2022 REPORT

OF THE SUPREME COURT

CIVIL PRACTICE COMMITTEE

January 2022

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *Rule* 1:2-1(b) - Virtual Transmission of Testimony

In its 2021 Omnibus Rule Amendment Order, the Supreme Court adopted a new paragraph (b) to *Rule* 1:2-1(b) titled "Virtual Transmission of Testimony". The Rule addresses taking testimony from witnesses who are at remote locations. The Chair suggested retitling this paragraph of the Rule to "Contemporaneous Transmission of Testimony" for consistency with the text of the Rule. The Committee agrees with the Chair's suggestion noting that that the transmission is a live actual transmission, not literally virtual.

The proposed amendments to *Rule* 1:2-1(b) follow.

1:2-1. Proceedings in Open Court; Robes

(a) …no change

(b) [Virtual Transmission of Testimony] Contemporaneous Transmission of Testimony. Upon application in advance of appearance, unless otherwise provided by statute, the court may permit testimony in open court by contemporaneous transmission from a different location for good cause and with appropriate safeguards.

(c) …no change.

(d) …no change.

Note: Source – *R.R.* 1:28-6, 3:5-1 (first clause), 4:29-5, 4:118-5, 7:7-1, 8:13-7(c); amended July 14, 1992 to be effective September 1, 1992; amended July 16, 2009 to be effective September 1, 2009; amended July 27, 2018 to be effective September 1, 2018; text redesignated as paragraphs (a) (c) and (d) with captions added and text of paragraph (d) amended, and new paragraph (b) adopted July 30, 2021 to be effective September 1, 2021; paragraph (b) title amended to be effective .

B. Proposed Amendments to *Rule* 1:6-2(a) – Form of Motion; Hearing

A Superior Court judge suggests that *Rule* 1:6-2(a) be amended to require proposed forms of order to contain designated numbered paragraphs. He submits the proposed amendment will facilitate reference to specific provisions of an order that require attention, and also, the review and disposition of motions by judges deciding motions remotely via the eCourts electronic system. After considering input from the Criminal and Family Practice Divisions, the Committee determined that the Rule in Part I should be clarified to make a more specific cross-reference to *Rule* 4:42-1(a)(4), which requires proposed forms of order in civil cases to contain numbered paragraphs.

The proposed amendments to *Rule* 1:6-2(a) follow.

1:6-2. Form of Motion; Hearing

(a) Generally. An application to the court for an order shall be by motion, or in special cases, by order to show cause. A motion, other than one made during a trial or hearing, shall be by notice of motion in writing unless the court permits it to be made orally. Every motion shall state the time and place when it is to be presented to the court, the grounds upon which it is made and the nature of the relief sought, and, as to motions filed in the Law Division-Civil Part only, the discovery end date or a statement that no such date has been assigned. The motion shall be accompanied by a proposed form of order in accordance with *R*. 3:1-4(a) or *R*. 4:42-1(a)(4) and (e), as applicable. The form of order shall note whether the motion was opposed or unopposed. If the motion or response thereto relies on facts not of record or not subject of judicial notice, it shall be supported by affidavit made in compliance with *R*. 1:6-6. The motion shall be deemed uncontested and there shall be no right to argue orally in opposition unless responsive papers are timely filed and served stating with particularity the basis of the opposition to the relief sought. If the motion is withdrawn or the matter settled, counsel shall forthwith inform the court.

(b) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

Note: Source – *R.R.* 3:11-2, 4:8-5(a) (second sentence). Amended July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; former rule amended and redesignated as paragraph (a) and paragraphs (b), (c), (d), and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) amended July 15, 1982 to be effective September 13, 1982; paragraph (c) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (c) amended and paragraph (f) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (c) amended and paragraph (d) caption and text amended June 29, 1990 to be effective September 4, 1990; paragraph (d) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 13, 1994 to be effective January 1, 1995; paragraphs (a) and (f) amended January 21, 1999 to be effective April 5, 1999; paragraphs (c) and (d) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 28, 2004 to be effective September 1, 2004; paragraphs (b), (c), and (f) amended July 27, 2006 to be effective September 1, 2006; paragraph (b) caption amended, former text of paragraph (b) captioned and redesignated as paragraph (1), and new paragraph (2) adopted July 9, 2008 to be effective September 1, 2008; paragraph (c) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended July 9, 2013 to be effective September 1, 2013; paragraph (a) amended to be effective .

C. Proposed Amendments to Various Part I and Part II Rules

The Appellate Division submitted proposals to amend a number of Part I and Part II Rules. Following study and examination initially for the purpose of suggesting changes needed for electronic filing purposes, the Appellate Division recognized that many of these rules have become cumbersome and difficult to navigate. The Appellate Division suggests streamlining some rules and changing others to improve appellate practice. While many of the proposed amendments are minor in nature, there are some substantive proposed amendments that, if adopted, would aid in the fair and efficient administration of justice in all cases.

1. Proposed Amendments to *Rule* 1:2-2 – Trial Courts; Verbatim Record of Proceedings

The proposed amendments to *Rule* 1:2-2 seek to address the greater use of audio or video recordings in trial courts and the profound impact on appeals of the failure to retain evidence. The proposed amendments include a requirement that a verbatim record shall be made of the content of all audio or video recordings as actually played or proffered during the proceedings and the recording itself, whether admitted or not, shall be marked into evidence as a court's exhibit and retained by the court unless unfeasible. The proposed amendments further specify that the recording shall be in a standard format promulgated by Administrative Directive, and the method of trial court retention of digital evidence shall be promulgated by Administrative Directive.

The Committee unanimously agrees with the Appellate Division's proposal.

The proposed amendments to *Rule* 1:2-2 follow.

1:2-2. Trial Courts: Verbatim Record of Proceedings

In the trial divisions of the Superior Court and in the Tax Court, all proceedings in court shall be recorded verbatim except, unless the court otherwise orders, settlement conferences, case management conferences, calendar calls, and *ex parte* motions. [Unless a transcript thereof is marked into evidence, a] A verbatim record shall also be made of the content of [an] all audio or video [tape] recordings as actually played or proffered during the proceedings and the [tape] recording itself, whether admitted or not, shall be marked into evidence as a court's exhibit and retained by the court unless unfeasible. *Ex parte* proceedings pursuant to *R*. 4:52 and *R*. 4:67 shall, however, be recorded verbatim subject to the availability of either a court reporter or a recording device. In the municipal courts, the taking of a verbatim record of the proceedings shall be governed by *R*. 7:8-8. Charge conferences, whether conducted in open court or in chambers, including those at sidebar, shall be recorded verbatim as required by *R*. 1:8-7(a). The recording shall be in a standard format as adopted by administrative directive and the method of trial court retention of digital evidence shall be as adopted by administrative directive. If a video includes an audio soundtrack, the audio portion shall be transcribed for the record unless the court directs otherwise.

Note: Source – *R.R*. 3:7-5 (first sentence), 3:7-10(d) (fifth sentence), 4:44-2 (first sentence), 4:44-5, 4:61-1(b). Amended June 20, 1979 to be effective July 1, 1979; amended December 20, 1983 to be effective December 31, 1983; amended July 26, 1984 to be effective September 10, 1984; amended January 5, 1998, to be effective February 1, 1998; amended July 10, 1998 to be effective September 1, 1998; amended July 5, 2000 to be

effective September 5, 2000; amended July 12, 2002 to be effective September 3, 2002; amended July 28, 2004 to be effective September 1, 2004; amended _____ to be effective _____.

2. Proposed Amendments to *Rule* 1:2-3 – Exhibits

The proposed amendments to *Rule* 1:2-3 add a paragraph regarding certain aspects of digital evidence, such as its exchange, alteration, and format.

This proposed new paragraph provides that unless otherwise permitted by law or on good cause shown (such as witness impeachment materials), all digital evidence shall be exchanged in advance as determined by the court. It specifies that no such evidence shall be altered in any way without advance notice to the court and to all parties. It requires that the format and other details concerning digital evidence be promulgated by Administrative Directive. It also explains that, for purposes of this provision, the term "digital evidence" shall include but is not limited to video recordings, audio recordings, photographs, and PDF versions of documents, charts, maps, diagrams, x-rays, diagnostic tests, or other similar exhibits.

The Committee agrees with the proposed amendments as they further the standardization and preservation of digital evidence.

The proposed amendments to *Rule* 1:2-3 follow.

1:2-3. Exhibits

(a) The verbatim record of the proceedings shall include references to all exhibits and, as to each[,]: the offering party[,]; a short description of the exhibit stated by the offering party or the court[,]; and the marking directed by the court. Following the conclusion of trial, unless otherwise provided by *R*. 1:2-2, evidence shall be returned to the proponent and so acknowledged on the record unless the court otherwise orders. The record shall note any exhibits retained by the court. All evidence shall be preserved pending direct appeal and proceedings on certification, and shall be made available for inclusion by any party in the record on appeal.

(b) Unless otherwise permitted by law or on good cause shown, such as when non-premarked exhibits are intended to be used for witness impeachment, all digital evidence shall be exchanged in advance as determined by the court. No such evidence shall be altered in any way without advance notice to the court and to all parties. The format and other details concerning digital evidence shall be adopted by administrative directive. For purposes of this provision, the term "digital evidence" shall include but not limited to video recordings, audio recordings, photographs, and PDF versions of documents, charts, maps, diagrams, x-rays, diagnostic tests, or other similar exhibits.

Note: Source – *R.R.* 3:7-5A, 4:45B; amended November 2, 1987 to be effective January 1, 1988; amended July 13, 1994 to be effective September 1, 1994; first paragraph designated as paragraph (a) and new paragraph (b) added to be adopted

3. Proposed Amendments to *Rule* 1:36-1 – Filing of Opinions

The proposed amendments to *Rule* 1:36-1 clarify that copies of written opinions should be sent to all parties of record, not just counsel.

The Committee agreed with the rule proposal, noting that it will clarify that both represented and self-represented parties should receive copies of written opinions.

The proposed amendments to *Rule* 1:36-1 follow.

1:36-1. Filing of Opinions

The original of each written opinion handed down in each court, including letter opinions and memorandum decisions, shall be filed with the clerk of the court in which rendered and copies thereof shall be sent to [counsel] all parties of record and, on all appeals, to the court or agency below. Opinions of the Appellate Division shall have typed or stamped thereon the following notice: "Not for Publication Without the Approval of the Appellate Division." Opinions of the trial courts shall have typed or stamped thereon the following notice: "Not for Publication Without the Approval of the Committee on Opinions."

Note: Source – *R.R.* 1:32(a)(b); amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

4. Proposed Amendments to *Rule* 1:36-2 (a) and (d) re: – Publication of Opinions

The proposed amendments to paragraph (a) of *Rule* 1:36-2 clarify that Appellate Division opinions should be published only upon the direction of the majority of the Appellate Division panel and with the approval of the Presiding Judge of the Appellate Division Part.

The proposed amendments to paragraph (d) of the Rule expand the guidelines for publication to include any Appellate Division disposition in which the panel is in disagreement about either the result or the majority's reasoning. The separate opinion may suggest uncertainly among members of the court about a particular principle that would be helpful in the future for the bar and the public.

The Committee agrees with the proposed amendments to paragraphs (a) and (d) noting that they provide additional clarity on the procedure for the publication of opinions.

The proposed amendments to *Rule* 1:36-2 follow.

1:36-2. Publication

(a) Appellate Opinions. All opinions of the Supreme Court shall be published except where otherwise directed by the Court. Opinions of the Appellate Division shall be published only upon the direction of a majority of the panel members issuing the opinion and with the approval of the Part's presiding judge.

(b) Committee on Opinions; Trial Court Opinions. The Chief Justice shall appoint a Committee on Opinions to review formal written opinions submitted for publication by a trial judge. Except in extraordinary circumstances, the Committee shall not review a trial court opinion until the time for appeal from the final judgment in the cause has expired. If an appeal has not been taken, the Committee shall determine whether to approve publication of the trial court opinion. If an appeal has been taken, the Appellate Division panel, in the manner described in paragraph (a), shall determine, when it decides the appeal, whether the trial court opinion shall be published. A trial judge submitting an opinion for review for publication shall file it with the Administrative Office of the Courts in triplicate with the notation on its face that it is being submitted for publication.

(c) Request for Publication. Any person may request publication of an opinion by letter to the Committee on Opinions explaining the basis of the request with specificity and with reference to the guidelines prescribed by paragraph (d). In the case of Appellate Division opinions, the Committee shall transmit the request to the presiding judge of the panel together with its recommendation, but the court shall retain

the publication decision which will be exercised in the manner described in paragraph (a).

(d) Guidelines for Publication. An opinion in appropriate form, excluding letter opinions and transcripts of oral opinions, shall be published where the decision (1) involves a substantial question under the United States or New Jersey Constitution, or (2) determines a new and important question of law, or (3) changes, reverses, seriously questions or criticizes the soundness of an established principle of law, or (4) determines a substantial question on which the only case law in this State antedates September 15, 1948, or (5) is based upon a matter of practice and procedure not theretofore authoritatively determined, or (6) is of continuing public interest and importance, or (7) resolves an apparent conflict of authority, or (8) although not otherwise meriting publication, constitutes a significant and nonduplicative contribution to legal literature by providing an historical review of the law, or describing legislative history, or containing a collection of cases that should be of substantial aid to the bench and bar, or (9) unless the entire panel unanimously agrees otherwise, whenever in the Appellate Division a member of the panel files a separate opinion from the majority's opinion.

Note: Source – *R.R.* 1:32(c) (d); amended July 29, 1977, to be effective September 6, 1977; text deleted and paragraphs (a)(b)(c) and (d) substituted July 13, 1994 to be effective September 1, 1994; amended _____ to be effective _____.

5. Proposed Amendments to *Rule* 2:1 – Scope

The proposed amendments to *Rule* 2:1 provide that the rules in Part I also govern the practice and procedure in the Supreme Court and the Appellate Division of the Superior Court insofar as applicable.

The Committee unanimously agrees with the proposed amendments.

The proposed amendments to *Rule* 2:1 follow.

2:1. Scope

Unless otherwise stated, the rules in Part II govern the practice and procedure in the Supreme Court and the Appellate Division of the Superior Court.

The rules in Part I also govern insofar as applicable.

Note: Source – *R.R.* 2:1-10; amended to be effective .

6. Proposed Amendments to *Rule* 2:2-3 – Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

The proposed amendments to *Rule* 2:2-3 seek to organize the Rule; add new categories of interlocutory orders appealable as of right; and clarify language with respect to appeals as of right. Specifically, paragraph (a) is reworked to designate as a new paragraph (b) the unnumbered paragraph addressing final judgments of a court. The new paragraph (b) delineates appealable non-final orders and collects all those orders that may be non-final but appealable as of right in a single location.

The Appellate Division also suggests the addition of two new categories of interlocutory orders that would appealable as of right despite a lack of finality: orders granting or denying class certification and orders denying intervention as of right. Orders granting or denying class certification have a profound impact on the progress of a case in trial court. And the same can be said about a mistaken ruling on a motion to intervene as of right.

Lastly, the Appellate Division recommends the insertion of the word "properly" in that part of the rule that recognizes an appeal as of right of an order certified as final.

The Committee agrees with the Appellate Division's proposed amendments, as they reorganize the rule such that appealable non-final orders are presented in a clear and categorical way.

The proposed amendments to *Rule* 2:2-3 follow.

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions

and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by *R.* 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), and except for appeals from a denial by the State Police of an application to make a gun purchase under a previously issued gun purchaser card, which appeals shall be taken to the designated gun permit judge in the vicinage, appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

(2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer excepting matters prescribed by *R.* 8:2 (tax matters) and matters governed by *R.* 4:74-8 (Wage Collection Section appeals), except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise;

(3) in such cases as are provided by law.

(b) Final judgments of a court, for appeal purposes, [shall also include those referred to by *R.* 3:28-6(c) (order enrolling defendant into the pretrial intervention program over the objection of the prosecutor), *R.* 3:26-3 (material witness order), *R.* 4:42-2 (certification of interlocutory order), *R.* 4:53-1 (order appointing statutory or liquidating receiver), *R.* 5:8-6 (final custody determination in bifurcated family action), and *R.* 5:10-9 (order on preliminary hearing in adoption action). An order granting or denying a motion to extend the time to file a notice of tort claim pursuant to *N.J.S.A.* 59:8-9, whether entered in the cause or by a separate action, and any order either compelling arbitration, whether the action is dismissed or stayed, or denying arbitration shall also be deemed a final judgment of the court for appeal purposes.] are judgments that finally resolve all issues as to all parties, except the following are also appealable as of right:

(1) orders enrolling a defendant into the pretrial intervention program over the objection of the prosecutor, *R*. 3:28-6(c);

(2) material witness orders, *R*. 3:26-3;

(3) orders properly certified as final under *R*. 4:42-2;

(4) orders appointing statutory or liquidating receivers, *R*. 4:53-1;

(5) orders determining final custody in bifurcated family actions, *R*. 5:8-6;

(6) orders on preliminary hearings in adoption actions, *R*. 5:10-9;

(7) orders granting or denying motions to extend the time to file a notice of tort claim pursuant to *N.J.S.A*. 59:8-9, whether entered in the cause or by a separate action;

(8) orders compelling or denying arbitration, whether the action is dismissed or stayed;

(9) orders granting or denying as a final matter class certification, *R*. 4:32;

(10) orders denying motions for intervention as of right, *R*. 4:33-1; and

(11) orders granting pretrial detention, *R*. 2:9-13 and *R*. 3:4A.

[(b)](c) By Leave. On application made pursuant to *R.* 2:5-6, appeals may be taken to the Appellate Division by leave granted, in extraordinary cases and in the interest of justice, from final judgments of a court of limited jurisdiction or from actions or decisions of an administrative agency or officer if the matter is appealable or reviewable as of right in a trial division of the Superior Court, as where the jurisdiction of the court, agency or officer is questioned on substantial grounds.

Note: Source – *R.R.* 2:2-1(a) (b) (c) (d) (f) (g), 2:2-4, 2:12-1, 3:10-11, 4:88-7, 4:88-8(a) (first sentence), 4:88-10 (first sentence), 4:88-14, 6:3-11(a). Paragraph (a) amended July 14, 1972 to be effective September 5, 1972; paragraph (b) amended November 27, 1974 to be effective April 1, 1975; caption and paragraph (a) amended June 20, 1979 to be effective July 1, 1979; paragraph (a) amended July 8, 1980 to be effective July 15, 1980; paragraph (a) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(1) amended July 22, 1983 to be effective September 12, 1983; paragraph (a) amended December 20, 1983 to be effective December 31, 1983; paragraph (b) amended July 26, 1984 to be effective September 10, 1984; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 27, 2006 to be effective September 1, 2006; paragraph (a)(3) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended July 21, 2011 to be effective September 1, 2011; paragraph (a) amended July 19, 2012 to be effective September 4, 2012; paragraph (a)(3)

amended July 31, 2020 to be effective September 1, 2020; paragraph (a) divided and redesignated paragraph (a) and new paragraph (b), former paragraph (b) redesignated as paragraph (c) to be effective .

7. Proposed Amendments to *Rule* 2:3-3 - Joint and Several Appeals

The proposed amendments to *Rule* 2:3-3 reorganize the rule into two paragraphs. Proposed paragraph (a) would contain the contents of the existing Rule 2:3-3 that states in a single sentence: "Parties interested jointly, severally or otherwise in a judgment, order, decision or action may join in an appeal therefrom or may appeal separately." Proposed paragraph (b) imposes an affirmative duty on all parties to advise of other appeals relating to the matter at hand.

The Committee agrees with the Appellate Division's proposed amendments.

The proposed amendments to *Rule* 2:3-3 follow.

2:3-3. Joint and Several Appeals

(a) Parties interested jointly, severally, or otherwise in a judgment, order, decision or action may join in an appeal therefrom or may appeal separately.

(b) When aware of any other pending appeal or an appeal already decided arising out of the same judgment, order, decision, or action, parties are obligated to immediately notify the clerk of the court of the existence of the other appeal even if the other appeal is filed after the party's appeal. This obligation requires the party to advise of other appeals pending or decided even if pending in or decided by a court of some other jurisdiction.

Note: Source – *R.R.* 1:2-5; first paragraph designated as (a) and new paragraph (b) added to be effective .

8. Proposed Amendments to *Rule* 2:4-1 - Time: For Judgments, Orders, Decisions, Actions and from Rules

The proposed amendments to *Rule* 2:4-1 add an additional case type and update language in light of Criminal Justice Reform. In subparagraph (a)(1), the Appellate Division suggests including that appealable orders in adoption matters should be filed within 21 days of their entry. In subparagraph (a)(3), the Appellate Division suggests adding reference to the time to file an appeal from an order granting pretrial detention.

The Committee agrees with the proposed amendments as they make finding the time to appeal in these types of matters more convenient for litigants.

The proposed amendments to *Rule* 2:4-1 follow.

2:4-1. Time: From Judgments, Orders, Decisions, Actions and From Rules

(a) Except as set forth in subparagraphs (1) and (2), appeals from final judgments of courts, final judgments or orders of judges sitting as statutory agents and final judgments of the Division of Workers' Compensation shall be filed within 45 days of their entry.

(1) Appeals from final judgments terminating parental rights and appealable orders in adoption matters, shall be filed within 21 days of their entry.

(2) Direct appeals from judgments of conviction and sentences shall be filed within 45 days of entry of trial court orders granting petitions for post-conviction relief pursuant to *R*. 3:22-11 under the limited circumstances where defendant has demonstrated ineffective assistance of counsel in trial counsel's failure to file a direct appeal from the judgment of conviction and sentence upon defendant's timely request.

(3) Appeals from orders granting pretrial detention shall be filed within 7 days of their entry and follow the process described in *R*. 2:9-13.

(b) …no change.

(c) …no change.

Note: Source – *R.R.* 1:3-1, 4:88-15(a), 4:88-15(b)(7); paragraph (b) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended June 20, 1979 to be effective July 1, 1979; paragraphs (a) and (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended June 26, 2012 to be effective September 4, 2012; effective date of June 26, 2012 amendments changed to November 5, 2012 by order of August 20, 2012; paragraphs (a) and (b) amended July 27, 2018 to be effective September 1, 2018; paragraph (a)(1) amended and new paragraph (a)(3) added to be effective .

9. Proposed Amendments to *Rule* 2:5-1 – Notice of Appeal; Order in Lieu Thereof; Case Information Statement

The proposed amendments to *Rule* 2:5-1 reorganize the Rule to clarify the requirements to institute an appeal. The proposal intends to clarify that an appeal is commenced not just by the filing of a notice of appeal but also by the additional filing and service of a transcript request form and a case information statement. Further, the proposed amendments expand the time within which a trial court may amplify a decision after an appeal is filed from fifteen to thirty days. The Committee agrees with this reorganization.

The proposed amendments to *Rule* 2:5-1 follow.

2:5-1. Notice of Appeal, [; Order in Lieu Thereof;] Transcript Request Form, and Case Information Statement

[(a) Service and Filing in Judicial Proceedings. An appeal from the final judgment of a court is taken by serving a copy of a notice of appeal and the request for transcript upon all other parties who have appeared in the action and, in adult criminal matters, upon the Appellate Section of the New Jersey Division of Criminal Justice, and by filing the originals with the appellate court and a copy of the notice of appeal and the transcript request with the court from which the appeal is taken. In criminal matters when bail pending appeal is sought, the party seeking bail shall present to the sentencing judge a copy of the notice of appeal with a certification thereon that the original has been filed with the appellate court. A notice of appeal to the Appellate Division shall have annexed thereto a Case Information Statement in the form prescribed by paragraph (f) of this rule, and the respondent shall file such a Case Information Statement within 15 days after service upon him of the notice of appeal.

(b) Notice to Trial Judge or Agency. In addition to the filing of the notice of appeal the appellant shall mail a copy thereof, with a copy of the Case Information Statement annexed, by ordinary mail to the trial judge. If the appeal is taken directly from the decision or action of an administrative agency or officer, the appellant shall mail a copy of the notice of appeal, with a copy of the Case Information Statement annexed, to the agency or officer, except that if the appeal is

taken from the Division of Workers' Compensation, a copy of the notice of appeal shall also be sent to the Workers' Compensation judge who decided the matter. Within 15 days thereafter, the trial judge, agency or officer, may file and mail to the parties an amplification of a prior statement, opinion or memorandum made either in writing or orally and recorded pursuant to *R*. 1:2-2. If there is no such prior statement, opinion or memorandum, the trial judge, agency or officer shall within such time file with the Clerk of the Appellate Division and mail to the parties a written opinion stating findings of fact and conclusions of law. The appellate court shall have jurisdiction of the appeal notwithstanding a failure to give notice to the trial judge, agency or officer, as required by this rule.

(c) Service in Juvenile Delinquency Actions. If the appeal is from a judgment in a juvenile delinquency action, a copy of the notice of appeal shall be served, within 3 days after the filing thereof, upon the county prosecutor, who shall appear and participate in the appellate proceedings.

(d) Service and Filing in Administrative Proceedings. An appeal to the Appellate Division to review the decision, action or administrative rule of any state administrative agency or officer is taken by serving copies of the notice of appeal upon the agency or officer, the Attorney General and all other interested parties, and by filing the original of the notice with the Appellate Division. Service on the Attorney General shall be made pursuant to *R*. 4:4-4(a)(7). On an appeal from the Division of Workers' Compensation the Division shall not be considered a party to

the appeal, and the notice of appeal shall not be served upon the Attorney General unless representing a party to the appeal.

(e) Contents of Notice of Appeal and Case Information Statement; Form; Certifications.

(1) Form of Notice of Appeal. A notice of appeal to the Appellate Division may be in the form prescribed by the Administrative Director of the Courts as set forth in Appendix IV of these Rules. The use of that form shall be deemed to be compliance with the requirements of subparagraphs 2 and 3 hereof. A notice of appeal to the Supreme Court shall meet the requirements of subparagraph 3(i), (ii) and the portions of (iii) that address service of the notice and the payment of fees. The notice of appeal to the Appellate Division shall have annexed thereto a Case Information Statement as prescribed by subparagraph 2 of this rule.

