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NEW JERSEY STATE BAR ASSOCIATION

MILES S. WINDER III, PRESIDENT
12 Quimby Lane
P.O. Box 775
Bernardsville, NJ 07924-0775
908-766-3300 • FAX: 908-766-6253
mswinder@gmail.com

April 15, 2016

Honorable Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex
P.O. Box 037
Trenton, NJ 08625-0037

Re: Comments on Rules Committee Reports

Dear Judge Grant:

The following represents the recommendations and comments of the New Jersey State Bar Association (NJSBA) regarding the 2016 reports of the Civil Practice, Special Civil Part Practice and Tax Court Committees. I thank the Court for considering the NJSBA's views and for extending the comment period to allow the NJSBA Board of Trustees an opportunity to adequately review and discuss the reports.

Civil Practice Committee Report

The NJSBA supports and agrees with many of the recommendations contained in the Civil Practice Report. Specifically, the NJSBA urges adoption of the following recommendations for rule changes:

1. R. 1:9-3 (Service of Subpoenas) -- permits service by mail under certain circumstances.

2. R. 2:6-2(a)(1) (Contents of Appellant's Brief) – requires inclusion of a Table of Judgments, Orders and Rulings being appealed in appellate briefs. This change will allow judges to access the matter being appealed in the record more easily, thus creating greater efficiency in brief review.

3. R. 2:6-11(d) (Time for Serving and Filing Briefs) – limits the types of cases that may be brought to an appellate court's attention by letter after a brief has been filed, and limits the length of the letter to two pages. This change will prevent a party from submitting an additional brief while the matter is pending before the court.

4. R. 2:12-9 (Appeals of Right) -- clarifies whether denial of a petition for certification also disposes of an appeal as of right. This proposal provides an appropriate clarification that an appeal as of right may proceed even if the petition for certification is denied.

5. R. 4:3-2 (Venue in Superior Court) – replaces reference to "corporate" or "corporation" with "business entity."

6. R. 4:5-4 (Affirmative Defenses) – specifically includes frustration of purpose and impossibility of performance as affirmative defenses.

7. R. 4:11-4 (Testimony for Use in Foreign Jurisdictions) – clarifies procedure for requesting subpoenas for testimony for use in another state. These clarifications will make application of the Uniform Interstate Deposition and Discovery Act easier.

8. R. 4:14-6 (Certification and Filing by Officer) -- prohibits access to court reporter's backup recording absent a court order.

9. R. 4:21A-4(F) and 4:21A-5 (Arbitration Award) – requires service of an arbitration award on an absent defendant be made within ten days of receipt of the award.

10. R. 4:30A (Entire Controversy) – allows bad faith claim after UM action. This codifies recent case law, and is the logical approach.

11. R. 4:46-2 (Summary Judgment Motions – Statement of Material Facts) -- requires statement of material facts to be a separate document filed with a summary judgment motion and not be subsumed within the motion brief.

12. Proposed amendments to Appendix I (Life Expectancy Tables) – Updates tables to reflect most recent statistics.

The NJSBA has some concerns with other rule proposals in the Civil Practice Committee Report. Specifically, the NJSBA recommends that the following rule proposals not be adopted:

1. R. 2:6-2(b) (Letter Briefs) -- requires parties to include a table of contents, including a table of authorities, in a letter brief. This will eliminate a letter brief as a streamlined option for litigants, as the only difference between a regular brief and a letter brief, if the Rule is adopted, would be the page limitations: 20 pages for a letter brief and 65 pages for a regular brief.

2. R. 4:18-1 (FOIA and OPRA Requests) – requires that all counsel in pending litigation be notified of FOIA and OPRA requests that are relevant to the litigation. Attorneys often utilize public records requests to obtain information, and these activities should be *ex parte* given the work product nature of the requests. Additionally, in some practice areas, the proposed rule change will create an uneven playing field. In the area of labor and employment law, for example, counsel for employers automatically have *ex parte* access to their client's records without any notice to other parties. Plaintiffs' attorneys, on the other hand, might have access to these documents through a public records request as part of their pre-discovery work product investigation, but, under the proposed rule, would now have to notify the opposing party of their efforts. A Demand for Production of Documents should be a sufficient tool for one party to obtain relevant information from the other.

