REPORT OF THE

SUPREME COURT COMMITTEE ON

MUNICIPAL COURT PRACTICE

2011 - 2013 TERM

February 1, 2013

TABLE OF CONTENTS

PAGE

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to R. 7:2-2 -- Telephonic Issuance of DORA and Nicole's Law Restraining Orders 1

B. Proposed Amendments to R. 7:7-7(b)(7) and R. 7:7-7(c)(3) -- Discovery of Birthdates of Potential Witnesses 6

C. Proposed Amendments to R. 7:7-7(b)(9) -- Discovery of Police Notes 9

D. Proposed Amendments to R. 7:7-7(f)(1) -- Protective Orders For Confidential Information 13

E. Proposed Amendments to R. 7:12-3 -- Expansion of the Plea by Mail Program 16

II. RULE AMENDMENTS AND OTHER ISSUES CONSIDERED AND REJECTED

A. Proposed Amendments to R. 7:7-2(a) -- Written Motions 20

B. Proposed Amendments to R. 7:7-2 -- Treating Inmates' Letters as Motions 21

C. Immigration and Deportation Warnings 24

D. Handling of a Disorderly Persons Citizen Complaint Connected to an Indictable Complaint 26

E. Improper Plea Agreements 28

F. Proposed Legislative Change to N.J.S.A. 39:4-97.2 and N.J.S.A. 39:4-67 31

G. Proposed Legislative Change to Expungement Statute, N.J.S.A. 2C:52-1 to -32 32

III. OTHER BUSINESS

A. Bail Reasons Form in Domestic Violence Cases 33

B. De Novo Standard of Review for Municipal Court Appeals 34

C. Conflict Between R. 3:26-2(a) and the Domestic Violence Procedures Manual 35

IV. MATTERS HELD FOR FUTURE CONSIDERATION

A. Proposed Amendments to R. 7:5-1 – Issuance of Telephonic Search Warrants by Municipal Court Judges 37

V. CONCLUSION 40

APPENDIX

Report of the Joint Criminal/Municipal Subcommittee on the Telephonic Issuance of Drug Offender Restraining Orders and Nicole's Law Restraining Orders

I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to R. 7:2-2 -- Telephonic Issuance of DORA and Nicole's Law Restraining Orders

Both the Drug Offender Restraining Order Act of 1999 (DORA), N.J.S.A. 2C:35-5.7, and Nicole's Law, N.J.S.A. 2C:14-12, authorize Superior Court and Municipal Court judges to issue restraining orders when a person is charged with eligible drug and sex offenses. On March 8, 2011, the Supreme Court issued an order relaxing both the Part III (Criminal) and Part VII (Municipal Court) court rules to permit judges to issue DORA and Nicole's Law restraining orders "by telephone, radio, or other electronic communication upon the sworn oral testimony of a law enforcement officer or prosecuting attorney communicated electronically to the issuing judge . . . ." The Court also asked the Criminal Practice Committee and the Municipal Court Practice Committee (Committee or MCP Committee) to draft appropriate rule revisions to comport with the rule relaxation for the Court's consideration.

Shortly after the rule relaxation, Acting Administrative Director Judge Glenn A. Grant distributed procedural guidance for judges to follow in issuing telephonic restraining orders for DORA and Nicole's Law matters. N.J.S.A. 2C:35-5.7. Subsequently, on April 6, 2011, the Legislature amended DORA to permit the pretrial issuance of DORA restraining orders "through telephone, radio or other means." The statutory amendments were consistent, though not identical, with the Court's rule relaxation and Judge Grant's procedural guidance.

In response to the Court's request, the Criminal Practice and Municipal Court Practice Committees formed a joint subcommittee to study the issue. The joint subcommittee's report (attached as an appendix) recommended that the Criminal

Practice Committee propose revisions to R. 3:3-1 (governing the issuance of complaints and summonses) and that the Municipal Practice Committee propose corollary revisions to the Part VII rule.

The MCP Committee agrees with the conclusions and recommendations of the joint subcommittee's report. It therefore recommends the Court add subsection (f) to R. 7:2-2, Issuance of Arrest Warrant or Summons. The text of the proposed subsection is identical to the joint subcommittee's proposed text of R. 3:3-1(g).

The proposed amendments to R. 7:2-2 set forth essentially the same procedure for telephonic issuance that is now in place under the Supreme Court's rule relaxation and the related procedural guidance, with a few refinements. The amendments provide that a judge may issue a DORA or Nicole's Law restraining order upon the sworn testimony of a law enforcement officer not physically present. The sworn oral testimony may be communicated to the judge via telephone, radio or other electronic means. The judge is required to record the testimony, or take adequate longhand notes. Once the judge decides to issue the order and is satisfied with its contents, the judge directs the officer to print the judge's name on the order. The order is served on the defendant by any officer authorized by law. Within 48 hours, the signed restraining order is delivered to the judge with a certification of service upon the defendant and, in the case of a DORA restraining order, a certification describing the location of the offense. The judge then verifies the order's accuracy by signing it.

There are two major differences between the procedure proposed in R. 7:2-2(f) and the one currently in place. First, R. 7:2-2 does not require the judge to find exigent circumstances to justify the issuance of a telephonic restraining order as

opposed to one obtained in person. This change was made because a preliminary bill (A-2416) regarding telephonic issuance of the DORA order required the finding of exigent circumstances. The Court and Judge Grant wanted the procedures to be in concert with the proposed bill. However, when the legislation was eventually enacted, the exigent circumstances language was deleted. Therefore, the proposed amendments to R. 7:2-2 do not require the judge to make a finding of an emergency before issuing an order by electronic means.

Second, under the proposed R. 7:2-2(f), service of the order is accomplished by any officer authorized by law and a certification of service must be completed. In the current procedure, the officer requesting the order was required to provide the defendant with a copy, if the defendant was present. This procedure was clearly deficient, since it provided no service to defendants who were not present. The change to the procedure corrects this deficiency.

The text of the proposed amendments follows.

Rule 7:2-2. Issuance of Arrest Warrant or Summons; Issuance of Restraining Orders by Electronic Communication

(a) no change.

(b) no change.

(c) no change.

(d) no change.

(e) no change.

(f) Issuance of Restraining Orders By Electronic Communication.

(1) Temporary Domestic Violence Restraining Orders. Procedures authorizing the issuance of temporary domestic violence restraining orders by electronic communication are governed by R.5:7A (b).

(2) N.J.S.A. 2C:35-5.7 and N.J.S.A. 2C:14-12 Restraining Orders. A judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") upon sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate long hand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the law enforcement officer or prosecuting attorney must identify himself or herself, specify the purpose of the request and disclose the basis of the application. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order. Upon issuance of the restraining order, the judge shall memorialize the specific terms of the order. That memorialization shall be either by means of a tape-recording device, stenographic machine, or by adequate longhand notes. Thereafter, the judge shall direct the law enforcement officer or prosecuting attorney to memorialize the specific terms authorized by the judge on a form, or other appropriate paper, designated as the restraining order. This order shall be deemed a restraining order for the purpose of N.J.S.A. 2C:35-5.7 ("Drug Offender

Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law"). The judge shall direct the law enforcement officer or prosecuting attorney to print the judge's name on the restraining order. A copy of the restraining order shall be served upon the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, the signed restraining order along with a certification of service upon the defendant. The certification of service shall include the date and time that service upon the defendant was made or attempted to be made in a form approved by the Administrative Director of the Courts. The judge shall verify the accuracy of these documents by affixing his or her signature to the restraining order.

(3) Certification of Offense Location for Drug Offender Restraining Orders. When a restraining order is issued by electronic communication pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") where the law enforcement officer or prosecuting attorney is not physically present at the same location as the court, the law enforcement officer or prosecuting attorney must provide an oral statement describing the location of the offense. Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, a certification describing the location of the offense.

Note: Source - R. (1969) 7:2, 7:3-1, 3:3-1. Adopted October 6, 1997 to be effective February 1, 1998; paragraphs (b) and (c) amended July 10, 1998 to be effective September 1, 1998; paragraph (a)(1) amended July 5, 2000 to be effective September 5, 2000; paragraph (a)(1) amended, new paragraph (b)(5) added, and former paragraph (b)(5) redesignated as paragraph (b)(6) July 12, 2002 to be effective September 3, 2002; paragraph (a)(1) amended, and paragraph (a)(2) caption and text amended July 28, 2004 to be effective September 1, 2004; paragraph (a)(1) amended and new paragraph (a)(3) adopted July 16, 2009 to be effective September 1, 2009[.]; new paragraph (f) adopted _____ to be effective _____.

B. Proposed Amendments to R. 7:7-7(b)(7) and R. 7:7-7(c)(3) — Discovery of Birthdates of Potential Witnesses

A private attorney contacted the Committee pointing out that R. 7:7-7, Discovery and Inspection, was inconsistent with R. 3:13-3, Discovery and Inspection, in that the Part III rule requires that the birthdate of potential witnesses be provided in discovery and the Part VII rule does not.

