

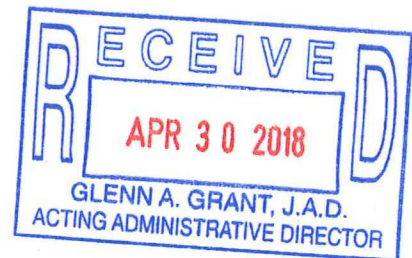


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#008

Via Email to comments.mailbox@njcourts.gov and First Class Mail

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

**Re: Comments of Legal Services of New Jersey on the 2016-2018 Report of the
Special Civil Part Practice Committee**

Dear Judge Grant:

On behalf of its low-income clients, Legal Services of New Jersey submits the following comments on the 2016-2018 Report of the Special Civil Part Practice Committee.¹

Section I.G. of the Report proposes an amendment to *R. 6:5-1*, to incorporate *Rules 4:25-7* and *4:35-1* in Special Civil Part cases. LSNJ strongly opposes this proposal because it would constitute an unwarranted and unconstitutional denial of the jury trial rights of unrepresented litigants.

The crux of the proposal would be to apply the requirements for pretrial exchanges of information in Law Division cases under *R. 4:25-7* to Special Civil Part cases, where it is well known that parties are often unrepresented by counsel.² Among other things, *R. 4:25-7* states that the “attorneys shall confer” about pretrial information exchanges, and that parties in jury trial cases exchange proposed jury instructions and provide them to the court at least seven days prior to the initial trial date.

¹ LSNJ coordinates New Jersey’s Legal Services system, a network of six independent non-profit corporations providing free essential legal services in civil matters to low-income people through offices in all 21 counties in New Jersey. When appropriate, LSNJ makes available information and perspectives on matters of broad public importance in the lives of people in poverty based on its experience in representing tens of thousands of low-income people each year.

² The Committee Report does not explain why the proposal also encompasses the adoption of *R. 4:35-1* in Special Civil Part cases. That rule sets out basic rules for asserting jury trial demands. LSNJ does not believe that adopting *R. 4:35-1* in Special Civil Part cases would raise serious concerns, but suggests that it should be considered by the Committee as an independent proposal in the next rules cycle to ensure that the proposal receives appropriate consideration.

In *Williams v. Am. Auto Logistics*, 226 N.J. 117 (2016), this Court held that R. 4:25-7 does not apply in Special Civil Part cases, and that even if it did, sanctions denying an unrepresented litigant's right to a jury trial for failure to comply with a procedural rule are unconstitutional. The *Williams* Court also noted that the litigant's failure to submit jury trial instructions was not, in the context of the case, sanctionable at all, as the failure had resulted in no harm to the other party, and imposed little if any burden on the trial judge.

This proposal is far from a housekeeping amendment to the rules. The Court's decision in *Williams* was entirely correct. The proposal at issue here would overturn the Court's correct decision, and thereby reanimate the constitutional concerns that the decision resolved. For the reasons set forth at greater length below, LSNJ urges the Court not to adopt this proposed amendment.

The purpose of the proposed amendment is to do what the Court has expressly prohibited.

In *Williams*, the Court clearly held that procedural violations of court rules cannot be used as a basis to deny any person of her constitutional right to a jury trial:

The primary question presented by this appeal is whether trial courts may deprive litigants of their right to a jury trial as a sanction for failure to comply with procedural rules. We hold that they may not.

Williams, supra, 226 N.J. at 123. Yet it is clear that this is precisely what the proposed amendment seeks to allow.

The genesis of the proposal is the perceived "abuse[]" of jury trial demands by some litigants. SCP Report at 29. This squarely locates the intent of the rule – it is to inhibit the ability of litigants to effectuate their jury trial rights. Indeed, there is no statement in the Committee Report (nor was there in the Committee deliberations) that requiring pretrial exchange of jury instructions is of great importance to the effective management of Special Civil Part trials. Instead, the focus is on the imposition of sanctions for noncompliance.

The Committee Report suggests that there might be a work-around to avoid a direct conflict with the Court's holding that denial of jury trial rights is not a permissible sanction for violation of a procedural rule. Instead, it is suggested that a Special Civil Part judge could dismiss the case outright (albeit without prejudice). SCP Report at 31. This is a transparent evasion in light of the stated reason for the proposal – to limit jury trial rights. It is also a suggestion at odds with the assertion that the perceived "abuse" is that jury demands may prevent Special Civil Part matters from being "disposed of quickly." SCP Report at 29. The suggestion does nothing to bring the proposal in line with the fundamental thrust of the *Williams* decision.

