to the parties only as provided by this rule, unless the court otherwise orders. [In the absence of a municipal or private prosecutor, discovery shall be available to the parties in the manner directed by the court.] All discovery requests by defendant shall be served on the municipal prosecutor, who shall be responsible for making government discovery available to the defendant. If the matter is, however, not being prosecuted by the municipal prosecutor, the municipal prosecutor shall transmit defendant's discovery requests to the private prosecutor in a cross complaint case, pursuant to R. 7:8-7(b).]; or, if there is no prosecutor, the municipal prosecutor shall transmit defendant's court-ordered discovery requests to the complaining witness.]

(b) Discovery by Defendant. In all cases [involving a consequence of magnitude or when ordered by the court,] the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be allowed to inspect, copy, and photograph or to be provided with copies of any relevant:

- (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.

(c) Discovery by the State. In all cases [involving a consequence of magnitude or when ordered by the court,] the municipal prosecutor or private prosecutor in a cross complaint case, on written notice to the defendant, shall be allowed to inspect, copy, and photograph or to be provided with copies of any relevant:

- (1) no change;
- (2) no change;
- (3) no change;
- (4) no change;
- (5) no change.

(d) No Change.

(e) Protective Orders.

(1) Grounds. Upon motion and for good cause shown, the court may at any time order that the discovery or inspection, copying or photographing sought pursuant to this rule be denied, restricted, or deferred or make such other order as is appropriate. In determining the motion, the court may consider the following: protection of witnesses and others from physical harm, threats of harm, bribes, economic reprisals and other intimidation; maintenance of such secrecy regarding informants as is required for effective investigation of criminal activity; protection of confidential relationships and privileges recognized by law; the reasonableness of the cost of any supplemental discovery ordered by the court to be disseminated to the parties; and any other relevant considerations.

(2) no change.

(f) No Change

(g) No Change.

Note: Source-Paragraph (a): new; paragraph (b): R. (1969) 7:4-2(h), 3:13-3(c); paragraph (c): R. (1969) 7:4-2(h), 3:13-3(d); paragraph (d): R. (1969) 7:4-2(h), 3:13-3(e); paragraph (e): R. (1969) 7:4-2(h), 3:13-3(f); paragraph (f) new; paragraph (g): R. (1969) 7:4-2(h), 3:13-3(g). Adopted October 6, 1997 effective February 1, 1998; paragraph (c) amended July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 16, 2009 to be effective September 1, 2009; paragraphs (a), (b), (c) and (e)(1) amended \_\_\_\_\_, 2011 to be effective \_\_\_\_\_.

**B. Proposed New Rule 7:7-11. Adherence to Standing Court Order for Use by Acting Judge.**

In State v. Broom-Smith, 201 N.J. 229, 235 (2010), the Supreme Court held that a Berkeley Township municipal court judge, who had been cross-assigned to Dover Township, could properly issue a search warrant for defendant's house in Dover Township. Nonetheless, the Court decided to impose some "order and uniformity . . . on the cross-assignment procedure." Id. at 235. It therefore mandated certain restrictions for the issuance of warrants by cross-assigned judges. First, it said that a cross-assigned judge may be contacted only where the territorially-appropriate judge was unable to hear the warrant application. Id. at 235-36. Second, it stated that the cross-assignment order should "prescribe the sequence to which substitute judges are to be resorted." Id. at 236. Third, it mandated that when a cross-assigned judge issues a warrant, a record should be made as to why the application was not made to the territorially-appropriate judge. Ibid. The Court then referred these issues to the Municipal Practice Committee "for recommendations regarding the retooling of the rule in accordance with the principles to which we have adverted." Id. at 237.

In response to Broom-Smith, the overwhelming majority of Assignment Judges have already issued standing orders setting forth the sequence by which acting judges are to be contacted when the sitting judge or judges are unavailable in the various municipal courts of each vicinage. The proposed rule places the onus on the contacted acting judge to ensure that law enforcement is using the sequence mandated by the Assignment Judges' standing order in contacting that particular judge.

The proposed rule also makes clear this procedure is only to be used when the particular municipal court is not in session as there may be anomalous situations when another acting judge, not the first judge in the prescribed sequence, is sitting in that court when the court is in session and that acting judge is contacted by law enforcement for a pre-trial application during a court session.