3. R. 4:42-9 (Attorney's Fees) – authorizes counsel fees for direct actions for first party coverage. The Appellate Division specifically rejected this proposition in the UM/UIM context (one form of first party coverage) in New Jersey Manufacturers Insurance Company v. Breen, 297 N.J. Super. 503, 516 (1997); aff'd as modified 153 N.J. 424 (1998). It is acknowledged that the Wadeer court (220 N.J. at 611) suggested the committee review the issue of first party coverage, but to date no justification has been presented to warrant the proposed amendment. In addition, it is believed that this rule amendment will fuel additional litigation, rather than encourage the negotiated resolution of claims.

We note the Committee referred a question back to the Court about the scope of tis review under this rule. We have concerns if the Committee's review is expanded to apply to all first party coverage matters, and believe any review should be limited to UM/UIM claims. We would have grave concerns about fee shifting in any circumstance where fees could be awarded in a circumstance other than in favor of a "successful claimant" based upon an entitlement to coverage as opposed to allowing for fees based upon the quantum of damages.

For these reasons, additional evaluation of this proposal is recommended before any change is implemented.

The NJSBA has a number of concerns with the Committee's recommendations for changes to the procedures governing guardianship actions. Specifically, the NJSBA asks the Court to not move forward on the following proposals:

1. R. 4:86-2(b)(3) (Guardianship Actions) -- proposes that the documents accompanying the complaint include a case information statement that includes the date of birth (DoB) and Social Security number (SSN) of the alleged incapacitated person (AIP). There doesn't seem to be a need for the AIP's DoB and SSN from the start of proceedings. In our view, circulating such information would put the AIP at serious risk of fraud and identity theft, particularly if that information is circulated to all parties to the litigation. If there is a need for the AIP's DOB and SSN, we suggest that such information be provided only to the county Surrogate's Office, at the end of proceedings, once guardians have been appointed (e.g., as part of the qualification process).

2. R. 4:86-4(a)(7)(B) and R. 4:86-5(a) -- changes the time requirements for court-appointed counsel's report and for plaintiff's proof of service. Currently these items must be filed at least three days before the hearing. These provisions change that to at least ten days before the hearing. Ten days is impractical and does not provide enough time. A good compromise would be five days.

3. R. 4:86-5(c) -- addresses the circumstances under which the AIP must be produced at the guardianship hearing. Rule 4:86-5 in its current form, and the new proposed rule, both require that the plaintiff or court-appointed counsel produce the AIP at the hearing unless certain requirements are met. However, in many circumstances it would be impractical, if not impossible, for the court-appointed attorney to bring the AIP to the hearing. The

governing statute, N.J.S.A. 3B:12-24.1(e), does not impose responsibility on the court-appointed attorney to bring the AIP to the hearing, nor should the court rules.

4. R. 4:86-6(d)(3) – requires a proposed judgment of legal incapacity and appointment of guardian shall be filed with the Surrogate not later than ten days prior to the hearing with a form cover sheet. Ten days is impractical. A better compromise would be five days. In addition, we don't know what the cover sheet would entail, and it seems unnecessary. The proposed judgment already includes a wealth of information on the first page.

5. R. 4:86-6(e)(5) -- requires guardians to report certain changes to the Surrogate within thirty days. Rather than the language here, we suggest the court rule should reflect the language from the New Jersey Judiciary's model guardianship judgment form: "The judgment shall require the guardian to advise the Surrogate of County within ten (10) days of any changes in the address or telephone number of himself or herself or the incapacitated person or within thirty (30) days of the incapacitated person's death or of any major change in status or health." The new provision would require the guardian to provide a death certificate to the Surrogate if the ward dies, but informing the Surrogate of the ward's death, which is all that is required under the current rule, is sufficient.

