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NEW JERSEY ASSOCIATION for JUSTICE Inc.
Formerly the Association of Trial Lawyers of America - New Jersey (ATLA-NJ)

150 West State Street
Capitol View Building • Trenton NJ 08608
P: 609-396-0096 • F: 609-396-2463
www.nj-justice.org • info@nj-justice.org

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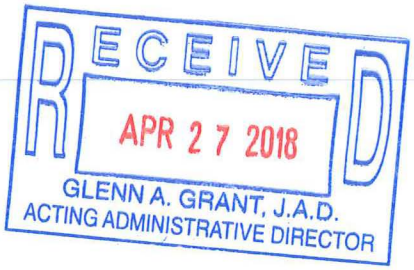

Honorable Glenn A. Grant, J.A.D
Acting Administrative Director of the Courts
Rules Comments
Hughes Justice Complex, P.O. Box 037
Trenton, New Jersey 08625-0037

And via e-mail to Comments.Mailbox@njcourts.gov

Re: Comments on the 2016-2018 Civil Practice Committee Report

Dear Judge Grant:

Thank you for inviting comments to the Civil Practice Committee Report. We especially wish to thank Judge Sabatino and the members of his committee for the good and important work they do.

As Your Honor is aware, the more than 2,600 members of the New Jersey Association for Justice (NJAJ) are among the most frequent users of our court system and feel uniquely qualified to assist with these rule changes.

Our comments will focus on proposed rule changes in the following four areas:

1. The proposed new R. 4: 25-8 Re: Motions in Limine;
2. The proposed new Rules 4:5B and 4:24–2 (B) Re: Affidavit of Merit and Expert Qualification in Professional Malpractice Cases;
3. The proposed new R.4:24A Re: High-Low Agreements; and
4. The rejection of proposed amendments to R. 1:7 Opening and Closing Statements.

I.

The proposed new R. 4: 25-8 Re: Motions in Limine

NJAJ recognizes that there presently exists no rule dealing specifically with Motions in Limine and that the only reference to such motions exists in Appendix XXIII. While NJAJ agrees that the bench and bar need guidance on the broad topic of Motions in Limine in general, it is respectfully requested that this proposed rule be carried until the next cycle to allow for a more thorough review.

For example, at the outset there needs to be a clear definition of exactly what a Motion in Limine is and what it is not. Is it a motion to bar an expert because of a claim of "net opinion?" Or to bar an expert under Frye? Is it a motion to bar counsel referring to a prior accident, injury, or conviction? Or to bar defense counsel from telling the jury "it's all about the money?" Or whether counsel can discuss "an error of judgment?" or whether or not Scafidi should apply in a professional negligence case?

In major products liability litigation and medical negligence cases, it is not unusual for 15 to 20 such motions to be filed by both sides. Because of the disparity in the way cases are assigned in various counties – namely that in some counties you know who the trial judge will be as in the Federal Courts, and in other counties you find out just before being assigned out, NJAJ feels that only the actual trial judge should decide Motions in limine. Also, because cases seldom, if ever, proceed on the first listed trial date, the new rule as proposed is unworkable and makes unnecessary work for all counsel. Therefore, NJAJ feels the proposed rule as currently written should not be adopted, but rather carried until the next cycle to allow additional time for needed improvements.

On the other hand, if it is a foregone conclusion that a Motion in Limine rule is needed now, we offer these suggestions:

(3) (A). 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 has the potential for creating confusion. The meaning of the proposed rule appears to be clear – Motions in Limine must be filed and served in advance of the actual trial date. In addition, the time should be changed from 14 days to seven days, with answering papers filed and served changed from seven to four days.

(B). While this section anticipates that the initial trial date will not be the actual trial date and deals with subsequent trial dates, again the changes of 14 to seven and seven to four seems appropriate.

(4). We propose that the sentence be modified to make it clear that the trial judge who is going to preside over the trial, must rule on the motions prior to opening statements.

(5) (b). We propose the words "to the extent practicable" be removed and that it be made clear that the Motions in Limine filed under this rule shall not be subject to the regular motion filing fees.

