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March 2, 2018

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

Re: Attorney Comment on Report of Civil Practice Committee

Dear Judge Grant:

I was afforded the privilege and honor to serve on the Civil Practice Committee from 2000 to 2010. Quite honestly, it was the most rewarding aspect of my legal career.

With that background stated, I offer the following comments on the Report of the Civil Practice Committee.

Regarding proposed new R. 4:5B-4, the use of the sole word "plaintiff" is going to create confusion among the Bar and result in unnecessary motion and likely Appellate Practice to make clear this Rule Amendment applies to both claims asserted by a plaintiff and also third-party plaintiffs. By simply changing the words to "plaintiff and/or claimant," this confusion and unnecessary motion/appellate review will not occur.

Regarding R. 4:24-2(b), query why this is limited to medical malpractice actions? It is reasonable to conclude the efficiency sought to be achieved by these proposed Rule Amendments related to medical malpractice will equally apply to all negligence and other actions where the credentials of an expert are going to be challenged.

Regarding the "reasonable notice" period under amended R. 4:6-2, I respectfully suggest this language be tightened up. This notice period needs to be stated because the strict time period that exists between decisions on summary judgment motions and the scheduling of trial dates.

Regarding new R. 4:24A, I suggest the following language "or some of them" be inserted after the word "parties" in the first sentence. This will now read: "A high-low agreement is one in which the parties or some of them".

The second paragraph of this Rule Amendment addresses Mary Carter Agreements. One can easily envision a scenario where not all parties enter into the High-Low Agreement. As currently drafted, this Rile seems to require that "all" parties enter into such an agreement.

Regarding the second paragraph of this proposed new amendment, may I respectfully suggest the language "immediately after entering into the agreement" be better defined. I suggest that the following clause be added after the end of the paragraph as currently drafted: "and not later than ten days prior to the start of trial."

The proposed amendment is silent on how the agreement is to be disclosed. Is this an automatic obligation or does one need to have a pending discovery request which serves as a condition precedent to the obligation to make such disclosure? Or, is the Rule intended to be self-actuating such that no prior discovery request is required to be made?

This obviously is a new Rule and therefore the language needs to be, respectfully, much tighter.

Regarding R. 4:24-1(d), it seems the scheduling of a Case Management Conference is all that should be included in this Rule. I do not understand why provision is being made and a right conferred to seek reconsideration of a matter adjudicated by another judge before another court. Reconsideration is governed by Court Rule, both in State and Federal Court. As currently drafted, new provision (1) is ambiguous because it suggests this right is automatic in derogation of the time period set forth under R. 4:49-2. One is always free to make application to seek modification of an Order. Using the phrase "reconsideration" is unnecessary and creates opportunity for mischief, as in awaiting reassignment before a new Court and Judge to make such an application.

Regarding proposed new Rule 4:25-8 (a)(1), the words "at trial" need to be specific. Does this mean filed to be returnable on the date trial is to commence? Does it mean after a jury is empaneled and prior to opening statements? Does it mean after opening statements or something else?

Also under (a)(1), use of the language "dispositive impact" is ambiguous. Does this intend to mean dispositive by way of adjudication of the claim on the merits? Or, does it mean something less? Any evidential ruling is going to have some type of "dispositive impact" on a litigant's case. Therefore, this language is unclear.

Regarding (a)(2), should this not be the same standard as set forth in R. 1:6-2(c). Why are we creating a different standard for something of similar import?

Regarding (a)(4), again, the language "prior to or shortly after the commencement of trial" needs to be better defined. It is not stated why the Committee left ambiguity in such a significant and profound change of practice regarding in limine motions.

Regarding (b), respectfully, there are several issues with the language as currently drafted. First, as noted above, the time period within which such motion is to be returnable needs to be clearer. Second, since we ordinarily do not have specific judges assigned to trials, despite judges at times being assigned to case management, it is unclear what is meant by "to the extent practicable" in limine motions shall be decided by the judge assigned to the trial. The meaning seems to be that the motion is going to be decided at some point after a jury is empaneled.

Regarding (c), this is an anti-lawyer provision. For this reason, I am not in favor of it. It seems clear that under the above section, (a)(3)(A), the time period is sufficiently stated. Since judges are not going to be assigned fourteen days prior to the trial date, imposing a "good cause" standard on counsel when the matter is not going to even be considered in almost all instances until trial, again, is an anti-lawyer provision and unnecessary.

Regarding this Rule, subsection (e) is at odds with the well-settled law of the case jurisprudence in New Jersey. If the intent of this sub-provision is to address a situation where an evidential ruling is made conditionally based on a representation of counsel that something may require latitude and based on such latitude a ruling is rendered, then this should be stated. However, as currently drafted, this seems to give an out and invite reconsideration of all evidential rulings made as part of in limine motion practice and otherwise.

One of the rules held for consideration is 4:17-4(e). Query whether the Discovery Subcommittee considered this rule in conjunction with document retention/destruction policies and the inevitable concerns arising under HIPPA. For example, what does a defense attorney do with old medical records and diagnostic studies as part of a document retention/destruction policy? Plaintiff's counsel can simply provide copies of such diagnostic studies to their client. However, defendants are not afforded a similar ease within which to dispose of accumulating voluminous records.

Finally, I think the Committee got it right and the Discovery Subcommittee, by suggesting a comment to the existing rule, got it wrong. There is a reason why we have Evidence Rule 703. This rule has a sound historic basis and is designed to permit an expert witness to sit through the proceedings and thereby testify as to facts and opinions made known to her/him while sitting through such proceedings. Of course, this is an expensive proposition since most experts, these days, charge upwards to $10,000 for a half day court appearance.

Nonetheless, one can easily envision cases where an expert may find it necessary to sit through the proceeding so as to render comment on the evidence as it is presented to the jury.

Thank you for your consideration of these comments and I welcome answering any questions you may have and also being of assistance as you move forward.

Respectfully submitted,

POTTERS & DELLA PIETRA LLP

Gary Potters

GP:af
c: Honorable Jack Sabatino, P.J.A.D.