Finally, the Committee thought the problem raised in Broom-Smith was endemic to municipal court practice and hence it was inappropriate to amend R. 1:12-3, a rule of general application. Thus, the Committee unanimously recommends the adoption of a new rule to be included in Part VII, R. 7:7-11, Adherence to Standing Court Order for Use by Acting Judge.

The proposed amendment to the rule is as follows.

**Proposed R. 7:7-11. Adherence to Standing Court Order for Use by Acting Judges.**

Pursuant to any pretrial application for the issuance of a telephonic arrest warrant, R. 7:2-1(e), for the issuance of a Temporary Restraining Order (TRO), R. 5:7A, for the issuance of a search warrant, R. 3:5-3(a) or R. 7:5-1(a) or for the setting of bail, R. 3:26 and R. 7:4-2(a), if the sitting judge(s) for the court whose jurisdiction is invoked for any of the above pretrial applications is unavailable for any reason when court is not in session, the contacted acting judge shall adhere to a standing Order entered by an Assignment Judge setting forth the sequence by which such acting judges are to be contacted.

Note: Adopted \_\_\_\_\_, 2011, to be effective \_\_\_\_\_.

**C. Proposed Amendments to R. 7:9-1. Sentence.**

A member of the public brought to the attention of the Committee a case in which a public official was convicted in municipal court of the disorderly persons offense of electioneering. Under N.J.S.A. 2C:51-2, Forfeiture of public office, position, or employment, that potential forfeiture should have been addressed. The municipal prosecutor in the case, however, did not raise the issue of forfeiture at the time of sentencing, because he was not “comfortable” recommending that the defendant be removed from office. As a consequence, the sentencing municipal court judge did not order forfeiture of the office held by defendant.

The member of the public suggested that the Committee tighten the court rules, so that this incident not be repeated. He argued in support of such a change that “[u]nless a court rule . . . is promulgated . . . , it remains too easy for politically-appointed municipal prosecutors to avoid raising the politically sensitive question of whether a given offense ought to result in a public official’s forfeiture of office.”

In response to the citizen’s concerns, the Committee is recommending an amendment to R. 7:9-1(b) that would require the municipal court judge to state on the record his or her reasons for ordering or denying forfeiture of office under N.J.S.A. 2C:51-2. This amendment affirms that the ultimate responsibility for considering the applicability of the forfeiture of public office, position, or employment requirements of N.J.S.A. 2C:51-2 rests with the court.

**Proposed Amendment to Rule 7:9-1. Sentence.**

(a) No Change.

(b) Statement of Reasons. At the time the sentence is imposed, the court shall state its reasons for imposing the sentence, including the findings respecting the criteria prescribed by N.J.S.A. 2C:44-1 to N.J.S.A. 2C:44-3, in disorderly, and petty disorderly cases, and indictable fourth degree cases, within the jurisdiction of the municipal court, for withholding or imposing imprisonment, fines or restitution and pursuant to N.J.S.A. 2C:51-2 for ordering or denying forfeiture of public office, position, or employment. The court shall also state its factual basis for its finding of particular aggravating or mitigating factors affecting sentence.

Note: Source-Paragraph (a): R. (1969) 7:4-6(a); paragraph (b): R. (1969) 7:4-6(c); paragraph (c): R. (1969) 3:21-4(c); paragraph (d): R. (1969) 7:4-6(e) and R. (1969) 3:21-7. Adopted October 6, 1997 to be effective February 1, 1998. Paragraph (b) amended 2011 to be effective \_\_\_\_\_.

**D. Proposed Amendment to R. 7:14-3. Court Calendar; Attorneys.**

The Committee undertook a study of R. 7:14-3, after the Administrative Office of the Court's Management and Operations Committee questioned a member of the Committee about the meaning of the rule. The Committee found that the language, which was taken from an old 1969 rule, R. 7:10-2, was outmoded. It also noted that the sequence of matters set forth in the rule is not the one generally followed in municipal courts. Accordingly, the Committee decided to rewrite the rule to comport with current practice and give municipal courts more flexibility in the order they follow in calling cases.

First, the language of the rule was modernized. Second, the introductory sentences were amended to recognize the usual practice of taking summary matters first where the defendant is represented by an attorney. These matters move swiftly and taking these defendants first allows attorneys to honor commitments in other courts. The introduction also gives municipal court judges more discretion to order matters in the way most suitable and efficient for that court. Third, the ordering of other matters, paragraphs (1) through (8), now reflects what is currently the common practice in most municipal courts.

