#008

NEW JERSEY STATE BAR ASSOCIATION

EVELYN PADIN, PRESIDENT
Law Office of Evelyn Padin
286 First Street
Jersey City, NJ 07302
201-963-8822 • FAX: 201-963-8874
evelyn@lawjcnj.com

April 24, 2020

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 Report of Supreme Court Committee on Civil Practice

Dear Judge Grant:

Thank you for allowing the New Jersey State Bar Association the opportunity to submit comments on the Report of the Supreme Court Civil Practice Committee. The NJSBA appreciates the Committee's outreach to ensure the organization's viewpoints were understood and considered, and commends the Committee for its thoughtful recommendations.

The NJSBA supports the majority of recommendations in the report, and respects the time and effort of the committee members in researching, discussing and debating the issues presented in an effort to improve the administration of justice in our court system. In that spirit, the NJSBA offers the following comments on four specific recommendations. As always, the Association's goal is to work 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.

1. **Proposed Amendments to *Rule* 4:22-1 – Requests for Admission**

The stated purpose of this proposal is to make our state court rule consistent with Federal Rule of Civil Procedure 36(a). The NJSBA supports that concept, but believes that by only adding "or opinion," the language proposed by the Civil Practice Committee goes farther than what the federal rule permits. Specifically, that rule does not permit requests to admit to the truth or accuracy of all opinions (including, most importantly, expert opinions), but only those that "relate to statements or opinions of fact or of the application of law to fact." *See* comments to *Fed. R. Civ. Pro. 36(a)*, as revised. By limiting admissions to opinions of fact, the federal rule does not provide unchecked ability to seek admission as to expert or lay opinions or as to the law. It is therefore respectfully suggested that the proposed amendment be revised to be consistent with the federal rule it seeks to emulate.

2. Proposed New *Rule* 4:25-8 - Motions *in limine*

The NJSBA appreciates the Supreme Court consideration of its previous concerns in connection with this proposal, and the extent to which the NJSBA was invited by the Civil Practice Committee to participate in discussions about potential alternative language to address those concerns. The NJSBA acknowledges that the current proposed rule eliminates many of the practical concerns it raised and, for the most part, codifies existing practice with minor additional details related to length of briefs and organization. The NJSBA has no objection to the process set forth in the rule.

The NJSBA notes, however, that the proposed rule does not resolve the important issues raised by *Cho v. Trinitas Reg'l Med. Ctr.*, 443 N.J. Super. 461 (App. Div. 2015). Specifically, the new proposed rule provides that "a dispositive motion falling outside the purview of this rule would include, but not be limited to, 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."

As was pointed out in the comments submitted in the prior rules cycle, 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.

[*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 continues to cause 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, are foreclosing legitimate dispositive motions in a way that is fundamentally unfair to litigants. Exacerbating the issue is the fact that treatment of these motions varies from vicinage to vicinage, and from judge to judge within a vicinage. 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.

Guidance is critical so that a predictable framework for litigating these issues is reliably available. Otherwise, uncertainty about these issues will persist. There are myriad examples. For instance, 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? It serves no one well to have a procedure that does not address how and when these motions should be decided in a predictable, uniform manner.

The NJSBA previously submitted proposed language for a rule that separated *in limine* motions into simple and complex ones. The NJSBA once again urges that the framework proposed by the NJSBA be adopted, at least as it relates to motions to bar experts, the outcome of which may have a dispositive impact on a party's case. Specifically, a motion filed *in limine* seeking to bar testimony of an expert in a manner that may have a dispositive effect should trigger an assignment to the judge who will try the case. The trial judge may determine the motion on regular notice or at the time of trial, but prior to the commencement of trial, within the discretion of the court. The filing of a motion *in limine* to bar testimony of an expert should be deemed to preserve the movant's right to move for dispositive relief after the motion is decided, if appropriate. Once such a motion in *limine* is filed, the judge assigned to hear that motion and try the case should order briefing on any dispositive motion on a schedule that is left to the court's discretion.

If a complex motion *in limine* seeks to bar some or all of an expert's testimony and that expert has been deposed, the record regarding that expert should, absent exceptional circumstances, be considered complete and the court should decide the motion on the record created without resort to a *R.* 104 hearing. If the expert has not been deposed, or if the motion (as occurs most frequently in pharmaceutical cases) seeks a court decision on the scientific reliability of the opinion proffered, the court should be able to, within its discretion, decide the motion on the record accompanying the motion or after a *R.* 104 hearing.

The NJSBA appreciates that there may be a concern that forced pre-assignment of a case pursuant to this framework may hinder a presiding judge's flexibility to manage the trial calendar. It is respectfully submitted, however, that it does so in only a minimal way. The court retains complete discretion as to whom the motion is assigned and as to when the matter is set down for trial.

At a minimum, the NJSBA posits that the proposed rule should specifically indicate that any timely filed *in limine* motion seeking to bar testimony of an expert in a manner that may have a dispositive impact on a party's case automatically preserves the movant's right to make a dispositive application, even if that application will be heard by the trial judge assigned. In that manner, the party seeking a pretrial ruling regarding an expert is not deprived of the right to make that application by a motion judge's decision to deny the motion without prejudice and defer handling of the substance to the trial judge.

3. Request for SSN in Form A (Personal Injury) and A(1) (Medical Malpractice) Interrogatories

The Civil Practice Committee Report indicates that the Committee determined the uniform request for a plaintiff's social security number does not serve a legitimate court-related need and should be removed from the form interrogatories. That information, however, is required to be collected by defendant insurance carriers to meet their reporting obligations under the State Children's Health Insurance Program (SCHIP). Plaintiff's social security number is also needed for HIPAA releases to obtain medical records, and to perform a search for prior accidents or claims. While the information can be requested in supplemental interrogatories, since the number of supplemental interrogatories is limited, routine information like this should continue to be collected through the form interrogatories. For these reasons, the NJSBA recommends that this proposal not be adopted.

4. Proposal for a Track V in Law Division – Civil Part

The NJSBA commends the Committee for proposing a Track V in the Law Division to allow for longer discovery periods. The NJSBA had proposed more flexibility in the extension of discovery end dates based on a recommendation from its Practice of Law Task Force. We appreciate the Court's previous correspondence advising the proposal was being considered by the Committee with an eye toward a more limited application to complex cases. We also applaud the Committee's efforts to move the proposal forward, but recommend that language be included in the final proposal to acknowledge that, while longer discovery periods are anticipated in Track V cases, each case is still expected to stay on a reasonable track to resolution. This will help to balance the NJSBA's original request for flexibility with the overarching goal of ultimately resolving the matter.

The New Jersey State Bar Association again thanks the Supreme Court for allowing the bar to submit comments and recommendations on these proposals. We again commend all of the volunteers for their efforts in contributing to the improvement of the administration of justice 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 able to be held. 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.

Respectfully Submitted,

Evelyn Padin, Esq.
President

cc: Kimberly A. Yonta, Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director