In its 2004-2007 report, the Criminal Practice Committee recommended that R. 3:13-3 be amended so that both the State and defendant would be required to furnish birthdates of potential witnesses. The report stated that the purpose of the proposal was to assist the parties in checking the criminal history of witnesses. The Supreme Court adopted this rule change proposal effective September 1, 2007.

The MCP Committee decided to recommend amending R. 7:7-7 to require the exchange of birthdates of witnesses in discovery. The Committee concluded that this information would help identify witnesses who had common names, as well as allowing the parties to check criminal histories.

Further, in general, the Committee prefers that the Part VII rules contain the same language as their counterparts in Part III, unless there is a reason for a divergence based in the nature of municipal practice. The Committee saw no reason for a divergence here.

The proposed amendments to R. 7:7-7(b)(7) and R. 7:7-7(c)(3) follow.

Rule 7:7-7. Discovery and Inspection

(a) no change.

(b) Discovery by Defendant. Unless the defendant agrees to more limited discovery, in all cases the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be provided with copies of all relevant material, including but not limited to the following:

(1) no change;

(2) no change;

(3) no change;

(4) no change;

(5) no change;

(6) no change;

(7) names, [and] addresses, and birthdates of any persons whom the prosecuting attorney knows to have relevant evidence or information, including a designation by the prosecuting attorney as to which of those persons the prosecuting attorney may call as witnesses;

(8) no change;

(9) no change;

(10) no change;

(11) no change;

(c) Discovery by the State. In all cases the municipal prosecutor or the private prosecutor in a cross complaint case, on written notice to the defendant, shall be provided with copies of all relevant material, including; but not limited to, the following:

(1) no change;

(2) no change;

(3) the names, [and] addresses, and birthdates of those persons known to defendant who may be called as witnesses at trial and their written statements, if any, including memoranda reporting or summarizing their oral statements;

(4) no change;

(5) no change.

(d) no change;

(e) no change;

(f) no change;

(g) no change;

(h) 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), and (c) amended, new paragraph (e) caption and text adopted, former paragraphs (e), (f), and (g) redesignated as paragraphs (f), (g), and (h) July 21, 2011 to be effective September 1, 2011; paragraphs (b)(7) and (c)(3) amended_____, 2013 to be effective_____2013.

C. Proposed Amendments to R. 7:7-7(b)(9) — Discovery of Police Notes

In State v. W.B., 205 N.J. 588 (2011), the Supreme Court reiterated its long-standing requirement that law enforcement officers preserve their notes of interviews and observations after producing their final reports. Id. at 607. Despite the Court's insistence on the preservation of notes, the officer in W.B. had destroyed her notes, at the direction of her superiors, once her report was completed. The Court, therefore, held that a defendant, upon request, may be entitled to an adverse inference charge. Id. at 597. The Court also referred the matter to the Criminal Practice Committee for any "necessary clarification of the Rules." Id. at 608.

The "Rules Subcommittee of the Special Supreme Court Committee on Electronic Discovery Issues in Criminal and Quasi-Criminal Cases" (Rules Subcommittee), chaired by Judge Edwin H. Stern, P.J.A.D., subsequently considered proposed amendments to both R. 3:13-3 and R. 7:7-7(b)(9) that were intended to codify the Court's holdings in State v. W.B. The Rules Subcommittee, however, could not reach an agreement on how to interpret or apply the Court's holdings, or on the specific language to be included in the court rules. Nonetheless, the Rules Subcommittee forwarded to this Committee for its consideration a proposed change to R. 7:7-7(b)(9): (additions underlined): "(9) police reports, including a police officer's contemporaneous notes of interviews or observations of the crime scene that are within the possession, custody or control of the prosecuting attorney."

The Committee considered the proposed amendments to R. 7:7-7(b)(9). A large majority of the Committee concluded that the principle enunciated in W.B. that an officer must preserve his or her notes should be applied to non-indictable cases heard in municipal court, as well as criminal cases, heard in Superior Court. The reasons that the Supreme Court gave in W.B. for preserving police notes in a criminal case apply with equal force to a municipal court case. Accordingly, the Committee thought that an amendment to R. 7:7-7(9)(b) was appropriate in light of W.B.

However, the Committee voted unanimously to disapprove the amendment language proposed by the Rules Subcommittee. The Committee thought that the language of the amendment was inappropriate for municipal court cases, since it referred to "crime scene", even though crimes are not adjudicated in municipal courts. Further, the Committee thought that the scope of the language of the amendment was too narrow. In the opinion of the Committee, a law enforcement officer should preserve notes relating to every part of the investigation, not just notes relating to interviews and crime scene observations.

Therefore, the MCP Committee, by a large majority, recommended that R. 7:7-7(b)(9) be amended to read: "[A]ny and all reports and notes of law enforcement officers related to the incident [police reports] that are within the possession, custody or control of the prosecuting attorney".

The minority of the Committee who disagreed with this rule recommendation did so because it did not believe that the holding of State v. W.B., supra, 205 N.J. at 588, required police to preserve notes relating to non-indictable offenses.

The proposed amendments to R. 7:7-7(b)(9) follow.

Rule 7:7-7. Discovery and Inspection

(a) no change.

(b) Discovery by Defendant. Unless the defendant agrees to more limited discovery, in all cases the defendant, on written notice to the municipal prosecutor or private prosecutor in a cross complaint case, shall be provided with copies of all relevant material, including, but not limited to, the following:

(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) any and all reports and notes of law enforcement officers related to the incident [police reports] that are within the possession, custody or control of the prosecuting attorney;

(10) no change;

(11) no change.

(c) no change.

(d) no change.

(e) no change.

(f) no change

(g) no change.

(h) 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), and (c) amended, new paragraph (e) caption and text adopted, former paragraphs (e), (f), and (g) redesignated as paragraphs (f), (g), and (h) July 21, 2011 to be effective September 1, 2011; paragraph (b)(9) amended _____, 2013 to be effective _____ 2013.

D. Proposed Amendments to R. 7:7-7(f)(1) – Protective Orders for Confidential Information

A suggestion was made to consider amending Court Rule 7:7-7(f)(1), Protective Orders, so that it conforms to the comparable rule in Part III, Court Rule 3:13-3(f)(1). Both these rules provide that a court may order that discovery is "denied, restricted or deferred" when appropriate. R. 3:13-3(f)(1) and R. 7:7-7(f)(1). The rules then list the grounds a court may consider in issuing a protective order. R. 3:13-3(f)(1) and R. 7:7-7(f)(1). In each rule the list is identical, except the Part III rule includes as a ground: "confidential information recognized by law," whereas the Part VII rule does not.

In its 2009-2011 Report, the Criminal Practice Committee recommended amending R. 3:13-3(f)(1) to include as a ground for a protective order "confidential information recognized by law." The Criminal Practice Committee noted that Nicole's Law provides that a victim's location shall remain confidential. N.J.S.A. 2C:14-12(c). The Criminal Practice Committee made its recommendation to allow a judge to issue a protective order when required to do so by this provision of Nicole's Law or other similar statutes. The Supreme Court adopted this recommendation. Accordingly, R. 3:13-3(f)(1) was amended on July 21, 2011, effective September 1, 2011.

The MCP Committee decided to recommend amendment of R. 7:7-7(f)(1) to include the "confidential information recognized by law" language. It agreed with the reasoning of the Criminal Practice Committee that the discovery rule, R. 7:7-7(f)(1), should authorize a court to enter a protective order when a statute or other law protects information from disclosure.

Further, in general, the Committee prefers that the Part VII rules contain the same language as their counterpart in Part III, unless there is a reason for a divergence based on the nature of municipal practice. The Committee saw no reason for a divergence here.

The proposed amendments to R. 7:7-7(f)(1) follow.

Rule 7:7-7. Discovery and Inspection

(a) no change.

(b) no change.

(c) no change.

(d) no change.

(e) no change.

(f) Protective Orders.

(1) Grounds. Upon motion and for good cause shown, the court may at any time order that the discovery 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; confidential information recognized by law, including protection of confidential relationships and privileges recognized by law; and any other relevant considerations.

(2) no change.

(g) no change.

(h) 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), and (c) amended, new paragraph (e) caption and text adopted, former paragraphs (e), (f), and (g) redesignated as paragraphs (f), (g), and (h) July 21, 2011 to be effective September 1, 2011; paragraph (f)(1) amended _____, 2013 to be effective _____ 2013.

E. Proposed Amendments to R. 7:12-3, Expansion of the Plea by Mail Program

The Conferences of Presiding Judges-Municipal Courts and Municipal Division Managers (Conferences) developed a program to expand the current plea by mail, R. 7:12-3, to permit certain plea agreements and dismissals in traffic cases, without the need for the defendant to appear in court. The stated purpose of the program is to reduce the overcrowding of the municipal courtroom, by eliminating the need for court appearances by persons whose cases are routinely downgraded or dismissed. The Conferences believe the expansion of the plea by mail program will improve customer service and preserve valuable courtroom resources for more complicated cases. With less courtroom crowding, defendants who are required to come to court will receive more individual attention by judges and court staff, leading to a less frustrating courtroom experience. The program was endorsed by both the Judiciary Management and Operations Committee and the Judicial Council.