Finally, the NJSBA has some recommendations for additional language to be included with certain rule amendments proposed by the Committee:

1. R. 1:6-5 (Motion Briefs) – imposes page limitations on motion briefs in the Trial Court. The NJSBA has some concerns about imposing page limitations on briefs, but acknowledges there are similar requirements in the federal courts and at the appellate level. We would recommend, however, that all parties be required to adhere to the same limitations. We agree that parties should be able to request permission to file longer briefs, if necessary, by motion. We also recommend that consideration be given to allowing briefs in dispositive motions to be an exception from the limitation, since such motions often require lengthy and detailed explanations about the existence or non-existence of genuine issues of material fact. If the proposal is adopted in any form, we further recommend that language be added to the rule to account for the following:

(1) the Rule should permit a motion to file an overlength brief, which motion can be submitted with the brief; and

(2) motions for overlength briefs should be liberally granted; and

(3) the court should be required to rule on a motion for an overlength brief within a set timeframe; and

(4) lines, pitch and point to be used in the brief should be defined and should be consistent with the appellate or federal rules for consistency.

2. R. 4:58-2 (Consequences of Non-Acceptance of Claimants Offer) – allows attorney's fees and expenses in UM/UIM claims where the verdict is 120% more than the offer. We recognize that in the particular circumstance of UM/UIM claims, even when balancing the interests of the insurance carrier and the claimants in those cases, the overall purpose of the offer of judgment rule is completely frustrated in circumstances where the verdict exceeds the contracted-for policy limit. Therefore, in evaluating entitlement to the benefits of the Offer of Judgment Rule in UM/UIM cases, it is more appropriate to consider the "verdict" rather than the "judgment." We would recommend, though, that the Rule be clarified to make it clear that any analysis of an entitlement to the benefits of the Rule evaluate the "verdict" compared to the Offer of Judgment after any appropriate offsets, including comparative negligence, a credit for the tortfeasor's available insurance coverage, and payments that area available from any recognized collateral source.

3. R. 4:72 (Actions for Name Change) – requires notice to Attorney General, County Prosecutor and Homeland Security in actions for a name change. The NJSBA recommends that a new section be added to ensure a minor's interest is protected:

> 4:72-2. Guardian Ad Litem**; Confidentiality**
>
> An action for the change of name of a minor may be commenced by a parent without the appointment of a guardian ad litem. **When requested by the minor's parent or guardian, the court shall, consistent with the provisions of R. 5:3-2 (a) and (b), allow all pleadings to be filed using the initials of the parties; allow all pleadings that use the full names of the parties to be filed under seal; and waive the publication requirements set forth in R. 4:72-3 and R. 4:72-4. Nothing herein shall prohibit the sealed records from being available to the parents or guardian of said minor, or to the minor upon reaching majority.**

4. R. 4:86-4(a)(6) and R. 4:86-5(b) (Guardianship Actions) -- proposes that the order for hearing shall require that any proposed guardian complete guardianship training as promulgated by the Administrative Director of the Courts. We have no objection to training that does not place undue burden, delay or expense on guardians. We understand training will likely be in the form of a video. We recommend that guardians be able to view the video at the Surrogate's Office on the same day they qualify. We also recommend that the requirement of training not apply to guardians who are already serving in other guardianships (especially professional guardians, including lawyers and non-profits like PLAN/NJ).

5. Proposed amendments to Appendix II - With the volume of motor vehicle accident cases in the civil docket, rather than incorporating interrogatories relating only to motor vehicle accident cases into Form A interrogatories, we recommend that motor vehicle accident cases have their own form-specific interrogatories, as is the case with medical malpractice cases (Form (A)(1)) and Products Liability cases (Form (A)(2)).

Special Civil Part Practice Committee Report

The NJSBA agrees with the report as written, and urges its adoption.

Tax Court Committee Report

The NJSBA agrees with the report as written, and urges its adoption.

The New Jersey State Bar Association thanks the Supreme Court for publishing the rules committee reports and allowing the bar to submit comments and recommendations. We also look forward to addressing the Court in the public hearing when it is scheduled. We appreciate the opportunity to participate in all aspects of the rule-making process, which has a significant impact on the practice of law in New Jersey. If you have any questions regarding our recommendations, please do not hesitate to contact me.

Very truly yours,

Miles S, Winder III
President

/sab
cc: Thomas H. Prol, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director