Finally, the Committee added a paragraph on the staggering of court sessions. The Committee believes that the staggering of sessions is an important case management tool, which greatly increases the efficiency of the courts, cuts down on waiting time for court customers, reduces court overcrowding in smaller facilities, reduces parking and traffic congestion, allows for more manageable court security, and increases customer satisfaction. The Committee thought it important to encourage this practice, while not making it an inflexible requirement in every circumstance.

**R. 7:14-3. [Court calendar; attorneys].**

[(a) Court Calendar. On each hearing day, the court shall follow as closely as possible, the following order:

- (1) applications for adjournment;
- (2) unlitigated motions;
- (3) arraignments;
- (4) guilty pleas;
- (5) litigated motions;
- (6) contested matters with an attorney;
- (7) other contested matters.

(b) Appearances of Attorneys. Appearances by attorneys shall be entered promptly with the court or municipal court administrator. Unless the appearance is entered, the attorney shall not receive priority on the trial list.]

**R. 7:14-3. Court Calendar; Attorneys**

(a) Court Calendar. At each court session, to the extent possible, the court shall give priority to attorney matters that are summary in nature. Other cases should be called in the following order, subject to the court's discretion:

- (1) requests for adjournments;
- (2) guilty pleas and first appearances;
- (3) pretrial conferences;
- (4) uncontested motions;
- (5) contested matters with attorneys;
- (6) noncompliance with time payment issues;
- (7) contested matters without attorneys;
- (8) matters to be placed on the record.

(b) Courts shall stagger the scheduling of cases, where necessary, in order to limit inconvenience to all parties.

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Note: Adopted \_\_\_\_\_, 2011, to be effective \_\_\_\_\_.

**E. Proposed Amendment to “Guidelines for Determination of Consequences of Magnitude.”**

In a letter dated June 1, 2010, the Court asked this Committee and the Criminal Practice Committee to form a joint subcommittee to consider and make recommendations on what constitutes a consequence of magnitude that would entitle an indigent defendant to assigned counsel. The Court also requested the subcommittee propose changes, if appropriate, to the “Guidelines for Determination of Consequences of Magnitude.”

The joint subcommittee recommended that subsection (b) of the Guidelines be amended so that the monetary sanction that would require defendant to be assigned counsel is raised from \$750 to \$800, exclusive of costs. The subcommittee took into consideration that it has been more than six years since the Court adopted the original Guidelines, during which time the cost of living has increased.

The Committee adopted the recommendation of the subcommittee. Therefore, it joins the Criminal Practice Committee in recommending the proposed amendment to the Guidelines:

## Appendix 2.

### GUIDELINES FOR DETERMINATION OF CONSEQUENCE OF MAGNITUDE (SEE RULE 7:3-2)

On October 6, 1997, the Supreme Court adopted the Comprehensive Revision of Part VII of the Rules of Court to be effective on February 1, 1998. [R. 7:3-2](#) of that Comprehensive Revision provides for the assignment of counsel "[i]f the court is satisfied that the defendant is indigent and that the defendant faces a consequence of magnitude or is otherwise constitutionally or by law entitled to counsel...." The Supreme Court directed that guidelines for the determination of a consequence of magnitude be developed by the Supreme Court Municipal Court Practice Committee to assist municipal court judges in deciding what factors should be considered when determining a consequence of magnitude.

In response to this direction, the Supreme Court Municipal Court Practice Committee developed the following set of guidelines. The Supreme Court, as recommended by the Committee, has included the guidelines as an Appendix to the Part VII Rules.

In determining if an offense constitutes a consequence of magnitude in terms of municipal court sentencing, the judge should consider the following:

- (1) Any sentence of imprisonment;
- (2) Any period of (a) driver's license suspension, (b) suspension of the defendant's nonresident reciprocity privileges or (c) driver's license ineligibility; or
- (3) Any monetary sanction imposed by the court of [~~\$750~~] \$800 or greater in the aggregate, except for any public defender application fee or any costs imposed by the court. A monetary sanction is defined as the aggregate of any type of court-imposed financial obligation, including fines, [costs,] restitution, penalties and/or assessments.

It should be noted that if a defendant is alleged to have a mental disease or defect, and the judge, after examination of the defendant on the record, agrees that the defendant may have a mental disease or defect, the judge shall appoint the municipal public defender to represent that defendant, if indigent, regardless of whether the defendant is facing a consequence of magnitude, if convicted.

