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Subject: Proposed Oral Argument Rule

I was counsel in the case of Matter of Peter by Johanning, 106 N.J. 365 (1987). If the Court recalls, that case involved the right of the guardian to remove a nasogastric tube from a ward in a persistent vegetative state.

In that case, with the permission of the Court, my partner, Nicholas E. Caprio, Esq., took advantage of the right of counsel for a 5-minute uninterrupted opening statement to explain to the Court why Hilda Peter would have wanted to have the nasogastric tube removed and be allowed to die peaceably. He was in a unique position to do because he had been the family counsel for years, knew Hilda Peter, and had drafted the durable power of attorney that led to the appointment of the guardian.

I believe this was an important perspective for the Court to have had at its disposal. While I was able, after the first 5-minute statement by Mr. Caprio, to discuss and argue the complex medical-ethical-legal issues involved, his opening statement surely helped the Court understand why Hilda Peter would have wanted to be allowed to die. This was particularly important because the Ombudsman for the Institutionalized Elderly changed his opinion on appeal to the Court. Previously he had found that Hilda Peter would have wanted to have the nasogastric tube removed, but on appeal to the Court he argued that there was not enough evidence to so conclude. Mr. Caprio's knowledge of Hilda Peter cogently rebutted this new false assertion and thus was essential for the holding that allowed the removal of the nasogastric tube.

This then was a case in which having two counsel argue for one side was helpful to the Court and essential for its result. I know of no abuses of practice and if there were it would be fault of counsel who ought to have the right to develop their strategy. While I note there is a possible exception for gaining permission to have two counsel argue, the commentary to the rule change fails to reveal that exception and would appear to provide for an absolute prohibition. I urge that the proposed rule not be adopted.

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