Specifically, the program would allow defendants charged with certain motor vehicle offenses to plead guilty by mail to an amended charge of N.J.S.A. 39:4-97.2, Driving or Operating a Motor Vehicle in an Unsafe Manner. There would be no plea agreement by mail option for motor vehicle defendants charged with more serious offenses, e.g., driving while intoxicated, driving while suspended, reckless driving, or speeding 30 miles per hour or more over the speed limit. The judge would retain discretion to exclude other matters depending on the individual factors in the case.

The program also includes a dismissal request by mail to permit defendants charged with N.J.S.A. 39:3-29, Failure to Exhibit Documents to Law Enforcement, to request dismissal of that charge by providing copies of the appropriate documents. Consistent with the statute, court costs could still be assessed in the court's discretion.

Currently, R. 7:12-3 provides that in order to use plea by mail, a defendant must show that his or her personal appearance "would constitute an undue hardship such as illness, physical incapacity, substantial distance to travel, or incarceration." A key recommendation of the Conferences in relation to expansion of the program is for the hardship requirement to be eliminated from the rule so more defendants could benefit. The expansion of the plea by mail program was sent to the Committee to consider this rule change.

After careful consideration of the plea by mail expansion, the Committee decided that the hardship requirement should be eliminated for the program. The proposed rule change follows.

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

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

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

(b) Plea of Guilty by Mail.

(1) no change;
(2) no change;

(c) Plea of Not Guilty by Mail

(1) no change;
(2) no change;

(d) no change.

(e) no change.

Source - R. (1969) 7:6-6. Adopted October 6, 1997 to be effective February 1, 1998; caption amended, paragraph (a) caption and text amended, former paragraph (b) amended and redesignated as paragraph (c), and new paragraph (b) adopted July 28, 2004 to be effective September 1, 2004; caption of rule amended, captions and text of former paragraphs (a) and (b) deleted, former paragraph (c) redesignated as paragraph (e) and amended, and new paragraphs (a), (b), (c), and (d) adopted June 15, 2007 to be effective September 1, 2007; paragraph (a) amended July 16, 2009 to be effective September 1, 2009; paragraph (a) amended _____, 2013 to be effective _____ 2013.

II. RULE AMENDMENTS AND OTHER ISSUES CONSIDERED AND REJECTED

A. Proposed Amendments to Rule 7:7-2(a) – Written Motions

A private attorney contacted the Committee suggesting that Rule 7:7-2(a), Motions, be amended to require that municipal court motions be made in writing, in consequence of magnitude cases, unless the court directs otherwise. Currently, R. 7:7-2(a) provides that most motions are to be made orally: “”[M]otions in the municipal court and answers to motions, if any, shall be made orally, unless the court directs that the motion and answer be in writing.” The attorney cited in support of his suggestion the following dicta from State v. Holup, 253 N.J. Super. 320, 326 (App. Div. 1992): “We understand that much of the subject matter in controversy in the municipal courts is minor and, in such cases, informal practices should continue, but in the more significant cases, a more careful, thorough procedure is warranted.”

The Committee unanimously concluded that the proposed amendments to R. 7:7-2(a) were not in the best interest of the municipal court or the litigants who appear in the court. In the Committee’s opinion, the current practice of permitting oral motions in most instances is best suited to the fast-paced municipal court calendar, where many of the parties are self-represented. Under the present rule, a judge may certainly require written motions when the matter is more complex and would benefit from a more formal practice. Further, if a party thinks that a particular request would be best made in writing, the court will naturally permit a written motion. So, where the judge or a party thinks a matter would benefit from a written motion, this more formal practice is permitted.

In most instances, though, even in consequence of magnitude cases, municipal court motions are straightforward and uncomplicated both legally and factually. The oral motion is appropriate for these easy-to-understand requests. If written motions were required, it would slow down the pace at which most municipal court cases are disposed. Further, written motions would be a significant obstacle to pro se defendants, who are unfamiliar with motion practice and may have difficulty drafting a written motion.

Accordingly, the Committee decided not to recommend an amendment to R. 7:7-2(a) that would require written motions in most consequence of magnitude cases.

B. Proposed Amendments to Rule 7:7-2 – Treating Inmates' Letters as Motions

In 2009, a prisoner wrote to Judge 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. The Committee discussed this letter extensively in the 2009-2011 term, without coming to a decision by the time its report was filed with the Supreme Court on January 24, 2011. Accordingly, in its 2009-2011 report, the Committee listed this matter as held for consideration.

In addressing the prisoner's request, the Committee did not think that an amendment to R. 7:8-5 was appropriate. A substantial portion of the Committee, however, thought there was a need for a rule that would require municipal courts to act upon all requests for action that were received from unrepresented inmates. 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 engaged in many lively debates on whether it should recommend the above-proposed rule, which would require municipal courts to treat certain letters from unrepresented prisoners as motions. Those supporting the rule change argued that many municipal courts simply ignore prisoner letters that contain specific requests that should be acted on. They argued that prisoners' letters should not be ignored merely because they do not structure their requests in the form of motions. It was pointed out that since the prisoners are unrepresented, they could not be expected to follow the practice of putting their requests for action in the proper form.

Those opposing the proposed rule argued that it 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 by offering pro se packets to prisoners so that they could file motions in the proper form. Many members thought the rule amendment was unnecessary, since many municipal court judges already address the prisoners' letters in some form, either by sending the prisoner a pro se packet, responding with a letter, or granting the requested relief, where appropriate.

Particularly controversial was the provision that provided that the relief was considered denied if no action was taken after 45 days of receipt. An automatic denial would give the prisoner an automatic right of appeal to the Superior Court, Law Division. Many on the Committee thought that this might flood the Superior Court with problematic municipal court appeals. The appeals would be particularly difficult for the Superior Court to handle, since the prisoner letters would be in an improper form and the municipal court would not have created any record on which the Superior Court could rely.

After considerable debate, a majority of the Committee rejected the rule proposal.

C. Immigration and Deportation Warnings

In State v. Nunez-Valdez, 200 N.J. 129, 131 (2009), our Supreme Court held that defense counsel did not provide competent counsel because he misinformed the defendant that under federal law his conviction would not mandate deportation. The Court also determined that plea procedures for indictable matters in the Superior Court should also be modified "to help ensure that a non-citizen defendant receives information sufficient to make an informed decision regarding whether to plead guilty." Id at 143. Shortly afterwards, the United States Supreme Court held in Padilla v. Kentucky, ____ U.S. ____, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010), that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.

As a result of these cases, Judge Grant issued Directive #09-11, "Informing Municipal Court Defendants of the Immigration Consequences of Guilty Pleas." That Directive requires municipal court judges to inform defendants that a guilty plea to certain offenses may result in negative immigration consequences and that they have a right to seek counsel regarding those potential consequences. Specifically, the Directive mandated advisements at three stages of the court process; in the opening statement, at first appearance, and in the guilty plea colloquy.

The Committee considered whether Part VII court rules should be changed to incorporate the requirement that municipal court defendants be informed of the immigration consequences when they plead guilty to certain offenses. For example, R. 7:3-2, Hearing on First Appearances; Right to Counsel, could be modified to state that the judge shall inform the defendant that pleading guilty to certain offenses could result in negative immigration consequences.

After a thorough discussion, the Committee decided not to recommend such a rule change. It thought that Directive #09-11 adequately addressed the concerns raised in Nunez-Valdez that a defendant should be informed of possible negative immigration consequences. The Committee also considered that this is a rapidly changing area of the law. If the rules were changed to reflect current law, they would be difficult to amend when the case law evolved.

Finally, the Committee noted that in its 2009-2011 term, a joint subcommittee of it and the Criminal Practice Committee considered whether the "Guidelines for Determination of Consequence of Magnitude" should be amended in light of Nunez-Valdez and Padilla. The joint subcommittee decided not to recommend a change in the Guidelines in light of the difficulties with determining defendant's immigration status and the complexities of federal immigration law.

In short, the Committee decided unanimously not to recommend rule changes that would require municipal court judges to inform defendants of the immigration consequences of a guilty plea.

D. Handling of a Disorderly Persons Citizen Complaint Connected to an Indictable Complaint

A citizen wrote to the Committee asking it to take action, including possibly recommending a rule change, to remedy what he perceived as the problem of municipal courts sending to the Superior Court disorderly persons complaints related to indictable matters. The citizen saw this as a particular problem when the disorderly persons complaint was filed by a citizen against a law enforcement officer.

The citizen cited as an example a 2011 case where a police officer charged a defendant with three indictable drug offenses. The defendant, in turn, filed a citizen complaint against the officer, charging him with simple assault during the arrest. A municipal court judge found probable cause on the citizen complaint and both complaints were sent to the county prosecutor's office for handling in the Superior Court. The drug charges were disposed in Superior Court in October 2012. The simple assault complaint against the officer has not yet been disposed of as of January 18, 2013. The citizen argued that the procedure of sending a non-indictable complaint to the Superior Court when it was connected to an indictable complaint was faulty because the county prosecutor's office could block prosecution of the citizen's complaint by not moving forward on it.