Note: Guidelines adopted July 28, 2004 to be effective September 1, 2004. Subsection (3) amended \_\_\_\_\_ 2011, to be effective \_\_\_\_\_.

## II. OTHER RECOMMENDATIONS

### A. **Proposed Recommendation to the Legislature to Amend N.J.S.A. 39:5-3(a).**

In State v. Buczkowski, 395 N.J. Super. 40 (App. Div. 2007), the Appellate Division held that under N.J.S.A. 39:5-3(a), most traffic complaints must be served within 30 days after the offense date. N.J.S.A. 39:5-3(a) provides: “When a person has violated a provision of this subtitle, the judge may, within 30 days after the commission of the offense, issue process directed to a constable, police officer, or the chief administrator for the appearance or arrest of the person so charged . . . .” Before Buczkowski, it was assumed that this statute meant that process must be issued within 30 days, but that service did not need to be accomplished within that short time frame. Buczkowski’s holding has created some practical problems for municipal courts.

Most traffic complaints are issued and served at the scene by the police officer writing the ticket. In such instances, issuing and serving a traffic complaint within 30 days is no problem. However, every year a certain number of traffic complaints are filed in the municipal courts by ordinary citizens. Under Buczkowski, the court must accept for filing these citizen complaints, make a probable cause determination, issue process and actually serve the defendant within 30 days of the commission of the offense. The municipal courts have had difficulty accomplishing all these tasks within this time limitation.

Most municipal courts serve complaints initially through ordinary mail; the most cost-effective method. If the defendant responds to the complaint, then service is effectuated. However, if there is no response, then courts will attempt service through the more expensive method of simultaneous service—that is—serving by certified mail and ordinary mail simultaneously. These attempts at service through the mail can quickly run the clock on a 30-day deadline. A further difficulty is presented if the citizen complaint is filed in a court where the judge has a conflict and therefore must be transferred to another municipal court. In short, adherence to the holding in Buczkowski may result in the dismissal of meritorious citizen complaints that were otherwise filed in the municipal court on a timely basis due to delays in mailing, bad addresses and/or other mail delivery issues. In summary, a 30-day deadline is too short.

Accordingly, the Committee recommends that the Court ask the Legislature to extend the 30-day deadline in N.J.S.A. 39:5-3(a) to 90 days. The Committee noted that the Legislature recently extended the deadline for filing complaints under N.J.S.A. 39:4-81, running a red light, from 30 days to 90 days. The Committee believes that extending the deadline will give the municipal courts sufficient time to issue and serve citizen traffic complaints.

**B. Referral to the Municipal Practice Committee in State v. Kent, 391 N.J. Super. 352, 382 (App. Div. 2007).**

In State v. Kent, 391 N.J. Super. 352 (App. Div. 2007) the Appellate Division held that the Confrontation Clause of the Federal Constitution and the testimonial standards of admissibility set forth in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) apply to drunk driving prosecutions in municipal court. The Kent court asked the Legislature, the Criminal Practice and Municipal Court Practice Committees to “consider the adoption of statutes or court rules patterned after N.J.S.A. 2C:35-19 that would create similar notice-demand requirements for State Police lab reports used in DWI trials and also for blood sample certificates generated under N.J.S.A. 2A:62A-11.” State v. Kent, *supra*, 391 N.J. Super. at 382.

At the May 2007 Criminal Practice Committee meeting, a Joint Municipal/Criminal Subcommittee was formed to address these issues. On May 16, 2007, the Supreme Court granted certification in State v. Buda, 191 N.J. 317 (2007); State v. Berezansky, 191 N.J. 317 (2007); State v. Sweet, 191 N.J. 318 (2007), and State in the Interest of J.A., 191 N.J. 317 (2007), which addressed similar confrontation issues as those raised in Kent. The Subcommittee decided to await these rulings to reconvene. In June 2008, the Supreme Court decided State v. Buda, 195 N.J. 278 (2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2858, 174 L. Ed. 2d 601 (2009); State v. Sweet, 195 N.J. 357 (2008), *cert. denied*, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2858, 174 L. Ed. 2d 601 (2009), and State in the Interest of J.A., 195 N.J. 324 (2008). As set forth in its 2007-2009 report, the Criminal Practice Committee decided that in light of these decisions, it need not reconvene the Subcommittee or recommend a rule change at that time.

