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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

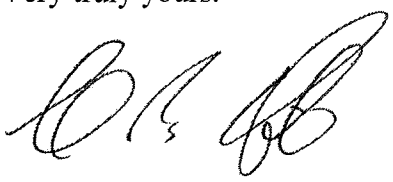
The NJSBA generally supports the recommendations contained in this report.

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.



Robert B. Hille, Esq.
President

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

RESPONSE TO REQUEST FOR COMMENT

To: NJSBA Board of Trustees
From: Executive Committee of the Civil Trial Bar Section
Date: April 17, 2018
Re: 2018 Report of the Supreme Court Civil Practice Committee

The Civil Trial Practice section has carefully reviewed proposed Rule 4:25-8 regarding in limine motions and respectfully requests that the court not adopt the rule in its present form, and that the committee be redirected to substantively address the issues raised by Cho v. Trinitas Reg'l Med. Ctr., 443 N.J. Super. 461 (App. Div. 2015). While we commend the committee on its hard work and earnest efforts to resolve the issues highlighted by Cho, we have serious reservations about what the resulting rule accomplishes and what it does not accomplish.

The longstanding guidance of our appellate courts has been to disfavor pretrial determination of in limine motions through traditional motion practice. The Cho Court aptly summarized the general state of the law on this subject indicating that:

> "[o]ur courts generally disfavor in limine rulings on evidence questions," because the trial provides a superior context for the consideration of such issues. Although a trial judge "retains the discretion, in appropriate cases, to rule on the admissibility of evidence pre-trial," we have cautioned that "[r]equests for such rulings should be granted only sparingly." This is particularly true when the "motion in limine" seeks the exclusion of an expert's testimony, an objective that has the concomitant effect of rendering a plaintiff's claim futile.
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> [Cho, 443 N.J. Super. at 470-71 (citations omitted).]

Juxtaposed against this rationale was the Cho court's ultimate treatment of the in limine motion filed on the eve of trial, whereby the court held that "absent extraordinary circumstances or the opposing party's consent, the consideration of an untimely summary judgment motion at trial and resulting dismissal of a complaint deprives a plaintiff of due process of law." Id. at 475.

The uncertainty caused by these two seemingly contradictory legal principles is highlighted through our appellate court's decision in Berman, Sauter, Record & Jardim, P.C. v. Robinson, No. A-5650-11(App. Div. Nov. 17, 2016). In reliance on Cho the court determined that an in limine motion filed at the time of trial seeking to bar an expert report on the basis that it constituted a net opinion must be denied, considering it "fundamentally unfair" to decide such a motion when it has the effect of being a dispositive motion. Id. at *4. The Appellate Division also reiterated this Court's longstanding caution against barring an expert's testimony based upon a report, when doing so without a Rule 104 hearing would ultimately be dispositive of the case. Ibid. While it would be fair to say that this is an unpublished

opinion with limited precedential value, doing so ignores the fact that the Cho decision is causing substantial confusion and uncertainty among the courts and attorneys as to how and when a motion to bar an expert can be decided in a manner that will allow a prevailing party to then make a dispositive motion in a timely manner.

To be certain, the dilemma faced by practitioners is both real and significant. When a timely motion is filed on notice seeking to bar an expert's testimony, it is frequently met by a court determination that in limine motions are "disfavored" resulting in the motion being denied without prejudice to consideration by the trial judge. By contrast, when such a motion is made before the trial court, even if timely presented as part of the Rule 4:25-7(b) pretrial submission, the trial judge, in reliance on Cho is now constrained to deny the motion on the grounds that it violates "due process" to do otherwise. These contradictory approaches, both of which are supported by published decisions, is foreclosing legitimate dispositive motions in a way that is fundamentally unfair to litigants. Exacerbating the issue, as the committee's report acknowledged, is the fact that treatment of these motions varies from vicinage to vicinage, and from judge to judge within a vicinage. (See Appendix 3 at p. 93) Treatment of the issue by any given judge also often depends upon whether or not the case is being individually case managed by that judge.

Trial attorneys and trial judges need guidance in this critical area so that a predictable framework for litigating these issues is reliably available. If a party has a legitimate basis to bar an expert's opinion when should that motion be filed? Should the trial court be required to decide the motion on regular notice if the expert has been deposed or should there still be a preference for a Rule 104 hearing? If the motion is to be filed on regular notice, does the court system need to allow for time for the filing of and decision on the dispositive motion that follows if the motion to bar is granted? After all, if it is a deprivation of "due process" to wait until the time of trial to file an in limine motion that, if granted, will have a dispositive impact, isn't it also a deprivation of "due process" to have a procedure that doesn't allow for those motions to be decided at all?