Court Rule 3:15-3 provides for mandatory joinder to a criminal complaint of any pending non-indictable complaint based on the same conduct or arising from the same episode: "Except as provided in paragraph (b), the court shall join any pending non-indictable complaint for trial with a criminal offense based on the same

conduct or arising from the same episode." Paragraph (b) provides that the court may decline to join a matter if a party is prejudiced by the joinder. R. 3:15-3(b).

The same citizen who wrote to this Committee also wrote to the Criminal Practice Committee asking that R. 3:15-3 be amended.

To effectuate the mandatory joinder rule, the practice in municipal courts is to send to the Superior Court any non-indictable complaint related to an indictable complaint. Directive #4-11, Disposition of Municipal Court Matters in the Superior Court and Notification to Municipal Court", provides that the Superior Court judge should dispose of the associated municipal court matter, unless there is some compelling reason otherwise. If the Superior Court judge does not dispose of the municipal court matter, then the paperwork should be returned to the municipal court within seven days. Directive #4-11.

Nonetheless, neither the county nor municipal prosecutor is obliged to move forward with prosecution of a citizen complaint. The prosecutor enjoys broad discretion in selecting matters for prosecution. Cupano v. Gluck, 133 N.J. 225, 234 (1993). "The prosecutor's broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review." In re L.Q., 227 N.J.Super. 41, 48 (App. Div. 1988). The prosecutor's discretion to decide whether to prosecute or dismiss extends to disorderly persons complaints filed by citizens. State v. Vitiello, 377 N.J. Super. 452, 456 (App. Div. 2005). Prosecutors, unlike private citizens, are guided by Rules of Professional Conduct to ensure fairness in the process. In re Loigman, 183 N.J. 133, 144 (2005). The prosecutor has obligations beyond that of an ordinary party, "the primary duty of a prosecutor is not

to obtain convictions, but to see that justice is done." State v. Frost, 158 N.J. 76, 83 (1999).

The Committee came to a consensus not to take any action relating to this issue. The members pointed out that the citizen's main objection was to the mandatory joinder rule, R. 3:15-3, a Part III rule, which is not within the purview of this Committee. It was also noted that there is a municipal court report that informs the municipal court administrator of matters that have been transferred to the County Prosecutor's office so that the administrator can follow up on transferred cases. The members also indicated that since the prosecutor's office has broad discretion whether to bring the prosecution of a complaint, in the example the citizen cited there was no impropriety in the prosecutor not moving forward with the simple assault complaint. Finally, the members thought that the example the citizen raised was an isolated incident that did not warrant a change in the rules.

E. Improper Plea Agreements

A member of the public wrote to the Committee asking it to take action to remedy the problem of improper plea agreements in the municipal courts. He expressed concern about two types of plea agreements. First, he described what he said was a wide-spread practice of municipal prosecutors offering plea agreements that result in the downgrading of a Title 2C offense to a preempted municipal ordinance. He gave specific examples of such downgrades in municipal courts scattered throughout the State. He pointed out that municipal prosecutors were explicitly prohibited from entering into such plea agreements by a 1998 Attorney General Directive. Second, he pointed out that in at least one municipal

court the municipal prosecutor was downgrading a possession of under 50 grams of marijuana (N.J.S.A. 2C:35-10(a)(4)) charge to a municipal ordinance for disorderly conduct.

The majority of the Committee agreed that the practice of downgrading to a preempted municipal ordinance is a practice prohibited by both statute and case law. Title 2C, New Jersey's Criminal Code, itself provides that municipal ordinances which conflict with the provisions of the code are unenforceable:

> [T]he local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.
>
> [N.J.S.A. 2C:1-5(d).]

Accordingly, in State v. Crawley, 90 N.J. 241 (1982), the New Jersey Supreme Court struck down a municipal loitering ordinance because it was preempted by Title 2C. The Court reasoned that since the Legislature had chosen not to make loitering an offense under the Criminal Code, it had expressed a policy to decriminalize the activity. It stated that if a municipality were permitted to make loitering an offense contrary to the State scheme, then the Legislature's intention "to create [in Title 2C] a consistent, comprehensive system of criminal law" would be undermined. Id. at 250.

Similarly, in State v. Paserchia, 356 N.J. Super. 461 (App. Div. 2003), the Appellate Division held that the offense of disorderly conduct in the Criminal Code, N.J.S.A. 2C:33-2, preempted a local ordinance prohibiting "loud or threatening language or disorderly or indecent behavior of any kind." The court concluded that both the State statute and the municipal ordinance sought to prohibit the same activity. Therefore, the court struck down the ordinance.

Further, a plea agreement that downgrades a marijuana possession charge to a municipal ordinance is prohibited by the "Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey," Appendix to Part VII of the Rules of Court. In general, the Guidelines limit plea agreements relating to possession of controlled dangerous substances.

In the opinion of the Committee, New Jersey's law already prohibits the enforcement of ordinances that are preempted by Title 2C. Both statutory and case law prohibit the practice of downgrading a Criminal Code offense to a preempted municipal ordinance. In the face of such clear law, the Committee determined that a court rule that prohibited the same practice would be merely redundant. Thus, the Committee decided unanimously not to recommend a rule change on this issue.

F. Proposed Legislative Change to N.J.S.A. 39:4-97.2 and N.J.S.A. 39:4-67

At the request of a member, the Committee considered whether it should ask the Supreme Court to make a recommendation to the Legislature to amend N.J.S.A. 39:4-97.2, Unsafe Driving, and N.J.S.A. 39:4-67, Obstructing Passage.

N.J.S.A. 39:4-97.2 provides that it is unlawful for a person "to drive or operate a motor vehicle in an unsafe manner likely to endanger a person or property." A person convicted of a first or second offense of N.J.S.A. 39:4-97.2 is subject to a fine and a surcharge, but is not assessed motor vehicle points. A third conviction will result in the imposition of motor vehicle points. It is common for municipal prosecutors to enter into plea agreements with defendants to downgrade a moving violation that carries points to N.J.S.A. 39:4-97.2. The member suggested that N.J.S.A. 39:4-97.2 be expanded to increase the number of times it could be used without imposing points on the offender.

N.J.S.A. 39:4-67 is another no-point violation that is often used to downgrade moving violations. The offense provides that: "No vehicle . . . shall be permitted . . . to so occupy a street as to interfere with or interrupt the passage of other . . . vehicles . . . ." The member thought that the definition of this offense should be expanded to cover a greater range of violations. The stated purpose of expanding the range of both these violations was to facilitate plea agreements in the municipal courts.

The Committee, by a large majority, rejected the proposal to recommend this Legislative change. The Committee recognized that under the "Operational Guidelines for Supreme Court Committees" that it can make recommendations for legislative changes, but thought its primary focus should be on Court Rule changes.

The members thought that the expansion of these two statutes was primarily one of policy that should be left to the Legislature. It was noted that there are currently a number of proposed bills in the Legislature to expand N.J.S.A. 39:4-97.2 and that it should be left to the legislative branch to determine whether those bills are in the best interest of the people of New Jersey.

G. Proposed Legislative Change to Expungement Statute, N.J.S.A. 2C:52-1 to -32.

An attorney wrote to the Criminal Practice Committee complaining that the Expungement of Records Statute, N.J.S.A. 2C:52-1 to -32, was not being effectively enforced. The Criminal Practice Committee discussed the matter but thought that this Committee should also consider it, since violations of the Expungement of Records Statute are disorderly persons offenses that are heard in the municipal courts, N.J.S.A. 2C:52-30.

The attorney described seven complaints an unnamed person filed in the municipal courts under N.J.S.A. 2C:52-30, attempting to charge various municipal prosecutors, a lawyer, and an assistant county prosecutor with illegally disclosing the person's expunged offense. All of these complaints were either dismissed, or no probable cause was found on them. The attorney concluded from these unsuccessful complaints that: "If New Jersey's Expungement Statute cannot be amended to make it workable, then it may as well be repealed."

The Committee carefully considered the letter, but concluded that a change or repeal of the Expungement Statute is in the purview of the New Jersey Legislature, not this Committee or the Supreme Court. Accordingly, the Committee voted to make no recommendation on this issue.

III. OTHER BUSINESS

A. Bail Reasons Form in Domestic Violence Cases

In its 2009-2011 report, the Criminal Practice Committee asked this Committee to consider creating a form to memorialize a judge's reasons for the amount of bail originally set when a defendant is charged with a domestic violence offense. The request arose out of N.J.S.A. 2C:25-26(e), a provision of the Prevention of Domestic Violence Act, which states:

> Once bail is set it shall not be reduced without prior notice to the county prosecutor and the victim. Bail shall not be reduced by a judge other than the judge who originally ordered bail, unless the reasons for the amount of the original bail are available to the judge who reduces the bail and are set forth in the record.

The Criminal Practice Committee pointed out that there is no form nor any consistent current procedures throughout the State for municipal or Superior Court judges to set forth the reasons for the amount of bail they set on domestic violence offenses. Accordingly, it is difficult for judges who review bail on domestic violence matters to comply with N.J.S.A. 2C:25-26(e).