The proposed amendment is designed to achieve an unconstitutional result. The Court correctly identified the deep roots and fundamental nature of our constitutional right to jury trials:

New Jersey has upheld the importance of jury trials in constitutions that date back to the origins of our nation. *See N.J. Const.* art. XXII (1776) (“[T]he inestimable right of trial by jury shall remain confirmed as a part of the law of this Colony, without repeal, forever.”); *N.J. Const.* art. I, § 7 (1844) (“The right of trial by jury shall remain inviolate....”); *N.J. Const.* art. I, ¶ 9 (1947) (“The right of trial by jury shall remain inviolate....”).

Our jurisprudence confirms the strength of our commitment to protecting the right to a jury. “The right to a civil jury trial is one of the oldest and most fundamental of rights.” *Allstate N.J. Ins. Co. v. Lajara*, 222 N.J. 129, 134, 117 A.3d 1221 (2015). “The right to trial by jury has long been a bedrock in the dispute resolution mechanisms of this State, and a bulwark against anti-democratic forces.” *Wood v. N.J. Mfrs. Ins. Co.*, 206 N.J. 562, 574, 21 A.3d 1131 (2011). “A jury trial is self-government at work in our constitutional system, and a verdict rendered by one's peers is the ultimate validation in a democratic society.” *Lajara, supra*, 222 N.J. at 134, 117 A.3d 1221.

Williams, 226 N.J. at 123. This fundamental right at the heart of the *Williams* decision, and at the heart of this proposal to abrogate it by rule.

The premise of the proposal – that Special Civil Part jury requests are “sometimes abused” – is inimical to the constitutionally-guaranteed status of jury trial rights. The very nature of constitutional rights is that they are to be protected *against* curtailment because a state actor may believe they are being abused. The motivation behind this proposal is clearly stated – limiting jury trial rights – and LSNJ submits that its use for this purpose would not survive this Court’s scrutiny if the rule proposal were to be adopted, and its application appealed. The result would be the same as the result reached in each of the *Williams* case’s two prior trips to the Court – that an unrepresented litigant’s jury trial rights are entitled to protection.

The proposed amendment is designed to burden unrepresented litigants, contrary to the Code of Judicial Ethics. The Committee deliberations about the proposed rule explicitly identified unrepresented litigants as source of the perceived abuses of jury trial rights. This is necessarily the case, because represented parties can be expected to *comply* with a rule calling for pretrial exchange of jury instructions. Such a rule would do nothing to solve any problem with abusive jury trial requests by *represented* parties (even assuming that jury trial requests could ever actually be abusive, given their constitutionally protected status).

It is only unrepresented parties that would find themselves predictably subject to sanctions under the proposed rule – it takes no great discernment to understand that few if any litigants without legal training have any idea what proposed jury instructions are, much less how to craft them. The rule would have significant negative consequences for unrepresented litigants in Special Civil Part cases, and, as described above, those negative consequences would specifically implicate their constitutional rights.

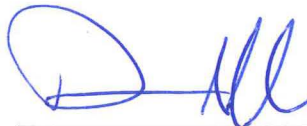
A rule designed to flummox unrepresented litigants is inconsistent with the letter and the spirit of New Jersey’s Code of Judicial Ethics. Rule 3.7 calls for judges to “accord to every person . . .

the right to be heard according to law,” a standard elucidated by a single Comment providing that “[a] judge may make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” Thus judges in New Jersey should seek out ways to ensure that unrepresented litigants can *effectuate* their constitutional rights in court, and should not design procedural mechanisms to trigger the *loss* of those same rights. This is particularly true where, as here, there is no substantiation of any need for the proposed change other than discouraging the exercise of the constitutional rights at stake.

Conclusion. For all of the foregoing reasons, the Court should decline to adopt the proposed amendment to R. 6:5-1 to incorporate Rules 4:25-7 and 4:35-1 in Special Civil Part cases.

Sincerely,
LEGAL SERVICES OF NEW JERSEY, INC

By:



David McMillin


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