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April 27, 2018

Via Email & Regular Mail

Comments.Mailbox@njcourts.gov

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: 2018 Report of the Supreme Court Civil Practice
Committee Rule 4:25-8**

Dear Judge Grant:

Please accept this correspondence on behalf of the Trial Attorneys of New Jersey ("TANJ") in respect of the proposed adoption of a new Court Rule addressing the filing of motions *in limine* before trial in civil matters. As you may know, TANJ is a unique bar organization. TANJ's membership consists of trial attorneys who represent plaintiffs and defendants in civil matters as well as criminal trial attorneys. Our mission is to promote and protect the jury trial system in the State of New Jersey through our numerous continuing legal education courses, participation as *amicus curiae* in important matters that affect the trial bar, and through public comment on important issues such as proposed amendments to the New Jersey Rules of Court.

TANJ's Public Positions Committee examined the proposed amendment to Rule 4:25-8 concerning *in limine* motions. The committee reviewed the Supreme Court Civil Practice Committee's 2018 Report and the recommendations concerning the adoption of a new rule addressing *in limine* motions. The Public Positions Committee then referred the subject to the entire Board of Trustees, who discussed the matter at our most recent Board of Trustees meeting.

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After considerable discussion and debate, TANJ offers the following comments and suggestions. The members of TANJ generally agree with the proposal to adopt a rule that provides some structure and organization to *in limine* motion practice. However, TANJ's members do not agree with the specific parameters of the proposed rule in the context of the other Rules that govern civil trial practice in New Jersey. TANJ does not quibble with a Rule that requires *in limine* motions be filed in advance of trial. That specific practice, as a general rule, is a reasonable rule amendment if adopted with other modifications to the existing Rules of Court. The timing of pre-trial submissions and the parameters of the proposed Rule will place many parties in an untenable situation in light of the other Rules governing civil trials.

For example, *Rule 4:46-1* requires that motions for summary judgment must be returnable no later than 30 days before the scheduled trial date. *Rule 4:36-3* requires the court to provide parties no less than 10 weeks notice of a trial date. It is a common practice in many counties to assign a trial date before discovery is complete, often as part of an order extending discovery, and less than 10 weeks after the completion of discovery. This means that a party is often left with mere days between the close of discovery and the deadline by which a summary judgment motion must be filed. In complex cases this schedule can be extremely problematic. This difficult timing is compounded by the Appellate Division's decision in *Cho v. Trinitas Regional Medical Center*, 443 N.J. Super. 461, 470 (App. Div. 2015), which requires motions that seek to bar expert testimony in cases in which the expert testimony is essential to proving the plaintiff's claims be filed in advance of trial and be treated as dispositive motions. The blurring of the line between a summary judgment motion and an *in limine* motion that simply seeks to limit the scope of an expert's testimony has not been addressed by the proposed rule and TANJ recommends that the rule be returned to the Civil Practice Committee for further consideration and review on this discrete issue.

It is in the context of the existing Rules of Court and the common practices of the judiciary in dealing with motions to bar expert testimony and motions for summary judgment that we examined the proposed Rule. In most instances, trial judges confronted with a motion to bar an expert opinion will defer to the trial judge and conclude that the trial judge should determine whether a 104 hearing is needed or whether the expert should be permitted to testify. Once at trial, most trial judges, now supported by the decision in *Cho*, will refuse to hear a motion to bar an expert as untimely. Practitioners are then left in an untenable situation. These often difficult situations are further aggravated by the reality that judges in different counties deal with these issues differently, with some judges simply refusing to hear any *in limine* motions at all. Notably, the stated purpose for considering an *in limine* motion rule was to address the circumstances presented in *Cho*. However, the proposed rule specifically excludes motions to bar expert testimony and does not address the *Cho* situation in any respect. TANJ proposes that the rule include a provision for motions to bar expert testimony and require that such motions be decided in advance of trial. If a motion to bar an expert is truly a dispositive motion, then that motion would be governed by *Rule 4:46-1*. If it is merely a motion to limit the scope of an expert's testimony and is not dispositive of any claim or defense, then the motion should be treated as an *in limine* motion and filed in advance of trial. There is no reason why the proposed Rule cannot address these circumstances and provide clear, uniform procedures.

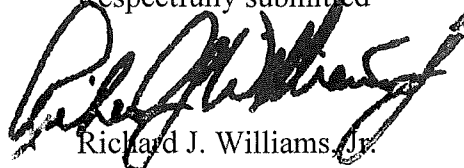
TANJ proposes that certain other rule modifications should be made to accommodate the more complex cases that require additional time between the close of discovery and the filing of dispositive motions and *in limine* motions. For example, in Track III and IV cases, TANJ proposes that the Court adopt a rule that precludes the trial court from issuing a trial notice before the 30th day following the completion of discovery and in no event shall the trial be scheduled any sooner than 120 days from the close of discovery. A period of four months to prepare, argue, and decide dispositive motions, and complex *in limine* motions, including motions to bar experts, is eminently reasonable in complex cases. In smaller, less complex cases assigned to Track I and II, such a rule is unnecessary.

Additionally, there are certain modifications to the proposed rule that TANJ believes would be appropriate. First, the Rule should require that the motions be decided or addressed prior to opening statements. As currently drafted, section (a)(4) of the Rule allows the trial court to decide the motion at its sole discretion. If the objective of the rule is to promote earlier preparation and foster settlement, deciding *in limine* motions before the trial commences is the most effective means of accomplishing that goal. Second, TANJ would propose that the Rule include a provision that allows the parties to opt out of the schedule imposed by the Rule in favor of an alternative schedule agreed upon by the parties and approved by the trial court. Such a provision should also permit a party to file an application with the trial court for an alternate schedule. The trial court should not be permitted to alter the schedule without providing notice to the parties' and an opportunity to be heard. Third, TANJ submits that section (a)(3)(A) of the proposed rule be modified to remove the phrase "initial trial date" and replaced with the phrase "actual trial date." Section (a)(3)(B) expressly states that parties may file motions *in limine* 14 days in advance of subsequently scheduled trial dates. That provision makes the reference to "the initial trial date" in paragraph (a)(3)(A) meaningless and will certainly cause confusion. The meaning of the proposed rule appears to be clear – motions *in limine* must be filed and served 14 days in advance of the actual trial date. TANJ respectfully submits that such a modification is necessary to avoid any confusion.

The members, trustees, and officers of TANJ are grateful for the opportunity to comment on the proposed adoption of an *in limine* motion rule. For the reasons stated, while TANJ agrees with the proposal to adopt a formal *in limine* motion procedure, TANJ respectfully submits that imposing a two-week deadline before trial for the filing of such motions is unnecessary and potentially unduly burdensome on trial practitioners in light of the other deadlines that already exist under the Rules of Court.

Thank you for Your Honor's attention to this matter.

Respectfully submitted

A handwritten signature in black ink, appearing to read "Richard J. Williams, Jr.", written over the typed name.

Richard J. Williams, Jr.