Subsequent to the filing of the Committee’s report, on June 25, 2009, the United States Supreme Court decided Melendez-Diaz v. Massachusetts, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) where it held that a state forensic analyst’s laboratory report prepared for use in a criminal prosecution is “testimonial” evidence subject to the Confrontational Clause as set forth in Crawford v. Washington. The Melendez Court found that the admission of this evidence violated the defendant’s 6<sup>th</sup> Amendment right to confront witnesses against him.

Thereafter, on June 29, 2009, the United States Supreme Court granted certiorari in Briscoe v. Virginia, \_\_\_ U.S. \_\_\_, 129 S. Ct. 2858, 174 L. Ed. 2d 600 (2009), to resolve the following question: “If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?” During the 2009-2011 term, the Criminal Practice Committee decided to revisit Kent after Briscoe was decided.

On January 25, 2010, the Supreme Court decided Briscoe. Briscoe v. Virginia, \_\_\_ U.S. \_\_\_ 130 S. Ct. 1316, 175 L. Ed. 2d 966 (2010). In Briscoe, the Supreme Court vacated the judgment of the Virginia Supreme Court and remanded the case for further proceedings not inconsistent with the opinion in Melendez-Diaz v. Massachusetts, supra, \_\_\_ U. S. \_\_\_, 129 S.Ct. 2527, 174 L. Ed. 2d 314.

Subsequently, the Criminal Practice Committee decided not to recommend a rule change on this issue. Instead, it decided to recommend to the Court that it support a legislative change consistent with Kent and the U.S. Supreme Court cases. The Municipal Practice Committee joins with the Criminal Practice Committee in recommending such a statutory change.

### **III. RECOMMENDATIONS CONSIDERED AND REJECTED**

#### **A. Proposed Amendment to R. 7:6-2. Pleas, Plea Agreements.**

An assignment judge asked the Committee to consider amending R. 7:6-2 to require municipal court judges to place a defendant under oath before taking a factual basis for a guilty plea. The assignment judge believed that oaths should be required for pleas to cases where there was a consequence of magnitude. The parallel Part III rule, R. 3:9-2, does require Superior Court judges to place a defendant under oath when taking a plea.

The Committee noted that when the Part VII rules were adopted in 1994, it decided to depart from the Part III requirement of placing defendants under oaths, because municipal court matters are relatively minor compared to Superior Court criminal matters. In discussing the matter again, the Committee again concluded that it was unwise to require placing a defendant under oath before a guilty plea in municipal court. Because of the large volume of cases handled in municipal court, requiring an oath for each guilty plea would be unduly time consuming. Further, the Committee rejected the idea that an oath should be taken in some cases, but not others. It believes this would send a signal to defendants that in cases where no oath was given, they did not need to tell the truth.

#### **B. Proposed Amendment to R. 7:8-7(b). Appearance for the Prosecution.**

In 2007, the Supreme Court amended R. 7:8-7 to eliminate the appearance of private prosecutors to represent the State in most situations, except where there are cross-complaints that present a potential for conflict for the municipal prosecutor. Shortly after the change to R. 7:8-7, the representative on the Committee from the New Jersey Municipal Prosecutors Association (Association) reported to the Committee that the Association found that the rule change increased the workload of the municipal prosecutors, since they now have to handle cases previously handled by private prosecutors. The Association favored changing the rule back again so that private prosecutors would be permitted in most cases. In response, the Committee formed a subcommittee to study the matter. The Committee also asked the subcommittee to study whether the court rule change eliminating most private prosecutors increased the fiscal burden on the municipalities. The Supreme Court had asked the Committee to investigate this question and report back on the results.

First, in order to determine the extent of the fiscal burden, the subcommittee distributed a questionnaire on this subject to the municipal prosecutors in Somerset and Union Counties and to the members of the Association. Only one responder reported an impact. That was in a municipal court where a Rutgers campus is located. Prior to the rule change, Rutgers had

employed a private prosecutor to prosecute municipal offenses that took place on its campus. The other responses indicated that there was no significant increase in cost to the municipalities.