(2) Form of the Case Information Statement; Sanctions. The Case Information Statement shall be in the form prescribed by the Administrative Director of the Courts as set forth in Appendices VII and VIII to these Rules (civil and criminal appeals, respectively). The appellant's Case Information Statement shall have annexed to it a copy of the final judgment, order, or agency decision appealed from except final judgments entered by the clerk on a jury verdict. In the event there is any change with respect to any entry on the Case Information Statement, appellant shall have a continuing obligation to file an amended Case

Information Statement on the prescribed form. Failure to comply with the requirement for filing a Case Information Statement or any deficiencies in the completion of this statement shall be ground for such action as the appellate court deems appropriate, including rejection of the notice of appeal, or on application of any party or on the court's own motion, dismissal of the appeal.

(3) Requirements of Notice of Appeal.

(i) Civil Actions. In civil actions the notice of appeal shall set forth the name and address of the party taking the appeal; the name and address of counsel, if any; the names of all other parties to the action and to the appeal; and shall designate the judgment, decision, action or rule, or part thereof appealed from, the name of the judge who sat below, and the name of the court, agency or officer from which and to which the appeal is taken.

(ii) Criminal, Quasi-Criminal and Juvenile Delinquency Actions. In criminal, quasi-criminal and juvenile delinquency actions the notice of appeal shall set forth the name and address of the appellant; the name and address of counsel, if any; a concise statement of the offense and of the judgment, giving its date and any sentence or disposition imposed; the place of confinement, if the defendant is in custody; the name of the judge who sat below; and the name of the court from which and to which the appeal is taken.

(iii) All Actions. In addition to the foregoing requirements, the notice of appeal in every action shall certify service of a copy thereof on all parties, the

Attorney General if necessary, and the trial judge, agency or officer. In all appeals from adult criminal convictions the notice of appeal shall certify service of a copy thereof and of a copy of the Case Information Statement upon the appropriate county prosecutor and the New Jersey Division of Criminal Justice, Appellate Section. In all actions the notice of appeal shall also certify payment of filing fees required by *N.J.S.A*. 22A:2. The notice of appeal shall also certify compliance with *R*. 2:5-1(e)(2) (filing of Case Information Statement), affixing a copy of the actual Case Information Statement to the notice of appeal. In all actions where a verbatim record of the proceedings was taken, the notice of appeal shall also contain the attorney's certification of compliance with *R*. 2:5-3(a) (request for transcript) and *R*. 2:5-3(d) (deposit for transcript), or a certification stating the reasons for exemption from compliance. Certifications of compliance shall specify from whom the transcript was ordered, the date ordered, and the fact of deposit, affixing a copy of the actual request for the transcript to the notice of appeal.

(f) Order in Lieu of Notice of Appeal. An order of the appellate court granting an interlocutory appeal or, on an appeal by an indigent, waiving the payment of filing fees and the deposit for costs shall serve as the notice of appeal if no notice of appeal has been filed, and, except as otherwise provided by *R*. 2:7-1, the date of the order shall be deemed to be the date of the filing of the notice of appeal for purposes of these rules. Within 10 days of the entry of such order, the appellant must file and serve the prescribed Case Information Statement in

accordance with these rules. Upon the entry of such order the appeal shall be deemed pending, and the appellant, or the clerk of the appellate court if the appellant appears *pro se*, shall forthwith so notify all parties or their attorneys; the clerk of the court or state administrative agency or officer from which the appeal is taken; and the trial judge if the appeal is from a judgment or order of a trial court sitting without a jury or if in an action tried with a jury, the appeal is from an order granting or denying a new trial or a motion for judgment notwithstanding the verdict. The trial judge shall file an opinion or may supplement a filed opinion as provided in paragraph (b) of this rule.

(g) Attorney General and Attorneys for Other Governmental Bodies. If the validity of a federal, state, or local enactment is questioned, the party raising the question shall serve notice of the appeal on the appropriate official as provided by *R*. 4:28-4 unless he or she is a party to the appeal or has received notice of the action in the court below. The notice shall specify the provision thereof that is challenged and shall be mailed within five days after the filing of the notice of appeal, but the appellate court shall have jurisdiction of the appeal notwithstanding a failure to give the notice required by this rule.]

(a) Commencing the Appeal. An appeal from the final judgment of a court is taken by filing with the court from which the appeal is taken, and serving on those identified in paragraph (b) of this rule with:

(1) a notice of appeal in the format required by paragraph (f) of this rule;

(2) a transcript request form in the format required by paragraph (g) of this rule or the certifying of compliance with *R*. 2:5-3; and

(3) a case information statement in the format required by paragraph (h) of this rule.

(b) Service. The notice of appeal, transcript request form, and case information statement must be served on all other parties who have appeared in the action and when applicable, the following:

(1) in adult criminal matters, the Appellate Section of the New Jersey Division of Criminal Justice. When bail pending appeal is sought, the party seeking bail shall present to the sentencing judge a copy of the notice of appeal with a certification that the original has been filed with the appellate court.

(2) in juvenile delinquency matters, on the county prosecutor, and within three days after the filing of the appeal.

(3) in administrative appeals, on the Attorney General, in the manner prescribed by *R*. 4:4-4(a)(7), except in workers' compensation appeals the Attorney General shall not be served unless representing a party to the appeal.

(4) in appeals challenging the validity of a federal, state, or local enactment, the party raising the question shall serve the appropriate official as provided by *R*. 4:28-4, and the Attorney General, unless already a party to the appeal or has received notice of the action in the court below.

(c) Notice to Trial Judge or Agency.

(1) The appellant must provide a copy of the notice of appeal, transcript request form, and case information statement to the trial judge or the administrative agency or officer who rendered the decision under review. If the appeal is taken from the Division of Workers' Compensation, a copy shall also be sent to the workers' compensation judge who decided the matter.

(2) The appellate court shall have jurisdiction of the appeal notwithstanding a failure to comply with paragraph (c)(1) of this rule.

(d) Trial Judge or Agency Amplification. Within 30 days of receipt of the notice of appeal, or an order in lieu of notice of appeal as described in paragraph (f)(4) of this rule, the trial judge, agency or officer who entered the order or judgment under review, may file and send to the clerk of the appellate court and the parties an amplification of a prior written or oral statement, opinion or memorandum. If oral, the amplification shall be recorded pursuant to R. 1:2-2. If there is no such oral or written statement, opinion or memorandum, the trial judge, agency or officer shall within 15 days file with the clerk of the appellate court and send to the parties a written opinion stating findings of fact and conclusions of law.

(e) Respondent. The respondent shall file a case information statement within 15 days after service of the notice of appeal.

(f) The Notice of Appeal.

(1) A notice of appeal to the Appellate Division may be in the form prescribed by the Administrative Director of the Courts as set forth in Appendix IV

of these Rules. The use of that form shall be deemed to be compliance with the requirements of paragraph (f)(2). A notice of appeal to the Supreme Court shall meet the requirements of paragraph (b) regarding the service of the notice; paragraph (f)(2); and the rules applicable to the payment of fees.

(2) Contents and Requirements of Notice of Appeal.

(i) In all appeals, the notice of appeal shall set forth the name, street address, and email address of the party taking the appeal, of all other parties to the action and to the appeal, and of counsel, if any. In all appeals, the notice of appeal shall certify service of a copy thereon on all parties, including when applicable those persons or parties identified in paragraph (b).

(ii) In civil actions, the notice of appeal shall contain the information set forth in subparagraph (i) and shall also designate the judgment, decision, action, or rule, or part thereof, appealed from, the name of the judge who sat below, and the name of the court, agency or officer from which and to which the appeal is taken.

(iii) In criminal, quasi-criminal and juvenile delinquency actions, the notice of appeal shall comply with subparagraph (i) and shall also include a concise statement of the offense and of the judgment, giving its date and any sentence or disposition imposed, the place of confinement, if the defendant is in custody; the name of the judge who sat below; and the name of the court from which and to which the appeal is taken.

(3) The notice of appeal shall certify compliance with paragraphs (g) and (h), or certify the reasons for exemption from compliance.

(4) Order in Lieu of Notice of Appeal. An order of the appellate court granting an interlocutory appeal or, on an appeal by an indigent, waiving the payment of filing fees and the deposit for costs shall serve as the notice of appeal if no notice of appeal has been filed, and, except as otherwise provided by *R*. 2:7-1, the date of the order shall be deemed to be the date of the filing of the notice of appeal for purposes of these rules. Within 10 days of the entry of such order, the appellant must file and serve the case information statement in accordance with paragraphs (b) and (h) of this rule. Upon the entry of such order the appeal shall be deemed pending, and the appellant, or the clerk of the appellate court if the appellant appears *pro se*, shall forthwith so notify: all parties or their attorneys; the clerk of the court or state administrative agency or officer from which the appeal is taken; and the trial judge if the appeal is from a judgment or order of a trial court sitting without a jury or if in an action tried with a jury, the appeal is from an order granting or denying a new trial or a motion for judgment notwithstanding the verdict.

(g) The Transcript Request Form. The request for transcript shall be in a form prescribed by the Administrative Director of the Courts. Except as otherwise provided by *R*. 2:5-3(c), if a verbatim record was made of the proceedings before the court, agency or officer from which the appeal is taken, the appellant shall, no

later than the time of the filing and service of the notice of appeal, serve a request for the preparation of the transcript.

(1) The transcripts necessary shall be ordered by serving the request on: the Appellate Division transcript unit by email to appeal-trans.mailbox@njcourts.gov; on the clerk of the court if the appeal is from a judgment of the Tax Court or a municipal court, or on the agency or officer if the appeal is from administrative action. The request for transcript shall state the name of the judge or officer who heard the proceedings, the date or dates of the trial or hearing.

(2) Existing Transcripts. The transcript request form shall state whether the transcripts have already been prepared and in appellant's possession or already on file with the court or, if the appeal is from an administrative officer or agency which has had the verbatim record transcribed. Compliance with the obligation to order the transcripts necessary for the appeal is satisfied, and the transcript request form must state, that the necessary transcripts are in appellant's possession and will be forthwith filed with the court or, if the administrative verbatim record has been transcribed, that appellant has demanded the agency make available the transcript.

(3) If a cross-appeal requires the preparation of a transcript not encompassed by the appellant's obligation to obtain and file transcripts pursuant to this rule, the appellant/cross respondent shall be responsible for ordering and filing and serving the transcript.

(h) The Case Information Statement.

(1) The Case Information Statement shall be in the form prescribed by the Administrative Director of the Courts as set forth in Appendices VII and VIII to these Rules (civil and criminal appeals, respectively). The appellant's Case Information Statement shall have annexed to it a copy of the final judgment, order, or agency decision appealed from except final judgments entered by the clerk on a jury verdict.

(2) All parties to the appeal have a continuing obligation to file an amended Case Information Statement in the event there is any change with respect to any entry on the filed Case Information Statement.

(3) Any deficiencies in the completion of the Case Information Statement and any failure to comply with the obligation to file and seasonably amend a Case Information Statement, shall be ground for such action as the appellate court deems appropriate, including rejection of the notice of appeal, or on application of any party or on the court's own motion, dismissal of the appeal.

Note: Source – *R.R.* 1:2-8(a) (first, second and fifth sentences) (b) (c) (d) (h), 1:4-3(a) (second sentence), 4:61-1(d), 4:88-8 (second sentence), 4:88-10 (second, third and fourth sentences), 6:3-11(b), 7:16-3. Paragraph (f) amended and paragraph (h) adopted July 7, 1971 to be effective September 13, 1971; paragraphs (a), (b), (e) and (f) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended October 5, 1973 to be effective immediately; paragraphs (a) and (b) amended November 27, 1974 to be effective April 1, 1975; paragraphs (b) and (f) amended July 29, 1977 to be effective September 6, 1977; paragraph (f) amended July 24, 1978 to be effective September 11, 1978; paragraph (e) amended and paragraph (f)(1) adopted and (f)(2) amended July 16, 1981 to be effective September 14, 1981; paragraph (d) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a), (f) and (g) amended March 22, 1984, to be effective April 15, 1984; caption, paragraphs (a), (b), (e), (f)(1) and (f)(2) amended November 1, 1985 to be effective January 2, 1986; paragraphs (f)(1) and (f)(2) amended November 7, 1988 to be effective January 2, 1989; paragraph (h) amended July 14, 1992 to be effective September 1, 1992; paragraphs (b), (e) and (f)(3)(i)(ii) and (iii) amended July 13, 1994 to be effective September 1, 1994; paragraphs (f)(2) and (f)(3)(i) amended June 28, 1996 to be effective September 1, 1996; paragraph (f)(1) amended

July 5, 2000 to be effective September 5, 2000; caption of paragraph (f)(2) amended, paragraphs (f)(3)(i), (ii) and (iii) redesignated (f)(3)(A), (B) and (C), and paragraph (h) amended July 27, 2006 to be effective September 1, 2006; paragraph (c) deleted, former paragraphs (d), (e), (f) and (g) amended and redesignated as paragraphs (c), (d), (e), and (f), and former paragraph (h) redesignated as paragraph (g) July 27, 2018 to be effective September 1, 2018; entire rule amended to be effective .

10. Proposed Amendments to *Rule* 2:5-2 – Deposits for Costs; Application for Dismissal for Default

The Appellate Division suggests eliminating of this rule, which requires an appellant to deposit $300.00 to answer for costs, since the rule has been largely ignored by parties and practitioners. Few deposits are made, and the failure to comply generates few motions to dismiss. Worse still, there is both the time and cost expanded by the Clerk's Office in returning deposits when appeals are concluded.

Committee members agreed. The proposed deletion of *Rule* 2:5-2 follows.

[2:5-2. Deposits for Costs; Application for Dismissal for Default

In all civil appeals the appellant shall, within 30 days after filing the notice of appeal or after entry of an order granting leave to appeal, deposit with the clerk of the appellate court $300 to answer the costs of the appeal. The party making the deposit shall give notice thereof to all other interested parties. If the deposit is not made within the time stated herein the appeal may be dismissed with costs on the application of any party. No deposit for costs shall be required where an appeal is taken by the State or any agency, officer or political subdivision thereof, or by an appellant who has filed a supersedeas bond or made a deposit in lieu thereof pursuant to *R*. 1:13-3(c), or if leave is granted to appeal as an indigent pursuant to *R*. 2:7-1.]

Note: Source – *R.R.* 1:2-10, 2:2-3(b), 2:2-5 amended July 16, 1981 to be effective September 14, 1981; amended July 14, 1992 to be effective September 1, 1992; rule eliminated to be effective _____.

11. Proposed Amendments to *Rule* 2:5-3 – Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

The proposed amendments to *Rule* 2:5-3 contain a technical amendment to paragraph (b) such that the phrase "by counsel" is deleted and substituted with "by the parties." Also, the proposed amendments reorganize the Rule and delete references to outdated technology. First, paragraph (d) is reorganized into separate subparagraphs to delineate who is responsible for the payment of transcripts. Second, paragraph (e) is amended to delete references to outdated technology, such as computer diskettes, and add references to recent technology such as the electronic case jacket.

The Committee approved of the proposed amendments to *Rule* 2:5-3 as they are warranted by the advent of electronic filing.

The proposed amendments to *Rule* 2:5-3 follow.

2:5-3. Preparation and Filing of Transcript; Statement of Proceedings; Prescribed Transcript Request Form

(a) [Request for] Ordering the Transcript[; Prescribed Form]. [Except as otherwise provided by *R.* 2:5-3(c), if a verbatim record was made of the proceedings before the court, agency or officer from which the appeal is taken, the appellant shall, no later than the time of the filing and service of the notice of appeal, serve a request for the preparation of an original and copy of the transcript, as appropriate, (1) upon the reporter who recorded the proceedings and upon the reporter supervisor for the county if the appeal is from a judgment of the Superior Court, or (2) upon the clerk of the court if the appeal is from a judgment of the Tax Court or a municipal court, or (3) upon the agency or officer if the appeal is from administrative action. The appellant may, at the same time, order from the reporter, court clerk, or agency the number of additional copies required by *R.* 2:6-12 to file and serve. If the appeal is from an administrative agency or officer which has had the verbatim record transcribed, such transcript shall be made available to the appellant on request for reproduction for filing and service. The request for transcript shall state the name of the judge or officer who heard the proceedings, the date or dates of the trial or hearing and shall be accompanied by a deposit as required by *R.* 2:5-3(d). The request for transcript shall be in a form prescribed by the Administrative Director of the Courts. A copy of the request for transcript shall be mailed to all other interested parties and to the clerk of the

appellate court. The provisions of this paragraph shall not apply if the original and copy of the transcript have already been prepared and are on file with the court.] In ordering a transcript, the appellant shall comply with *R.* 2:5-1(g) and all other provisions in this rule.

(b) Contents of Transcript; Omissions. Except if abbreviated pursuant to *R*. 2:5-3(c), the transcript shall include the entire proceedings in the court or agency from which the appeal is taken, including the reasons given by the trial judge in determining a motion for a new trial, unless a written statement of such reasons was filed by the judge. The transcript shall not, however, include opening and closing statements to the jury or *voir dire* examinations or legal arguments by [counsel] the parties unless a question with respect thereto is raised on appeal, in which case the appellant shall specifically order the same in the request for transcript.

(c) Abbreviation of Transcript. The transcript may be abbreviated in all actions either:

(1) …no change.

(2) by order of the trial judge or agency which determined the matter on appellant's motion specifying the points on which the appellant will rely on the appeal. The motion shall be filed and served no later than the time of filing and service of the notice of appeal, and service of the request for transcript [prescribed

by paragraph (a) of this rule] shall be made within 3 days after entry of the order determining the motion.

(d) Deposit for Transcript; Payment Completion. [The appellant, if not the State or a political subdivision thereof, shall, at the time of making the request for the transcript, deposit with the reporter or the clerk of the court or agency from whom a transcript is ordered, either the estimated cost of the transcript as determined by the court reporter, clerk or agency, or the sum of $ 500.00 for each day or fraction thereof of trial or hearing. If the appellant is the State or a political subdivision thereof, it shall provide a voucher to the reporter or the clerk or the agency for billing for the cost of the transcript. The reporter, clerk or agency, as the case may be, shall upon completion of the transcript, bill or reimburse the appellant, as appropriate, for any sum due for the preparation of the transcript or overpayment made therefore. If the appellant is indigent and is entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial or the appellate court, on application, may order the transcript prepared at public expense. Unless the indigent defendant is represented by the Public Defender or that office is otherwise obligated by law to provide the transcript to an indigent, the court may order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance.]

(1) Unless the necessary transcripts already exist, or unless exempted by subparagraphs (2) or (3), the appellant shall, at the notification of the court reporter or transcription agency, deposit either the estimated cost of the transcript as determined by the reporter, clerk or agency, or the sum of $500 for each day or fraction thereof of trial or hearing;

(2) If the appellant is the State or a political subdivision thereof, the appellant shall provide a voucher to the reporter or the clerk or the agency for billing for the cost of the transcript. The reporter, clerk or agency shall upon completion of the transcript, bill or reimburse the appellant, as appropriate, for any sum due for the preparation of the transcript or overpayment made therefore.

(3) Absent specific authority in statute, case law or rule, or other authority approved by the Supreme Court, if the appellant is indigent and:

(A) may be entitled to have a transcript of the proceedings below furnished without charge for use on appeal, either the trial court or the appellate court, on application, may order the transcript prepared at public expense for proceedings including, but not limited to, the Division of Child Protection and Permanency, adoptions, or involuntary civil commitments;

(B) a defendant in a criminal proceeding represented by the Public Defender, or the Public Defender is otherwise obligated by law to provide the transcript to an indigent, the court may order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for

violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance;

(C) a defendant in a criminal or quasi-criminal appeal and is not represented by the Public Defender, or the Public Defender is not otherwise obligated by law to provide the transcript, the court may order the transcript of the proceedings below furnished at the county's expense if the appeal involves prosecution for violation of a statute and at the municipality's expense if the appeal involves prosecution for violation of an ordinance. If the sentence imposed does not constitute a consequence of magnitude, as set forth in the "Guidelines for Determining a Consequence of Magnitude" in Appendix 2 of Part VII of the Rules of Court, and the applicant is not constitutionally or otherwise entitled by law to transcripts at public expense, the trial court may determine whether to grant the motion for purposes of the appeal even if other transcripts in the case were previously provided. If the trial court denies the application, the trial court shall briefly state the reasons for its determination, and the application may be renewed within 20 days before the appellate court in accordance with *R*. 2:7-3.

(e) Preparation and Filing. The court reporter, clerk, or agency, as the case may be, shall promptly prepare or arrange for the preparation of the transcript in accordance with standards fixed by the Administrator Director of the Courts. The person preparing the transcript shall deliver the original to [the appellant and shall deliver a copy together with a computer diskette or CD-ROM of the transcript

to the court reporter supervisor in the case of an appeal] the Appellate Division transcript unit when the appeal is from the Superior Court, [to the clerk of the court in the case of an appeal from] the Tax Court, [or] a municipal court, or [to the] an administrative agency or officer [in the case of an administrative appeal]. The transcript [diskette or CD-ROM] shall be in [Microsoft Word, Microsoft Word compatible or] text searchable Adobe PDF format. The person preparing the transcript shall also forthwith notify all parties of such deliveries. When the last volume of the entire transcript has been delivered to the appellant, the court reporter supervisor, clerk or agency, as the case may be, shall certify its delivery on a form to be prescribed by the Administrative Director of the Courts. That transcript delivery certification and a complete set of the transcripts [and diskettes/CD-ROMs] shall be forwarded immediately to the clerk of the court to which the appeal is being taken. A copy of the certification shall also then be sent to the appellant. The [appellant] Appellate Division shall serve a copy of the certification on all other parties [within seven days after receipt] upon filing within the electronic case jacket and, if the appeal is from a conviction on an indictable offense, on the New Jersey Division of Criminal Justice, Appellate Section. [The appellant shall file proof of such service with the clerk of the court to which the appeal has been taken.]

(f) …no change.

Note: Source – *R.R.* 1:2-8(e) (first, second, third, fourth, sixth and seventh sentences), 1:2-8(g), 1:6-3, 1:7-1(f) (fifth sentence), 3:7-5 (second sentence), 4:44-2 (second sentence), 4:61-1(c), 4:88-8 (third and fourth sentences), 4:88- 10 (sixth sentence). Paragraphs (a)(b)(c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraphs (b) and (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (c) amended June 29, 1973 to be effective September 10, 1973; caption amended and paragraph (a) caption and text amended July 24, 1978 to be effective September 11, 1978; paragraphs (c) and (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (d) caption and text amended, former paragraph (e) redesignated paragraph (f), and paragraph (e) caption and text adopted November 7, 1988 to be effective January 2, 1989; paragraphs (a) and (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (c), (e) and (f) amended July 13, 1994 to be effective September 1, 1994; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (e) amended July 27, 2006 to be effective September 1, 2006; paragraph (d) amended July 16, 2009 to be effective September 1, 2009; paragraphs (a), (b), (c), (d) and (e) amended to be effective .

12. Proposed Amendments to *Rule* 2:5-4(d) – Use of Record by Court

Paragraph (d) of *Rule* 2:5-4 permits a party or the court to request that the clerk of the court or agency, from which the appeal is taken, deliver requested portions of the record "…for use by counsel at the argument…" The Appellate Division suggests changing "by counsel" to "by the advocates."

The Committee agrees with the proposed amendments as they make clear that parties represented by counsel, self-represented litigants, and amici curiae are not precluded from making requests under this Rule.

The proposed amendments to *Rule* 2:5-4(d) follow.

2:5-4. Record on Appeal

(a) …no change.

(b) …no change.

(c) …no change.

(d) Use of Record by Court. On the request of a party or of a judge of the appellate court, the clerk of the court or courts below or the agency from which the appeal is taken shall deliver to the clerk of the appellate court for use by [counsel] the advocates at the argument or for the personal inspection by the judges thereof such portions of the record as may be designated.

Note: Source – *R.R.* 1:6-1(a) (b) (c), 7:16-4; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (d) amended _____ to be effective _____.

13. Proposed Amendments to *Rule* 2:5-6 – Appeals from Interlocutory Orders, Decisions and Actions and Proposed Amendments to *Rule* 2:11-2 – Determination of Appeal on Motion for Leave to Appeal

The Appellate Division proposes eliminating the existing *Rule* 2:5-6, which addresses motions for leave to appeal, and replacing it with a proposed new *Rule* 2:5-6.

The Appellate Division notes that currently the leave-to-appeal practice is addressed in three separate rules – *Rules* 2:5-6, 2:8-1(a), and 2:11-2. The proposed new *Rule* 2:5-6 combines all procedure applicable to motions for leave to appeal and provisions peculiar to interlocutory appeals within a single rule. Accordingly, *Rule* 2:8-1(a) is amended, and *Rule* 2:11-2 is eliminated to avoid duplication.

The Committee agrees with the Appellate Division's recommendation as it is more convenient to have all provisions relating to this practice in a single rule.

The proposed amendments to *Rule* 2:5-6 and proposed deletion of *Rule* 2:11-2 follows. The proposed amendments to *Rule* 2:8-1(a) are located in section I. C. 22. below.

2:5-6. Appeals From Interlocutory Orders, Decisions and Actions

(a) Appeals. [Applications for leave to appeal from interlocutory orders of courts or of judges sitting as statutory agents and from interlocutory decisions or actions of state administrative agencies or officers shall be made by serving and filing with the court or agency from which the appeal is taken and with the appellate court a notice of motion for leave to appeal, as prescribed by R. 2:8-1, within 20 days after the date of service of such order, administrative decision or notice of such administrative action. If, however, a motion to the trial court for reconsideration of the order from which leave to appeal is sought is filed and served within 20 days after the date of its service, the time to file and serve the motion for leave to appeal in the Appellate Division shall be extended for a period of 20 days following the date of service of an order deciding the motion for reconsideration. The filing of a motion for leave to appeal shall not stay the proceedings in the trial court or agency except on motion made to the court or agency which entered the order or if denied by it, to the appellate court.] A party aggrieved of an interlocutory order of a court or of a judge sitting as statutory agent or of an interlocutory decision or action or inaction of a state administrative agency or officer may apply for leave to appeal.

