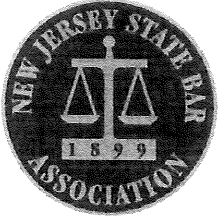


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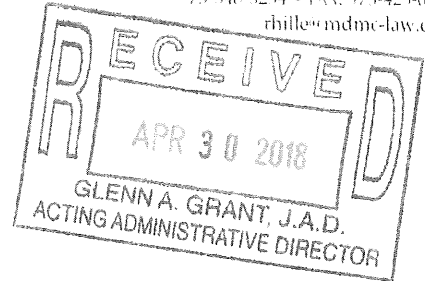


NEW JERSEY STATE BAR ASSOCIATION

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April 27, 2018

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 Court Committee Reports

Dear Judge Grant:

The New Jersey State Bar Association (NJSBA) submits its recommendations and comments regarding the following reports and recommendations recently published for comment:

- Arbitration Advisory Committee Recommendation to Amend Rule,
- Civil Practice Committee Report,
- Criminal Practice Committee Supplemental Report and Second Supplemental Report,
- Family Practice Committee Report on Juvenile Waiver, and
- Report of the Working Group on Private Citizen Complaints in Municipal Court.

The NJSBA does not have any comments on the Special Civil Part Practice Committee Report and the Report from the Tax Court. We thank the Court for extending the deadline for comments to allow the NJSBA an opportunity to participate in the rule-making process, and for the Court's consideration of the NJSBA's views.

The NJSBA applauds the efforts of all of the Court's committees in researching, discussing and debating potential rule amendments in an effort to improve the administration of justice in our court system. The NJSBA's comments are offered in that spirit, with the goal of working cooperatively with the Court to ensure our rules are clear, establish procedures that are fair to all parties, and, most importantly, advance the interests of and access to justice.

The NJSBA's comments to each Committee's report are outlined below.

Arbitration Advisory Committee Recommendation to Amend Rule 4:21A-2(b)

The NJSBA previously supported the automatic qualification of certified civil trial attorneys as arbitrators, but opposes this proposal to mandate certified civil trial attorneys complete the

training required under R. 1:40-12(c) before being entitled to serve as an arbitrator. The Supreme Court has designated certified civil trial attorneys as those attorneys who demonstrate sufficient levels of experience, education, knowledge and skill in the practice of civil trial law. To be eligible for the certification, attorneys must successfully complete a rigorous exam and undergo a peer-review process, during which an attorney must demonstrate sufficient skills and reputation in the designated specialty. Once the certification designation is earned, attorneys must meet additional annual special continuing education requirements to keep the designation. Given this extensive process and specific education requirements, the NJSBA believes it is unnecessary and would be unreasonable and unfair to require attorneys who have already earned a designation as a specialist in their field to undergo additional arbitration training.

Civil Practice Committee Report

The NJSBA generally supports the recommendations in this report, but shares some concerns, as noted below.

Proposed New Rules 4:5B-4 and 4:24-2(b) re: Affidavit of Merit and Expert Qualification in Professional Malpractice Cases

The NJSBA cautions the Court about adopting this proposal, as it detracts from a judge's discretion in appropriately managing a professional malpractice case. Further, it imposes seemingly arbitrary timeframes in connection with affidavits of merit that the bar asserts will only lead to increased litigation. Instead of providing more clarity in connection with the filing of affidavits of merit, the proposal will raise a host of new issues and time constraints, making it more difficult to meet the requirement. A likely outcome is that meritorious cases could be jeopardized or not brought at all. The NJSBA is not aware of any overarching complaints with the current system of managing the affidavit of merit requirements and scheduling Ferreira conferences when appropriate. Therefore, it urges the Court to reject this proposal and leave the system stand.

Proposed New Rule 4:24A re: High-Low Agreements

The NJSBA supports this rule proposal, premised on the statement in the Committee report that such agreements would only be disclosed to a jury under extraordinary circumstances within the discretion of the court, as set forth in the committee's comments that accompanied the proposed rule change. The NJSBA believes this is a critical part of the proposal and urges the Court, if it adopts the proposed rule, to highlight this point in its implementation.

Proposed New Rule 4:25-8 re: Motions *In Limine*

The NJSBA opposes this proposed new rule. We agree that changes are necessary to resolve the issues highlighted by the Appellate Division in Cho v. Trinitas Reg'l Med. Center, 443 N.J. Super. 461 (App. Div. 2015) to provide a predictable framework for bringing and hearing motions *in limine*. However, the proposed rule does not solve those issues and specifically

exempts them from rule's purview. The association believes further consideration about what changes are appropriate is warranted so that any rule enacted addresses the issues highlighted by Cho. Our members predict that the currently proposed rule will result in higher fees and costs for litigants, unnecessary time constraints on attorneys and little, if any, relief for judges in hearing last minute motions before trial.