The MCP Committee noted that in some vicinages bail reasons forms have been used for many years. A subcommittee was formed to develop a standardized bail reasons form for use throughout the State. The subcommittee developed a form that tracks information about the defendant's criminal history and history of domestic violence with the current alleged victim, as well as other victims. It also contains information about weapons and the defendant's mental health issues.

The full Committee agreed to the subcommittee's draft form, with a few minor changes. It decided to refer the draft form to the Criminal Practice Committee for comments. Once the two Committees come to a consensus on the form, the Municipal Court Practice Committee recommends that the form be sent to the Administrative Director with a proposal that the form be promulgated as an Administrative Office of the Courts' statewide form.

B. Trial De Novo Standard of Review for Municipal Court Appeals

In its 2009-2011 report, the Criminal Practice Committee discussed whether the *de novo* standard of review for municipal court appeals should be revised. The Criminal Practice Committee cited the high caliber, experience, and extensive training of municipal court judges as strong support for replacing the *de novo* standard with a standard that accords more deference to the findings of the municipal court. The Criminal Practice Committee formed a subcommittee to explore alternative standards of review for municipal appeals.

Over the past 30 years, the knowledge and competence of municipal court judges has vastly increased. Many unique municipal court practices have disappeared. See, Veniero and Pressler, 2012 N.J. Court Rules, comment on "Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey." Municipal court judges, like their Superior Court counterparts, receive extensive training by the AOC and the vicinage, upon appointment and thereafter.

Further, the Municipal Court Presiding Judge of each vicinage provides careful oversight of the judges and ensures that municipal court procedures are in compliance with the Court Rules and Statewide policies. In short, the Committee believes that a review of the *de novo* standard is in order.

Accordingly, the Chair of the MCP Committee wrote to the Chair of the Criminal Practice Committee offering support and expertise to the subcommittee that is exploring alternatives to the *de novo* standard. The Criminal Practice Committee responded favorably and has invited a municipal court presiding judge, a municipal court judge, a municipal prosecutor, a municipal public defender, and a member of the defense bar to attend the meetings of the subcommittee.

C. Conflict Between R. 3:26-2(a) and the Domestic Violence Procedures Manual

The Chair of the Committee pointed out that there is a conflict between R. 3:26-2(a) and Section 6.4.2 of the Domestic Violence Procedures Manual. R. 3:26-2(a) specifically prohibits a municipal court judge from setting bail for contempt of a domestic violence restraining order:

> A Superior Court judge may set bail for a person charged with any offense. Bail for any offense except . . . a person arrested under N.J.S.A. 2C:29-9b for violating a restraining order may be set by any other judge, or in the absence of a judge, by a municipal court administrator or deputy court administrator.

In contrast, the Domestic Violence Procedures Manual, Section 6.4.2(C) provides that an Assignment Judge may authorize municipal court judges in the vicinage to set bail on a violation of a restraining order that is a disorderly persons offense. The Procedures Manual provides: "If the contempt has been initially screened as a disorderly persons offense, bail may be set by a Municipal Court

Judge if the Assignment Judge in that vicinage has issued a directive/order allowing the practice."

Recognizing that these two provisions are inconsistent, the Committee authorized its Chair to write to both the Family Practice Committee and the Criminal Practice Committee pointing out the discrepancy and suggesting that the conflict should be reconciled. The Committee takes no position on whether the Court Rule or the Procedures Manual should be modified.

IV. MATTERS HELD FOR FUTURE CONSIDERATION

A. Proposed Amendment to R. 7:5-1-- Issuance of Telephonic Search Warrants by Municipal Court Judges

The Committee considered whether the Part VII rules should allow municipal court judges to issue search warrants upon the sworn oral testimony of an applicant who is not physically present—in other words, a telephonic search warrant. Superior Court judges currently have the authority to issue a telephonic search warrant under R. 3:5-3(b).

Specifically, the Committee considered whether it should recommend amending R. 7:5-1 to include the following language, which is modeled on R. 3:5-3(b):

> (c) A Superior Court or Municipal Court judge may issue a search warrant upon sworn oral testimony of an applicant who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate longhand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the applicant must identify himself or herself, specify the purpose of the request and disclose the basis of his or her information. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a search warrant. A warrant may issue if the judge is satisfied that sufficient grounds for granting the application have been shown. Upon approval, the judge shall memorialize the specific terms of the authorization to search and shall direct the applicant to enter this authorization verbatim on a form, or other appropriate paper, designated the duplicate original search warrant. This warrant shall be deemed a search warrant for the purpose of R. 3:5 and R. 7:5-1. The judge shall direct the applicant to print the judge's name on the warrant. If a recording is made, the judge shall direct that the testimony be transcribed as soon

> as practicable. This transcribed record shall be certified by the judge. The judge shall promptly issue a written confirmatory search warrant and shall enter thereon the exact time of issuance of the duplicate original warrant. In all other respects, the method of issuance and contents of the warrant shall be that required by R. 3:5-3(a).

A number of members favored this rule change because it would provide an efficient and speedy alternative method for issuing a search warrant compared to the traditional method of basing the warrant on the in-person testimony of a police officer. See State v. Pena-Flores, 198 N.J. 6, 33-36 (2009). The members anticipated that search warrant requests would increase in light of the Supreme Court's decision in Pena-Flores, which reaffirmed that in New Jersey an exigency inquiry has always been part of the automobile exception to the search warrant requirement. State v. Pena-Flores, supra, 198 N.J. at 25-26.

Nonetheless, the Committee decided to hold this matter for consideration in the next term because the "Report of the Supreme Court Special Committee on Telephonic and Electronic Search Warrants" (Pena-Flores Report) recommended that, at least initially, municipal court judges not be permitted to issue telephonic search warrants. The Pena-Flores Report recommended that only Superior Court judges should respond to telephonic search warrant requests during and after regular business hours. Pena-Flores Report at pp. 37-38. Nonetheless, the Pena-Flores Committee recognized that if the number of telephonic search warrant requests increased to the extent that Superior Court judges could not handle the volume, then certain selected municipal judges might need to be enlisted to handle applications. Pena-Flores Report at pp. 41-42. Certain members of the Pena-

Flores Committee opposed the recommendation for the future use of Municipal Court judges for this purpose. Ibid.

The Pena-Flores Report has not yet been approved by the Supreme Court. However, if the Municipal Practice Committee recommended a rule change to allow municipal court judges to issue telephonic search warrants, it would be in clear contradiction to the recommendation of the Pena-Flores Report. The Municipal Practice Committee, therefore, prefers to await the Supreme Court's decision on whether to adopt the recommendation of the Pena-Flores Report before it makes its own recommendation on this issue.

V. CONCLUSION

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

Respectfully submitted:

Roy F. McGeady, P.J.M.C., Chair
Frank J. Zinna, P.J.M.C., Vice-Chair
David S. Bunevich, Esq.
Steven P. Burkett, C.J.M.C.
Frank T. Carpenter, P.J.M.C.
Annmarie Cozzi, Asst. Prosecutor
Brenda Coppola Cuba, J.M.C.
David Eberhardt, MDM
William Ferreira, Esq.
Arnold N. Fishman, Esq.
Elaine B. Frick, Esq.
Jeffrey Evan Gold, Esq.
Carol M. Henderson, Esq.
Edward H. Herman, P.J.M.C.
John Leonard, Esq.
Peter A. Locascio, J.M.C.
Dominick M. Manco, Esq.
Marcy M. McMann, Esq.
Robyn M. Mitchell, Esq.
Michael Mitzner, Esq.
Richard E.A. Nunes, C.J.M.C.
Stephen L. Ritz, Esq.
Louis S. Sancinito, Esq.
Cassandra T. Savoy, Esq.
H.Robert Switzer, J.M.C.
Daniella M. Trancho, C.M.C.A.
James E. Trabilsy, Esq.
Robert T. Zane, P.J.M.C.
Carol A. Welsch, Esq., Staff

APPENDIX

Report of the
Joint Criminal/Municipal Subcommittee
On the Telephonic Issuance of Drug Offender
Restraining Orders and Nicole's Law
Restraining Orders

Respectfully Submitted,

Hon. Martin Cronin, J.S.C., Chair
Hon. Mitchel Ostrer, J.A.D.
Hon. Steven Burkett, C.J.M.C.
Jeffrey Coghlan, Esq.
Ronald Susswien, Esq.
Steven Somogyi

January 14, 2013

TABLE OF CONTENTS

PAGE

I. Overview 1

II. Recommendation 3

III. Background 3
- A. Drug Offender Restraining Order Act (DOROA) 3
- B. Nicole's Law 5

IV. Revisions to R. 3:3-1 7
- A. Paragraph (g)(1) – Acknowledging Separate Procedures for Domestic Violence Restraining Orders 8
- B. Paragraph (g)(2) – Procedures for Issuance DOROA and Nicole's Law Orders by Electronic Communication 8
  1. Emergent Circumstances are Not Required 9
  2. Issuance by Electronic Communication for Pretrial Orders Only 9
  3. Issuance by Electronic Communication – Discretionary with the Court 10
  4. Sworn Oral Testimony by Applicant and Contemporaneous Recording by the Judge 11
  5. Memorialization of the Order 11
  6. Service Upon the Defendant and Delivery of Signed Restraining Order to the Court 12
- C. Delivery of Certification of Offense Location for DORA Orders Orders to the Court 14

V. Procedures Governing Violations of Monetary and Non-Monetary Bail Conditions 15

VI. Conclusion 17

Appendix A

Proposed Revisions to R. 3:3-1

I. OVERVIEW

DOROA were pending, the Supreme Court issued an order, dated March 8, 2011, relaxing Part III (Criminal) and Part VII (Municipal Court) of the court rules "so as to permit the issuance of restraining orders, pursuant to (a) N.J.S.A. 2C:35-5.7 (the "Drug Offender Restraining Order Act of 1999" or DORA); or (b) N.J.S.A. 2C:14-12 and 2C:44-8 ("Nicole's Law"), by telephone, radio, or other electronic communication upon the sworn oral testimony of a law enforcement officer or prosecuting attorney communicated electronically to the issuing judge, pursuant to procedures approved by the Supreme Court and promulgated by the Administrative Director of the Courts." The Court also asked the Criminal Practice Committee and Municipal Court Practice Committee to draft appropriate rule revisions, for its consideration, to comport with the rule relaxation and the DOROA legislation, should it be enacted.