(b) [Cross Appeals.] Manner of Seeking Leave to Appeal. [Applications for leave to cross appeal from interlocutory orders and administrative decisions or actions as to which leave to appeal has not already been granted shall be made by

serving and filing with the appellate court a notice of motion within 20 days after the date of service of the court order or administrative decision appealed from or after notice of the agency or officer's action taken or, if no cross motion is filed, within 20 days following decision of a motion for reconsideration as provided by *R*. 2:5-6(a). If an appeal from an interlocutory order, decision or action is allowed, an application for leave to cross appeal (if the application has not been previously denied) may be made by serving and filing with the appellate court a notice of motion within 10 days after the date of service of the order of the appellate court allowing the appeal.] A party may seek leave to appeal an interlocutory order or decision described in paragraph (a) by filing with the court or agency from which the appeal is taken and with the appellate court a notice of motion for leave to appeal, as prescribed by *R*. 2:8-1.

(c) [Notice to the Trial Judge or Officer; Findings.] Time to seek Leave to Appeal. [A party filing a motion for leave to appeal from an interlocutory order shall serve a copy thereof on the trial judge or officer who entered the order. If the judge or officer has not theretofore filed a written statement of reasons or if no verbatim record was made of any oral statement of reasons, the judge or officer shall, within 10 days after receiving the motion, file and transmit to the clerk of the Appellate Division and the parties a written statement of reasons for the disposition. The statement may also comment on whether the motion for leave to appeal should be granted on the ground, among others, that a controlling question

of law not theretofore addressed by an appellate court of this state is involved and that the grant of leave to appeal may materially advance the ultimate resolution of the matter. Any statement of reasons previously made may also be amplified.]

(1) The motion for leave to appeal must be filed no later than 20 days after the date of service of the interlocutory order or decision or within the time as extended by the circumstance described in subparagraph (3).

(2) When served with a motion for leave to appeal, a party may move for leave to file a cross-appeal as to the same interlocutory order or decision challenged in the motion for leave to appeal unless the party has already sought and been denied leave to appeal the same order. A motion for cross-appeal shall be served and filed within the latest of the following: the time provided by *R*. 2:8-1(b) for opposition to motions; 20 days after the date of service of the interlocutory order or decision; or the time as extended by the circumstance described in subparagraph (3).

(3) If a motion to the trial court or administrative agency or officer of the order from which leave to appeal or cross-appeal is sought is filed and served within 20 days after the date of its service, the time to file and serve the motion for leave to appeal or cross-appeal in the Appellate Division shall be extended for a period of 20 days following the date of service of an order deciding the motion for reconsideration.

(d) Motions for Cross-Appeal when Leave to Appeal is Granted. If an appeal from an interlocutory order or decision is allowed, an application for leave to appeal (if the application has not been previously denied) may be made by serving and filing with the appellate court a notice of motion within 10 days after the date of service of the order of the appellate court allowing the appeal.

(e) The effect of the motion. The filing of a motion for leave to appeal or cross-appeal shall not stay the proceedings in the court or agency that rendered the interlocutory order except on motion made to the court or agency that entered the order or, if denied by it, to the appellate court.

(f) Service. A party filing a motion for leave to appeal or cross-appeal from an interlocutory order shall serve a copy thereof on the trial judge or officer who entered the order. If the trial judge or officer has not theretofore filed a written statement of reasons or if no verbatim record was made of any oral statement of reasons, the judge or officer shall, within 10 days after receiving the motion, file and transmit to the Clerk of the Appellate Division and the parties a written statement of reasons for the disposition. The statement may also comment on whether the motion for leave to appeal should be granted on the ground, among others, that a controlling question of law not theretofore addressed by an appellate court of this state is involved and that the grant of leave to appeal may materially advance the ultimate resolution of the matter. Any statement of reasons previously made may also be amplified.

(g) Briefs. In moving for leave to appeal or cross-appeal, the movant's brief shall include argument on the merits of the substance of the interlocutory appeal. If no opposing brief is filed, the appellate court may consider the request for leave to be unopposed but not the merits of the interlocutory appeal.

(h) Deciding the Interlocutory Appeal. On finding the matter sufficiently briefed, the court may grant leave to appeal and determine the merits of the interlocutory appeal. Otherwise, the court may grant leave to appeal and later determine the merits on the motion papers and any additional briefs or submissions the court may require.

(i) Interlocutory Appeals are Expedited. Appeals on leave granted, if not summarily decided as permitted by paragraph (h) of this rule, shall be expedited and, unless impracticable, placed by the panel granting leave to appeal on a plenary calendar for disposition on the merits as soon after the grant of leave to appeal as practicable.

Note: Source – *R.R.* 1:2-3(b), 2:2-3(a) (second sentence), 4:53-1 (sixth sentence), 4:61-1(d). Paragraphs (a) and (c) amended July 7, 1971 to be effective September 13, 1971; paragraphs (a) and (c) amended July 16, 1981 to be effective September 14, 1981; paragraph (c) amended November 1, 1985 to be effective January 2, 1986; paragraph (c) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (c) amended July 23, 2010 to be effective September 1, 2010; paragraph (c) amended July 22, 2014 to be effective September 1, 2014; entire rule amended, new paragraphs (c)(1), (2), (3), (d), (e), (f), (g), (h), and (i) added _____ to be effective _____.

[2:11-2. Determination of Appeal on Motion for Leave to Appeal

Where summary disposition is appropriate, the court may elect to consider the merits of the appeal simultaneously with the motion for leave to appeal on the motion papers alone. Otherwise, it may grant leave to appeal and determine the appeal on the papers submitted on the motion and any additional papers it may require. Appeals on leave granted shall be expedited.**]**

Note: Amended July 16, 1981 to be effective September 14, 1981; amended July 31, 1981 to be effective September 14, 1981; *Rule* 2:11-2 eliminated to be effective .

14. Proposed New *Rule* 2:5-7 – Electronic Filing in the Appellate Division

The proposed new *Rule* 2:5-7 sets forth the requirements for electronic filing in the Appellate Division. This new rule addresses the fact that attorneys must file electronically while non-attorneys are prohibited from filing electronically. The new rule conforms to the Court's prior orders on e-filing in the Appellate Division.

The Committee agrees with the Appellate Division's proposed new rule.

The proposed new *Rule* 2:5-7 follows.

2:5-7. Electronic Filing in the Appellate Division

(a) Scope. This rule shall govern the procedures for electronic filing in the Appellate Division.

(b) Eligibility. Attorneys who are authorized by *Rule* 1:21 to practice law in New Jersey are required to utilize the eCourts-Appellate electronic filing system ("eCourts-Appellate" or "system") in all appellate case types initiated after January 1, 2018.

(c) Electronic Filing Procedure.

(1) Notices. Notices generated by the Clerk's Office in electronically filed appeals shall be sent via electronic communication to the parties who provide valid e-mail addresses. Access to any correspondence, order or opinion filed in the matter is available to authorized users via eCourts-Appellate.

(2) Payment. Any required payment shall be made through eCourts-Appellate.

(3) Required Submissions. All documents shall be submitted electronically, except those documents sealed pursuant to a protective order pursuant to *Rule* 3:13-3 or *Rule* 4:10-3, sealed juvenile records pursuant to *N.J.S.A.* 2A:4A-62, or as otherwise provided by law or order of the court. Three paper copies of the aforementioned sealed documents shall be submitted to the court in three separate envelopes clearly and prominently marked "for the confidential use of the court." Other confidential documents excluded from public access pursuant

to statute, rule or case law shall be submitted electronically as a confidential exhibit through eCourts-Appellate.

(4) Clerk's Office Review of Electronically Filed Documents. Prior to entry upon the appellate docket, the Clerk's Office shall review each document submitted through eCourts-Appellate for compliance with this e-filing Rule and the Rules of Court. Upon the Clerk's Office's acceptance, the document shall be considered filed with the court at the time the original submission to eCourts-Appellate was completed. If a filing is rejected, the attorney will receive electronic notification, which will identify the error(s) to be corrected and state a deadline for the attorney to resubmit in a conforming format.

(5) Calculation of Time. Unless otherwise specified by the court or by rule, documents may be submitted for filing at any time. For filings that must be filed by a particular date, a filing is considered timely if it is filed by 11:59:59 P.M. as defined by the Judiciary's data system. The time for filing any required or permitted response shall begin to run on the first business day following such electronic filing, unless otherwise specified by the court.

(6) Briefs and Appendices. In appeals other than those referred to in subsection (g), merits briefs and appendices shall be submitted electronically. The parties' merits briefs shall be reviewed for compliance with this and other applicable rules. Upon the Clerk's Office's acceptance, the filer shall be notified via electronic communication, after which the filer shall provide three hard copies

of the file-stamped brief and appendix to the court via conventional mail or personal delivery. The response time to a merits brief shall be calculated from the date of the court's electronic notification advising that the merits brief has been accepted for filing, unless the court directs otherwise.

(7) Motions. Motions submitted electronically shall be reviewed for compliance with this and all other applicable rules. Upon the Clerk's Office's acceptance, the filer shall be notified via electronic communication. If the motion exceeds a combined total of seventy-five pages, inclusive of notice of motion, supporting brief and appendix and exclusive of proof of service, the filer shall receive electronic notification from the Clerk's Office to submit two additional hard copies of the complete file-stamped motion and any transcript to the court via conventional mail or personal delivery. The prohibition set forth in *Rule* 2:8-1(a) that a motion brief not exceed twenty-five pages, without leave of court, applies in equal force and effect to electronically-filed motions. Service of a motion for leave to appeal on the trial judge shall be made electronically through eCourts-Appellate to the extent feasible, unless the file size is greater than the e-mail system allows. If oversized, written notification will be provided without an attachment and the trial judge may gain access to the documents through the appellate case management system.

(d) Format and Content of Documents.

(1) Identifying Information. All documents submitted electronically shall include the attorney's identification number and current e-mail address adjacent to the attorney's name.

(2) Searchable Format. All documents submitted electronically shall be submitted in a text-searchable Portable Document Format (PDF). Documents shall not be locked or otherwise password protected.

(3) Margins. Margins shall be one inch, with the exception of the top margin, which shall be one and one-half inches to accommodate the "filed" stamp format.

(4) Redaction of Confidential Personal Identifiers. All documents submitted electronically must comply with *Rule* 1:38-7.

(e) Service of Electronically Filed Documents.

(1) Electronic Service Accomplished Through eCourts-Appellate. Service of documents upon all parties represented by attorneys on appeal and upon the Appellate Section of the New Jersey Division of Criminal Justice in adult criminal matters shall be made electronically through eCourts-Appellate. Service of documents upon self-represented litigants, who have not provided the clerk's office with an email address, shall be made in accordance with the applicable rules governing conventional mail and personal service. Attorneys have an obligation to register and maintain accurate contact information as a condition of their licensure.

(2) Notification to Trial Judge or Agency. Service of the Notice of Appeal and Case Information Statement on the trial judge shall be made electronically through eCourts-Appellate. If the appeal is taken directly from the decision or action of an administrative agency or officer, service of the Notice of Appeal and Case Information Statement shall be made electronically through eCourts-Appellate to the agency or officer. If the appeal is taken from the Division of Workers' Compensation, service of the Notice of Appeal and Case Information Statement shall be made electronically through eCourts-Appellate on the Workers' Compensation judge who decided the matter.

(f) Request for Transcript and Deposit for Transcript and Payment Completion.

(1) Transcript Request Form. Appellant shall complete and submit the prescribed transcript request form electronically through eCourts-Appellate, which system shall notify (A) the Appellate Division Transcript Unit, and (B) the court reporter if the appeal is from a judgment of the Superior Court; or (C) the clerk of the court if the appeal is from the judgment of the Tax Court or a municipal court; or (D) the agency or officer if the appeal is from administrative action.

(2) Deposit. The transcriber or court reporter shall notify appellant of the amount of the required deposit, and the deposit must be paid to the transcriber within five business days of notification of the amount due. Failure to make

payment of the deposit within this time frame shall make the appeal subject to dismissal.

(g) Self-represented Parties to the Appeal. Those parties who are not permitted to electronically file shall file and serve all pleadings, briefs and other papers in accordance with the procedures set forth in all other applicable rules.

Note: New *Rule* 2:5-7 established to be effective .

15. Proposed Amendments to *Rule* 2:6-1 – Preparation of Appellant's Appendix; Joint Appendix; Contents

The proposed amendments to *Rule* 2:6-1 add a new paragraph (a) titled, "Preparation" that adheres more closely to the Federal Rules of Appellate Procedure on joint appendices and encourages parties to agree on the contents of the appendix. The new paragraph requires the appellant to include the designated parts in the appendix that both the appellant and respondents intend to include in absence of an agreement. Further, it sets forth requirements on who must bear the cost of the appendix.

The Committee was closely divided on these proposed amendments, with concerns being raised about conferring on joint appendices with respect to timing and cases involving highly contentious adversaries. By a slight majority, the Committee recommends the Appellate Division's proposal, noting that the Federal Appellate Rules on joint appendices have been in place for many years, apparently, and there have not been significant problems reported with joint appendix preparation or designation of parts in the appendix.

The proposed amendments to *Rule* 2:6-1 follow.

2:6-1. Preparation of [Appellant's] the Joint Appendix; [Joint Appendix;] Obligation to Confer; Contents

(a) [Contents of Appendix] Preparation.

(1) [Required Contents. The appendix prepared by the appellant or jointly by the appellant and the respondent shall contain (A) in civil actions, the complete pretrial order, if any, and the pleadings; (B) in criminal, quasi-criminal or juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below; (C) the judgment, order or determination appealed from or sought to be reviewed or enforced, including the jury verdict sheet, if any; (D) the trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions; (E) the statement of proceedings in lieu of record made pursuant to *R*. 2:5-3(f); (F) the notice or notices of appeal; (G) the transcript delivery certification prescribed by *R*. 2:5-3(e); (H) any unpublished opinions cited pursuant to *R*. 1:36-3; and (I) such other parts of the record, excluding the stenographic transcript, as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied upon by the respondent in meeting the issues raised. If the appeal is from a disposition of a motion for summary judgment, the appendix shall also include a statement of all items submitted to the court on the summary judgment motion and all such items shall be included in the appendix, except that briefs in support of and opposition to the motion shall be included only as

permitted by subparagraph (2) of this rule.] The parties are encouraged to agree on the contents of the appendix.

(2) [Prohibited Contents. Briefs submitted to the trial court shall not be included in the appendix, unless either the brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included. A document that is included in appellant's appendix shall not also be included in respondent's appendix unless appellant's appendix includes only a portion of the document and the complete document is required for a full understanding of the issues presented. If the same document has been annexed to more than one pleading or motion filed in the trial court, the document shall be reproduced in the appendix only with the first such pleading or motion and shall be referred to thereafter only by notation to the appendix page on which it appears.] In the absence of an agreement, the appellant must, within 14 days after receipt of receipt of any transcripts, serve on all respondents a designation of the parts of the record the appellant intends to include in the appendix and a statement of the issues the appellant intends to present for review. Respondents may, within 14 days after receiving the designation, serve on the appellant a designation of additional parts of the record they wish included in the appendix. The appellant must include the designated parts in the appendix. The parties must not engage in unnecessary designation of parts of the record.

(3) [Confidential Documents] Costs. [If the appellate record is not sealed, any documents that are required to be excluded from public access pursuant to *R*. 1:38-3 shall be submitted in a separate appendix marked as confidential. The format of the confidential appendix shall in all respects conform with the requirements of this rule.] Unless the parties otherwise agree, the appellant must bear the cost of the appendix. If the appellant considers parts of the record designated by another party to be unnecessary, the appellant must advise that other party, who must then advance the cost of including those parts in the appendix. The cost of reproducing the appendix is a taxable cost, but if any party causes unnecessary parts of the record to be included in the appendix, the court may impose the cost of the inclusion of those parts on that party.

(b) [Form] Required Contents. [Documents included in the appendix shall be abridged by omitting all irrelevant or formal portions, with asterisks being used to indicate omissions. The filing date of each included paper shall be stated at the head of the copy as well as its subject matter (*e.g*., Pretrial Order, Notice of Appeal). Each page shall be numbered consecutively followed by the letter "a" to indicate the appendix (*e.g*., 1a, 2a, etc.).] The joint appendix or the appendix prepared by the appellant shall contain:

(1) all parts of the record as are essential to the proper consideration of the issues, including such parts as the appellant should reasonably assume will be relied on by the respondent in meeting the issues raised;

(2) the judgment, order or determination appealed from or sought to be reviewed or enforced including the jury verdict sheet, if any;

(3) the trial judge's charge to the jury, if at issue, and any opinions or statement of findings and conclusions;

(4) the notice or notices of appeal and notice or notices of cross-appeal;

(5) the transcript delivery certification prescribed by *R*. 2:5-3(e);

(6) when applicable, the statement of proceedings in lieu of record made pursuant to *R*. 2:5-3(f).

(7) in civil actions, the pleadings and the complete pretrial order, if any;

(8) in criminal, quasi-criminal and juvenile delinquency actions, the indictment or accusation and, where applicable, the complaint and all docket entries in the proceedings below;

(9) all orders entered by the appellate court in the appeal by the time the appendix is filed;

(10) all prior opinions or orders entered by the appellate court in prior appeals in the same case or any related case;

(11) in appeals from a disposition of a motion for summary judgment, the appendix must include

(A) a statement of all items submitted to the court on the summary judgment motion;

(B) the items submitted to the court on the summary judgment motion, except that briefs in support of and opposition to the motion shall be included only as permitted by paragraph (b) of this rule; and

(C) the transcript of transcripts of the argument and the court's ruling on the summary judgment notwithstanding the requirements of *R*. 2:6-1(c)(2).

(c) [Binding; Table of Contents] Prohibited Contents. [The appendix may be bound with the brief or separately, into volumes containing no more than 200 sheets each. If bound with the brief, it shall follow the brief, but there shall be a single table of contents of the brief and appendix. If bound separately it shall be prefaced with a table of contents. The table of contents shall indicate the initial page of each document, exhibit or other paper included, and the pages of the stenographic record at which each exhibit was marked for identification and was offered into evidence. Attachments to a document by way of affidavits, exhibits or otherwise shall each be separately identified in the table of contents and the initial page of each such attachment noted therein. If there are multiple volumes of the appendix, each volume shall contain a full table of contents and shall specify on its cover the appendix pages included therein.] Appendices shall not include:

(1) Briefs submitted to the trial court unless the brief is referred to in the decision of the court or agency, or the question of whether an issue was raised in

the trial court is germane to the appeal, in which event only the material pertinent to that issue shall be included.

(2) transcripts of court proceedings, which must be filed separately; deposition transcripts, municipal transcripts, agency transcripts, and transcripts not of the proceedings occurring in the appealed court or tribunal, are to be included in the appendix;

(3) More than one copy of the same document. If the same document has been annexed to more than one pleading or motion filed in the trial court, the document shall be reproduced in the appendix only with the first such pleading or motion and shall be referred to thereafter only by notation to the appendix page on which it appears. A document that is included in appellant's appendix shall not also be included in respondent's appendix unless appellant's appendix includes only a portion of the document, and the complete document is required for a full understanding of the issues presented.

(d) [Joint Appendix] Abridged Documents. [Whenever possible counsel shall agree upon a joint appendix, which shall be bound separately. The cost thereof shall be apportioned between them.] Documents included in the appendix shall be abridged by omitting all irrelevant or formal portions, with asterisks being used to indicate omissions.

(e) Confidential Documents. If the appellate record is not sealed, any documents that are required to be excluded from public access pursuant to *R*. 1:38-

3 shall be submitted in a separate appendix marked as confidential. The format of the confidential appendix shall in all respects conform with the requirements of this rule.

(f) Unpublished opinions. The appendix shall include any unpublished opinions cited pursuant to *R*. 1:36-3 in a volume of the appendix separate from the remainder.

(g) Format of included items. The filing date of each included paper shall be stated at the head of the copy as well as its subject matter (*e.g.*, Pretrial Order, Notice of Appeal). Each page shall be numbered consecutively followed by the letter "a" to indicate the appendix (*e.g.*, 1a, 2a, etc.).

(h) Binding. The appendix may be bound with the brief or separately, into volumes containing no more than 200 sheets each. If bound with the brief, it shall follow the brief, but there shall be a single table of contents of the brief and appendix. If bound separately it shall be prefaced with a table of contents.

(i) Table of contents. The table of contents shall indicate the initial page of each document, exhibit or other paper included, and the pages of the stenographic record at which each exhibit was marked for identification and was offered into evidence. Attachments to a document by way of affidavits, exhibits or otherwise shall each be separately identified in the table of contents and the initial page of each such attachment noted therein. If there are multiple volumes of the

appendix, each volume shall contain a full table of contents and shall specify on its cover the appendix pages included therein.

Note: Source — *R.R.* 1:7-1(f), 1:7-2 (first six sentences), 1:7-3. Paragraph (a) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended July 22, 1983 to be effective September 12, 1983; paragraphs (a), (b) and (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a)(1) and (c) amended July 12, 2002 to be effective September 3, 2002; new subparagraph (a)(3) adopted July 19, 2012 to be effective September 4, 2012; subparagraph (a)(1) amended July 27, 2018 to be effective September 1, 2018; rule amended and paragraphs (e), (f), (g), (h) and (i) added to be effective .

16. Proposed Amendments to *Rule* 2:6-2 – Contents of Appellant's Brief

The proposed amendments to *Rule* 2:6-2, among other things, eliminate letter briefs on the merits, thereby requiring tables of contents and authorities and other brief elements. The optional use of letter briefs on motions is retained.

The Committee agrees with the Appellate Division, noting technical advancements in word processing has made the creation of tables of contents and tables of authorities easier than in the past.

The proposed amendments to *Rule* 2:6-2 follow.

2:6-2. Contents of Appellant's Brief

[(a) Formal Brief. Except as otherwise provided by *R*. 2:6-4(c)(1) (statement in lieu of brief), by *R*. 2:9-11 (sentencing appeals), and by paragraph (b) of this rule, the brief of the appellant shall contain the following material, under distinctive titles, arranged in the following order:

(1) A table of contents, including the point headings to be argued. It is mandatory that for every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below.

(2) A table of judgments, orders and rulings being appealed. This table shall include a listing of the places in the record where the following items are located:

(A) The trial court's judgment(s), order(s), and ruling(s) being appealed, or the administrative agency's final decision(s);

(B) The trial judge's written or oral opinion;

(C) Intermediate decisions, if any, pertinent to the appeal. Such intermediate decisions include such items as planning board resolutions, initial decisions of the administrative law judge, and appeal tribunal decisions.

(3) A table of citations of cases, alphabetically arranged, of statutes and rules and of other authorities.

(4) A concise procedural history including a statement of the nature of the proceedings and a reference to the judgment, order, decision, action, or rule appealed from or sought to be reviewed or enforced. The appendix page of each document referred to shall be stated. The plaintiff and defendant shall be referred to as such and shall not, except where necessary, be referred to as appellant and respondent.

(5) A concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript. The statement shall be in the form of a narrative chronological summary incorporating all pertinent evidence and shall not be a summary of all of the evidence adduced at trial, witness by witness.

(6) The legal argument for the appellant, which shall be divided, under appropriate point headings, distinctively printed or typed, into as many parts as there are points to be argued. For every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below. New Jersey decisions shall be cited to the official New Jersey reports by volume number but if not officially reported that fact shall be stated and unofficial citation made. All other

state court decisions shall be cited to the National Reporter System, if reported therein and, if not, to the official report. In the citation of all cases the court and year shall be indicated in parentheses except that the year alone shall be given in citing the official reports of the United States Supreme Court, the Supreme Court of New Jersey, and the highest court of any other jurisdiction.

(7) In addition to the foregoing, each brief may include an optional preliminary statement for the purpose of providing a concise overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes or, to the extent practicable, citations.

(b) Letter Brief. In lieu of filing a formal brief in accordance with paragraph (a) of this rule and except as otherwise provided by *R*. 2:9-11 (sentencing appeals), the appellant may file a letter brief. Letter briefs shall not exceed 20 pages and shall conform with the requirements of subparagraphs (1), (2), (4), (5) and (6) of paragraph (a). As to any point not presented below a statement to that effect shall be included in parenthesis in the point heading. No cover need be annexed provided that the information required by *R*. 2:6-6 is included in the heading of the letter.

(c) All Briefs. All briefs must be plainly legible and must conform with spacing, paper quality, type-size and reproduction requirements set forth in *R*. 2:6-10. (d) respondent/Cross Appellant's Brief. The respondent/cross appellant shall

file a single brief both addressing the cross appeal and answering the appellant's brief.

(d) Respondent/Cross Appellant's Brief. The respondent/cross appellant shall file a single brief both addressing the cross appeal and answering the appellant's brief.]

(a) Brief. Except as otherwise provided by *R.* 2:6-4(c)(1) (statement in lieu of brief), and by *R.* 2:9-11 (sentencing appeals), the brief of the appellant shall contain the following material, under distinctive titles, arranged in the following order:

(1) A table of contents, including the point headings to be argued. It is mandatory that for every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement that the issue was not raised below.