The rationale for the proposed rule specifically included the intention "to avoid the late filing of motions that might have dispositive effect as was the case in Cho." (See Appendix 3 at p. 93). In spite of this proffered rationale the rule specifically excludes from consideration any motion that would have a dispositive impact on a party's case, and even more specifically excludes from its purview "an application to bar an expert's testimony in a matter in which such testimony is required as a matter of law to sustain a party's burden of proof." See 4:25-8(a)(1). In other words, the proposed rule completely fails to address the very dilemma the committee was asked to consider in the first instance. It is respectfully submitted that any rule governing the filing and consideration of in limine motions must address the fundamental manner in which pretrial motions to bar an expert are to be handled by both counsel and the courts.

Suggestions for the committee's consideration include a provision that creates a presumption that the motion to bar must ordinarily be considered and decided on regular notice in any circumstance in which the expert was deposed. This seems reasonable in that the expert has now had the opportunity to explain the "whys and wherefores" of his or her opinion in advance of the motion.

In any circumstance when an expert hasn't been deposed that motion should still need to be filed on regular notice. In circumstances where the court then determines that a Rule 104 hearing is warranted and denies the motion without prejudice, the court rule could contemplate a pretrial time frame for that hearing to take place so that the ability to file a dispositive motion, if successful, is preserved. At a minimum the rule should provide that the moving party's right to seek consideration of a "dispositive motion" is preserved for trial and provide for a time frame for briefs to be filed and considered by the trial court.

The rule could contemplate a provision that once a motion is filed that motion will be assigned to a judge who will then continue to handle the case through trial. This would assure that the trial judge has maximum flexibility to schedule a determination of the issue while at the same time eliminate any uncertainty among trial judges as to who is best positioned to decide such a motion.

It is respectfully submitted that any rule must also acknowledge the additional time needed after the discovery end date to allow for motions to bar to be filed and decided on regular notice after discovery and still provide a minimum of 60 days for the filing and disposition of a summary judgment motion as is currently contemplated by our court rules. The rule could include a requirement that in such circumstances, the party reserving the right to file such a motion must notify the court so that the time to file the motion can be built in before trial.

The above represents only a few of the ways in which a rule on this issue could provide much needed guidance and predictability in an area which the committee acknowledged is sorely needed. It is respectfully submitted that any rule related to in limine motions, to be meaningful, must be comprehensive and should address the competing "due process" considerations highlighted by Cho.

Additionally, while the proposed rule, in general, borrows various elements from the minority of states (17) that have seen fit to address the issue through a formal rule, other than the Cho issue, which is unresolved, the rule doesn't appear to advance any of the rationales offered as a basis for adopting the rule, nor does it resolve any issue reported to be causing problems at trial.

The stated rationales are 1) to create uniformity in the manner in which judges approach in limine motions, and 2) to encourage prompt resolution of admissibility questions to enhance overall certainty at trial. (See Appendix 3 at p. 93). The subcommittee report also included a "cautionary note that any such proposal be flexible and not overly burdensome to either the Bench or Bar."

While, as the final committee report correctly notes, the proposed rule "provides structure and sets forth the obligations of the bar with respect to motions in limine," the rule provides no such structure or obligations for the courts. In other words, it doesn't advance the rationale the subcommittee detailed as the basis for adopting the rule in the first place.

While the federal system and some states routinely incorporate meet and confer requirements within their rule structure, New Jersey does not. There is no evidence, anecdotal or otherwise, that a meet and confer requirement has any potential to resolve evidence disputes. In addition, the inclusion of this requirement in a process that already requires a motion to be filed 14 days in advance of a trial date fails

to consider the added burden placed on busy practitioners, especially small and solo firms who are exposed to trials on smaller cases virtually every week.

Moreover, while the comments in both the subcommittee report and the final committee report allude to an attempt to curtail the burden placed upon the court by having to address "inappropriate or overly burdensome motions (See p. 27), the stated preference that the motions will, to the extent possible, be decided by the judge assigned to try the case (See 4:25-8(b)) actually exacerbates that problem.