Finally, (5) should make it clear that the 20-page limitation applies to each motion.

II.
The proposed new Rules 4:5B and 4:24–2 (B) Re: Affidavit of Merit and Expert Qualification in Professional Malpractice Cases

NJAJ supports the proposed R.4:5B in general. Our proposed changes are to subpart (a) where a sentence should be added just before the last sentence that says: "Plaintiff need not seek a 60-day extension of the first 60-day period for serving an Affidavit of Merit" since the conference is not being held until the 90th day. The second proposed change to subpart (a) would be at the very end of the paragraph adding the words: "or the objection would be deemed waived."

Next, after the second full sentence of (c) this language should be added: "Where there is no objection to the sufficiency of the Affidavit of Merit, a consent order to that effect shall be submitted by plaintiff within 60 days of the service of the Affidavit of Merit and curriculum vitae." This sentence should be substituted for the present full third sentence that is confusing.

With regard to R.4: 24 -2 (b) (1), the second sentence should read: "The motion shall be accompanied by a certification setting forth the defendant's alleged area of specialty and qualifications that form the basis for the challenge of the expert's qualifications under the Patient's First Act and provide a copy of the defendant's curriculum vitae and other supporting documents." The way the sentence is presently written it speaks of the defendant's expert's qualifications, which is not the relevant consideration in a challenge to plaintiff's expert. A similar change should be made to the second sentence of (2).

Finally, the time for filing motions should be 30 days from the receipt of the transcript of the deposition of the experts, not 30 days from the service of the expert's report as is presently in (1) and (2). The reason for this recommended change is that often counsel will not find out the percentages of how a physician is spending his or her time (teaching, clinical practice, etc.) until a deposition and counsel will not find this out from an expert's report or curriculum vitae.

III.

The proposed new R.4: 24A Re: High-Low Agreements

The new rule must make it clear that juries shall not to be informed of the existence of the high-low agreement and that no counsel may be permitted to comment on the existence of such an agreement.

IV.

Proposed Amendment to Rule 1:7-1 Opening and Closing Statements

For the past 50 years, Botta v. Brunner, 26 N.J. 82 (1958) has prevented plaintiff and defense attorneys in personal injury litigation from suggesting to the jury a sum of money to be awarded for non-economic damages. NJAJ feels it is long past time to bring New Jersey into the majority view, shared by 37 states, and allow attorneys to suggest a specific dollar sum.

The Supreme Court Civil Practice Committee considered this rule change and rejected it, despite the fact that the majority of the subcommittee voted in favor of such a change. The section of the committee report that deals with this topic is referred to as: "Rule Amendments Considered and Rejected" and begins at Page 58. For reference, the full majority and minority subcommittee reports are contained in appendices 4A and 4B.

Model Jury Charge 8.11E titled "Disability, Impairment and Loss of the Enjoyment of Life, Pain and Suffering," has been used for years to charge juries on non-economic damages. NJAJ feels that the language set forth in the jury charge simply is an inefficient and imprecise method for lay jurors to assess what a fair and reasonable measure of damages should be. The charge reads as follows:

> "The law does not provide you with any table, schedule or formula by which a person's pain and suffering, disability, impairment, and loss of enjoyment of life may be measured in terms of money. The amount is left to your sound discretion. You are to use your sound discretion to attempt to make the plaintiff whole, so far as money can do so, based upon reason and sound judgment, without any passion, prejudice, bias or sympathy. You each know from your common experience the nature of pain and suffering, disability, impairment and loss of enjoyment of life and you also know the nature and function of money. The task of equating the two so as to arrive at a fair and reasonable award of compensation requires a high order of human judgment. For this reason, the law can provide no better yardstick for your guidance than your own impartial judgment and experience."

As Justice O'Hern aptly noted in Dehanes v. Rothman, 158 N.J. 90, 99 (1999):

> "Law is an incremental process. We have learned much about the ability of jurors to digest complex evidence. New Jersey jurors do not now, if they ever did, fit the portrait of rustics, in the style of Norman Rockwell, who have come to court to be entertained by lawyers. Jurors today are far more sophisticated."