(2) A table of judgments, orders and rulings being appealed. This table shall include a listing of the places in the record where the following items are located:

(A) The trial court's judgment(s), order(s), and ruling(s) being appealed, or the administrative agency's final decision(s);

(B) The trial judge's written or oral opinion;

(C) Intermediate decisions, if any, pertinent to the appeal. Such intermediate decisions include such items as planning board resolutions, initial decisions of the administrative law judge, and appeal tribunal decisions;

(D) A table listing the transcripts in chronological order and including the nature of the proceeding. The table shall also include the abbreviation for each transcript to be used in the brief, *i.e.*, 1T, 2T, etc.;

(3) A table of citations of cases, alphabetically arranged, of statutes and rules and of other authorities;

(4) Although not required, each brief may include an optional preliminary statement for the purpose of providing a concise overview of the case. The preliminary statement shall not exceed three pages and may not include footnotes;

(5) A concise procedural history including a statement of the nature of the proceedings and a reference to the judgment, order, decision, action, or rule appealed from or sought to be reviewed or enforced. The appendix page of each document referred to shall be stated. The plaintiff and defendant shall be referred to as such and shall not, except where necessary, be referred to as appellant and respondent;

(6) A concise statement of the facts material to the issues on appeal supported by references to the appendix and transcript. The statement shall be in the form of a narrative chronological summary incorporating all pertinent evidence

and shall not be a summary of all of the evidence adduced at trial, witness by witness;

(7) The legal argument for the appellant, which shall be divided, under appropriate point headings, distinctively printed or typed, into as many parts as there are points to be argued. For every point, the appellant shall include in parentheses at the end of the point heading the place in the record where the opinion or ruling in question is located or if the issue was not raised below a statement indicating that the issue was not raised below. New Jersey decisions shall be cited to the official New Jersey reports by volume number but if not officially reported that fact shall be stated, and unofficial citation made. All other state court decisions shall be cited to the National Reporter System, if reported therein and, if not, to the official report. In the citation of all cases the court and year shall be indicated in parentheses except that the year alone shall be given in citing the official reports of the United States Supreme Court, the Supreme Court of New Jersey, and the highest court of any other jurisdiction.

(b) Respondent/Cross Appellant's Brief. The respondent/cross appellant shall file a single brief both addressing the cross appeal and answering the appellant's brief.

Note: Source — *R.R.* 1:7-1(a) (b) (d) (e) (g); amended July 29, 1977 to be effective September 6, 1977; paragraph (a) amended, former paragraphs (a) (b) (c) and (e) redesignated subparagraphs (1) (2) (3) and (5), subparagraph (4) and paragraphs (b) and (c) adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended January 10, 1979 to be effective immediately; paragraph (a) amended July 16, 1981 to be effective

September 14, 1981; paragraph (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (a)(5) amended November 1, 1985 to be effective January 2, 1986; paragraphs (a) and (b) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; new paragraph (d) added July 14, 1992 to be effective September 1, 1992; paragraph (a)(5) amended July 13, 1994 to be effective September 1, 1994; paragraph (a)(6) added July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (b) amended August 1, 2016 to be effective September 1, 2016; entire rule amended _____ to be effective _____.

17. Proposed Amendments to *Rule* 2:6-6(a) – Covers of Briefs and Appendices, Contents

The proposed amendments to *Rule* 2:6-6(a), are to require self-represented litigants to provide their names, addresses and email addresses, if any, on brief covers. If the information is protected by statute, rule or case law, the self-represented litigant would not be required to provide it.

The Committee agrees with the technical proposal.

The proposed amendments to *Rule* 2:6-6(a) follow.

2:6-6. Covers of Briefs and Appendices

Except as otherwise provided by *R*. 2:6-2(b), covers of briefs and appendices shall be as follows:

(a) Contents. The cover of each brief, and of the appendix if bound separately, shall contain the following matter: (1) the name of the appellate court and the docket number of the action; (2) the title of the action, which shall add to the designation of the parties in the trial court the designation of appellant and respondent; (3) the nature of the proceeding in the appellate court, the name of the court or agency or officer below, and, if a court, the name of the judge or judges who sat below; (4) the title of the document and the designation of the party for whom it is filed; (5) the name and office address of the attorney of record and the names of any attorneys "of counsel" or "on the brief[.]"; (6) when not represented by counsel, the name and address, including email address, if any, of the unrepresented party, unless the confidentiality of some or all of this information is protected by statute, rule or case law.

(b) …no change.

Note: Source – *R.R.* 1:7-6(a)(b)(c)(d)(e)(f). Paragraph (b) amended July 7, 1971 to be effective September 13, 1971; first sentence adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended to be effective .

18. Proposed Amendments to *Rule* 2:6-7 – Length of Briefs

The proposed amendments to *Rule* 2:6-7 reduce the length of brief page limits (subject to motions for enlargement) and provide a time frame and requirements regarding a motion to file an overlength brief. The proposal includes reducing the maximum length of the parties' initial briefs from 65 to 50 pages; reply briefs from 20 to 15 pages; brief of an appellant/cross-respondent filed pursuant to Rule 2:6-2(d) from 90 to 75 pages; brief of an appellant/cross-respondent filed pursuant to *Rule* 2:6-4(e) from 65 to 50 pages. With respect to motions to file a late brief, it is proposed that that a party may file such a motion with a certification no later than 20 days before expiration of the time file the brief.

The Committee approved these provisions. It acknowledges that the bar has a general aversion to page limits in the context of advocacy and access to justice, but notes that courts have been flexible in making exceptions to page limits in individual cases where longer briefs are justified. The Committee further observes that the reduction of presumptive page limits for civil cases in trial courts that was made a few years ago was implemented successfully and recommends this similar appellate Rule amendment as proposed.

The proposed amendments to *Rule* 2:6-7 follow.

2:6-7. Length of Briefs

The initial briefs of parties shall not exceed [65] 50 pages and reply briefs shall not exceed [20] 15 pages. The brief of a respondent/cross appellant filed pursuant to *R*. 2:6-2(d) shall not exceed [90] 75 pages, and the brief of an appellant/cross respondent filed pursuant to *R*. 2:6-4(e) shall not exceed [65] 50 pages. These page limitations shall be exclusive of tables of contents and citations [and may be relaxed by leave of court]. Parties may seek a relaxation of these page limitations of the party's first brief upon a showing of good cause by motion filed no later than 20 days before expiration of the time for filing the brief; the movant must certify the motion is made in good faith and not for purposes of delay.

Note: Source – *R.R.* 1:7-7; amended November 7, 1988 to be effective January 2, 1989; amended July 14, 1992 to be effective September 1, 1992; amended to be effective .

19. Proposed Amendments to *Rule* 2:6-10 – Format of Briefs and Other Papers

The proposed amendments to *Rule* 2:6-10 reorganize the Rule into two paragraphs and update items such as margins, fonts, line spacing, and footnotes in briefs, petitions, and motions in light of electronic filing.

The Committee approved to these recommendations.

The proposed amendments to *Rule* 2:6-10 follow.

2:6-10. Format of Briefs and Other Papers

(a) All briefs, [appendices,] petitions, and motions, [transcripts, and other papers may be reproduced by any method capable of providing plainly legible copies. Paper shall be of good quality, opaque and unglazed. Coated paper may be used. Where the method of reproduction permits, color of paper shall be India eggshell. Copy may be printed on both sides provided legibility is not impaired. Papers] must be in the following format: Each page shall be [approximately] 8.5 inches by 11 inches and[, unless a compressed transcript format is used,] shall contain no more than 26 double-spaced lines [of no more than 65 characters including spaces, each of no less than 10-pitch or 12-point type]. Footnotes and indented quotations may[, however,] be single-spaced. All briefs, petitions, and motions shall utilize a Times New Roman style font, size 14.

(b) When a compressed transcript format is used, two transcript pages may be reproduced on a single page, provided that no compressed page contains more than 25 lines of no more than 55 characters including spaces, each of no less than 9-pitch type. Except for compressed transcript format pages, margins shall be approximately one inch. Papers on file or in evidence may be reproduced.

(c) [Papers] Any documents, pleadings or other filings that are submitted in any fashion other than electronic filling shall be securely fastened, either bound along the left margin or stapled in the upper left-hand corner. [Covers shall conform to *R*. 2:6-6(b).]

Note: Source – *R.R.* 1:7-10. Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1992 to be effective September 1, 1992; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended and divided into paragraphs (a), (b) and (c) to be effective .

20. Proposed Amendments to *Rule* 2:6-11 – Time for Serving and Filing Briefs; Appendices; Transcript; Other Permissible Submissions

The proposed amendments to *Rule* 2:6-11 reorganize the Rule for clarity. A suggestion is made to end the current *Rule* 2:6-11(b) before the sentence that starts "[n]o other briefs"; then segregating that declaration about "no other briefs" in its own paragraph (d) that groups together those other "permissible submissions" that shall be filed or served without leave of court. These submissions include letters calling to the court's attention relevant published opinions issued, or legislation enacted, or rules, regulations, and ordinances adopted, subsequent to the filing of the brief and responses to amicus briefs.

In addition, the proposed amendments rephrase the provisions that toll the time for serving and filing briefs in the Appellate Division, revise the description of the tolling motion current in subparagraph (g)(1)(A) so that it is described not just as a motion to supplement but also a motion to correct or supplement, and add a motion for summary disposition as a motion that will toll the time for filing briefs and appendices.

The Committee approved these recommendations as they are mostly technical or clarifying.

The proposed amendments to *Rule* 2:6-11 follow.

2:6-11. Time for Serving and Filing Briefs; Appendices; Transcript; [Notice of Custodial Status] Other Permissible Submission

(a) Time Where No Cross Appeal Taken. Within ten days after the filing of a complete set of transcripts pursuant to *R*. 2:5-3(e), the appellant shall file three additional copies with the clerk, as provided by *R*. 2:6-12(d), and shall serve the transcript as provided by *R*. 2:6-12(a). Except as otherwise provided by *R*. 2:9-11 (sentencing appeals), the appellant shall serve and file a brief and appendix within 45 days after the delivery to appellant of the transcript, if a verbatim record was made of the proceedings below; or within 45 days after the filing of the settled statement of the proceedings, if no verbatim record was made of the proceedings below; or within 45 days of the filing of the notice of appeal if a transcript or settled statement has been filed prior to a filing of the notice of appeal or if no transcript or settled statement is to be filed; or, on an appeal from a state administrative agency, within the time stated above or within 45 days after the service of the statement of the items comprising the record on appeal required by *R*. 2:5-4(b), whichever is later. The respondent shall serve and file an answering brief and appendix, if any, within 30 days after the service of the appellant's brief. The appellant may serve and file a reply brief within [10] 14 days after the service of the respondent's brief.

(b) Time Where Cross Appeal Taken. Except as otherwise provided by *R*. 2:9-11 (sentencing appeals), if a cross appeal has been taken, the party first

appealing, who shall be designated the appellant/cross respondent, shall serve and file the first brief and appendix within 30 days after the service of the notice of cross appeal or within the time prescribed for appellants by *R* 2:6-11(a), whichever is later. Within 30 days after the service of such brief and appendix, the respondent/cross appellant shall serve and file an answering brief and appendix, if any, which shall also include therein the points and arguments on the cross appeal. Within 30 days thereafter, the appellant/cross respondent shall serve and file a reply brief, which shall also include the points and arguments answering the cross appeal. Within [10] 14 days thereafter, the respondent/cross appellant may serve and file a reply brief, which shall be limited to the issues raised on the cross appeal. [No other briefs shall be served or filed without leave of court. If a cross appeal has been taken, the appellant/cross respondent shall be responsible for ordering and filing the transcript pursuant to *R*. 2:5-3(e) and for serving it pursuant to paragraph (a) of this rule and *R*. 2:6-12(a).]

(c) …no change.

(d) [Letter to Court After Brief Filed] Permissible Submissions. No briefs other than those permitted in paragraphs (a) and (b) of this rule shall be filed or served without leave of court, except:[.]

(1) A party may, [however,] without leave, serve and file a letter calling to the court's attention, with a brief indication of their significance, relevant published opinions issued, or legislation enacted, or rules, regulations, and

ordinances adopted, subsequent to the filing of the brief. Unpublished opinions shall not be submitted pursuant to this rule, unless they are of a type that the reviewing court is permitted under *R*. 1:36-3 to cite in its own opinions. Any other party to the appeal may, without leave, file and serve a letter in response thereto within five days after receipt thereof. The initial letter and subsequent responses shall not exceed two pages in length without leave;[.]

(2) In criminal, quasi-criminal and juvenile matters the appellant shall by letter advise the court of any change in the custodial status of a defendant, juvenile or other party subject to confinement, during the pendency of the appeal;[.]

(3) In appeals involving children, the appellant or respondent shall by letter advise the court of any change in the placement status of the child during the pendency of the appeal; and

(4) a party to the appeal may, without leave of court, file a brief in response to an amicus brief either ten days from the submission of the amicus brief or ten days before the disposition date for the appeal, whichever comes first.

(e) [Advising Court of Custodial Change] Motions that Toll the Time for Serving and Filing Briefs in the Appellate Division.

(1) Subject to subparagraph (e)(2) of this rule, in addition to the filing of those motions that toll the time for the filing of briefs and appendices as provided by *R*. 2:5-5(a) and *R*. 2:8-3(b), the time for the filing of briefs and appendices will be tolled by the filing of a motion:

(A) to correct or supplement the record in trial court, administrative agency or Appellate Division;

(B) for summary disposition pursuant to *R*. 2:8-3(b);

(C) to strike the entirety or portions of a brief or appendix;

(D) to dismiss the appeal;

(E) for final remand;

(F) to stay appellate proceedings; and

(G) to file an overlength merits brief.

(2) The time for the filing of briefs and appendices will not be tolled if the party filing the motion under subparagraph (a) was previously granted one or more prior extensions of time to file its brief and appendix. In that event, the party seeking the tolling of the time to file a brief and appendix shall be required to file a separate motion seeking an extension.

(3) If the time to file a brief and appendix is tolled by the filing of a motion, the remaining time shall begin again to run from the date of entry of an order disposing of the motion, unless otherwise directed by the court.

[(f) Division of Child Protection and Permanency Matters; Advising Court of Child's Placement Status. In Division of Child Protection and Permanency matters, the appellant or respondent shall by letter advise the court of any change in the placement status of the child during the pendency of the appeal.

(g) Motions that Toll the Time for Serving and Filing Briefs in the Appellate Division. In Division of Child Protection and Permanency matters, the appellant or respondent shall by letter advise the court of any change in the placement status of the child during the pendency of the appeal.

(1) Subject to subparagraph (g)(2) of this rule, in addition to the filing of those motions that toll the time for the filing of briefs and appendices as provided by R. 2:5-5(a) and R. 2:8-3(b), the filing of the following motions in the Appellate Division pursuant to this rule shall toll the time for the filing of briefs and appendices in the Appellate Division:

(A) Motion to supplement the record in trial court or administrative agency proceedings made directly to the Appellate Division by any party or on the court's own motion. If granted, the proceedings, if any, required to supplement the record shall continue to toll the time for the filing of briefs and appendices;

(B) Motion to strike the entirety or portions of a brief or appendix;

(C) Motion to dismiss the appeal;

(D) Motion for final remand;

(E) Motion to stay appellate proceedings; and

(F) Motion to file overlength merits brief.

(2) If the party filing the motion under this section has been granted prior extension(s) of time to file its brief and appendix, the motion will not toll the time and the party should request a further extension by motion.

(3) The making of a motion pursuant to this rule shall toll the time for serving and filing the next brief due, but the remaining time shall again begin to run from the date of entry of an order disposing of such a motion, unless otherwise directed by the court or provided in this section.]

Note: Source — *R.R.* 1:7-12(a)(c), 1:10-14(b), 2:7-3. Paragraph (b) amended by order of September 5, 1969 effective September 8, 1969; paragraph (a) amended July 7, 1971 to be effective September 13, 1971; caption and paragraphs (a) and (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (a) amended May 8, 1975 to be effective immediately; paragraphs (c), (d) and (e) adopted July 16, 1981 to be effective September 14, 1981; paragraphs (a) and (b) amended and titles of paragraphs (c)(d) and (e) added November 2, 1987 to be effective January 1, 1988; paragraphs (a) and (b) amended July 14, 1992 to be effective September 1, 1992; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended July 28, 2004 to be effective September 1, 2004; paragraph (f) adopted July 16, 2009 to be effective September 1, 2009; paragraph (f) caption and text amended July 9, 2013 to be effective September 1, 2013; new paragraph (g) adopted July 22, 2014 to be effective September 1, 2014; paragraph (d) amended August 1, 2016 to be effective September 1, 2016; paragraphs (a), (b), (d) and (e) amended, paragraphs (f) and (g) deleted to be effective .

21. Proposed Amendments to *Rule* 2:7 – Appeals By Indigent Persons

The proposed amendments to *Rule* 2:7 suggest changes to the entire current *Rule* and add a new *Rule* 2:7-5. They include revisions to *Rule* 2:7-1(a) that provide instruction at the outset for appellants who claim indigency and seek relief from filing fees on how to obtain an order waiving payment. *Rule* 2:7-2(d) is amended to provide that "[a]n attorney filing notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal a motion to be relieved as counsel and for the assignment of counsel on appeal." Language is added to *Rule* 2:7-4 to set for the duration of a granted fee waiver application and guidance on what to do when that time frame has been exceeded.

The new *Rule* 2:7-5 sets forth the circumstances under which an indigent defendant appealing from a judgment of conviction by the Law Division entered on a trial de novo may be entitled to a transcript at the county or municipality's expense.

The Committee approved these recommendations.

The proposed amendments to *Rule* 2:7 follow.

2:7-1. Relief From Filing Fees; [Deposit for Costs]

(a) Appeals from Trial Court Judgments and Orders. Except as otherwise provided by *R*. 2:7-4, [a person who, by reason of poverty,] an appellant who claims indigency and seeks relief from the payment of appellate filing fees [and the deposit for costs] may without fee file with the trial court a verified petition setting forth the facts relied upon, and the trial court, if satisfied of the facts of indigency, shall enter an order waiving such payment [and deposit] and shall forthwith transmit a copy thereof to the clerk [of the appellate court] to which the appeal is taken. [If the appeal is taken from the action of a State administrative agency or officer, the verified petition shall be filed directly with the Appellate Division. If a person is, however, represented as an indigent by any person, society or project enumerated in *R*. 1:13-2, all filing fees and deposits shall be waived by the appropriate clerk or clerks without the necessity of court order. The appeal is timely if the date of the filing of the petition is within the period provided by *R*. 2:4-1.] If the trial court denies the application, it shall briefly state its reasons therefor, and the petition may be renewed within 20 days thereafter before the appellate court in accordance with *R*. 2:7-3.

(b) Appeals from Agency Determinations. If the appeal is taken from the action of an administrative agency or officer, the verified petition shall be filed directly with the Appellate Division. If the Appellate Division denies the application, it shall briefly state its reasons therefor, and the petition may be

renewed within 20 days thereafter before the Supreme Court in accordance with *R*. 2:7-3.

(c) Representation by *Rule* 1:13-2 Entities. If an indigent by any person, society or project enumerated in *R*. 1:13-2, all filing fees and deposits shall be waived by the appropriate clerk or clerks without the necessity of court order.

(d) Timeliness. The appeal is timely if the filing of the verified petition to waive filing fees is made (1) to the trial court when the appeal is taken from a trial court order or judgment, or (2) to the Appellate Division, if the appeal is taken from an agency determination, within the period provided by *R*. 2:4-1. If the petition is made to the trial court, a copy of the submission must be included with the notice of appeal. If the petition is made to the Appellate Division, it must be filed simultaneously with the notice of appeal.

Note: Source – *R.R.* 1:2-7(a) (first and fourth sentences); amended July 24, 1978 to be effective September 11, 1978; amended July 13, 1994 to be effective September 1, 1994; amended and divided into paragraphs (a), (b), (c) and (d) to be effective .

2:7-2. Assignment of Counsel on Appeal

(a) …no change.

(b) …no change.

(c) …no change.

(d) Responsibility of Counsel Assigned by the Trial Court [F]for Non-Indictable Offenses. Assigned counsel representing a defendant in a non-indictable prosecution shall file an appeal for a defendant who elects to exercise [his or her] the right to appeal. An attorney filing a notice of appeal shall be deemed the attorney of record for the appeal unless the attorney files with the notice of appeal [an application] a motion to be relieved as counsel and for the assignment of counsel on appeal.

Note: *R.R.* 1:2-7(b), 1:12-9(b) (d). Paragraph (c) adopted November 1, 1985 to be effective January 2, 1986; paragraph (a) amended, paragraph (b) caption and text amended, paragraph (c) adopted and former paragraph (c) redesignated paragraph (d) November 5, 1986 to be effective January 1, 1987; paragraphs (b) and (d) amended July 10, 1998 to be effective September 1, 1998; paragraphs (b) and (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended June 15, 2007 to be effective September 1, 2007; paragraph (d) caption and text amended July 16, 2009 to be effective September 1, 2009; paragraph (b) amended July 22, 2014 to be effective September 1, 2014; paragraph (d) amended _____ to be effective _____.

2:7-4. Relief in Subsequent Courts

Except as provided in *R*. 2:7-2(b), with respect to the assignment of counsel, a person who has been granted relief as an indigent by any court shall be granted relief as an indigent in all subsequent proceedings resulting from the same indictment, accusation or criminal or civil complaint in any court without making application therefor upon filing with the court in the subsequent proceeding a copy of the order granting such relief or a sworn statement to the effect that such relief was previously granted and stating the court and proceeding in which it was granted. The filing of such order or statement shall be accompanied by an affidavit stating that there has been no substantial change in the petitioner's financial circumstances since the date of the entry of the order granting such relief. [An indigent defendant appealing from a judgment of conviction by the Law Division entered on a trial *de novo*, who has been afforded or had a right to a transcript at public expense of municipal court proceedings pursuant to *R*. 3:23-8(a), shall be entitled to a transcript of the Law Division proceedings paid for in the same manner as the municipal court transcript.] The duration of a granted fee waiver application is one year after the date of judgment. If this time frame has been exceeded, the application for waiver of court fees must be renewed in the trial court at the same time as the new appellate filing in accordance with *R*. 2:7-1. If the trial court denies the application, it shall briefly state its reasons therefor, and

the petition may be renewed within 20 days thereafter before the appellate court in accordance with *R*. 2:7-3.

Note: Amended July 13, 1994 to be effective September 1, 1994; amended July 28, 2004 to be effective September 1, 2004; amended July 22, 2014 to be effective September 1, 2014; amended to be effective .

2:7-5. Transcripts in Appeals by Indigent Defendants from Judgment of Conviction Entered on Trial *de Novo*

An indigent defendant appealing from a judgment of conviction by the Law Division entered on a trial de novo, who has been afforded or had a right to a transcript at public expense of municipal court proceedings pursuant to *R*. 3:23-8(a)(3), may be entitled to a transcript of the Law Division proceedings furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. If the sentence imposed does not constitute a consequence of magnitude, as set forth in the "Guidelines for Determining a Consequence of Magnitude" in Appendix 2 to Part VII of the Rules of Court, and the applicant is not constitutionally or otherwise entitled by law to transcripts at public expense, the trial court, upon application, may determine whether to grant the motion for purposes of the appeal, irrespective of whether transcripts previously were provided in the case. If the trial court denies the application, it shall briefly state its reasons therefor, and the petition may be renewed within 20 days thereafter before the appellate court in accordance with *R*. 2:7-3.

Note: New *Rule* 2:7-5 established to be effective .

22. Proposed Amendments to *Rule* 2:8-1 – Motions

The proposed amendments to *Rule* 2:8-1 reorganize the *Rule* to provide clarity on appellate motion process in part because of electronic filing. Specifically, it is proposed that paragraph (a) be reorganized to include subparagraphs (a)(1) – (4); paragraph (b) be reorganized to paragraphs to separately address the filing of motions, time for filing opposition, other papers, and argument. Additionally, minor edits are proposed to the part of the *Rule* that currently obligates the clerk to "mail true copies thereof to counsel." It is suggested that "mail true copies" be changed to "provide true copies" and second, "to counsel" be changed to "to the parties of record."

The Committee approved this proposal.

The proposed amendments to *Rule* 2:8-1 follow.

2:8-1. Motions

(a) Contents; Form of Brief and Appendix.

(1) Every motion shall be accompanied by a brief[,] conforming [either] to the requirements of *R*. 2:6-2(a) [(formal brief) or (b) (letter brief),] or by letter brief, which shall include all the information required by *R*. 2:6-2(a) except a table of authorities and by an appendix and shall be in the form [and reproduced] as provided by *R*. 2:6-10. The brief shall explain clearly the nature of the action, the relief the moving party seeks and why the moving party is entitled thereto. [It may, for purposes of clarity, summarize pleadings and other undisputed papers or records which do not accompany the brief.] The appendix shall include the judgment or order and the opinion or statement of findings and conclusions below and, where essential, the transcript of the testimony, depositions or other discovery, pleadings or other portions of the record, including the portions thereof upon which the movant should reasonably assume the opposing party will rely. If the transcript cannot be obtained in time for the motion, an affidavit may be filed in lieu thereof giving the substance of such testimony.

(2) If the motion is opposed, the opposing party shall file an answering brief setting forth with equal explicitness the grounds of opposition, annexing an appendix containing copies of any papers relied on which are not in the moving party's appendix.

(3) [On motion for leave to appeal the brief shall include argument on the merits of the issues sought to be appealed. If no opposing brief is filed the court may consider the motion unopposed. Without leave of the court, which may be applied for *ex parte*, s]Supporting and answering briefs shall not exceed 25 pages, exclusive of tables of contents, table of citations and appendix. Appendices shall not exceed 100 pages. Leave to file a brief or an appendix in excess of this page limit must be sought on motion on notice to all parties.

(4) In motions concerning administrative matters relating to the appeal, a party may, on good cause shown, file a certification in lieu of brief.

(b) Time for Filing and Service; Copies; Argument. [The moving party shall serve 2 copies of the moving papers on all other parties. In the Appellate Division, the original and 4 copies of the papers shall be filed with the Clerk of that court. In the Supreme Court, the original and 8 copies of the papers shall be filed with the Clerk of that court. Within 10 days after the service of the movant's papers, the opposing party shall serve and file the same number of papers in opposition. No other papers shall be filed by either party without leave of court. Motions shall not be argued unless the court directs oral argument.]

(1) Filing of Motions. The mode of filing a motion that complies with subsection (a) shall be in accordance with the filing and service requirements of *R.* 2:5-7.

(2) Time for Filing Opposition. Any opposition to a motion must be filed and served no later than 10 days after the service of the movant's submission.

(3) Other Papers. No other submission shall be filed by any party without leave of court.

(4) Argument. Motions shall not be argued unless the court directs oral argument.

(c) …no change.

(d) Order and Notice. Unless the court otherwise directs, upon determination of the motion the court or the clerk acting under its direction shall forthwith enter an order granting or denying the motion in accordance with the determination of the court and shall [mail] provide true copies thereof to [counsel] parties of record.