As noted in Cho, the term "in limine" is taken from the Latin phrase, "at the outset." Black's Law Dictionary 791 (9th ed. 2009). Black's defines a motion in limine as "[a] pretrial request that certain inadmissible evidence not be referred to or offered at trial." Id. at 1109; see Cho, 443 N.J. Super. at 470. In states such as Arizona that have a rule governing in limine motions, the stated purpose is to allow parties to obtain a **pretrial** ruling on evidentiary disputes and to avoid the admission of unduly prejudicial evidence to a jury. See commentary to Ariz. R. Civ. P. 7.2 citing State ex rel Berger v. Superior Court, 697 P.2d 331 (1985). Generally speaking, most states with a rule express a strong preference that the motions be decided before the trial commences.

By contrast, the rule proposed for adoption by New Jersey courts provides no such preference, allowing for the motions to be decided pretrial, shortly after the commencement of trial, or at a later juncture in the trial, all of which is left to the discretion of the individual trial judge. In addition, the court may reconsider any ruling it has made sua sponte during the trial. As a result, instead of promoting the stated rationales of uniformity among judges in considering in limine motions, and encouraging prompt resolution of admissibility questions to enhance overall certainty at trial, the rule as drafted does exactly the opposite.

Perhaps the committee should give consideration to a two category approach to in limine applications differentiating between "simple" and "complex" in limine applications.

A "simple" motion is one that is designed to limit evidence that may be heard at trial in order to streamline the jury's consideration of the issues presented and to avoid prejudice to a party by allowing an issue to proceed through openings and testimony that will later require a curative instruction. While the Court should have the discretion to determine when such a motion should be decided, the amount of prejudice that will occur if the evidence is allowed to invade the case and is later determined to have been inadmissible should be a major factor in whether the application should be addressed pretrial.

Simple motions should continue to be submitted as part of the Rule 4:25-7 pretrial exchange. The motion should cite an evidence rule or case as applicable and should be expressed in no more than one page. Responses should be similarly limited. These simple motions should not be subject to a fee as they are anticipated to be essentially evidence issues that do not require extended briefing or examination of voluminous exhibits. Additionally, they aren't "filed" with the clerk, but merely handed to the judge, and so there is no basis for an administrative fee when no administrative handling is contemplated.

'Complex" in limine motions should be filed pretrial on appropriate notice. A complex motion is one that examines the admissibility of all or part of an expert's testimony on liability or damages, or otherwise seeks to bar a witness from testifying, particularly if granting of the motion will result in dismissal of a cause of action or a measure of damages, or granting of whole or partial summary judgment. Another criteria defining complexity could be any motion that exceeds a minimal page limit or requires attachment of exhibits.

This type of two tiered approach seems more designed to strike the desired balance between the burden placed upon attorneys and the trial courts in managing in limine applications.

Finally, the rule is silent on whether in limine applications must each be individually filed with the court or may be filed as one motion provided that the brief is in compliance with the requirements set forth in the proposed rule. Under current Rule 4:25-7, in limine applications are submitted (not filed) as part of the pretrial submission which does not result in a fee to the client. Under the proposed rule complying with the rule will result in a $50 charge to the litigant.

It is respectfully submitted that requiring a separate filing for each motion, many of which are simple motions, places an unfair and unwarranted burden on litigants. As this court is aware, a number of counties began treating in limine applications in pretrial submissions as separate motions each requiring a separate $50 fee. There was substantial public outcry over this practice and this Court, recognizing the legitimate nature of those complaints, suspended that practice.

The basis for the filing fee is the need to cover the administrative cost of processing the motion. Provided that all of the in limine rulings sought can be concisely stated and briefed within the 20 page limit proposed, there is no additional expense incurred by the court to handle the filing and therefore no need to unduly burden litigants with additional costs. In fact, allowing all of the rulings to be sought in one motion supported by a twenty page brief actually promotes efficient handling by the court by encouraging attorneys to be concise in expressing arguments they are now required to make in advance of trial. To the extent a party cannot remain within that limit thereby requiring separate applications, the court is justified in charging an additional fee as the additional paperwork requires additional processing.

Thank you for the opportunity to comment on an area that is important to civil trial lawyers who will need to navigate the issues addressed on a daily basis.

Respectfully submitted,
The Executive Committee of the Civil Trial Bar Section

/s Michael V. Madden, Esquire, Chair