This report contains the recommendations of the joint subcommittee of the Criminal Practice Committee and Municipal Court Practice Committee on procedures to allow for the issuance of DOROA and Nicole's law orders, as a condition of release, by telephone, radio or other means of electronic communication (hereafter referred to as "telephonic procedures" or "electronic communication") in situations when the law enforcement officer or prosecuting attorney (hereafter referred to as "law enforcement officer") seeking the order is not physically present in the same location as the court. With respect to the telephonic procedures governing the issuance of DOROA and Nicole's law orders, the subcommittee took the approach to draft revisions to R. 3:3-1 and to forward its recommendations to the Criminal Practice Committee for adoption and to the

Municipal Court Practice Committee for corollary revisions to the appropriate Part VII rules.

Additionally, the joint subcommittee began exploring whether to revise R. 3:26-1 to develop procedures for the enforcement of non-monetary conditions of release including, but not limited to, conditions imposed pursuant to DOROA or Nicole's Law. The joint subcommittee recognized the need to examine this issue; however, it was cognizant that developing enforcement procedures goes beyond the Court's referral to the Criminal Practice Committee and the Municipal Court Practice Committee to revise the court rules in accordance with its March 8, 2011 order. The joint subcommittee is therefore seeking clarification that the Supreme Court's referral extends to developing procedures to handle the enforcement of violations of monetary and non-monetary conditions of pretrial release.

Finally, while both DOROA and Nicole's law orders can be issued when a person is convicted of an applicable offense, the DOROA statute specifically permits the issuance of orders by electronic means, as condition of release, when a defendant is charged with an eligible offense on a warrant. Therefore, the proposed amendments recommended in this report are limited to the context of DOROA and Nicole's Law orders that are issued as a condition of release. The proposed rule revisions do not address orders issued upon conviction.

II. RECOMMENDATION

For the reasons stated in this report, the joint subcommittee is recommending that the Criminal Practice Committee adopt revisions to R. 3:3-1 (governing the issuance of complaints and summonses) and that the Municipal Court Practice Committee draft corollary revisions to the appropriate Part VII rules, which would provide authority for the court to consider and grant applications for the issuance of DOROA and Nicole's law orders by electronic means when the applicant is not physically present in the same location as the court when the application is made.

III. BACKGROUND

A. Drug Offender Restraining Order Act of 1999 ("DORA"), N.J.S.A. 2C:35-5.4 – 5.10

In relevant part, DOROA provides authority for the court to issue an order, as a condition of release, prohibiting a person charged with certain drug offenses from entering specified locations enumerated in the statute.[1] Procedures to implement DOROA, when the applicant appears in-person before the court, were issued to the Criminal, Family and Municipal Courts by then-Acting Administrative Director of the Courts Richard Williams as set forth in the Assignment Judges Memorandum dated May 3, 2002. Effective April 6, 2011, N.J.S.A. 2C:35-5.7(a) of DOROA was amended to permit expedited procedures for the court to consider and grant the issuance of a restraining order pursuant to DOROA, as a condition of release, when

[1] A DOROA order can be issued for any of the following applicable offenses: N.J.S.A. 2C:35-3; N.J.S.A. 2C:35-4; N.J.S.A. 2C:35-5; N.J.S.A. 2C:35-6; N.J.S.A. 2C:35-8; N.J.S.A. 2C:35-9; N.J.S.A. 2C:35-4.1; N.J.S.A. 2C:35-5.2; N.J.S.A. 2C:35-5.3; N.J.S.A. 2C:35-7; or N.J.S.A. 2C:35-7.1; or (2) the unlawful possession or use of an assault firearm as defined in N.J.S.A. 2C:39-1w. See N.J.S.A. 2C:35-5.6c. The order can restrict a person from any premise, residence, business establishment, location or specified area including all buildings and all appurtenant land, in which or at which a criminal offense occurred or is alleged to have occurred or is affected by the criminal offense with which the person is charged. As defined, the term "place" does not include public rail, bus or air transportation lines or limited access highways which do not allow pedestrian access. N.J.S.A. 2C:35-5.6b.

a defendant is charged with an eligible offense on a warrant and the applicant (the law enforcement officer or the prosecuting attorney) is not physically present at the same location as the court when the application is made. Under the amended law, an application for a DOROA order may be made telephone, radio or other means of electronic communication and the procedures for handling such applications shall be in accordance with the rules of the court. As set forth in N.J.S.A. 2C:35-5.7(a), this expedited process only applies when a person is charged with an eligible offense on a warrant. The telephonic procedures are not available when a person is charged with an eligible offense on a summons. Rather, when a summons is issued, upon application of a law enforcement officer, the court shall issue the DOROA order at the time of the defendant's first appearance.[2] N.J.S.A. 2C:35-5.7(b).

Moreover, as part of the application for a DOROA order, the law enforcement officer must submit a certification describing the location of the offense. N.J.S.A. 2C:35-5.9. The 2011 law clarifies that when the applicant is not physically present at the same location as the court, the applicant must provide an oral statement describing the location of the offense, followed by submission, within a reasonable time, of a certification describing the offense location in accordance with the court rules.

The 2011 amendments to the DOROA are the legislative counterpart to the March 8, 2011 order of the Supreme Court relaxing certain criminal and municipal court rules to permit the court to issue restraining orders pursuant to DOROA and

[2] The Assembly Bill that was introduced in 2010 contained language that would authorize the issuance of DOROA orders by electronic or telephonic means when a defendant is released on a summons, however, that language was not incorporated in the law as enacted. See A-2416 (Introduced March 4, 2010). As enacted, the law provides that if a defendant is released on a summons, upon request of the law enforcement officer or prosecuting attorney, the court shall issue the DOROA order at the first appearance.

Nicole's Law, as a condition of pretrial release. Upon entering the rule relaxation order the Court also referred this matter to the Criminal Practice Committee and the Municipal Court Practice Committee to draft proposed rule revisions consistent with the statute and the rule relaxation. By memorandum dated March 17, 2011 the Administrative Director of the Courts issued interim guidance regarding the telephonic issuance of restraining orders pursuant to DOROA and Nicole's law, which were based on the language of Assembly Bill No. 2416 that was then-pending with the legislature. The procedures were made available pending the evaluation of this issue by Criminal and Municipal Court Practice Committees. The March 17, 2011 memorandum supplemented the Assignment Judges Memorandum, dated May 3, 2002, which implemented DORA and AOC Directive #1-10, which implemented Nicole's Law.

B. Nicole's Law - N.J.S.A. 2C:14-12

In relevant part, Nicole's Law, N.J.S.A. 2C:14-12, permits the court to issue an order, as a condition of release, prohibiting a defendant charged with a sex offense from having any contact with a victim, including restraining the defendant from entering a victim's residence, place of employment, business or school and from harassing or stalking the victim or victim's relatives. The law defines "sex offense" by referencing Megan's Law, N.J.S.A. 2C:7-2. Nicole's Law orders are similar to domestic violence restraining orders, except that there need not be a domestic relationship between the defendant and the victim for a Nicole's Law order to be issued, so long as the person is charged with an eligible sex offense. By Directive #1-10, dated March 2, 2010, procedures were issued for the Criminal, Family and Municipal Courts to implement Nicole's Law.

Nicole's law differs from DOROA in several respects. First, unlike DOROA where an order must be entered upon request by a law enforcement officer, pursuant to Nicole's Law, the court has discretion to issue an order when the defendant is charged with an eligible offense. Specifically, N.J.S.A. 2C:14-12 provides that "[w]hen a defendant charged with a sex offense is released from custody before trial on bail or personal recognizance, the court authorizing the release may, as a condition of release issue an order prohibiting the defendant from having contact with the victim.