(e) …no change.

Note: Source – *R.R.* 1:7-10(b), 1:11-1, 1:11-2(a) (b), 1:11-3, 2:11-1, 2:11-2, 2:11-3,4:61-1(c). Paragraph (a) amended, paragraph (c) adopted and former paragraph (c) redesignated (d) July 24, 1978 to be effective September 11, 1978; paragraph (b) amended and paragraph (e) adopted July 16, 1981 to be effective September 14, 1981; paragraph (c) and (d) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraphs (a) and (b), and (d) amended to be effective .

23. Proposed Amendments to *Rule* 2:8-2 – Dismissals of Appeals

The proposed amendment to *Rule* 2:8-2 adds the phrase "on procedural or jurisdictional grounds" to the end of the first sentence.

The Committee approved this recommendation.

The proposed amendments to *Rule* 2:8-2 follow.

2:8-2. Dismissal of Appeals: Order; Stipulation

The appellate court may at any time on its own motion or that of a party dismiss the appeal or petition for certification on procedural or jurisdictional grounds. Appeals and petitions for certification in class actions and in actions involving the status of minors shall not be dismissed without an order of the appellate court; all other appeals and petitions may be dismissed upon the filing of a stipulation by the parties agreeing thereto. An appellant may dismiss the appeal without consent at any time before the first brief on appeal is filed. Such dismissal shall be accompanied by a proof of service thereof on all respondents.

Note: Source – *R.R.* 1:4-1 (third sentence), 1:8-6, 1:10-6(a) (third sentence). Amended July 24, 1978 to be effective September 11, 1978; amended November 1, 1985 to be effective January 2, 1986; amended _____ to be effective _____.

24. Proposed Amendments to *Rule* 2:8-3 – Motion for Summary Disposition

The proposed amendments to *Rule* 2:8-3 revise paragraph (b) to clarify that the appellate court should not summarily dispose of an appeal *sua sponte* once oral argument has been requested.

Furthermore, the third sentence of existing paragraph (b) states that, "the motion may be filed at any time after filing the notice of appeal but unless leave is otherwise granted not later than 25 days after the filing of respondents' briefs."

The Appellate Division suggests changing this wording to "The motion may be filed at any time after filing of the notice of appeal; provided, however, that the motion for summary disposition may not be filed, absent leave granted by the court, if 25 days have elapsed from the filing of all respondent's briefs."

The Committee approved this recommendation.

The proposed amendments to *Rule* 2:8-3 follow.

2:8-3. Motion for Summary Disposition

(a) …no change.

(b) Appellate Division. Any party to an appeal may move the Appellate Division for summary disposition in accordance with *R*. 2:8-1(a). Such motion shall demonstrate that the issues on appeal do not require further briefs or full record. The motion may be filed at any time after filing of the notice of appeal; [but unless leave is otherwise granted not later than 25 days after the filing of respondents' briefs] provided, however, that the motion for summary disposition may not be filed, absent leave granted by the court, if 25 days have elapsed from the filing of all respondent's briefs. The court may deny the motion; may grant it by affirming, reversing or modifying the judgment or order appealed from on the record before it or on such further record as it may direct; or may take such other action in respect of limitation of the issues or otherwise as it deems appropriate. Unless oral argument has been requested, [T]the court may summarily dispose of any appeal on its own motion at any time, and on such notice, if any, to the parties as the court directs, provided that the merits have been briefed. A motion for summary disposition shall toll the time prescribed by these rules for further perfection of the appeal.

Note: Source – Adopted December 21, 1971 to be effective January 31, 1972. Paragraph (a) designation added and paragraph (b) adopted July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraph (b) amended November 1, 1985 to be effective January 2, 1986;

paragraph (a) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended to be effective .

25. Proposed Amendments to *Rule* 2:9-1(a) – Control Prior to Appellate Disposition

The proposed amendments to *Rule* 2:9-1(a) reorganize the rule to include subparagraphs that list the exceptions to the maxim that the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken.

The Committee agrees with the Appellate Division's recommendation as reorganizing the paragraph into subparagraphs provides easier reference for litigants and the courts.

The proposed amendments to *Rule* 2:9-1(a) follow.

2:9-1. Control by Appellate Court of Proceedings Pending Appeal or Certification

(a) Control Prior to Appellate Disposition. The supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed, [E]except:

(1) as otherwise provided by *R*. 2:9- 3[,];

(2) as otherwise provided by *R*. 2:9-4 [(bail),];

(3) as otherwise provided by *R*. 2:9-5 [(stay pending appeal),];

(4) as otherwise provided by *R*. 2:9-7[,];

(5) as otherwise provided by *R*. 2:9-13(f)[,]; [and]

(6) as otherwise provided by *R*. 3:21-10(d)[,]; [the supervision and control of the proceedings on appeal or certification shall be in the appellate court from the time the appeal is taken or the notice of petition for certification filed.]

(7) The trial court[, however], shall have continuing jurisdiction to enforce judgments and orders pursuant to *R*. 1:10 and as otherwise provided[.];

(8) [In addition,] when an appeal is taken from an order compelling or denying arbitration, the trial court shall retain jurisdiction to address issues relating to claims and parties that remain in that court unless otherwise ordered by the appellate court possessing supervision and control[.];

(9) When an appeal is taken from an order involving a child who has been placed in care by the Division of Child Protection and Permanency, the trial court shall retain jurisdiction to conduct summary hearings in due course to address

issues not the subject of the appeal relating to the child or the child's family. Unless the appeal concerns the permanency plan of the child, the trial court also shall retain jurisdiction to conduct hearings to address the permanency plan of the child. The appellate court may at any time entertain a motion for directions to the court or courts or agencies below or to modify or vacate any order made by such courts or agencies or by any judge below.

(b) …no change.

(c) …no change.

Note: Source – *R.R.* 1:4-1 (first sentence), 1:10-6(a) (first and third sentences). Paragraph (a) amended July 16, 1981 to be effective September 14, 1981; paragraph (a) amended November 1, 1985 to be effective January 2, 1986; new paragraph (c) adopted July 16, 2009 to be effective September 1, 2009; paragraph (a) amended July 19, 2012 to be effective September 4, 2012; paragraph (a) amended July 27, 2015 to be effective September 1, 2015; paragraph (a) amended October 19, 2016 to be effective January 1, 2017; paragraph (a) amended to be effective .

26. Proposed Amendments to *Rule* 2:9-8 – Temporary Relief in Emergent Matters

The proposed amendments to *Rule* 2:9-8 recognize the power of a single judge to grant emergent relief on the mere application without waiting for a notice of appeal or motion for leave to appeal. The Appellate Division notes that in the past not all judges have been in agreement that the Appellate Division was empowered to enter temporary relief merely on an application by a litigant to file an emergent motion; those judges were of the opinion that the court could not grant affirmative relief until a notice of appeal or motion for leave to appeal is actually filed.

The Committee approved this recommendation.

The proposed amendments to *Rule* 2:9-8 follow.

2:9-8. Temporary Relief in Emergent Matters

(a) A request to the Supreme Court for emergent relief from an order or emergent application disposition of the Appellate Division may be made by contacting the Supreme Court Clerk's office, which will handle intake and referral of the matter to a single Justice on a rotating basis or to the full Court, as appropriate. When necessary, temporary relief, stays, and emergency orders may be granted, with or without notice, by a single Justice of the Supreme Court or, if the matter is pending in the Appellate Division, by a single judge thereof, to remain in effect until the court acts upon the application. [A request to the Supreme Court for emergent relief from an order or emergent application disposition of the Appellate Division may be made by contacting the Supreme Court Clerk's office, which will handle intake and referral of the matter to a single Justice on a rotating basis or to the full Court, as appropriate.]

(b) A request to the Appellate Division for emergent relief from a trial court order or judgment or administrative agency order or judgment may be made by contacting the Appellate Division Clerk's office, which will handle intake and refer the matter to a designated Appellate Division judge. When necessary, temporary relief, stays, and emergency orders may be granted, with or without notice, at the time of the submission of the written request for emergent relief, by a single judge of the Appellate Division, to remain in effect until the court acts upon the application or as the court may later otherwise order.

Note: Source – *R.R.* 1:1-5A, 2:4-3 (fourth sentence), 4:88-12(a) (second sentence), 4:88-12(b); amended January 22, 1974, effective immediately; amended July 29, 1977 to be effective September 6, 1977; amended July 19, 2012 to be effective September 4, 2012; amended and new designations of paragraphs (a) and (b) added to be effective .

27. Proposed Amendments to *Rule* 2:11-1 – Appellate Calendar; Oral Argument

The proposed amendments to *Rule* 2:11-1 revise paragraph (a) to provide that orders made appealable as of right pursuant to subparagraphs (e), (f), (h), and (i) of *Rule* 2:2-3(a)(4) are excluded from the general rule that the clerk of the appellate court shall enter all appeals upon a docket in chronological order.

Additional proposed amendments reorganize subparagraph (b)(2) addressing oral argument in the Appellate Division and revise subparagraph (b)(3) so that the prohibition on reading at length from the briefs, appendices, transcripts, or decision not only applies to attorneys but to unrepresented litigants as well. It is also suggested that the first sentence of (b)(3) be changed to the following to ensure that the prohibition set forth within applies to both represented and unrepresented parties: "No party shall be permitted to argue unless that party has either filed a brief or joined in another party's brief."

The Committee approved these recommendations.

The proposed amendments to *Rule* 2:11-1 follow.

2:11-1. Appellate Calendar; Oral Argument

(a) Calendar. The clerk of the appellate court shall enter all appeals upon a docket in chronological order and, except for appeals on leave granted or from orders [compelling or denying arbitration] made appealable as of right pursuant to subparagraphs (5), (6), (8), and (9) of *R.* 2:2-3(b) which shall be entitled to a preference, cases shall be argued or submitted for consideration without argument in the order of perfection, insofar as practicable, unless the court otherwise directs with respect to a category of cases or unless the court enters an order of acceleration as to a particular appeal on its own or a party's motion.

(b) Oral Argument.

(1) …no change.

(2) Argument Time Line

(A) In the Appellate Division, appeals shall be submitted for consideration without argument, unless argument is requested by one of the parties [within 14 days after service of the respondent's brief or is ordered by the court] or unless the court deems oral argument appropriate. [Such request shall be made by a separate captioned paper filed with the Clerk in duplicate. The clerk shall notify counsel of the assigned argument date. If one of the parties has filed a timely request for oral argument, the other parties may rely upon that request and need not file their own separate requests for argument. A party may withdraw its request for

oral argument only if it has the consent to do so from all other parties participating in the appeal.]

(B) A party's request for oral argument must be submitted, by way of a separate filing, to the Clerk no later than 14 days after service of the respondent's brief. If one of the parties has filed a timely request for oral argument, the other parties may rely upon that request and need not file their own separate requests for argument.

(C) A party may withdraw its request for oral argument only if it has the consent to do so from all other parties participating in the appeal.

(D) When oral argument is timely requested or when it is scheduled by the court when the parties have not requested oral argument, the clerk shall notify counsel of the assigned argument date.

(3) [Counsel] No party shall [not] be permitted to argue for a party who has neither filed a brief nor joined in another party's brief. The appellant shall be entitled to open and conclude argument. An appeal and cross appeal shall be argued together, the party first appealing being entitled to open and conclude, unless the court otherwise orders. Unless the court determines more time is necessary, each party will be allowed 30 minutes for argument in the Supreme Court and 15 minutes in the Appellate Division, but the court may terminate the argument at any time it deems the issues adequately argued. No more than two attorneys will be heard for each party in the Appellate Division, and one attorney

will be heard for each party in the Supreme Court, unless the Court otherwise orders. An [attorney] advocate will not be permitted to read at length from the briefs, appendices, transcripts or decision.

Note: Source – *R.R.* 1:8-1(a) (b), 1:8-2(a), 1:8-3, 1:8-4, 2:8-3. Amended July 7, 1971 to be effective September 13, 1971; paragraph (b) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (b) amended November 5, 1986 to be effective January 1, 1987; paragraph (a) amended November 2, 1987 to be effective January 1, 1988; paragraph (a) amended June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended July 19, 2012 to be effective September 4, 2012; paragraph (b) amended July 22, 2014 to be effective September 1, 2014; paragraph (b)(3) amended July 27, 2018 to be effective September 1, 2018; paragraphs (a) and (b(2) and (3) amended to be effective .

28. Proposed Amendments to *Rule* 2:11-4 – Attorney's Fees on Appeal

The proposed amendments to *Rule* 2:11-4 add language regarding what a supporting affidavit or certification in support of a motion for appellate counsel's fees should contain. The Appellate Division explains that the practice has unfortunately become one in which the movant often provides only the bare minimum in certification and then attaches invoices sent to the client without providing a clear breakdown of the hours spent researching, writing, an initial brief, writing a reply brief, and preparing for oral argument, among other tasks.

The Committee approved this recommendation.

The proposed amendments to *Rule* 2:11-4 follow.

2:11-4. Attorney's Fees on Appeal

An application for a fee for legal services rendered on appeal shall be made by motion supported by affidavits as prescribed by *R*. 4:42-9(b) and (c), which shall be served and filed within 10 days after the determination of the appeal. Although a movant should append statements or invoices sent to the client as supportive of the claim for fees, the supporting affidavit must also list in detail the services rendered, the dates the services were rendered, and the type of service rendered on that date. The application shall also state how much has been previously paid to or received by the attorney for legal services both in the trial and appellate courts or otherwise, including any amount received by way of pendente lite allowances, and what arrangements, if any, have been made for the payment of a fee in the future. Fees may be allowed by the appellate court in its discretion:

(a) …no change.

(b) …no change.

(c) …no change.

Note: Source – *R.R.* 1:9-3, 2:9-3, 1:12-9(f), 4:55-7(a)(b)(e), 5:2-5(f). Paragraph (d) amended July 14, 1972 to be effective September 5, 1972; text amended and paragraph (g) and (h) adopted July 29, 1977 to be effective September 6, 1977; paragraphs (a) (b) (c) (e) (g) and (h) deleted, new paragraph (a) adopted, former paragraph (d) redesignated (b) and former paragraph (f) redesignated paragraph (c) November 1, 1985 to be effective January 2, 1986; introductory paragraph amended July 13, 1994 to be effective September 1, 1994; final paragraph added June 28, 1996 to be effective September 1, 1996; final paragraph amended July 27, 2918 to be effective September 1, 2018; introductory paragraph amended to be effective .

29. Proposed Amendments to *Rule* 2:11-6(a) – Reconsideration; Page Limits

The proposed amendments to *Rule* 2:11-6(a) reduce the 25-page limit for briefs on motions for reconsideration to 15 pages and reorganize for clarity as to the framework for motions for reconsideration paragraph (a).

In addition, the amendments suggest revising *Rule* 2:11-6(a)(2) to provide that the reconsideration motion "contain a brief statement and argument of the ground relied upon and a certificate of the party's attorney or, when unrepresented, a certificate of the party that it is submitted in good faith and not for purposes of delay." This is to clarify that such certificates must be provided by both represented and unrepresented parties.

The Committee approved this recommendation.

The proposed amendments to *Rule* 2:11-6(a) follow.

2:11-6. Motion for Reconsideration

(a) Service; Filing; Contents; Argument.

(1) Time for Filing. Within ten days after entry of judgment or order, unless such time is enlarged by court order, a party may apply for reconsideration [by serving two copies of a motion on counsel for each of the opposing parties and filing nine copies thereof with the Supreme Court, or five copies thereof with the Appellate Division, as appropriate. One filed copy shall be signed by counsel].

(2) Content and Length of Moving Briefs. The motion shall not exceed [25] 15 pages and shall contain a brief statement and argument of the ground relied upon and a certificate of [counsel] the party's attorney or, when unrepresented, a certificate of the party that it is submitted in good faith and not for purposes of delay. The motion shall have annexed thereto a copy of the opinion or order that is the subject thereof.

(3) Responses. [An answer] No response shall be filed [only if] unless requested by the court, and within ten days after such request or within such other time as the court fixes therein.

(4) Argument. The motion will not be argued orally unless directed by the court.

(b) …no change.

(c) …no change.

Note: Source – *R.R.* 1:9-4(a)(b)(c). Caption, paragraph (a) and paragraph (b) amended November 1, 1985 to be effective January 2, 1986; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (a) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a) and (b) amended July 5, 2000 to be effective September 5, 2000; paragraph (a) amended and divided in subparagraphs (a)(1) through (4) to be effective .

30. Proposed Amendments to *Rule* 2:12-7(a) – Form, Service and Filing for Certification, Form and Contents

The proposed amendments to *Rule* 2:12-7(a), clarify that the petitioner's counsel or petitioner, if not represented by counsel, must sign and certify that the petition represents a substantial question and is filed in good faith and not for purposes of delay.

The Committee agrees, noting that the proposed amendment is technical and precludes self-represented litigants from arguing that the rule does not apply to them because they are not "counsel."

The proposed amendments to *Rule* 2:12-7(a) follow.

2:12-7. Form, Service and Filing of Petition for Certification

(a) Form and Contents. A petition for certification shall be in the form of a brief, conforming to the applicable provisions of *R*. 2:6 and not exceeding 20 pages exclusive of tables of contents, citations and appendix. It shall contain a short statement of the matter involved, the question presented, the errors complained of, the reasons why certification should be allowed, and comments with respect to the Appellate Division opinion. It shall have annexed the notice of petition for certification; the written opinions of the courts below; a copy of the transcript of any relevant oral opinions or statements of findings and conclusions of law; and in the case of a sentencing appeal heard by the Appellate Division pursuant to *R*. 2:9-11, the transcript of the oral argument, which shall be requested from the Chief, Reporting Services in the Appellate Division. The petition shall be signed by petitioner's counsel [who] or by petitioner when not represented by counsel and shall certify that [it presents] the petition represents a substantial question and is filed in good faith and not for purposes of delay.

(b) …no change.

Note: Source – *R.R.* 1:10-9, 1:10-10(a). Paragraph (a) amended March 5, 1974 to be effective immediately; paragraph (a) amended November 7, 1988 to be effective January 2, 1989; paragraph (a) amended January 19, 1989 to be effective February 1, 1989; paragraph (b) amended June 29, 1990 to be effective September 4, 1990; paragraph (a) amended July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended July 27, 2006 to be effective September 1, 2006; paragraph (a) amended _____ to be effective _____.

31. Proposed Amendments to *Rule* 2:13-1(b) – Presiding Justice or Judge

The proposed amendments to *Rule* 2:13-1(b) rename the "Presiding Judge for Administration" to the "Chief Judge of the Appellate Division."

The Committee agrees with the Appellate Division's recommendation as it is in line with the usage in other intermediate state appellate courts.

The proposed amendments to *Rule* 2:13-1(b) follow.

2:13-1. Presiding Justice or Judge

(a) …no change.

(b) Appellate Division. The presiding judge of each part, designated by the Chief Justice, shall preside over its sessions and conferences. If the presiding judge is absent or unable to serve or if none has been designated, the senior judge attending shall serve temporarily as presiding judge. Seniority shall be determined by length of service on the Appellate Division. The Chief Justice shall designate one presiding judge as the [Presiding Judge for Administration] Chief Judge of the Appellate Division to be responsible for the administration of the Appellate Division pursuant to *R*. 1:33-4. The Chief Justice may designate another presiding judge as the Deputy Presiding Judge for Administration, who shall assist the [Presiding Judge for Administration] Chief Judge of the Appellate Division.

Note: Source – *R.R.* 1:1-4, 1:1-6, 2:1-5, 2:1-8. Paragraph (a) amended November 27, 1974 to be effective April 1, 1975; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraphs (a) and (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (b) amended October 8, 2013 to be effective immediately; paragraph (b) amended _____ to be effective _____.

D. Proposed Amendments to *Rule* 4:11-4(b)(1) – Submission of Foreign Subpoena

Rule 4:11-4(b) effectively adopts the Uniform Interstate Deposition and Discovery Act ("UIDDA") and sets forth procedures to secure a subpoena for compelling testimony of in-state persons for use in foreign state proceedings. "Foreign state" is intended to mean any state other than New Jersey, i.e., one of the other forty-nine states. *Rule* 4:11-4(b)(1) states, in part, that "[t]he foreign subpoena…shall be filed with the Clerk of the Superior Court." (emphasis added).

In practice, foreign subpoenas are not actually "filed." Thus, the Committee proposes amending the Rule to provide that foreign subpoenas are submitted to the Clerk of the Superior Court. The proposed amendments will eliminate confusion for litigants.

The proposed amendments to *Rule* 4:11-4(b)(1) follow.

4:11-4. Testimony for Use in Foreign Jurisdictions

(a) …no change.

(b) Testimony for Use in a Foreign State.

(1) Submission of Foreign Subpoena. Whenever the deposition of a person is to be taken in this State pursuant to the laws of a foreign state for use in connection with proceedings there, an out-of-state attorney or party may submit a foreign subpoena along with a New Jersey subpoena, in the name of the Clerk of the Superior Court, which complies with subparagraph (3) to an attorney authorized to practice in this State or to the Clerk of the Superior Court or designee. The foreign subpoena must include the following phrase below the case number: "For the Issuance of a New Jersey Subpoena Under New Jersey Rule 4:11-4 (b)" and shall be [filed with] submitted to the Clerk of the Superior Court. It shall be treated as a miscellaneous matter and the fee charged shall be pursuant to *R*. 1:43.

(2) Request Does Not Constitute Appearance. A request for the issuance of a subpoena does not constitute an appearance in the courts of this State. A request for the issuance of a subpoena does create the necessary jurisdiction in this State to enforce the subpoena; to quash or modify the subpoena; to issue any protective order or resolve any other dispute relating to the subpoena; to impose sanctions on the attorney or party requesting the issuance of the subpoena for any action which would constitute a violation of the Rules Governing the Courts of the

State of New Jersey, including the Rules of Professional Conduct; and to take such other action as may be appropriate.

(3) Contents of Subpoena. A subpoena under this subsection shall:

(A) state the name of the New Jersey court issuing it and comply with the requirements of *R*. 4:14-7;

(B) incorporate the terms and conditions used in the foreign subpoena to the extent those terms and conditions do not conflict with R. 4:14-7;

(C) advise the person to whom the subpoena is directed of that person's right to move to quash or modify the subpoena or otherwise move under *R*. 4:10-3, *R*. 4:14-4, *R*. 4:23-1 or any other Rules Governing the Courts of the State of New Jersey that are applicable to discovery;

(D) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel; and

(E) bear the caption and case number of the foreign case to which it relates, identifying the foreign jurisdiction and the court where the case is pending.

(4) Service of Subpoena. A subpoena issued by an attorney authorized to practice in this State or by the Clerk of the Superior Court must be served in compliance with *R*. 1:9-3 and *R*. 1:9-4.

(5) Deposition, Production, and Inspection. The provisions of *R*. 1:9-2 apply to a subpoena issued under this section. As required by *R*. 4:14-7(c), a

subpoena commanding a person to produce evidence for discovery purposes may be issued only to a person whose attendance at a designated time and place for the taking of a deposition is simultaneously compelled. The subpoena shall state that the subpoenaed evidence shall not be produced or released until the date specified for the taking of the deposition and that if the deponent is notified that a motion to quash the subpoena has been filed, the deponent shall not produce or release the subpoenaed evidence until ordered to do so by the court or the release is consented to by all parties to the action. The subpoena shall be simultaneously served no less than 10 days prior to the date therein scheduled on the witness and on all parties. Depositions and other discovery taken pursuant to the rule shall be conducted consistent with and subject to the limitations in the Rules Governing the Courts of the State of New Jersey, including the Rules of Professional Conduct, and all other applicable laws of this State.

(6) Motion or Application to a Court. A motion or an application to the court for a protective order or to enforce, quash, or modify a subpoena issued by an attorney authorized to practice in this State or by the Clerk of the Superior Court under section (b) must comply with the rules and statutes of this State and be submitted to the court in the county in which discovery is to be conducted or the deponent resides, is employed or transacts business. It must be filed as a miscellaneous matter bearing the caption that appears on the subpoena. The following phrase must appear below the case number of the newly filed matter:

"Motion or Application Related to a Subpoena Issued Under *R*. 4:11-4(b)." Any later motion or application relating to the same subpoena must be filed in the same matter.

Note: Source — *R.R*. 4:17-4. Amended July 21, 1980 to be effective September 8, 1980; text amended and designated as paragraph (a), paragraph (a) caption adopted, and new paragraph (b) adopted July 22, 2014 to be effective September 1, 2014; paragraph (a) and subparagraphs (b)(1), (b)(4) and (b)(6) amended and subparagraph (b)(7) deleted August 1, 2016 to be effective September 1, 2016; paragraph (b)(1) amended to be effective .

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

In the 2016-2018 rules cycle, a practitioner suggested that *Rule* 4:22-1 be amended to mirror Federal Rule of Civil Procedure 36(a), which permits requests for admissions to extend to opinions as well as facts. The attorney contended that changing the Rule to allow requests for admissions of opinions will result in a reduction of disputed issues to be decided by the trier of fact.

During the 2018 – 2020 rules cycle, the Discovery Subcommittee examined how federal courts have handled opinion requests for admissions and whether such requests have posed a problem. The Discovery Subcommittee concluded that allowing opinion requests for admission has not caused any significant problems since the Federal Rule was amended in 1970. The Subcommittee also determined the Rule amendment could help reduce wasted effort on truly uncontested issues. Thus, the Discovery Subcommittee proposed to add the term "opinion" to the existing Rule, and the Committee adopted its proposal. However, the Court declined to act on this Rule proposal and instead, referred it back to the Committee for further study and consideration.

This rules cycle, the Discovery Subcommittee conducted further extensive research of federal cases, treatises, and law review articles on Federal Rule of Civil Procedure 36(a) and prepared a report. See Attachment 1. The Discovery Subcommittee concluded that the allowance of the admissibility of opinions could help to expedite trial and that case law provides a mechanism for separating proper

requests to admit in matters of opinion from improper requests to admit matters of ultimate conclusion.