Second, the subcommittee recommended changing R. 7:8-7(b) as follows (proposed additions underlined, [proposed deletions bracketed]):

(b) Appearance for the Prosecution. The municipal prosecutor, municipal attorney, Attorney General, county prosecutor, or county counsel, as the case may be, may appear in any municipal court in any action on behalf of the State and conduct the prosecution either on the court's request or on the request of the respective public official. [The court may also, in its discretion and in the interest of justice, direct the municipal prosecutor to represent the State. The court may permit an attorney to appear as a private prosecutor to represent the State in cases involving cross-complaints.] As to any citizen complaints, the municipal prosecutor may, in his or her sole discretion, and in the interests of justice, choose to prosecute that complaint, choose not to prosecute it, or dismiss it. "Citizen complaints" mean any complaints brought by someone other than a police and/or law enforcement officer and /or a government employee, acting in his official capacity. If the municipal prosecutor chooses not to prosecute, the court may permit an attorney to appear as a private prosecutor to represent the State in such cases, whether or not they involve cross-complaints.

Such private prosecutors may be permitted to appear on behalf of the State only if the court has first reviewed the private prosecutor's motion to so appear and an accompanying certification submitted on a form approved by the Administrative Director of the Courts. The court may grant the private prosecutor's application to appear if it is satisfied that [a potential for conflict exists for the municipal prosecutor due to the nature of the charges set forth in the cross-complaints] the private prosecutor qualifies pursuant to State v. Storm, 141 N.J. 245 (1995). The court shall place such a finding on the record.

After careful consideration, a large majority of the Committee voted to reject this rule proposal. The Committee noted that N.J.S.A. 2B:25-5 places a duty on municipal prosecutors to prosecute all cases within the jurisdiction of the municipal court. The proposed amendment conflicts with this statutory duty in that it would allow municipal prosecutors to decline to prosecute certain cases. The Committee also noted that it is the role of the municipal prosecutor to screen

the substance of citizen complaints to ensure that only meritorious complaints are prosecuted. When citizen complaints are prosecuted by a private prosecutor, acting in the name of the state, this screening does not take place and non-meritorious complaints are prosecuted. This burdens the court, and more importantly, defendants, who are dragged into court needlessly. Finally, the Committee stated that since the rule change in 2007, prohibiting most private prosecutors, the professionalism of the municipal courts has been raised. The Committee is apprehensive that if the proposed rule amendment were adopted that the gains that have been made since 2007 would be lost.

**C. Proposed Amendment to R. 7:14-1. Opening Statement.**

A member of the Committee suggested that R. 7:14-1 be modified to reference the model opening statements for municipal court sessions that Judge Grant distributed in May 2009. The Committee decided that this amendment was unnecessary. The Committee thought it was more useful to train the municipal court judges to follow the general outline of the model opening statements, rather than to change the rules.

**D. Proposed Amendment to Guideline 4 of the “Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey.”**

In response to a citizen’s concerns that the municipal courts were not enforcing the forfeiture of public forfeiture statute (see Part I, section C, for a more complete discussion of this issue), the Committee considered whether it should amend the “Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey,” an Appendix to Part VII of the Court Rules. The proposal was to make the following changes to Guideline 4 (proposed additions underlined):

No plea agreements whatsoever will be allowed in drunken driving, certain drug offenses or forfeiture of public office, position, or employment offenses. Those offenses are:

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50), and

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

C. Charges involving a likelihood of forfeiture of public office, position, or employment, pursuant to N.J.S.A. 2C:51-2, upon conviction.

The Committee unanimously rejected this proposal. It pointed out that the municipal court judge or municipal prosecutor might not know, at the time of the plea agreement, whether the defendant was a public office holder or public employee. Moreover, the Committee, as a general principal, is opposed to further limiting the powers of municipal courts. It expressed the opinion that prohibiting certain types of plea agreements in municipal court demonstrates a mistrust of the municipal court system, which is no longer justified.

In response to the citizen's concerns, the Committee recommended the change to R. 7:9-1(b), outlined in Part I, section C, of this report.

**E. Proposed Amendment to “Guidelines for Determination of Consequences of Magnitude.**

The Consequences of Magnitude Joint Subcommittee (see Part I, section E of this report) referred to the Committee the issue of whether the immigration consequences of a conviction should be added to the Guidelines as a consequence of magnitude. The Committee discussed the many complex issues involved in making the immigration consequences a consequence of magnitude, including that a court has no way to know whether a defendant is a citizen of the United States. Further, municipal court judges are not experts in immigration law and would find it difficult to determine whether a conviction would lead to negative immigration consequences. In view of these difficulties, the Committee voted unanimously not to recommend such an amendment to the Guidelines.