As outlined in detail by NJAJ member Thomas F. Shebell, III, Esq. in support of the rule change, Botta no longer has any relevance to the jurisprudence in this State pertaining to comments made by counsel in opening and closing statements. To the

contrary, the statements made by counsel are subject to the usual assessment of credibility a jury brings to any trial, a methodology employed by the vast majority of jurisdictions throughout the country (See Exhibit 1, supplied by the American Association for Justice (AAJ) outlining the various states which permit lump sum and per diem arguments of non-economic damages in their respective jurisdictions.).

As Mr. Shebell makes clear, so long as the dollar amount that counsel advances is based on reasonable inferences drawn from the evidence, the argument should be permissible, subject to a limiting instruction. Counsel for both plaintiffs and defendants will benefit from their ability to discuss damages in this fashion. Such a rule amendment will help to reduce aberrational verdicts and will redirect jurors' attention away from matters not in evidence that some may now employ in arriving at verdicts (e.g. how much my neighbor or cousin got under similar facts and other non-relevant speculations). The rule change will require counsel to make a thoughtful and reasonable dollar-sum suggestion, or risk losing credibility with the jurors. Many studies, as well as anecdotal evidence from experienced trial lawyers, demonstrate that jurors want to know "how much are you suing for" and are frustrated when not told. The defense bar, by making their own suggestion, can convince a jury that their number is the more reasonable amount.

The specific proposal drafted by a member of the subcommittee proposed an amendment to R.1:7-1 to accomplish the elimination of the Botta rule:

1:7-1. Opening and Closing Statement

(a) Opening Statement. Before any evidence is offered at trial, the State in a criminal action or the plaintiff in a civil action, unless otherwise provided in the pretrial order, shall make an opening statement. A defendant who chooses to make an opening statement shall do so immediately thereafter. [There should be language here to make it clear that counsel may comment in opening in similar fashion to language in (b). Suggested amendment: "In the event any party in a civil case chooses to do so, with prior notice to all parties and the court, unliquidated, non-economic damages may be addressed as set forth in subpart (b)."]

(b) Closing Statement. After the close of the evidence and except as may be otherwise ordered by the court, the parties may make closing statements in the reverse order of opening statements. In civil cases any party may suggest to the trier of fact, with respect to any element of damages, that unliquidated, non-economic damages be calculated on a time-unit basis [without reference to a specific sum may be presented for calculation on a time-unit basis], either by reference to a specific sum, or any other means. In the event such comments are made to a jury, the judge shall instruct the jury prior to such assertion, that they are argument only and do not constitute evidence.

V.

Conclusion

Thank you for allowing NJAJ to comment on this important matter. I will be available to testify on these matters should additional information be requested.