The Discovery Subcommittee resubmitted the proposed amendments that the term "or opinion" be added to the existing Rule. The Committee agrees with the Subcommittee's proposal. Allowing the Rule to extend to the admission of appropriate opinions will help eliminate superfluous issues, unnecessary expense, and expedite trials.

The proposed amendments to *Rule* 4:22-1 follow.

4:22-1. Request for Admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters of fact or opinion within the scope of *R*. 4:10-2 set forth in the request, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after being served with the summons and complaint. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an

admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless stating that a reasonable inquiry was made and that the information known or readily obtainable is insufficient to enable an admission or denial. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial, may not, on that ground alone, object to the request but may, subject to the provisions of *R*. 4:23-3, deny the matter or set forth reasons for not being able to admit or deny.

Requests for admission and answers thereto shall be served pursuant to *R*. 1:5-1 and shall not be filed unless the court otherwise directs.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The provisions of *R*. 4:23-1(c) apply to the award of expenses incurred in relation to the motion.

Note: Source – *R.R.* 4:26-1. Former rule deleted and new *R*. 4:22-1 adopted July 14, 1972 to be effective September 5, 1972; amended November 27, 1974 to be effective April 1, 1975; amended July 24, 1978 to be effective September 11, 1978; amended July 13, 1994 to be effective September 1, 1994; amended to be effective .

F. Proposed Amendments to *Rule* 4:26-2 – Minor or Mentally Incapacitated Person

In *S.T. v. 1515 Broad Street*, LLC, 241 N.J. 257 (2020), the Court requested that the Committee review *Rule* 4:26-2 as to a trial court's appointment of a guardian ad litem (GAL) for a litigant, and its interplay with the procedures set forth by *Rule* 4:86 for adjudication of a litigant's incapacity and appointment of a guardian.

S.T. arose out of a personal injury action in which the trial court authorized the GAL appointed pursuant to *Rule* 4:26-2 for the plaintiff, an adult, to make decisions as to the disposition of the case without a judicial finding that the plaintiff was incapacitated pursuant to *Rule* 4:86. The GAL and plaintiff's counsel then recommended settlement, which the court accepted over the forceful objections of the plaintiff. Plaintiff appealed arguing she never received notice of the appointment of the GAL.

The Conference of Civil Presiding Judges and the Conference of General Equity Presiding Judges and the Probate Part Judges Committee, with the assistance of the Civil Practice Division, developed and endorsed proposed amendments to *Rule* 4:26-2 taking into consideration the Court's direction in *S.T.* In addition, they updated language and clarified provisions as deemed necessary. It was also determined that no amendments to *Rule* 4:86 were necessary in light of the proposed changes to *Rule* 4:26-2.

The proposed amendments to *Rule* 4:26-2 are summarized as follows:

- References to "mentally incapacitated person" and "ward" are replaced with "alleged or adjudicated incapacitated person" as appropriate throughout the rule.
- *Rule* 4:26-2(a) is updated for clarity, including addition of a reference to "an adult who has been adjudicated incapacitated pursuant to *Rule* 4:86-1 *et seq*."
- *Rule* 4:26-2(b)(1) is updated to apply only to minors and for clarity. Parents are presumptively deemed the guardian of a minor child, unless there is a conflict, in which case *Rule* 4:26-2(a) would apply. Note, a minor cannot be alleged or adjudicated incapacitated.
- *Rule* 4:26-2(b)(3) is amended to apply to all pending actions, and to alleged or adjudicated incapacitated persons. Provisions related to service are moved to new *Rule* 4:26-2(b)(5).
- *Rule* 4:26-2(b)(4) is updated to apply to alleged or adjudicated incapacitated persons and for clarity.
- New *Rule* 4:26-2(b)(5) renumbers the service provisions formerly contained in subparagraph (b)(3) and establishes procedures for service of notice of a petition or motion for appointment of a GAL pursuant to subparagraphs (b)(2)-(4). In accordance with *S.T.*, it

requires personal service on an alleged or adjudicated incapacitated person.

- New *Rule* 4:26-2(c)(1) and (c)(2) clarify and codify the duties of a GAL appointed pursuant to subparagraphs (b)(2)-(4) as set forth in *S.T.* Provisions related to allowance of fees are moved to new *R.* 4:26-2(e). Subparagraph (c)(2) requires a GAL to conduct an independent investigation to determine whether the alleged incapacitated person may be incapacitated as defined by statute and to submit a report to the court with the results of the investigation and recommending whether the best interests of the alleged incapacitated person require the filing of an action for adjudication of incapacity and appointment of a guardian in accordance with *R.* 4:86-1. The GAL shall not have authority to make decisions on behalf of the alleged incapacitated person.
- New *Rule* 4:26-2(c)(3) renumbers the provisions related to the duties of a GAL appointed in a foreclosure matter formerly contained in subparagraph (d) and sets forth the duties of a GAL appointed in a foreclosure matter.
    - Subparagraph (c)(3)(A) specifies that the court shall limit the duties of a GAL appointed to represent the interests of a minor or an alleged or adjudicated incapacitated person in a

foreclosure action to investigate whether the minor or alleged or adjudicated incapacitated person is entitled to raise an objection as to the right to foreclose or other valid claim or defense, and thus assess whether a foreclosure should be contested. It was noted that a minor could be named in a foreclosure matter where a trust or an estate is involved.

- Subparagraph (c)(3)(B) requires the GAL to submit a written report with the results of the investigation. A report that raises no objection as to the right to foreclose or other valid claim or defense shall be filed with the Superior Court Clerk in Trenton. A report that raises an objection as to the right to foreclose or other valid claim or defense shall be filed with the court that appointed the GAL.
- Subparagraph (c)(3)(C) establishes that, in matters in which a GAL is appointed and the report of the GAL raises an objection as to the right to foreclose or other valid claim or defense, the court shall discharge the GAL appointed in the foreclosure action and appoint a GAL pursuant to subparagraph (b)(4) to perform the duties set forth in subparagraph (c)(2). This revision stemmed from a concern of the General Equity Judges that if an objection or a valid claim or defense is raised in the

foreclosure action, there might also be issues of potential incapacity, which the foreclosure GAL might not be equipped to handle. By way of example, if a defendant homeowner has significant equity in a home or there are sufficient funds available to make payments, but the debt has not been paid, that raises a mental capacity concern. The judges wanted a mechanism by which a separate GAL, with expertise in incapacity, could be appointed to address the issue of incapacity.

- New *Rule* 4:26-2(d) specifies actions to be taken by the court upon receipt of a GAL's report of an alleged incapacitated person, in accordance with *S.T.* and feedback provided by the Judicial Conferences and Committee. The new provision requires the court to make its own independent fact findings, with or without testimony, and exercise its discretion in determining whether an action for adjudication of incapacity and appointment of a guardian under *Rule* 4:86-1 is required. Any *Rule* 4:86-1 action shall be filed by an interested party on behalf of the alleged incapacitated person or by the GAL, and shall be heard in the Probate Part. It was noted that nothing precludes an interested party from bringing an independent *Rule* 4:86-1 action on behalf of an alleged incapacitated person who is involved

in a separate civil matter. Notice of the *Rule* 4:86-1 action shall be provided to the court, which may stay the underlying matter pending adjudication of the action in the Probate Part. Provisions related to the duties of a GAL appointed in a foreclosure matter are moved to new *Rule* 4:26-2(c)(3).

- New *Rule* 4:26-2(e) updates for clarity and renumbering the provisions related to allowance of fees formerly contained in subparagraph (b)(3). Guardians *ad litem* are usually not paid, but can submit a request for payment under this provision.

The Committee agrees with the proposed amendments, determining that they make the appointment of a GAL more concise and consistent while also addressing the issues raised by the Court in *S.T.*

The proposed amendments to *Rule* 4:26-2 follow.

4:26-2. Minor or [Mentally] Incapacitated Person

(a) Representation by Guardian. Except as otherwise provided by law or *R*. 4:26-3 (virtual representation), a minor or [mentally incapacitated person] an adult who has been adjudicated incapacitated pursuant to *R*. 4:86-1 *et seq*. shall be represented in an action by the guardian of either the person or the property, appointed in this State[, or if]. If no such guardian has been appointed, or if a conflict of interest exists between the guardian and [ward] the minor or adjudicated incapacitated person or for other good cause, the minor or adjudicated incapacitated person shall be represented by a guardian *ad litem* appointed by the court in accordance with paragraph (b) of this rule.

(b) Appointment of Guardian *Ad litem*.

(1) Appointment of Parent in Negligence Actions. In negligence actions, unless the court otherwise directs, a parent of a minor [or mentally incapacitated person] shall be deemed to be appointed guardian *ad litem* of the child without court order upon the filing of a pleading or [certificate] certification signed by an attorney stating the parental relationship[,]; the child's status and[, if a minor, the] age[,]; the parent's consent to act as guardian *ad litem*[,]; and the absence of a conflict of interest between parent and child.

(2) Appointment on Petition. The court may appoint a guardian *ad litem* [for a minor or an alleged mentally incapacitated person,] upon the verified petition of a friend on [his or her] behalf of a minor or an alleged or adjudicated

incapacitated person. In an action in which the fiduciary seeks to have the account settled or has a personal interest in the matter, the petition shall state whether or not the proposed guardian *ad litem* [therein nominated] was [proposed] nominated by the fiduciary or the fiduciary's attorney. Each petition shall be accompanied by the sworn consent of the proposed guardian *ad litem*, stating [his or her] the proposed guardian *ad litem's* relationship to the minor or alleged [mentally] or adjudicated incapacitated person; [and] certifying that [he or she] the proposed guardian *ad litem* either has no interest in the litigation, or [if such interest exists,] setting forth the nature [thereof,] of any such interest; and certifying that [he or she] the proposed guardian *ad litem* will [with undivided fidelity] perform the duties of guardian *ad litem* with undivided fidelity[,] if appointed. The court shall appoint the proposed guardian *ad litem* [so proposed] unless it finds good cause for not doing so[,]. [in which] In such case, [it shall afford the petitioner opportunity to file] a new petition seeking the appointment of another [person] proposed guardian *ad litem* may be filed within 10 days of the rejection. If [such] a new petition is not filed within [such time, or if filed,] 10 days or is not granted, the court[, when designating some other person as guardian *ad litem*,] shall state [for the record] its reasons for rejecting petitioner's nominee on the record at the appointment of a guardian *ad litem* selected by the court. A conflict of interest between the petitioner and the minor or alleged [mentally] or adjudicated incapacitated person shall be good cause for rejection of the petitioner's nominee.

Only one guardian *ad litem* shall be appointed for all minors or alleged [mentally] or adjudicated incapacitated persons unless a conflict of interest exists.

(3) Appointment on Party's Motion. On motion by a party to [the] a pending action, the court may appoint a guardian *ad litem* for a minor or alleged [mentally] or adjudicated incapacitated person [if no petition has been filed and either default has been entered by the clerk or, in a summary action brought pursuant to *R*. 4:67 or in a probate action, 10 days have elapsed after service of the order. Notice of the motion shall be served at least 10 days before the return date fixed therein upon the appropriate persons as designated in *R*. 4:4-4(a)(1)(2)(3) or (c) either personally, at the time of service of process or thereafter, or by registered or certified mail, return receipt requested. The court on *ex parte* motion may, in lieu thereof, fix such notice of the motion, given to such persons in such manner as it deems appropriate].

(4) Appointment on Court's Motion. The court may appoint a guardian *ad litem* for a minor or alleged [mentally] or adjudicated incapacitated person on its own motion.

(5) Service. Notice of a petition or motion for appointment of a guardian *ad litem* pursuant to subparagraphs (2)-(4) above shall be served on an alleged or adjudicated incapacitated person personally, and on any other parties pursuant to *R*. 4:4-4(a)(1)(2)(3) or (c) either personally at the time of service of process or thereafter, or by registered or certified mail, return receipt requested. If notice

cannot be served as set forth above, the court on ex parte motion may determine the manner of service as it deems appropriate. Notice of a motion for appointment of a guardian *ad litem* shall be served at least 10 days before the return date.

(c) Duties of Guardian *Ad litem*.

(1) Guardian *Ad litem* of Minor or Adjudicated Incapacitated Person. A guardian *ad litem* of a minor or adjudicated incapacitated person appointed pursuant to subparagraphs (b)(2)-(4) above shall represent the minor or adjudicated incapacitated person in the action pursuant to paragraph (a) above.

(2) Guardian *Ad litem* of Alleged Incapacitated Person. Except in foreclosure actions subject to subparagraph (c)(3) below, a guardian *ad litem* of an alleged incapacitated person appointed pursuant to subparagraphs (b)(2)-(4) above shall conduct an independent investigation as to the alleged incapacity as defined in N.J.S. 3B:1-2. Following the investigation, the guardian *ad litem* shall submit a report to the court containing the results of the investigation and recommending whether the best interests of the alleged incapacitated person require the filing of an action for adjudication of incapacity and appointment of a guardian in the Superior Court, Chancery Division, Probate Part in accordance with *R*. 4:86-1. The guardian *ad litem* shall not have authority to make decisions on behalf of the alleged incapacitated person. To the extent feasible, the proceedings under this Rule shall be completed in a reasonably timely manner, as specified in a case management order or otherwise by the court.

(3) Guardian *Ad litem* in Foreclosure Actions.

(A) The court shall limit the duties of a guardian *ad litem* appointed to represent the interests of a minor or an alleged or adjudicated incapacitated person in a foreclosure action to investigate whether the minor or alleged or adjudicated incapacitated person is entitled to raise an objection as to the right to foreclose or other valid claim or defense.

(B) Following the investigation, the guardian *ad litem* shall submit a written report containing the results of the investigation. If the report raises no objection as to the right to foreclose or other valid claim or defense, it shall be filed with the Superior Court Clerk in Trenton. If the report raises an objection as to the right to foreclose or other valid claim or defense, it shall be filed with the court that appointed the guardian *ad litem*.

(C) In matters in which a guardian *ad litem* is appointed to represent the interests of an alleged incapacitated person, and the report of the guardian *ad litem* raises an objection as to the right to foreclose or other valid claim or defense, the court shall discharge the guardian *ad litem* appointed in the foreclosure action and appoint a guardian *ad litem* pursuant to subparagraph (b)(4) above to perform the duties set forth in subparagraph (c)(2) above.

(d) Action on Recommendation of Guardian *Ad litem* of Alleged Incapacitated Person. On receipt of the report of the guardian *ad litem* pursuant to subparagraph (c)(2) above, the court shall make its own independent fact findings,

with or without testimony, and exercise its discretion in determining whether an action for adjudication of incapacity and appointment of a guardian under *R*. 4:86-1 is required. Any action under *R*. 4:86-1 shall be filed by an interested party on behalf of the alleged incapacitated person or by the guardian *ad litem*, and shall be heard in the Superior Court, Chancery Division, Probate Part. Notice of the *R*. 4:86-1 action shall be provided to the court, which may stay the underlying matter pending adjudication of the action in the Probate Part.

[(c)] (e) Allowance of Fees. A guardian *ad litem* appointed pursuant to this rule or *R*. 4:26-3(c) (failure of virtual representation) who [intends to apply for an] seeks allowance of a fee shall [serve upon all parties and] file a written notice with the court. [at least 7 days before the hearing a] The [written] notice shall be served upon all parties at least 7 days before the hearing. [of] The notice shall state the fee amount [applied for] sought; [stating] that the report and affidavit of services have been filed, [(]unless [no such affidavit is] not required under *R*. 4:87-7;[) have been filed] and that copies [thereof] will be furnished on request.

[(d) Filing Foreclosure Reports. Notwithstanding the appointment of a guardian *ad litem* in a foreclosure action to represent the interests of a minor or incapacitated person by a judge, if the written report of the guardian *ad litem* raises no objection or dispute as to the right to foreclosure, the report shall be filed with the Superior Court Clerk in Trenton. Reports which raise an objection or dispute shall be filed with the judge who appointed the guardian *ad litem*.]

Note: Source – *R.R.* 4:30-2(a)(b)(c), 7:12-6; paragraph (b) amended July 16, 1981 to be effective September 14, 1981; paragraphs (a), (b) and (c) amended July 14, 1992 to be effective September 1, 1992; paragraph (b)(3) amended July 13, 1994 to be effective September 1, 1994; caption amended, and paragraphs (a), (b)(1), (b)(2), (b)(3), and (b)(4) amended July 12, 2002 to be effective September 3, 2002; new paragraph (d) added July 9, 2008 to be effective September 1, 2008; amended to be effective .

G. Proposed Amendments to *Rule* 4:42-2 – Judgment Upon Multiple Claims and *Rule* 4:49-2 – Motion to Alter or Amend a Judgment or Order

In *Lawson v. Dewar*, 468 *N.J. Super*. 128 (App. Div. 2021), the Appellate Division pointed "out commonly misunderstood distinctions between motions seeking reconsideration of final orders and motions seeking reconsideration of interlocutory orders." The court explained that *Rule* 4:49-2 sets a twenty-day time bar for filing motions to alter or amend and applies "only to motions to alter or amend final judgments and final orders." *Rule* 4:42-2, on the other hand, applies to motions to reconsider interlocutory orders which "shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice."

A Committee member who is an Appellate Division judge proposes minor alternations to *Rules* 4:42-2 and 4:49-2 to help elucidate the framework for reconsideration explained in *Lawson*. First, *Rule* 4:49-2 states that a motion to alter or amend "a judgment or order" must be served within 20 days after service of "the judgment or order." The Appellate Judge suggests that in both places the word "order" should be changed to "final order." Second, the concept that a litigant may seek reconsideration of an interlocutory order at any time prior to entry of final judgment is buried at the end of *Rule* 4:42-2, which chiefly deals with a trial court's authority to certify an interlocutory order as final. The

Appellate Judge suggests that *Rule* 4:42-2 should be modified slightly and be divided into two subsections.

The Committee unanimously agrees with the proposed amendments to these rules as they will to help prevent the misunderstanding that a litigant must move for reconsideration of an interlocutory order within twenty days when, in fact, such a motion may be filed at any time prior to entry of final judgment in the interests of justice.

The proposed amendments to *Rules* 4:42-2 and 4:49-2 follow.

4:42-2. Judgment Upon Multiple Claims; Reconsideration of Interlocutory Orders

(a) If an order would be subject to process to enforce a judgment pursuant to *R*. 4:59 if it were final and if the trial court certifies that there is no just reason for delay of such enforcement, the trial court may direct the entry of final judgment upon fewer than all the claims as to all parties, but only in the following circumstances: (1) upon a complete adjudication of a separate claim; or (2) upon complete adjudication of all the rights and liabilities asserted in the litigation as to any party; or (3) where a partial summary judgment or other order for payment of part of a claim is awarded.

(b) In the absence of [such] a direction authorized by paragraph (a), any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interest of justice. To the extent possible, application for reconsideration shall be made to the trial judge who entered the order.

Note: Source – *R.R.* 4:55-2; amended July 16, 1981 to be effective September 14, 1981; amended November 1, 1985 to be effective January 2, 1986; amended November 7, 1988 to be effective January 2, 1989; amended and divided into paragraphs (a) and (b) to be effective .

4:49-2. Motion to Alter or Amend a Judgment or Order

Except as otherwise provided by *R*. 1:13-1 (clerical errors) a motion for rehearing or reconsideration seeking to alter or amend a judgment or final order shall be served not later than 20 days after service of the judgment or order upon all parties by the party obtaining it. The motion shall state with specificity the basis on which it is made, including a statement of the matters or controlling decisions which counsel believes the court has overlooked or as to which it has erred, and shall have annexed thereto a copy of the judgment or final order sought to be reconsidered and a copy of the court's corresponding written opinion, if any.

Note: Source – *R.R*. 4:61-6. Amended November 5, 1986 to be effective January 1, 1987; amended July 14, 1992 to be effective September 1, 1992; amended July 10, 1998 to be effective September 1, 1998; amended July 19, 2012 to be effective September 4, 2012; amended to be effective .

H. Proposed Amendments to *Rule* 4:58 – Offer of Judgment

The Offer of Judgment Subcommittee was tasked with addressing an ambiguity in the context of a global offer to multiple defendants in *Rule* 4:58 that was noted by the Court in its decision *Willner v. Vertical Reality, Inc*., 235 *N.J.* 65 (2018) and due to the renewal of proposed amendments from NJ Pure in the wake of that decision. As the Court observed in *Willner*, "the rule leaves unclear the circumstances triggering the imposition of sanctions on an individual defendant when a single plaintiff makes a global offer to multiple defendants, there is no acceptance of the offer, and no counteroffer is made in response."

The Subcommittee submitted an extensive report to the Committee detailing background and history of the Rule and proposed amendments to the Rule. *See* Attachment 2. Several numerical illustrations exemplifying how the proposed Rule would operate in practice are set forth in Part III of the Subcommittee's report. The Subcommittee focused on revisions to *Rule* 4:58-4(b), which addresses multiple defendants. The proposed amendments take a systematic approach in order to expand the range of scenarios directly addressed under the Rule by addressing global offers, defendants against whom no joint and several judgment is sought, and individual offers. It also addresses the consequences of various responses to a global offer made to multiple defendants in *Rule* 4:58-4(b)(A) through (E).

The Committee agrees with the Subcommittee's proposed rule amendments to the Offer of Judgment Rule, as they will encourage settlement, promote discussion among parties, incentivize defendants to make "on target" offers, and give defendants an opportunity to respond to offers from plaintiffs as a group. The Committee also recommends that the illustrations and examples should be made readily available to the public in some format, whether it be a Notice to the Bar or Official Comment to the rule.

The proposed amendments to *Rule* 4:58 follow.

4:58-1. Time and Manner of Making and Accepting Offer

(a) Except in a matrimonial action or action adjudicated in the Special Civil Part, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided herein.

(b) …no change.

(c) Except as otherwise provided under this Rule, prior to the service or filing of a notice of acceptance, an offeror may withdraw an offer by serving on the offeree and filing a notice of withdrawal with the court. An offer voluntarily withdrawn by the offerror shall not be subject to this Rule.

Note: Source – *R.R.* 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; text allocated to paragraphs (a) and (b), and paragraphs (a) and (b) amended July 27, 2006 to be effective September 1, 2006; paragraph (a) amended and new paragraph (c) added to be effective .

4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) …no change.

(b) …no change.

(c) No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Note: Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text amended and designated as paragraph (a), new paragraph (b) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended, new paragraph (b) added, and previous paragraph (b) redesignated as paragraph (c) August 1, 2016 to be effective September 1, 2016; paragraph (c) amended to be effective .

4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a [monetary] judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by *R*. 4:58-2[, which shall constitute a prior charge on the judgment or verdict in uninsured/underinsured motorist actions].

(b) A favorable determination qualifying for allowances under this rule is a [money] judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship or otherwise result in unfairness to the offeree. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Note: Source – *R.R*. 4:73; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text allocated into paragraphs (a), (b), (c), and paragraphs (a), (b), (c) amended July 27, 2006 to be effective September 1, 2006; paragraphs (a) and (b) amended August 1, 2016 to be effective September 1, 2016; amended to be effective .

4:58-4. Multiple Claims; Multiple Parties

(a) [Multiple Plaintiffs] Per Quod and Derivative Plaintiffs. If a party joins as plaintiff for the purpose of asserting a per quod claim or if one or more plaintiffs seek a claim that is derivative of the claim of another plaintiff, the claimants may make a single unallocated offer. Otherwise, multiple claimants may file and serve any offer individually.

(b) Multiple Defendants. [If there are multiple defendants against whom a joint and several judgment is sought, and one of the defendants offers in response less than a pro rata share, that defendant shall, for purposes of the allowances under *R*. 4:58-2 and -3, be deemed not to have accepted the claimant's offer. If, however, the offer of a single defendant, whether or not intended as the offer of a prorated share, is at least as favorable to the offeree as the determination of total damages to which the offeree is entitled, the single offering defendant shall be entitled to the allowances prescribed in *R*. 4:58-3, provided, however, that the single defendant's offer is at least 80% of the total damages determined.] Where there are multiple defendants, offers shall be made as follows:

(1) Global Offer. Claimant may make a global offer to multiple defendants. If claimant obtains a money judgment in an amount that is 120% of the global offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, those allowances as

prescribed in *R*. 4:58-2(a). In such case, the assessment of costs and fees shall be applied as follows:

(A) No Response. When there is a rejection of, or no response to, plaintiff's global offer, each defendant will be jointly and severally responsible for the entire allocation set forth pursuant to *R*. 4:58.

(B) Global Counteroffer. When there is a global counteroffer from defendants and plaintiff obtains a favorable determination qualifying for allowances under this rule, each defendant will be responsible for the portion of expenses and fees equal to the percentage that they were individually adjudicated responsible. Subject to *R*. 4:58-3(c), in the event the defendants obtain a global favorable determination, plaintiff will be responsible for the expenses and fees payable pro rata to each defendant in accordance with that defendant's proportionate share of the offer.

(C) Counteroffer to Claimant's Global Offer by One Defendant. When a single defendant makes a counteroffer to a global offer, it shall be treated as a counteroffer limited to that defendant's share.

a. If that defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.

b. If that defendant's final adjudication is greater than 120% of their counteroffer, they should be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(D) Counteroffers by Multiple but not All Defendants. When multiple defendants individually make a counteroffer representing only their individual share of responsibility, they shall indicate that.

a. If any responsive individual defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.

b. If any responsive individual defendant's final adjudication is greater than 120% of their counteroffer, they shall be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(E) All Defendants Respond Individually. When all defendants counteroffer individually to a global offer, the individual responses should be

combined and treated as a global counteroffer. Each defendant who counteroffered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed 100% of allowances. The allowances will be assessed based on their adjudicated percentage share of responsibility of the allowances and the combination of the remaining defendants must equal 100% of the allowances. However, if all defendants have individually offered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment but 120% of the combined counteroffer amount is less than the claimant's global offer, then each defendant will be responsible for the portion of expenses and fees equal to the percentage that the defendant was adjudicated responsible.