**F. Proposed Legislative Change to N.J.S.A. 2B:25-5.**

In response to a citizen's letter concerning the failure of a municipal prosecutor to seek the forfeiture of public office or employment under N.J.S.A. 2C:51-2 (see Part I, section C, for a more complete discussion of this issue), the Committee considered recommending to the Supreme Court a change to N.J.S.A. 2B:25-5(a), Duties of a Municipal Prosecutor. That statute currently provides (in relevant part):

A municipal prosecutor shall be responsible for handling all phases of the prosecution of an offense, including, but not limited to, discovery, pretrial and post-trial hearings, motions, dismissals, removals to Federal District Court and other collateral functions authorized to be performed by the municipal prosecutor by law or Rule of Court.

[N.J.S.A. 2B:25-5(a).]

The Committee discussed whether this statute should be amended to make it explicit that the municipal prosecutor has the responsibility to bring sentencing issues before the municipal court.

The Committee unanimously rejected this proposal. The Committee concluded that the proposal was unfair to municipal prosecutors, because prosecutors may not know that a defendant is a public official or government employee at the time of sentencing. It also noted that the current forfeiture statute, N.J.S.A. 2C:51-2, states that if the forfeiture issue is not raised at the time of sentencing, the court may still order the forfeiture upon the request of the county prosecutor, Attorney General, other public officer or public entity having authority to remove the person convicted from his public office, position or employment.

As an alternative to this proposal, the Committee recommended the change to R. 7:9-1(b), outlined in Part I, section C, of this report.

#### **G. Proposed New Rule 7:7-12. Sanctions.**

On October 18, 2010, Judge Paul Catanese, Chair of the Conference of Presiding Judges—Municipal Courts, wrote to the Committee asking it to consider a rule amendment to permit sanctions to be imposed upon a party, witness or attorney who repeatedly files numerous complaints that plainly do not meet the probable cause standard. In response, the following new rule was proposed:

##### **Rule 7:7-12. Sanctions.**

If the Court finds that any party, attorney or witness requests frivolous or not in good faith relief from the Court, it may order any one or more of the following:

- (a) payment by the offending party, attorney or witness of an amount that the Court shall fix to the “Treasurer, State of New Jersey” or to any adverse party;
- (b) payment by the offending party, attorney or witness of the reasonable expenses, including attorney’s fees, to any aggrieved party;
- (c) dismissal of the complaint or motion or the granting of the motion; or

(d) such other action as it deems appropriate.

The Committee rejected adoption of this rule, because it thought that there was a potential that municipal court judges could abuse the power granted by the proposed rule by imposing unreasonable sanctions. This potential was greater since the proposed rule set no maximum monetary sanction. The Committee also thought that sanctioning complainants runs counter to the principle that any one can file a complaint in municipal court. The Committee feared that this rule might have a real chilling effect on citizens' ability to settle their grievances in the municipal courts.

#### IV. MATTERS HELD FOR CONSIDERATION

##### A. **Proposed Amendment to R. 7:7-2. Motions.**

A prisoner wrote to Acting Administrative Director Judge Glenn A. Grant asking for an amendment to R. 7:8-5, so that an incarcerated defendant could require a municipal court to adjudicate any case on which there is an open detainer or warrant. Judge Grant referred the letter to the Committee. In addressing the prisoner's request, a substantial portion of the Committee thought there was a need for a rule that would require municipal courts to act upon all requests for action that were received from inmates.

After many lively discussions, it was proposed that a new subsection (d) be added to R. 7:7-2:

If the court of jurisdiction receives any written communication from an incarcerated, unrepresented defendant either before or after the entry of a guilty plea or trial seeking relief from the court of any nature, the written communication shall be deemed to be a motion. The court shall respond on the record to the motion seeking relief within 45 days of the receipt of the motion and shall notify the defendant in writing of the court's ruling on the motion. In the event that the court does not decide within 45 days of the receipt of the motion (being the written communication), the motion shall be deemed to be denied.

The Committee could not come to a consensus on this proposed rule. Those supporting it maintained that many prisoner letters that should be treated as motions are ignored. Those opposing it argued that this rule would increase the workload of our already overburdened municipal courts. It was also argued that the problem should be approached not by a rule change but by training municipal court judges or offering pro se packets to prisoners, so that they could file motions in the proper form.

Because the Committee could not agree on this proposal, it was determined to carry this item to the next term.

## **V. CONCLUSION:**

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

Respectfully submitted:

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