Respectfully,

Eric G. Kahn, Esq.
President

EXHIBIT 1

State	Lump Sum	Per Diem	Reference
Alabama	Yes	Yes	Atl. Coast Line R. Co. v. Kines, 160 So. 2d 869, 876 (Ala. 1963)
Alaska	Yes	Yes	Beaulieu v. Elliot, 434 P.2d 665, 675 (Alaska 1967)
Arizona	*Judicial Discretion*	*Judicial Discretion*	O'Rielly Motor Co. v. Rich, 411 P.2d 194, 200 (Ariz. Ct. App. 1966)
Arkansas	*Judicial Discretion*	*Judicial Discretion*	Vanlandingham v. Gartman, 367 S.W.2d 111, 113 (Ark. 1963)
California	Yes	Yes	Beagle v. Vasold, 417 P.2d 673 (Cal. 1966)
Colorado	Yes	Yes	Rodrigue v. Housman, 519 P.2d 1216, 1217 (Colo. App. 1974)
Connecticut	Yes	Yes	§ 52--216b, as held in Bleau v. Ward, 603 A.2d 1147, 1149 (Conn. 1992)
Delaware	No	No	Henne v. Balick. 146 A.2d 394 (Del. 1958).
Florida	Yes	Yes	Magid v. Mozo, 135 So. 2d 772 (Fla. 1st Dist. App. 1961)
Georgia	Yes	Yes	GA. CODE ANN. § 9-10-184 (West 2014); **Harwick v. Price, 152 S.E.2d 905, 908 (Ga. Ct. App. 1966)**
Hawaii	Yes	Yes	Franco v. Fujimoto, 390 P.2d 740, 748 (Haw. 1964)
Idaho	Yes	Yes	Meissner v. Smith, 494 P.2d 567 (Idaho 1972)
Illinois	Yes	No	Caley v. Manicke, 182 N.E.2d 206 (Ill. 1962)
Indiana	Yes	Yes	S. Ind. Gas & Elec. Co. v. Bone, 180 N.E.2d 375, 380 (Ind. Ct. App. 1962) citing N.Y. Cent. R. Co. v. Milhiser, 106 N.E. 2d 453, 460 (Ind. 1952)
Iowa	Yes	Yes	Corkery v. Greenberg, 114 N.W.2d 327 (Iowa 1962)
Kansas	Yes	Yes	Wilson v. Williams, 933 P.2d 757, 761 (Kan. 1997)
Kentucky	Yes	Yes	Stand. Sanitary Mfg. Co. v. Brian's Adm'r, 6 S.W.2d 491 (Ky. 1928); Louisville & N. R. Co. v. Mattingly, 339 S.W.2d 155 (Ky. 1960)
Louisiana	Yes	Yes	Little v. Huges, 136 So. 2d 448, 452 (La. 1961)
Maine	Yes	*Unsettled*	Hartt v. Wiggin, 379 A.2d 155 (Me. 1977)
Maryland	*Judicial Discretion*	*Judicial Discretion*	Nicholson v. Blanchette, 210 A.2d 732, 737 (Md. 1965), supplemented, 213 A.2d 71 (Md. 1965), abrogated on other grounds by Deems v. W. Maryland Ry. Co., 231 A.2d 514 (Md. 1967)
Massachusetts	Yes	Yes	Luz v. Stop & Shop, Inc. of Peabody, 202 N.E.2d 771 (Mass. 1964); Cuddy v. L & M Equipment Co., 225 N.E.2d 904, 908 (Mass. 1967)
Michigan	Yes	Yes	Yates v. Wenk, 109 N.W.2d 828 (Mich. 1961)
Minnesota	Yes	Yes	Symons v. Great N. Ry. Co., 293 N.W. 303 (Minn. 1940)
Mississippi	Yes	Yes	Arnold v. Ellis, 97 So. 2d 744 (Miss. 1957)
Missouri	Yes	Yes	Domijan v. Harp, 340 S.W.2d 728 (Mo. 1960)
Montana	*Judicial Discretion*	*Judicial Discretion*	Vogel v. Fetter Livestock Co., 394 P.2d 766, 772 (Mont. 1964) citing Wyant v. Dunn, 368 P.2d 917, 920 (Mont. 1962)
Nebraska	*Judicial Discretion*	*Judicial Discretion*	Yount v. Seager, 150 N.W.2d 245 (Neb. 1967); Richardson v. Children's Hosp., 787 N.W.2d 235 (Neb. 2010)
Nevada	Yes	*Judicial Discretion*	Johnson v. Brown, 345 P.2d 754, 759 (Nev. 1959) (interpreting NEV. REV. STAT. ANN. § 16.090 allowing the pleadings to be read by counsel)
New Hampshire	Yes	No	Duguay v. Gelinas, 182 A.2d 451 (N.H. 1962)
New Jersey	No	Yes	N.J. Ct. R. 1:7-1
New Mexico	Yes	Yes	Higgins v. Hermes, 552 P.2d 1227, 1230 (N.M. 1976)
New York	Yes	*Unsettled*	Tate by McMahon v. Colabello, 445 N.E.2d 1101 (N.Y. 1983)
North Carolina	Yes	Yes	**Weeks v. Holsclaw, 295 S.E.2d 596 (N.C. 1982)**
North Dakota	Yes	No	Brauer v. James J. Igoe & Sons Const., Inc., 186 N.W.2d 459 (N.D. 1971)
Ohio	Yes	Yes	Grossnickle v. Vill. of Germantown, 209 N.E.2d 442, 445 (Ohio 1965)
Oklahoma	*Judicial Discretion*	*Unsettled*	Shuck v. Cook, 494 P.2d 306 (Okla. 1972)
Oregon	Yes	Yes	DeMaris v. Whittier, 569 P.2d 605 (Or. 1977)
Pennsylvania	No	No	Stassun v. Chapin, 188 A. 111 (Pa. 1936)
Rhode Island	Yes	Yes	Worsley v. Corcelli, 377 A.2d 215, 218 (R.I. 1977).
South Carolina	Yes	No	Harper v. Bolton, 124 S.E.2d 54, 59 (S.C. 1962)
South Dakota	No, but *unsettled*	*Unsettled*	Estate of He Crow v. Jensen, 494 N.W.2d 186, 192 (S.D. 1992); Jennings v. Hodges, 129 N.W.2d 59, 64 (S.D. 1964).