(2) Defendants Against Whom No Joint and Several Judgment Is Sought. If there are multiple defendants and there are defendants against whom no joint and several judgment is sought, claimant may file and serve individual offers on those defendants against whom no joint and several judgment is sought as prescribed by this rule. Similarly, those defendants against whom no joint and several judgment is sought may file and serve individual offers as prescribed by *R*. 4:58-1. If such offeror is successful as prescribed by *R*. 4:58-2 or -3, such claimant or defendant

shall be entitled to the allowances as prescribed by *R*. 4:58-2 or -3 as the case may be and subject to the provisions of this rule.

(3) Individual Offer. If there are multiple defendants, individual offers of judgment may be filed and served as prescribed by *R*. 4:58-1. If such offeror is successful as prescribed by *R*. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by *R*. 4:58-2 or -3, as the case may be.

(c) …no change.

Note: Adopted July 5, 2000 to be effective September 5, 2000; caption amended, former text redesignated as paragraph (b) and amended, and new paragraphs (a) and (c) adopted July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (b) amended to be effective .

4:58-7. Acceptance of Offer Not Deemed a Judgment; Payment of Accepted Offer

(a) Except as provided for in (b), acceptance and payment of an offer under *R*. 4:58 will not be deemed a judgment against the offeree and will not require the filing of a Warrant of Satisfaction.

(b) Absent leave of court, or the agreement of the offeror and offeree, full payment of the accepted offer shall be made within 30 days after the date of service of notice of acceptance. Within 7 days of full payment, the offeror and the offeree shall file a Stipulation of Dismissal With Prejudice as to all claims that are the subject of the accepted offer. If full payment is not made within 30 days, then the party entitled to receive payment may (i) withdraw its offer or acceptance, or (ii) apply for relief consistent with *R*. 1:6-2(a) for entry of final judgment. The court shall award reasonable expenses, including reasonable fees and costs for the application for final judgment unless the court finds that the failure to make payment was substantially justified or that other circumstances make an award of expenses unjust.

Note: New *Rule* 4:58-7 established _____ to be effective _____.

I. Proposed Amendments to *Rule* 4:59-1(h) – Notice to Debtor

The Supreme Court Special Civil Part (SCP) Practice Committee proposes amending *Rule* 4:59-1(h) to be consistent with *Rule* 4:59-1(e) by adding a provision to allow a judgment-creditor to waive in writing the right to appear at a hearing addressing an objection to a levy of a debtor's property.

The SCP Practice Committee examined *Rule* 4:59-1(e), which governs wage garnishments and *Rule* 4:59-1(h), which governs levies on debtor's property. In the event of an objection to a wage garnishment, *Rule* 4:59-1(e) provides in part: "The judgment-creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers." The SCP Practice Committee observed that *Rule* 4:59-1(h) does not contain the same waiver of appearance provision for hearings on objections to levies. In practice, judgment-creditors' attorneys often waive their appearance and rely on the papers in hearings for both types of objections.

The Committee agrees with the SCP Practice Committee's proposal as it reflects current practice.

The proposed amendments to *Rule* 4:59-1(h) follow.

4:59-1. Execution

(a) …no change.

(b) …no change.

(c) …no change.

(d) …no change.

(e) …no change.

(f) …no change.

(g) …no change.

(h) Notice to Debtor. Every court officer or other person levying on a debtor's property shall, on the day the levy is made, mail a notice to the last known address of the person or business entity whose assets are to be levied on stating that a levy has been made and describing exemptions from levy and how such exemptions may be claimed by qualified persons. If the execution is served on a bank or other financial institution as garnishee pursuant to *N.J.S.A*. 2A:17-63, the officer shall mail the notice to the debtor on the day the officer serves the writ. The notice shall be in the form prescribed by Appendix VI to these rules and copies thereof shall be promptly filed by the levying officer with the clerk of the court and mailed to the person who requested the levy. If the clerk or the court receives a claim of exemption, whether formal or informal, it shall hold a hearing thereon within 7 days after the claim is made. The judgment-creditor may waive in writing the right to appear at the hearing on the objection and rely on the papers. If an

exemption claim is made to the levying officer, it shall be forthwith forwarded to the clerk of the court and no further action shall be taken with respect to the levy pending the outcome of the exemption hearing. No turnover of funds or sale of assets may be made, in any case, until 20 days after the date of the levy and the court has received a copy of the properly completed notice to debtor.

(i) …no change.

Note: Source – *R.R.* 4:74-1, 4:74-2, 4:74-3, 4:74-4. Paragraph (c) amended November 17, 1970 effective immediately; paragraph (d) amended July 17, 1975 to be effective September 8, 1975; paragraph (a) amended, new paragraph (b) adopted and former paragraphs (b), (c), (d), and (e) redesignated (c), (d), (e) and (f) respectively, July 24, 1978 to be effective September 11, 1978; paragraph (b) amended July 21, 1980 to be effective September 8, 1980; paragraphs (a) and (b) amended July 15, 1982 to be effective September 13, 1982; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (b) amended and paragraph (g) adopted November 1, 1985 to be effective January 2, 1986; paragraph (d) amended June 29, 1990 to be effective September 4, 1990; paragraph (e) amended July 14, 1992 to be effective September 1, 1992; paragraphs (a), (c), (e), (f), and (g) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended June 28, 1996 to be effective June 28, 1996; paragraph (d) amended June 28, 1996 to be effective September 1, 1996; paragraph (e) amended July 10, 1998 to be effective September 1, 1998; paragraphs (a), (e), and (g) amended July 5, 2000 to be effective September 5, 2000; paragraph (d) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraphs (a) and (d) amended, and new paragraph (h) adopted July 27, 2006 to be effective September 1, 2006; paragraphs (a) and (f) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) redesignated as subparagraph (c)(2), new paragraph (c) caption adopted, new subparagraph (c)(1) caption and text adopted, and paragraph (g) amended July 23, 2010 to be effective September 1, 2010; paragraph (a) amended, former paragraphs (b) through (h) redesignated as paragraphs (c) through (i), new paragraph (b) adopted, redesignated paragraph (h) amended, and caption added to redesignated paragraph (i) July 19, 2012 to be effective September 4, 2012; paragraph (i) amended July 22, 2014 to be effective September 1, 2014; paragraph (c) amended July 27, 2015 to be effective September 1, 2015; paragraph (e) amended July 31, 2020 to be effective September 1, 2020; paragraph (h) amended to be effective .

J. Proposed Amendments to *Rule* 4:72-1 – Actions for Change of Name - Complaint and *Rule* 4:72-3 – Actions for Change of Name – Notice of Application

The AOC Civil Practice and Family Practice Divisions suggest amending *Rules* 4:72-1 and -3 to provide clarity on service of notice of name change applications. The proposed amendments reorganize the rules such that the notice requirements for name change matters are exclusively contained in *Rule* 4:72-3 (Notice of Application).

The Committee recommended proposed rule amendments.

The proposed amendments to *Rules* 4:72-1 and 4:72-3 follow.

4:72-1. Complaint

(a) Change of Name for Adult.

(1) Generally. An action for change of name of an adult shall be filed and heard in the Law Division, Civil Part. The action shall be commenced by filing a verified complaint which shall contain the date of birth of the plaintiff and shall state: (1) that the application is not made with the intent to avoid creditors or to obstruct criminal prosecution or for other fraudulent purposes; (2) whether plaintiff has ever been convicted of a crime and, if so, the nature of the crime and the sentence imposed; (3) whether any criminal charges are pending against plaintiff and, if so, such detail regarding the charges as is reasonably necessary to enable the Division of Criminal Justice or the appropriate county prosecutor to identify the matter. [If criminal charges are pending, at least 20 days prior to the hearing a copy of the complaint shall be served on the Director of the Division of Criminal Justice to the attention of the Records and Identification Section if the charges were initiated by the Division of Criminal Justice, or otherwise on the appropriate county prosecutor. Service on the Division of Criminal Justice or on a county prosecutor shall be accompanied by a request that the official make such response as may be deemed appropriate.]

(2) …no change.

(b) Change of Name for Minor. An action for the change of name of a minor shall be filed and heard in the Chancery Division, Family Part. The action

shall be commenced by filing a verified complaint by a parent or guardian on behalf of the minor which shall contain the date of birth of the minor and shall state: (1) that the application is not made with the intent to avoid creditors or to obstruct criminal prosecution or for other fraudulent purposes; (2) whether the minor has ever been adjudicated delinquent or convicted of a crime and, if so, the nature of the crime and the disposition/sentence imposed; (3) whether any criminal charges are pending against the minor and, if so, such detail regarding the charges as is reasonably necessary to enable the Division of Criminal Justice or the appropriate county prosecutor to identify the matter. [If criminal charges are pending, at least 20 days prior to the hearing a copy of the complaint shall be served on the Director of the Division of Criminal Justice to the attention of the Records and Identification Section if the charges were initiated by the Division of Criminal Justice, or otherwise on the appropriate county prosecutor. Service on the Division of Criminal Justice or a county prosecutor shall be accompanied by a request that the official make such response as may be deemed appropriate.] Absent extraordinary circumstances, where the parent or guardian and the minor consent to the change of name, the court shall conduct the hearing in a summary fashion for the limited purpose of creating a record and confirming the information set forth in the verified complaint.

(c) …no change.

Note: Source – *R.R.* 4:91-1. Amended July 11, 1979 to be effective September 10, 1979; amended July 15, 1982 to be effective September 13, 1982; amended November 1, 1985 to be effective January 2, 1986; amended July 13, 1994 to be effective September 1, 1994; former text of rule designated as paragraph (a) and amended, paragraph (a) caption added, and new paragraph (b) adopted July 9, 2008 to be effective September 1, 2008; paragraph (a) caption amended, paragraph (a) text amended and designated as subparagraph (a)(1) with new caption, new subparagraph (a)(2) caption and text adopted, paragraph (b) caption and text amended, and new paragraph (c) caption and text adopted July 27, 2018 to be effective September 1, 2018; paragraphs (a)(1) and (b) amended to be effective .

4:72-3. Notice of Application

The court by order shall fix a date for hearing not less than 30 days after the date of the order. In all name change actions, [N]notice of application must be served by certified and regular mail, at least 20 days prior to the hearing to the Director of the Division of Criminal Justice to the attention of the Records and Identification Section. If criminal charges initiated by a county prosecutor are pending, a copy of the complaint shall also be served on the county prosecutor by certified and regular mail at least 20 days prior to the hearing. Service on the Division of Criminal Justice or a county prosecutor shall be accompanied by a request that the official make such response as may be deemed appropriate. The court shall also require, in the case of a minor plaintiff, that notice be served by registered or certified mail, return receipt requested, upon a non-party parent at that parent's last known address.

Note: Source – *R.R.* 4:91-3. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended August 1, 2016 to be effective September 1, 2016; amended November 17, 2020 to be effective immediately; amended _____ to be effective _____.

K. Proposed Amendments to Appendix II – Form Interrogatories

A Committee member proposes several changes to Appendix II – Form Interrogatories to achieve, in part, consistency in the questions posed to plaintiffs and defendants and clarity in the wording of the forms. The Discovery Subcommittee reviewed this issue and issued a report recommending changes to Appendix II. *See* Attachment 3. Additional revisions for consistency were made following the submission of the Subcommittee report.

The proposed changes to the Form Interrogatories are summarized as follows:

- Form Interrogatories A:
    1. Add Form C interrogatory #5 to Form A interrogatories as #25 for consistency. As a result of the insertion, the present Form A interrogatories #25 to 37 will be renumbered to #26 to 38.
    2. Add one question seeking information the about consumption of alcoholic beverages, drugs, or medication prior to the subject incident and a second additional question seeks information about employment with a Transportation Network Company as interrogatories #39 and #40.

These proposed interrogatories seek to identify pertinent information and potential third-party defendants early in the litigation to avoid late amendments and redeposition of parties.

3. Add “clarification wording” to Form A interrogatories #2 and #16. Specifically, the Subcommittee recommends replacing references to “accident or occurrence” with “your version of the alleged occurrence, incident, accident, or act of negligence asserted” in Form A interrogatories #2 and #16

- Form Interrogatories C:

1. Add “clarification wording” to Form C interrogatories #2 and #8. Specifically, the Subcommittee recommends replacing references to “accident or occurrence” with “your version of the alleged occurrence, incident, accident, or act of negligence asserted.”
2. Add “clarification wording” to Form C interrogatory #5. Specifically, the Subcommittee recommends amending this interrogatory to include statements about the subject matter of the litigation and not just statements about the litigation itself.
3. Add Form A interrogatory #20 to the Form C interrogatories as #16 and add Form A interrogatory #21 to Form C interrogatories as #17 for consistency.

- Form Interrogatories C(1)

    1. Add one question seeking information the about consumption of alcoholic beverages, drugs, or medication prior to the subject incident and a second additional question seeks information about employment with a Transportation Network Company as interrogatories #21 and #22.

- Form Interrogatories C(3)

    1. The Subcommittee recommends changing the heading to clarify that all medical malpractice defendants (physician and non-physician) are obligated to respond to these Interrogatories.

    2. Add "clarification wording" to interrogatories #1, #2, and #14. Specifically, the Subcommittee recommends replacing references to "accident or occurrence" with "your version of the alleged occurrence, incident, accident, or act of negligence asserted."

The Committee approves of the recommended changes to the Form Interrogatories.

The proposed amendments to Appendix II – Form Interrogatories follow.

APPENDIX II. - INTERROGATORY FORMS

Form A. Uniform Interrogatories to be Answered by Plaintiff in All Personal Injury Cases (Except Medical Malpractice Cases): Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with R. 4:17-1(b)(3). Information provided in response to these interrogatories shall not be used for any improper purpose. Use of such information shall be in accordance with the Rules of Court, including but not limited to R. 1:38, and the Rules of Professional Conduct.

(Caption)

1. …no change.

2. Describe [in detail] your version of the alleged occurrence, incident, accident or [occurrence] act of negligence asserted in detail setting forth the date, location, time and weather.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

16. State the names and addresses of all eyewitnesses to your version of the [accident or] alleged occurrence, incident, accident, or act of negligence asserted, their relationship to you and their interest in this lawsuit.

17. …no change.

18. …no change.

19. …no change.

20. …no change.

21. …no change.

22. If you claim that the violation of any statute, rule, regulation or ordinance is a factor in this litigation, state the exact title and section.

23. …no change.

24. …no change.

25. State (a) the name and address of any person who has made a statement regarding this lawsuit or the subject matter of this lawsuit; (b) whether the statement was oral or in writing; (c) the date the statement was made; (d) the name and address of the person to whom the statement was made; (e) the name and address of each person present when the statement was made; and (f) the name and address of each person who has knowledge of the statement.

Unless subject to a claim of privilege, which must be specified: (g) attach a copy of the statement, if it is in writing; (h) if the statement was oral, state whether a recording was made and, if so, set forth the nature of the recording and the name and address of the person who has custody of it; and (i) if the statement was oral and no recording was made, provide a detailed summary of its contents.

TO BE ANSWERED ONLY IN AUTOMOBILE ACCIDENT CASES

[25] 26. State on what street, highway, road or other place (designate which) and in what general direction (north, south, east or west) your vehicle was

proceeding immediately prior to the collision. (You may include a sketch for greater clarity.)

[26] 27. With respect to fixed objects at the location of the collision, state as nearly as possible the point of impact. If you included a sketch, place an X thereon to denote the point of impact.

(Note: The term "point of impact" as used in this and other questions has reference to the exact point on the street, highway, road or other place where the vehicles collided or where any pedestrian was struck.)

[27] 28. State whether there were any traffic control devices, signs or police officers at or near the place of the collision. If there were, describe them (i.e., traffic lights, stop sign, police officers, etc.) and state the exact location of each.

[28] 29. If you contend that there was a malfunction of a motor vehicle or equipment, state: (a) make, model and year of the motor vehicle and whether or not that vehicle was equipped with power brakes and steering; (b) the nature of the malfunction; (c) the date the motor vehicle was purchased and the name and address of the person from whom the motor vehicle was purchased; (d) the date that that portion of the motor vehicle in which the malfunction occurred was last inspected and the name and address of the person inspecting same; (e) the last date prior to the accident that that portion of the motor vehicle was repaired or replaced, the nature and extent of the repairs, the name and address of the person repairing or replacing same; (f) if the motor vehicle was repaired after the accident, state the name and address of the person repairing same and the nature of the repairs; and (g) attach a copy of any repair bills.

[29] 30. If the collision occurred at an uncontrolled intersection, state: (a) which vehicle entered the intersection first; (b) whether your vehicle came to a full stop before entering the intersection; and (c) if your vehicle did not come to a full stop before entering the intersection, state the speed of your vehicle when it entered the intersection.

[30] 31. For each other vehicle or pedestrian collided with, state, at the time you first observed the other vehicle or pedestrian, (a) your speed and (b) the speed of the other vehicle or the movement, if any, of the pedestrian, and the distance in feet between (c) the front of your vehicle and the point of impact; (d) the front of the other vehicle or pedestrian and the point of impact, and (e) the front of your vehicle and the other vehicle or pedestrian.

[31] 32. State where each vehicle came to rest after the impact. Include the distance in terms of feet from the point of impact to the point where each vehicle came to rest.

[32] 33. For each other vehicle or pedestrian involved, state (a) which part of your vehicle; and (b) which part of the other vehicle or pedestrian came into contact.

[33] 34. State the following facts with respect to the collision: (a) time; (b) condition of weather; (c) condition of visibility; and (d) condition of roadway.

[34] 35. For each other vehicle or pedestrian involved, state whether you observed the vehicle or pedestrian prior to the accident? YES (__) or NO (__). If the answer is "yes," set forth the time that elapsed from the time you first saw the vehicle or pedestrian until the impact occurred.

[35] 36. At the time of the impact, state the speeds of all vehicles involved in the collision.

[36] 37. Were you charged with a motor vehicle violation as a result of the collision? YES (___) or NO (___). If the answer is "yes", state: (a) charge; (b) plea; and (c) disposition.

[37] 38. Do you have insurance coverage and/or PIP benefits under an applicable policy or policies of automobile insurance? As to each such policy provide the name and address of the insurance carrier, policy number, the named insured and attach a copy of the declaration sheet.

39. If the Plaintiff(s) or any occupant of the vehicle consumed any alcoholic beverage or took any drugs or medication within twenty-four (24) hours before the subject incident, state what was consumed.

40. If at the time of the accident you were in the course of your employment, logged on to a Transportation Network Company's digital network or engaged in a prearranged ride for a Transportation Network Company (TNC), state the name and address of your employer or TNC.

If you are making a claim for property damage to a motor vehicle, provide answers to the uniform interrogatories contained in Form B, questions 1 through 18.

FOR PRODUCT LIABILITY CASES (OTHER THAN PHARMACEUTICAL AND TOXIC TORT CASES), ALSO ANSWER A(2) CERTIFICATION

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added Effective 09/01/2016, July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 23 and certification amended July 28, 2004 to be effective September 1, 2004; caption and final instruction amended July 23, 2010 to be effective September 1, 2010; interrogatory 1 amended July 19, 2012 to be effective September 4, 2012; former number 25 renumbered as 37, and new numbers 25 through 36 added August 1, 2016 to become effective September 1, 2016; introductory paragraph amended July 31, 2020 to be effective September 1, 2020; interrogatory numbers 2 and 16 amended, new interrogatory number 25 added, interrogatory numbers 26 through 37 renumbered and new interrogatory numbers 39 and 40 added to be effective .

Appendix II. - Interrogatory Forms
Form C. Uniform Interrogatories to be Answered by Defendant in All Personal Injury Cases: Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with *R*. 4:17-1(b)(3).

(Caption)

1. …no change.

2. Describe [the] your version of the alleged occurrence, incident, accident, or act of negligence asserted [or occurrence] in detail, setting forth the date, location, time and weather.

3. …no change.

4. …no change.

5. State (a) the name and address of any person who has made a statement regarding this lawsuit or the subject matter of this lawsuit; (b) whether the statement was oral or in writing; (c) the date the statement was made; (d) the name and address of the person to whom the statement was made; (e) the name and address of each person present when the statement was made; and (f) the name and address of each person who has knowledge of the statement.

Unless subject to a claim of privilege, which must be specified: (g) attach a copy of the statement, if it is in writing; (h) if the statement was oral, state whether a recording was made and, if so, set forth the nature of the recording and the name and address of the person who has custody of it; and (i) if the statement was oral and no recording was made, provide a detailed summary of its contents.

6. …no change.

7. …no change.

8. State the names and addresses of all eyewitnesses to your version of the alleged occurrence, incident, accident, or act of negligence asserted [occurrence], their relationship to you and their interest in this lawsuit.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change

15. …no change.

16. If you or your representative and the plaintiff have had any oral communication concerning the subject matter of this lawsuit, state: (a) the date of the communication; (b) the name and address of each participant; (c) the name and address of each person present at the time of such communication; (d) where such communication took place; and (e) a summary of what was said by each party participating in the communication.

17. If you have obtained a statement from any person not a party to this action, state: (a) the name and present address of the person who gave the statement; (b) whether the statement was oral or in writing and if in writing, attach a copy; (c) the date the statement was obtained; (d) if such statement was oral, whether a recording was made, and if so, the nature of the recording and the name and present address of the person who has custody of it; (e) if the statement was written, whether it was signed by the person making it; (f) the name and address of the person who obtained the statement; and (g) if the statement was oral, a detailed summary of its contents.

For Automobile Cases also answer Form C(1), for Fall down Cases also answer Form C(2),
for Medical Malpractice Cases also answer Form C(3)
for Product Liability Cases (other than Pharmaceutical and Toxic Tort Cases) also answer Form C(4)

Certification

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: Amended July 17, 1975 to be effective September 8, 1975; entire text deleted and new text added July 13, 1994 to be effective September 1, 1994; entire text deleted and new text added June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 10 and certification amended July 28, 2004 to be effective September 1, 2004; interrogatory 3 amended July 27, 2006 to be effective September 1, 2006; interrogatory 2 amended July 19, 2012 to be effective September 4, 2012; interrogatory numbers 2., 5., and 8. amended and new interrogatory numbers 16. and 17 added to be effective .

Form C(1). Uniform Interrogatories to be Answered by Defendant in Automobile Accident Cases Only: Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with R. 4:17-1(b)(3).

(Caption)

1. …no change.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

15. …no change.

16. …no change.

17. …no change.

18. …no change.

19. …no change.

20. …no change.

21. If the Defendant(s) or any occupant of the vehicle consumed any alcoholic beverage or took any drugs or medication within twenty-four (24) hours before the subject incident, state what was consumed.

22. If at the time of the accident you were in the course of your employment, logged on to a Transportation Network Company's digital network or engaged in a prearranged ride for a Transportation Network Company (TNC), state the name and address of your employer or TNC.

Certification

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; certification amended July 28, 2004 to be effective September 1, 2004; interrogatories 9, 13, 15, and 18 amended July 22, 2014 to be effective September 1, 2014; new interrogatory numbers 21. and 22. added _____ to be effective _____.

Form C(3). Uniform Interrogatories to be Answered by Defendant(s) [Physicians in Medical Malpractice Cases] in all Professional Malpractice Cases Involving Healthcare Providers Only: Superior Court

All questions must be answered unless the court otherwise orders or unless a claim of privilege or protective order is made in accordance with R. 4:17-1(b)(3).

(Caption)

1. Identify and describe the appearance of each and every person who was present in the vicinity of [the] your version of the alleged occurrence, incident, accident, or act of negligence asserted in this action, giving the name, address and occupation of each such person and stating your relationship to each.

2. …no change.

3. …no change.

4. …no change.

5. …no change.

6. …no change.

7. …no change.

8. …no change.

9. …no change.

10. …no change.

11. …no change.

12. …no change.

13. …no change.

14. …no change.

Certification

I hereby certify that the foregoing answers to interrogatories are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

I hereby certify that the copies of the reports annexed hereto provided by either treating physicians or proposed expert witnesses are exact copies of the entire report or reports provided by them; that the existence of other reports of said doctors or experts are unknown to me, and if such become later known or available, I shall serve them promptly on the propounding party.

Note: New form interrogatory adopted June 28, 1996 to be effective September 1, 1996; new introductory paragraph added July 5, 2000 to be effective September 5, 2000; interrogatory 15(c) and certification amended July 28, 2004 to be effective September 1, 2004; interrogatory 15(c) amended July 27, 2006 to be effective September 1, 2006; interrogatory 13 amended July 19, 2012 to be effective September 4, 2012; title and interrogatory number 1. amended to be effective .

II. RULES REJECTED

A. Proposed Amendments to *Rule* 1:13-2(a) – Proceedings by Indigents – Waiver of Fees

An attorney suggests removing the first sentence of *Rule* 1:13-2(a), which allows for the waiver of court filing fees. Alternatively, he suggests requiring community service as a condition of obtaining a fee waiver or permitting fee waivers for all parties when one party obtains a waiver.

The Committee unanimously recommended against taking any action on this proposal. Although there are individuals who use the civil litigation process to harass others, there is a frivolous pleading rule, and statute when a non-attorney is involved, to address such conduct. Furthermore, issues regarding proof of indigency requirements for fee waivers already was considered a few years ago, by a separate committee, including members of this Committee. That committee's work resulted in Administrative Directive #03-17 which addresses procedures for indigent applications for fee waivers requested pursuant to *Rule* 1:13-2.

B. Proposed Amendments to *Rule* 1:13-7 – Dismissal of Civil Cases for Lack of Prosecution

In *Estate of Semprevivo v. Lahham*, 468 *N.J. Super*. 1, 10 (App. Div. 2021), the Appellate Division considered the application and limitations of *Rule* 1:13-7 and addressed (1) whether the good cause or exceptional circumstances standard applies for reinstatement of the complaint in a multi-defendant case, when no defendants have appeared in the case and participated in discovery; and (2) whether the rule empowers the trial court to dismiss a complaint with prejudice in response to a motion filed by the nondelinquent party.

The Appellate Division concluded in *Estate of Semprevivo* that the trial court misapplied the exceptional circumstances standard under *Rule* 1:13-7 to the facts presented but that the good cause standard applied and had been satisfied. Accordingly, the Appellate Division held that the trial court mistakenly exercised its discretion by denying plaintiffs' motion to reinstate their complaint. The Appellate Division also held that *Rule* 1:13-7 neither empowers a trial court to dismiss a cause of action with prejudice nor authorizes a party in a case to affirmatively seek such a drastic sanction as a form of relief.