Second, Nicole's Law does not require that an application be submitted by a law enforcement officer before the court can enter an order. Rather, the statute, as cited above, authorizes the court to enter a Nicole's law order on its own initiative. Thus, different from DOROA, Nicole's law does not contain a reference to telephonic procedures for the issuance an order when an applicant is not physically present with the court when the application is made. Although, Nicole's Law does not contain a statutory reference to telephonic procedures for the issuance of the orders, it was reported by the Municipal Court Presiding Judges that, in practice, Nicole's Law orders often are either requested by law enforcement or issued by the court on its own initiative, at time that a complaint is filed and as a condition of release when bail is set. Often bail is set in the middle of the night and by telephone, therefore, to ensure that the orders are promptly issued in appropriate cases, the proposed rule amendments in this report cover the issuance of Nicole's law orders by electronic communication.

Thus, as directed in the March 8, 2011 Supreme Court rule relaxation order and the March 17, 2011 memorandum from the Administrative Director of the Courts, the

joint subcommittee's recommended procedures encompass the issuance of both DOROA and Nicole's law orders by electronic communication. Against this backdrop, the joint subcommittee has drafted proposed amendments to the court rules.

IV. Revisions to R. 3:3-1

Acknowledging that DOROA and Nicole's Law orders will likely be issued when a complaint is filed and bail is set, the joint subcommittee drafted revisions to R. 3:3-1, which governs the issuance of an arrest warrant or summons. The revisions to the rule add a new paragraph (g) governing the issuance of DOROA and Nicole's law orders by electronic communication. The proposed amendments contain three components: (1) paragraph (g)(1) acknowledges the separate procedures in R. 5:7A(b), which authorize the issuance of temporary domestic violence restraining orders by electronic communication; (2) paragraph (g)(2) sets forth the procedural requirements for the issuance of DOROA and Nicole's law orders by electronic communication; and (3) paragraph (g)(3) sets forth the procedural requirements for the applicant to provide the court with a certification of the offense location when a DOROA order is issued by electronic communication. The text of the proposed amendments to R. 3:3-1 is in Appendix A.

A. Paragraph (g)(1) – Acknowledging Separate Procedures for Domestic Violence Restraining Orders

Paragraph (g)(1) of the proposed rule revisions refers to R. 5:7A(b), which governs the issuance of temporary domestic violence restraining orders. The joint subcommittee recognized that DOROA and Nicole's Law orders are unique to criminal/municipal courts, because they are directly related to the criminal charges or disorderly persons offenses that the individual is facing. Pursuant to both statutes, for an order to be issued, an individual must be charged with or convicted of certain eligible criminal charges or disorderly persons offenses. To avoid any confusion between the issuance of domestic violence restraining orders and the issuance of DOROA or Nicole's law orders, the text of paragraph (g)(1) acknowledges the separate procedures in R. 5:7A(b) authorizing the issuance of temporary domestic violence restraining orders by electronic communication.

B. Paragraph (g)(2) – Procedures for the Issuance of DOROA and Nicole's Law Orders by Electronic Communication

Paragraph (g)(2) sets forth the procedural requirements for the issuance of DOROA and Nicole's law orders by electronic communication. As discussed below, the procedures being recommended for the telephonic issuance of DOROA and Nicole's law orders are similar to practices that are currently in place for the issuance of other judicial orders and warrants by municipal and superior court judges when the applicant is not physically present in the same location as the court when an application is made. See R. 3:2-3 (telephonic issuance of arrest warrants); R. 3:5-3(b) (telephonic issuance of search warrants); R. 5:7A(b) (telephonic issuance of temporary domestic violence restraining orders). Thus, much of the

language in the proposed revisions to R. 3:3-1 is derived from and mirrors the language in the respective court rules governing those practices.

1. Emergent Circumstances are Not Required

As introduced in the legislature Assembly Bill No. 2416 contained language, which would have permitted the issuance of DOROA orders by electronic communication in "emergent circumstances." This particular language was not adopted in the amendments to DOROA, as enacted. Therefore, the proposed amendments to R. 3:3-1 do not require that the law enforcement officer make a prerequisite showing of an emergency before seeking an order by electronic or telephonic means, as opposed to seeking an order in-person.

2. Issuance by Electronic Communication for Pretrial Orders Only

Both DOROA and Nicole's Law orders can be issued pretrial when a person is charged with an eligible offense or at sentencing when a person is convicted of an eligible offense. The 2011 amendments to DOROA allow for the telephonic issuance of DOROA orders as a condition of release on bail, when a defendant is charged with a crime or disorderly persons offense on a warrant. As such, the proposed rule amendments are limited to the applications sought by electronic means for DOROA and Nicole's law orders that are issued as a condition of release. Although the DOROA and Nicole's Law statutes permit the issuance of orders when a defendant has been convicted of applicable charges, the proposed amendments in this report do not address procedures for the telephonic issuance of the orders outside of the context of pretrial release.

3. Issuance by Electronic Communication – Discretionary with the Court

It is clear on the face of the DOROA statute that if an in-person application is made by a law enforcement officer, the order must be entered by the court. Nonetheless, the statute is equally clear that the decision to issue a DOROA order by electronic means is discretionary with the court. Specifically, N.J.S.A. 2C:35-5.7(a) of the DOROA statute provides that the law enforcement officer or prosecuting attorney may file an application for the issuance of the order by telephonic or electronic means. When an application is filed telephonically, the court has discretion to consider and grant the application in accordance with the rules of the court. Thus, for telephonic applications, the court has discretion either to follow the procedures to issue the order by electronic communication or to deny the telephonic application and require that the law enforcement officer appear before the court, in-person. As such, for applications made telephonically, there is leeway for the issuing judge to require that the applicant personally appear before the court. Pursuant to Nicole's law, a decision to enter an order by electronic communication or based upon a request made in-person rests within the discretion of the court. N.J.S.A. 2C:14-12. Consistent with these statutes, the proposed rule revision provides that a "judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") upon sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present." (emphasis added).

4. Sworn Oral Testimony by the Applicant and Contemporaneous Recording by the Judge

The proposed revisions to R. 3:3-1 requiring sworn oral testimony from the applicant and contemporaneous recording by the court are similar to the current procedures in place that govern the issuance of arrest warrants, search warrants and temporary domestic violence restraining orders by electronic communication. See R. 3:2-3 (telephonic issuance of arrest warrants); R. 3:5-3(b) (telephonic issuance of search warrants); R. 5:7A(b) (telephonic issuance of temporary domestic violence restraining orders). The proposed rule revisions require: (1) the applicant must provide sworn oral testimony; (2) the judge shall contemporaneously record the sworn oral testimony; (3) after taking the oath the law enforcement officer or prosecuting attorney must identify himself or herself, specify the purpose of the request and disclose the basis of the application; and (4) the sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order.

5. Memorialization of the Order

The proposed rule revisions set forth specific requirements to memorialize the order that is being issued by electronic means. The proposed revisions state that once the court determines that an order will be issued, the judge must memorialize the specific terms of the order by either a tape recording or longhand notes. The judge shall then direct the law enforcement officer to memorialize the specific terms on the order, as authorized by the judge. This document shall be deemed a restraining order for the purpose of DOROA or Nicole's Law. The judge shall also direct the law enforcement officer to print the judge's name on the restraining order. These procedures are similar to other practices that have been in place for the

issuance of court orders and warrants by municipal and superior court judges when the applicant is not physically present in the same location as the court when the application is made. See R. 3:2-3 (telephonic issuance of arrest warrants); R. 3:5-3(b) (telephonic issuance of search warrants); R. 5:7A(b) (telephonic issuance of temporary domestic violence restraining orders).

6. Service Upon the Defendant and Delivery of Signed Restraining Order to the Court

The rule proposal next sets forth the requirements for service upon a defendant and the process for the law enforcement officer to deliver the signed order to the court. The proposed language provides that once the restraining order is entered by the judge, a copy of the order shall be served upon the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer must provide the court with: (1) the signed restraining order, and (2) a certification of service of the order upon the defendant. The law enforcement officer can deliver the order and certification of service to the judge either in-person, by facsimile transmission or by other means of electronic communications, such as email.

Both DOROA and Nicole's law restraining orders have a place for the defendant to sign the order, acknowledging receipt. The subcommittee discussed whether the defendant should be required to sign a DOROA or Nicole's law restraining order, as well as a mechanism to ensure service of the order upon a defendant who is not present when an order is issued. One member recommended that the rule contain language explaining that the restraining order shall include the defendant's signature and the date and time that it was served upon the defendant. The joint subcommittee discussed, however, that some defendants are not present with the

law enforcement officer when the order is issued. Furthermore, in some circumstances a defendant may refuse or decline to sign a restraining order when it is issued. It was suggested that if the rule makes it mandatory that the defendant sign the restraining order, it should also include language that the failure of the defendant to sign the restraining does not affect the validity of the order. After a discussion, the subcommittee agreed that the requirement that a defendant sign the restraining order need not be included in the rule; however the defendant should be given an opportunity to sign the restraining order, to acknowledge receipt.