Tennessee	Yes, but not in med mal	Yes, but *unsettled*	Elliott v. Cobb, 320 S.W.3d 246 (Tenn. 2010)
Texas	Yes	Yes, but *unsettled*	Peden Iron & Steel Co. v. Claflin, 146 S.W.2d 1062 (Tex. Civ. App.--Galveston 1940), writ dismissed, judgment correct; Hernandez v. Baucum, 344 S.W. 2d 498, 500 (Tex. App. 1961)
Utah	*Judicial Discretion*	*Judicial Discretion*	Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d 575, 576 (Utah 1960)
Vermont	Yes	Yes	Debus v. Grand Union Stores of Vermont, 621 A.2d 1288 (Vt. 1993)
Virginia	Yes	Yes	Virginia Code § 8.01-379.1. Wakole v. Barber, 283 Va. 488, 722 S.E.2d 238 (2012).
Washington	Yes	Yes	Jones v. Hogan, 351 P.2d 153, 159 (Wash. 1960)
West Virginia	No	No	Bennett v. 3 C Coal Co., 379 S.E.2d 388, 397 (W. Va. 1989); Crum v. Ward, 122 S.E.2d 18, 27 (W.Va. 1961)
Wisconsin	Yes	No	Fischer v. Fischer, 142 N.W.2d 857, 861 (Wis. 1966), overruled on other grounds by Matter of Stromsted's Est., 299 N.W.2d 226 (Wis. 1980); Affett v. Milwaukee & Suburban Transp. Corp., 106 N.W.2d 274, 277 (Wisc. 1960)
Wyoming	Yes, but *unsettled*	No	Henman v. Klinger, 409 P.2d 631 (Wyo. 1966)

State Authority on the Permissibility of Non-Economic Damage Arguments

Lump Sum & Per Diem	Lump Sum Only	Per Diem Only	Neither Argument	Discretion
1. Alabama	1. Illinois	1. New Jersey	1. Delaware	1. Arizona
2. Alaska	2. Maine (PD unsettled)		2. Pennsylvania	2. Arkansas
3. California	3. Nevada (PD unsettled)		3. South Dakota (unsettled)	3. Maryland
4. Colorado	4. New Hampshire		4. West Virginia	4. Montana
5. Connecticut	5. New York (PD unsettled)			5. Nebraska
6. Florida	6. North Dakota			6. Utah
7. Georgia	7. South Carolina			7. Oklahoma
8. Hawaii	8. Tennessee (PD unsettled; none in medmal)			
9. Idaho	9. Texas (PD unsettled)			
10. Indiana	10. Wisconsin			
11. Iowa	11. Wyoming (LS unsettled)			
12. Kansas				
13. Kentucky				
14. Louisiana				
15. Massachusetts				
16. Michigan				
17. Minnesota				
18. Mississippi				
19. Missouri				
20. New Mexico				
21. North Carolina				
22. Ohio				
23. Oregon				
24. Rhode Island				
25. Vermont				
26. Virginia				
27. Washington				