Our concerns are detailed further in the attached analysis of the proposal from the NJSBA's Civil Trial Bar Section, which consists of both plaintiff and defense attorneys. That analysis contains a number of potential alternatives for the Committee to consider, including:

- (1) a presumption that a motion to bar an expert must be decided on regular notice;
- (2) a requirement that, once filed, an *in limine* motion must be assigned to a judge who will handle the case through trial;
- (3) a requirement that any party contemplating a summary judgment motion after the discovery end date must notify the court in advance so time for such a motion can be accounted for in setting the trial schedule; and
- (4) establishing a two-category approach to *in limine* motions for "simple" requests designed to limit evidence to streamline the jury's consideration, and "complex" motions designed to outright bar the admissibility of evidence or the testimony of a witness.

Finally, we note that the proposal does not address whether *in limine* applications must be filed individually or as one motion so long as it meets the requirements of the proposed rule. Under the current Rule 4:25-7, *in limine* applications are submitted as part of the pretrial submission, which does not result in a fee to the client. Under the proposed rule, litigants will be charged at least \$50 for such applications, but those fees could be much higher if each request must be filed separately. The NJSBA submits that requiring a separate filing for each motion, many of which are simple requests, places an unfair and unwarranted burden on litigants. Provided that all of the *in limine* requests can be concisely stated and briefed within the 20-page limit proposed, the NJSBA suggests that the Court clarify that *in limine* applications are not formal motions that trigger a fee and, when submitted as a motion, that a single filing is permitted, accompanied by a single payment of the \$50 fee.

In light of these comments, the NJSBA urges the Court to return this recommendation to the Committee for reconsideration, and offers to work with the Committee to fashion a more viable solution.

Proposed New Rule 4:86-7A Application for Financial Maintenance for Incapacitated Adults Subject to Prior Chancery Division, Family Part Order

The NJSBA recognizes that child support terminates at age 23 under N.J.S.A. 2A:17-56.67, *et seq.* and, in order for support to continue, a parent must make an application for financial maintenance. The NJSBA agrees that when such application is based on the incapacitation of the child, that application should be made in the Probate Part. The NJSBA has concerns, though, about the impact this change will have on the current operations of the Probate Part and the

ability of litigants to navigate the Probate Part to appropriately bring a maintenance action. The NJSBA therefore urges the Court to consider how to mitigate that impact in adopting this proposal.

Currently, economically disadvantaged parents have access to a host of resources within the Family Part to assist them in support matters, including bringing *pro se* actions and having support funds collected through a variety of garnishments and other levies. In the Probate Part, however, virtually all actions are handled by Verified Complaint and Order to Show Cause. The Probate Part is not set up to work with *pro se* litigants in the same manner as the Family Part. The NJSBA is concerned, therefore, that moving these actions to the Probate Part may result in less access to the courts for individuals who need it most.

In addition, probate judges, while very competent in what they do, are not necessarily equipped to handle child support matters, which involve a completely different set of rules and procedures than those utilized in the Probate Part. Furthermore, the Probate Part calendar is already pressed to its limits. The Surrogates, with whom Probate Part filings are made, were given more administrative duties in connection with guardianships under the last set of rule changes in 2016. This proposal will certainly add even more work for them. Our members who practice in the Probate Part regularly are concerned that current cases processed and heard in that division -- guardianships, accountings, will contests -- will be unduly delayed because of the new responsibilities for support maintenance orders.

In light of these concerns, the NJSBA urges the Court to ensure that, if applications for financial maintenance are moved to the Probate Part, adequate training and resources be made available to judges, court staff and litigants to ensure individuals, especially those of limited financial means, can have matters heard in an appropriate and timely manner, and current court operations are not impeded by these new responsibilities.

Criminal Practice Committee Supplemental and Second Supplemental Report

The NJSBA generally supports the recommendations contained in both Committee reports.

Family Practice Committee Juvenile Waiver Report

The NJSBA generally supports the recommendations contained in this report.

Working Group on Private Citizen Complaints

The NJSBA generally supports the recommendations contained in this report. The New Jersey State Bar Association thanks the Supreme Court for publishing these reports and allowing the bar to submit comments and recommendations. We again commend all of the volunteers for their efforts in contributing to the work of the various committees and hope that our comments represent a meaningful contribution to their debate.

Our leaders also look forward to addressing the Court at the public hearing when it is scheduled. 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, is appreciated. If you have any questions regarding these recommendations, please do not hesitate to contact me.

Very truly yours.

A handwritten signature in black ink, appearing to read 'R. B. Hille', written in a cursive style.

Robert B. Hille, Esq.
President

/sab

cc: John E. Keefe Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director