With respect to service of the order upon the defendant, the joint subcommittee agreed that a copy of the restraining order shall be served upon the defendant by any officer authorized by law. Additionally, a certification of service upon the defendant must be provided to the court. The joint subcommittee recognized that domestic violence restraining orders include language, in the order itself, for the law enforcement officer to indicate how service upon a defendant was carried out. However, at this time, the subcommittee is not recommending revisions to the DOROA and Nicole's Law orders to mirror the language in the domestic violence restraining orders. Rather, the subcommittee is recommending that the certification of service shall include the date and time that service was made or attempted to be made upon the defendant. The subcommittee recommends that the Administrative Director of the Courts develop guidance, consistent with this recommendation, setting forth the necessary requirements for the certification of service that must be provided to the court to ensure that proper notice and due process requirements are satisfied.

Finally, the joint subcommittee determined that within 48 hours of the telephonic issuance of the order, the law enforcement officer shall deliver to the court the signed restraining order and certification of service upon the defendant. The subcommittee discussed several methods of delivery, including delivery in-person or by facsimile. Additionally, the subcommittee agreed that once the order is signed it can be scanned and submitted to the court by email. As such, the proposed amendments to the rule provide an option for a law enforcement officer to submit the signed restraining order to the court by electronic means. The proposed rule revisions to address options for the delivery of the signed restraining order and the certification of service upon the defendant to the court are as follows:

> Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, the signed restraining order along with a certification of service upon the defendant

C. Paragraph (g)(3) - Delivery of Certification of Offense Location for DORA Orders to the Court

DOROA provides that "[t]he court shall issue a restraining order . . . only upon request by a law enforcement officer or prosecuting attorney and either: (1) submission of a certification describing the location of the offense; or (2) in matters where the applicant is not physically present at the same location as the court, an oral statement describing the location of the offense followed by submission within a reasonable time of a certification describing the location of the offense in accordance with the Rules of Court." N.J.S.A. 2C:35-5.9. The joint subcommittee considered an appropriate timeframe for a law enforcement officer to submit a certification describing the location of the offense to the court when a DOROA order

is issued telephonically. The subcommittee agreed that the certification shall be submitted to the court within 48 hours; the same timeframe that is being proposed in paragraph (g)(2) for the applicant to deliver to the court the copy of the signed restraining order and certification of service upon the defendant. Consistent with the method of delivery being proposed in paragraph (g)(2), proposed paragraph (g)(3) includes the option for law enforcement to submit the certification of the offense location for DORA orders to the court by email.

The subcommittee is proposing the following language in new paragraph (g)(3) to govern the delivery of the certification of the offense location to the court:

> (g) Issuance of Restraining Orders By Electronic Communication . . . .
>
> (3) Certification of Offense Location for Drug Offender Restraining Orders. When a restraining order is issued by electronic communication pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") where the law enforcement officer or prosecuting attorney is not physically present at the same location as the court, the law enforcement officer or prosecuting attorney must provide an oral statement describing the location of the offense. Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, a certification describing the location of the offense

The proposed revisions to R. 3:3-1 are fully set forth in Appendix A.

V. PROCEDURES GOVERNING VIOLATIONS OF MONETARY AND NON-MONETARY BAIL CONDITIONS

Among the issues being considered by the full Committee included whether the existing DOROA or Nicole's Law orders need to be revised. A member recommended that the orders should be amended to notify the defendant that a violation of these orders may result in the revocation of a defendant's pretrial

release, in addition to contempt of court and the revocation of bail. It was suggested that the orders should further specify that defendant's pretrial release is expressly conditioned upon compliance with DOROA and Nicole's Law conditions. It was further recommended that the full committee should explore whether to develop procedures for the enforcement of any non-monetary conditions of release, including but not limited to those imposed pursuant to DOROA or Nicole's Law. Theoretically, these procedures would be equally applicable to non-monetary conditions imposed under R. 3:26-1(a) which, in turn, provides that, "[t]he court may also impose terms or conditions appropriate to release including conditions necessary to protect persons in the community."

This subcommittee discussed procedures to address noncompliance with non-monetary conditions of bail, including, but not limited to violations of DOROA and Nicole's Law restraining orders. These discussions concerned revisions to R. 3:26 in a manner consistent with "best practices," as articulated in sources including the American Bar Association Standards for Criminal Justice, Pretrial Release Standards (2007) and the Bail Reform Act of 1984, 18 U.S.C. § 3148. See State v. Korecky, 169 N.J. 365, 373-76 (2001)(cites with approval ABA and federal approach), State v. Johnson, 61 N.J. 351, 361-62 (1972)(same). While the subcommittee acknowledged the need for these revisions, it also recognized that these revisions address issues that exceed those referred to this committee by the Supreme Court in its March 8, 2011 order. The subcommittee further recognized that these revisions have wide application beyond telephonically issued DOROA and Nicole's Law restraining orders and that their application raise significant resource allocation issues. Accordingly, the subcommittee requests clarification that the

Supreme Court's referral extends to developing procedures to enforce compliance with non-monetary pretrial release conditions.

VI. CONCLUSION

In conclusion, the joint subcommittee is recommending that the Criminal Practice Committee adopt the proposed revisions to R. 3:3-1 to codify procedures to allow for the issuance of DOROA and Nicole's Law restraining orders when the applicant is not physically present before the court at the time that an application is made. The proposed procedures are limited to restraining orders that are issued prior to trial. Additionally, the Municipal Court Practice Committee should consider conforming amendments to the appropriate Part VII rules.

APPENDIX A

Proposed Revisions to R. 3:3-1

3:3-1. Issuance of an Arrest Warrant or Summons; Issuance of Restraining Orders by Electronic Communication

(a) Issuance of a Warrant. . . no change.

(b) Issuance of a summons. . . no change.

(c) Determination of Whether to Issue a Summons or Warrant. . no change.

(d) Finding of No Probable Cause. . .. no change.

(e) Additional warrants or summonses. . . no change.

(f) Process Against Corporations. . .. no change.

(g) Issuance of Restraining Orders By Electronic Communication.

(1) Temporary Domestic Violence Restraining Orders. Procedures authorizing the issuance of temporary domestic violence restraining orders by electronic communication are governed by R.5:7A (b).

(2) N.J.S.A. 2C:35-5.7 and N.J.S.A. 2C:14-12 Restraining Orders. A judge may as a condition of release issue a restraining order pursuant to N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law") upon sworn oral testimony of a law enforcement officer or prosecuting attorney who is not physically present. Such sworn oral testimony may be communicated to the judge by telephone, radio or other means of electronic communication. The judge shall contemporaneously record such sworn oral testimony by means of a tape-recording device or stenographic machine if such are available; otherwise, adequate long hand notes summarizing what is said shall be made by the judge. Subsequent to taking the oath, the law enforcement officer or prosecuting attorney must

identify himself or herself, specify the purpose of the request and disclose the basis of the application. This sworn testimony shall be deemed to be an affidavit for the purposes of issuance of a restraining order. Upon issuance of the restraining order, the judge shall memorialize the specific terms of the order. That memorialization shall be either by means of a tape-recording device, stenographic machine, or by adequate longhand notes. Thereafter, the judge shall direct the law enforcement officer or prosecuting attorney to memorialize the specific terms authorized by the judge on a form, or other appropriate paper, designated as the restraining order. This order shall be deemed a restraining order for the purpose of N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") and N.J.S.A. 2C:14-12 ("Nicole's Law"). The judge shall direct the law enforcement officer or prosecuting attorney to print the judge's name on the restraining order. A copy of the restraining order shall be served upon the defendant by any officer authorized by law. Within 48 hours, the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, the signed restraining order along with a certification of service upon the defendant. The certification of service shall include the date and time that service upon the defendant was made or attempted to be made in a form approved by the Administrative Director of the Courts. The judge shall verify the accuracy of these documents by affixing his or her signature to the restraining order.

(3) Certification of Offense Location for Drug Offender Restraining Orders. When a restraining order is issued by electronic communication pursuant to

N.J.S.A. 2C:35-5.7 ("Drug Offender Restraining Order Act of 1999") where the law enforcement officer or prosecuting attorney is not physically present at the same location as the court, the law enforcement officer or prosecuting attorney must provide an oral statement describing the location of the offense. Within 48 hours the law enforcement officer or prosecuting attorney shall deliver to the judge, either in person, by facsimile transmission or by other means of electronic communication, a certification describing the location of the offense.

HISTORY: Source-R.R. 3:2-2(a)(1)(2)(3) and (4); paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b) and (c) redesignated as (c) and (d) respectively July 21, 1980 to be effective September 8, 1980; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (b) amended July 22, 1983 to be effective September 12, 1983; caption and paragraph (a) amended and paragraph (f) adopted July 26, 1984 to be effective September 10, 1984; paragraph (b) amended January 5, 1988 to be effective February 1, 1988; captions and text amended to paragraphs (a), (b), (c), (e) and (f), paragraph (g) adopted July 13, 1994, text of paragraph (a) amended December 9, 1994, to be effective January 1, 1995; paragraphs (a), (c), (e), (f), and (g) deleted, paragraph (b) amended and redesignated as paragraph (c), paragraph (d) amended and redesignated as paragraph (e), new paragraphs (a), (b), (d), and (f) adopted July 5, 2000 to be effective September 5, 2000[.]; new paragraph (g) adopted to be effective .