The Committee considered whether an overhaul of *Rule* 1:13-7 was necessary based on the decision in *Estate of Semprevivo*. After review and discussion of the opinion, the Committee concluded that the opinion provided

adequate guidance on how to treat the issues raised therein and thus declined to recommend amendments to *Rule* 1:13-7.

C. Proposed Amendments to *Rule* 1:21-1 – Who May Practice; Attorney Access and Availability; Appearance in Court

An attorney who is the Chief Complex Claims Litigation Officer of NJ PURE and the Chief Operating Officer of CURE Auto Insurance suggests a new subparagraph be added to *Rule* 1:21-1(a) requiring attorneys defending medical malpractice actions to maintain minimum malpractice insurance coverage and disclose their coverage to their clients.

In 2014, a Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance was created for the purpose of addressing some of these issues. In 2017, the Ad Hoc Committee submitted its report and recommendations to the Court. The Ad Hoc Committee recommended that the Court not adopt a requirement of mandatory malpractice coverage for all attorneys engaged in the private practice of law. The Court agreed with the Ad Hoc Committee and declined to impose a requirement of mandatory malpractice coverage for all attorneys engaged in the private practice of law. The Ad Hoc Committee also recommended that attorneys without malpractice coverage be required to affirmatively disclose their lack of coverage to their clients. The Court has not yet acted on this recommendation and noted it would be revisited at a later date.

Although insurance companies may require minimum coverages of their policy holders, the Committee did not believe that this is something that should be

incorporated into the Rules of Court. The Committee declined to adopt this proposal.

D. Proposed Amendments to *Rule* 1:36-3 – Unpublished Opinions

The Appellate Division proposes amending *Rule* 1:36-3, which sets forth how the briefs of parties and the decisions of the courts should treat unpublished opinions. Initially, the Appellate Division suggested amending this rule so that the only unpublished decisions that the parties may cite are those that fall within the limited exception that now exists for when an unpublished decision may be cited by a court, *i.e.*, when required by res judicata, collateral estoppel, and so on. The Appellate Division noted that some judges find briefs that take up space with citations and discussions about unpublished opinions detract from what a court must properly consider to decide an appeal.

The Appellate Division also came to recognize that the problem with the present rule is that parties often will rely extensively in their legal arguments on one or more unpublished opinions, allowing those nonprecedential decisions to not only dominate the legal discussion but actually supplant the parties' obligation to provide the court with a discussion of those decisions that the court is authorized to cite in its opinion. In this regard, it was pointed out that the Appellate Division normally issues 2,500 or more nonprecedential opinions each year and that trial courts issue countless more nonprecedential decisions.

The Appellate Division's initial proposal was rejected by the Committee in a close vote. Following that, the Appellate Division revised its proposal. As an alternative to its initial proposal, the Appellate Division suggested amending the

current rule to provide that unpublished opinions that do not fall within a recognized exception for when courts can cite an unpublished opinion may be cited by parties in merits or motion briefs, but only in footnotes. The footnote provision was extended to allow counsel to identify unpublished opinions, which the court would be free to consult or not consult in its decisions.

Committee members were closely divided on this topic. Those disagreeing with the Appellate Division's proposal observed that some unpublished opinions may provide a template for analysis and a roadmap, for example, in cases of first impression, may contain helpful explanations of legislative history or address cases with specific facts that are helpful in other contexts, and may illuminate the Appellate Division's analysis in particular circumstances. While some members observed that parties create additional work for judges by failing to cite or adequately address controlling precedential decisions, the Appellate Division's proposals were, nevertheless, narrowly rejected by the Committee.

E. Proposed Amendments to *Rule* 2:7-1 – Relief from Filing Fees; Deposits for Costs

The Rachel Coalition suggested amending *Rule* 2:7-1 so as to require the waiver of transcript fees for indigent plaintiffs who appeal a denial of a final restraining order under the Prevention of Domestic Violence Act. The Committee referred this proposal to the Supreme Court Family Practice Committee.

The Family Practice Committee concluded that there should be no rule change due to concerns as to who would bear the cost of the transcripts. There is also no existing statutory authority to provide transcripts in such cases at public expense. Further, the Judiciary cannot presumptively waive the cost of transcript for one party over another in such a Family Court matter, absent statutory authorizations and appropriations. The Committee agreed with the Family Practice Committee's recommendation and declined to recommend amendments to *Rule* 2:7-1.

F. Proposed Amendments to *Rule* 4:14-1 – When Depositions May Be Taken

An attorney representing the Certified Court Reporters Association of New Jersey ("CCRA") suggests amendments to *Rule* 4:14-1 in an effort to safeguard the Certified Court Reporter licensing process. The Conference of Civil Presiding Judges reviewed this recommendation and found no compelling reason to amend the rule. The Committee agreed and concluded there is no demonstrated need to amend the Rule at this time.

G. Proposed Amendments to *Rule* 4:14-9 – Audiovisual Recording of Depositions and Proposed Amendments to *Rule* 4:16-1 – Use of Depositions

An officer for New Jersey Physicians United Reciprocal Exchange (NJ PURE) and Citizens United Reciprocal Exchange (CURE) suggests revising *Rule* 4:14-9 to require that the "taking of an audiovisually-recorded deposition of a treating physician or expert witness shall preclude any party from producing the witness at trial." He also suggests adding language to *Rule* 4:16-1 that "no witness who has been deemed unavailable for the purpose of this Rule may subsequently testify in person in the same proceeding unless such witness is called for the purpose of rebuttal."

The officer submits that the proposed amendments will address the perceived "…prejudicial imbalance of allowing a witness to testify ahead of trial and out of order, only to have that witness appear at trial to testify live." He contends that attorneys should not be allowed to "suddenly 'un-declare' a witness to be unavailable" and have the witness, who already has testified and knows what to expect at trial, testify again live.

The Committee concluded that no rule amendments are necessary at this time, noting that counsel may examine a witness live based on a previously taken video deposition. Thus, the balance is maintained when a *de bene esse* deposition

of a witness is taken ahead of trial but later not used because the same witness testifies live at trial.

H. Proposed Amendments re: Technology and Social Media and *Rule* 4:4-4 – Summons; Personal Service; In Personam Jurisdiction

During the 2018-2020 Rules Cycle, the Administrative Director of the Courts requested several Supreme Court Committees consider whether to recommend amendments to service rules to account for technological and social media advances.

The Committee Chair formed the Technology and Social Media Subcommittee, to consider whether social media may be used to serve process and to what extent it may be used for service of discovery. The Subcommittee was comprised of members of this Committee, the Supreme Family Practice, Special Civil Part Practice and Tax Committees.

After a comprehensive review of all state, federal, and international court rules relevant to social media service of process and motion filings, the Subcommittee recommended that *Rule* 4:4-4 not be revised, finding that the current rule functions well and is sufficiently broad and flexible enough to allow service by social media without having to include specific language to that effect. The Subcommittee further noted that, as written, the rule permits service as provided by court order consistent with due process. A copy of the Subcommittee's report is attached hereto as Attachment 4.

The Supreme Court Family Practice, Special Civil Part Practice and Tax Committees have endorsed the Subcommittee's recommendation. The Committee also endorsed the Subcommittee's recommendation and thus declined to recommend amendments to *Rule* 4:4-4.

I. Proposed Amendments to *Rule* 6:2-3(d) – Service by Mail Program

By letter dated August 7, 2020, the Administrative Director of the Courts directed the Committee to consider whether some amendment to the current rules permitting service of process by regular and certified mail is needed. The Administrative Director referenced a letter raising concerns about service by mail he received from Philip Geron, President of Guaranteed Subpoena Service, Inc. He further asked the Committee to consider whether "to the extent that USPS mail delivery may not be consistently reliable in all areas of New Jersey, continued reliance on service by mail would be misplaced and potentially incompatible with our Judiciary-wide commitment to access and fairness."

The Chair formed the Service by Mail Subcommittee to address these issues. The Subcommittee examined whether systematic bias is created through the service by mail rule under circumstances in which process may be received differently depending upon the socioeconomic, racial, and ethnic demographics of an area. The Subcommittee prepared a report summarizing its findings. See Attachment 5.

The Subcommittee reached a consensus – but not a unanimous one – that service by mail is concerning. Specifically, there is substantial anecdotal evidence from individuals serving indigent and low-income populations that mail simply is not getting through to their clients. However, the Subcommittee suggested that

additional data regarding default rates and racial/ethnic/socio-economic distribution of defaulted defendants be developed to move forward with a proposal for a rule change.

The Committee agreed with the Subcommittee's recommendation for future study and does not recommend any rule change at this time in the absence of such a study.

J. Proposed Amendments regarding Contention Interrogatories

An amendment to Local Federal Court Rule 33.1 defers "contention interrogatories" until near the end of the discovery period. The Committee considered whether a similar initiative should be considered for state court complex cases. The Committee determined that there was no need to consider this initiative because contention interrogatories ordinarily can be posed through Requests for Admission or the same topics can be explored at depositions.

III. RULES HELD FOR CONSIDERATION

A. Proposed Amendments to *Rule* 4:23-1 – Motion for Order Compelling Discovery

A member requests that the Committee consider adding a mandatory sanction of filing fees, at a minimum, for motions to compel discovery. The member contends that requests for discovery are often ignored, thereby requiring the time and expense of repeated requests and ultimately motion practice for discovery responses that are required under the Court Rules. The Committee Chair determined to hold this issue, which was raised in the past by both plaintiff and defense attorneys and referred to the Discovery Subcommittee, for further discussion during the next rules cycle.

B. Proposed new rule regarding FOIA and OPRA requests

During the 2014-2016 rules cycle, the Committee recommended amending *Rule* 4:18-1 to require that a party requesting records under the Freedom of Information Act (FOIA) and the New Jersey Open Public Records Act (OPRA) to provide a copy of the request to all counsel. The Discovery Subcommittee concluded that notice should be given to allow parties to assert that the records are confidential or privileged. Most of the Committee agreed with the recommendation but suggested that the proposed language clarify that the request must be relevant to pending litigation. This 2016 recommendation was met with opposition from some members of the bar and ultimately rejected by the Court.

Subsequently, the Committee was asked whether a rule governing OPRA or FOIA requests in pending actions is necessary. An attorney suggested a new rule, similar to *Rule* 4:14-7(c) regarding subpoenas for depositions, that would require parties to provide adverse counsel with any related OPRA requests made upon public agencies and responses thereto.

The Chair held this item for further consideration in the next rules cycle to afford the Office of the Attorney General sufficient time to weigh in on the proposal.

C. Proposed Amendments to Rules Related to Discovery

The President of the New Jersey Civil Justice Institute (the Institute) submitted several proposed amendments to the Court Rules, which the Institute submits will align New Jersey's civil discovery rules more closely with the Federal Rules of Civil Procedure, and also, proposed other amendments the Institute contends will improve the process of civil discovery in the state courts. Suggested amendments address subjects including, but not limited to, electronically stored information ("ESI") and its preservation and production, proportionality, and litigation financing agreements.

With respect to proportionality, members commented that this topic was already addressed in previous Rules Cycles in discussions about the Duke Conference and through other methods such as differentiated track assignments, including the Complex Business Litigation Program. Other members suggested examining ESI further. The Chair determined to hold this item for further consideration of these issues.

IV. RULE AMENDMENTS WITHDRAWN

A. Proposed Amendments to *Rule* 4:42-8 – Costs

This item was held over from the last rules cycle. A Committee member, on behalf of the New Jersey Creditors Bar Association, had suggested amending *Rule* 4:42-8 to clarify what costs are to be taxed because there are instances when certain costs do not appear on the notice from the Special Civil Part Clerk's Office and the Law Division – Civil Part taxed bill of costs. According to the member, many such instances relate to motions filed pre-judgment, such as summary judgment and discovery motions.

Committee members discussed what costs are permissible to be taxed under *Rules* 1:43 and 4:42-8 and debated whether a party must prevail to be entitled to certain costs and fees. Committee members could not agree on whether a prevailing party should receive the costs for motions that have been denied, and thus, the Committee sought more research regarding fees for prevailing parties.

Subsequently, the Committee member who submitted the rule proposed amendments withdrew this proposal.

B. Proposed Amendments to *Rule* 4:42-11 – Interest; Rate on Judgments; in Tort Actions

This item was held over from the last rules cycle. A Committee member had suggested amending *Rule* 4:42-11 to address the judgment interest rate when a foreign judgment has been domesticated in New Jersey. He noted that the judgment interest rate of the forwarding state is usually higher than the rate in New Jersey such that a domesticated judgment may not be fully satisfied. The Committee member suggested revising the Rule to require that interest on judgments from foreign jurisdictions that are domesticated in the State of New Jersey shall be calculated at the rate provided for in the foreign jurisdiction or the rates in effect in the State of New Jersey, whichever one is greater.

Committee members discussed whether full faith and credit should be accorded to the interest rates and damages embodied in foreign judgments under *Rule* 4:101-1 and sought a comprehensive internal review of the relevant rules, statutes, processes, and procedures before moving forward.

Subsequently, the Committee member who submitted the proposed amendments withdrew the proposal.

V. MISCELLANEOUS

A. *Rule* 2:12A-1 – Responding to Questions of Law

Rule 2:12A-1 states that the Supreme Court "may answer a question of law certified to it by the United States Court of Appeals for the Third Circuit, if the answer may be determinative of an issue in litigation pending in the Third Circuit and there is no controlling appellate decision, constitutional provision, or statute in this State."

A recent editorial in the *New Jersey Law Journal* (NJLJ), May 17, 2021, edition, suggests that the time has come to amend this rule to allow for the Third Circuit's certification of an issue if the controlling appellate decision is of dubious value. The NJLJ gives an example in which the controlling appellate decision was an eighty-year-old decision of the Court of Errors and Appeals.

The Appellate Division suggests that if the there is interest in following the NJLJ's approach, it might be a simple addition of the phrase "or if any controlling appellate decision is of dubious value" to the rule.

The Appellate Division and Committee take no position on this suggested approach but instead identify the issue for the Court's attention.

Respectfully submitted,

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Hon. Michael A. Toto, A.J.S.C.
Suvarna Sampale, Esq., Committee Staff

Dated: January 2022

LMJG

ATTACHMENT 1

Report of the Discovery Subcommittee on the request for a revision of R 4:22-1 to allow requests to include not only “matters of fact” but also to allow requests to include “matters of opinion”.

(current) **New Jersey Rule: 4:22-1 - Request for Admission**, “A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters of fact within the scope of R. 4:10-2 set forth in the request, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.”

(proposed) **New Jersey Rule: 4:22-1 - Request for Admission**, “A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters of fact **or opinion** within the scope of R. 4:10-2 set forth in the request, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.”

Comment:

Not only is it often difficult as a practical matter to separate “fact” from “opinion,” but an admission on a matter of opinion can also facilitate proof or narrow the issues or both, when there is no legitimate basis for the defendant to deny the request. There is no logical reason why requests to admit should be limited to purely facts, when there are also issues that could be narrowed by a request to admit opinions.

For example, an admission that *“an employee acted in the scope of his employment”, or that* “*the premises on which said accident occurred were owned by the defendant”* can remove an issue from the trial. Yet, RFAs directed to these issues are routinely objected to on the basis of the argument that they seek opinions rather than simply facts.

However, there are a large number of issues which could be narrowed by allowing requests to admit mixed fact and opinion such as "*an employee acted in the scope of his employment" or "that the premises on which said accident occurred were occupied owned by the defendant".* Requests to admit could also be useful when addressed to opinions that the other party is not in a position to refute; such as medical bills being reasonable and necessary.

The more significant issue is the divide between a request for admission of an *opinion* as opposed to a *conclusion*. Case law has made it clear that admissions as to opinions of law and fact are acceptable, but conclusions about the law and fact are not. So long as the opinion is something that is not a legal conclusion then admission of the opinion is appropriate. We considered trying to craft the Rule to draw that distinction, but would prefer to leave that to caselaw and judicial interpretation. We borrow from Federal caselaw interpreting Rule 36, which is identical to the language we propose.

Courts permit opinions that apply law to the facts but not pure conclusions of law. Rule 36 permits requests for admission to seek opinions about facts or the application of facts to the law but not legal conclusions. *See Lumpkin v. Meskill*, 64 F.R.D. 673 (D. Conn. 1974), *Audiotext Comm. Network, Inc. v. US Telecom, Inc.,* 18995 WL 625744, Civ.A.No. 94-2395-GTV (D.C. KS, Oct. 5, 1995). A few courts have directly addressed the distinction between opinions and conclusions of law. The cases that have addressed the issue provide important insight.

In *Lumpkin,* the defendant objected to requests for admission pursuant to Rule 36, asking it to admit or deny the accuracy of a statistical data summary prepared by the plaintiff. 64 F.R.D. at 675. During a hearing on plaintiff's motion to compel responses to the requests for admission, the defendant was once again asked about his opinion on the statistical data summary. The defendant testified "that its opinion was that in the 'abstract,' such sampling techniques, and [supporting affidavit], were valid methods for arriving at an accurate approximation of the [entire data set]." *Id.* at 678. The court found that this statement was a proper opinion pursuant to Rule 36.

Audiotext Communications Network v. Telecom, Inc. also addressed the issue of permissible opinions in connection with requests for admission. 18995 WL 625744 at *1. The plaintiff objected to requests for admission prepared by the defendant on several grounds, including that the requests sought legal conclusions. *Id.* at *6. The court disagreed. *Id.* In reaching its decision, the court stated:

> The requests appear to require no more than the application of law to the facts of the case…Opinions on abstract propositions of law are still objectionable, but requests seeking admissions of the truth of statements applying law to the facts of the case are specifically sanctioned [citations omitted]. Certain requests here at issue seek admissions of matters involving the application of law to the facts. The court finds no request which seeks an admission of a matter of law unrelated to the facts of the

> case. The court, therefore, overrules the objections that certain requests seek legal conclusions.

Thus, while the Federal rule only states that an RFA can be addressed to fact or opinion, caselaw does provide guidance into the permissible scope of the request to admit opinions.

Requests for admission under Rule 36 are also not objectionable because they are directed to issues within the purview of the jury. Courts allow requests for admission to seek opinions on issues that are within the purview of the jury. *See Audiotext Comm Network, Inc. v. US Telecom, Inc.,* 18995 WL 625744, Civ.A.No. 94-2395-GTV (D.C. KS Oct. 5, 1995)("'It is not a proper ground for objection that the matter presents a genuine issue for trial the party must admit or deny it or state the reason why it cannot be admitted or denied.'")(*quoting* William W. Schwarzer et al., CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE*, 5*-12 (2d ed. 1994)).

While our research did not uncover any other cases that directly address this issue in the context of opinions, courts have found that requests for admission generally (not specifically relating to opinions) can pertain to issues within the purview of the jury. In *Reliance Ins. Co. v. Marathon LeTourneau Co.,* 152 F.R.D. 524 (S.D. W. Va. 1994), the court stated that requests for admission that involved issues for the jury are not prohibited by Rule 36 nor the Note of the Advisory Committee accompanying the Rule. *Id.* at 525. Significantly, the court noted that, "[a] ruling … that a request for admission was improper because it involved issues for decision by the jury could, of course, implicate almost any request for admission and would, in effect, emasculate the provisions of Rule 36." *Id.* In addition, the court stated:

> The 'issue for the jury to decide' characterization appears to be merely another way of objecting to requests on the basis that the requests relate to an "ultimate fact" or to issues of fact "dispositive of one aspect of the case" -- objections which have been found inappropriate by the courts. *Branch Banking and Trust Company v. Deutz-Allis Corporation*, 120 F.R.D. 655, 658 (E.D. N.C. 1988). *See also, City of Rome v. United States*, 450 F. Supp. 378, 383 (D. D.C. 1978), *aff'd* 446 U.S. 156, 64 L. Ed. 2d 119, 100 S. Ct. 1548 (1980).

Requests for admissions may, indeed, seek opinions to the ultimate facts of the case. *See Pleasant Hill Bank v. United States*, 60 F.R.D. 1, 4 n.1 (W.D. Mo. 1973); *Cereghino v. The Boeing Co.,* 873 F. Supp. 398, 403 (D. Or. 1994); *In re Niswonger*, 116 B.R. 562, 566 (Bankr. S.D. Ohio 1990). Admissions can also be dispositive of the entire case. *Cereghino,* 873 F. Supp. at 403; *In re Niswonger*, 116 B.R. at 566. Several courts have

discussed this issue without distinguishing between opinions and facts, which indicates that Rule 36 applies equally to both.

In *Pleasant Hill*, the plaintiff filed an action for conversion of certain furnishings and equipment from a nursing home. 60 F.R.D. 1. The key fact at issue was whether the defendant sold all of the furnishings and equipment. The defendant denied that the furnishings and equipment were sold in its response to the requests for admission. *Id.* at *4. Defendant argued that the requests for admission were objectionable because "they go to central facts in dispute, facts upon which the case will turn." *Id.* at *4 n.1. The court concluded that Rule 36 allows "requests to go to all the fact issues in an action". *Id.* In reaching its decision, the court adopted the rule that admissions may seek all of the facts at issue in the case:

> Some courts and commentators have said that Rule 36 is not intended to be used to cover the entire case and every item of evidence. There is no basis in the rule for these comments and no discernible reason for such a limitation. The statements to this effect do not rise above the level of *dicta*, and they were uttered in cases in which the requests were objectionable on other grounds, usually because they were prolix and unclear. Thus, the sounder perception is that of a commentator who says: 'It is appropriate, therefore, to note that a party who wishes to cover the entire case should proceed with care. There should be no question, however, concerning his right to proceed.'

Id. at *4 n.1 (*quoting* 8 Wright, FEDERAL PRACTICE AND PROCEDURE § 2251, at 710 (1970); Finman, *The Request for Admissions in Federal Civil Procedure*, 71 YALE L.J. 371, 402-404 (1962)).

In *Cereghino*, the plaintiffs brought an action against Boeing and three other corporate defendants relating to a claim of ground water contamination. 873 F. Supp. at 399. During discovery, Boeing requested that plaintiffs "admit that, … given the contamination of the parcel with TCE, there have been no additional damages to Plaintiffs as a result of the alleged contamination of the land by TCA." *Id.* at 401. Plaintiffs admitted to this request. *Id.* Boeing moved for summary judgment, which was granted based upon this admission, as this was an essential element of the claim. *Id.* at 404.

In *Niswonger*, plaintiffs submitted several requests for admission in an action involving the construction of a home. *Id.* at 565. Defendant failed to respond to the request. *Id*. The Court found that plaintiffs' admissions were conclusively established under Rule 36 when defendant failed to answer or respond to the requests. *Id.* at 566. Thus, the court granted summary judgment because defendants' responses established all relevant facts of the case. *Id.*

However, permissible opinions under Rule 36 must not pose a hypothetical or be unrelated to facts of the case. In that instance, they are clearly conclusions unrelated to

the facts of the case, even though they are couched in terms of being opinions as to facts. *See Abbott v. United States,* 177 F.R.D. 92 (N.D.N.Y. 1997). In *Abbott*, the defendant argued that the plaintiff's requests for admission of opinions were improper in that they were based on hypothetical facts that were unrelated to the case. *Id.* For example, the requests for admission asked the defendant to admit or deny whether payment from a landowner to a trespasser after falling into a concealed hole in exchange for a release of personal injury claims would be excludable. *Id.* The court found that these requests were improper under Rule 36, as they did not elicit opinions "requiring application of law to the facts peculiar to this case to clarify the [defendant's] legal theories." *Id.* Rather, the court concluded that the requests used "hypothetical factual scenarios unrelated to the facts here to ascertain answers to pure questions of law." *Id.* Thus, the court held that defendants were not required to respond to the requests for admission. *Id.* at 94.

Finally, there are other States that have incorporated the "opinion" language of Rule 36 into their rules of civil procedure. Washington has an analogous rule to Fed. R. Civ. P. 36(a)(1)(A). In *Thompson v. King Feed & Nutrition Service, Inc.*, 153 Wn.2d 447, 474, 105 P.3d 378 (2005), the Wisconsin Supreme Court was asked to interpret the Wisconsin Rule of Civil Procedure that permitted requests for admission to seek "statements or opinions of fact or of the application of law to fact." *Id.* at 461. The court rejected the defendant's argument that the requests for admission sought conclusions of law. In reaching its decision, the court stated:

> This argument fails because the requests did not ask King Feed to state legal conclusions. What courts refer to as legal conclusions may also be called questions of law. CR 36 does not authorize requests for admission to ask, nor require a party to answer, questions of law. Rather, the requests for admission asked King Feed major factual issues and asked King Feed to apply the law to the facts concerning negligence, proximate cause, and contributory negligence. Nothing in CR 36 entitled King Feed to deny the questions in absence of proof to support such denial.

Id. at 465.

Texas has also adopted the opinion language from Fed. R. Civ. P. 36(a)(1)(A) in the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 198.1. Statements that constitute proper opinions under Texas Rule of Civil Procedure 198.1, include "Plaintiff believes that its employee, Smith, can enter into contracts on its behalf" and "Defendant electric utility believes that the wires on its transmissions poles must comply with applicable provisions of the National Electric Safety Code." Robert K. Wise, Katherine Hendler Fayne, *A Guide to Properly Using and Responding to Requests for Admission Under the Texas Discovery Rules*, 45 ST. MARY'S L.J. 655 (2014).

The allowance of the admissibility of opinions could help to expedite the trial. See: (SEC v. Goldstone, Acadia Ins. Co. v. D. R. Horton, Inc., and Brown v. Montoya) which stand for the proposition that "expedit[ing] trials by establishing as true certain material facts of a case without the necessity of formal proof at trial" Keen v. Detroit Diesel Allison, 569 F.2d 547, 554 (10th Cir.1978). is noted as a solid reason to admit opinion that is stipulated to and will allow juries to focus on the facts.

Thus, while the devil may be in the details, case law does provide a mechanism for weeding out proper requests to admit matters of opinion from improper requests to admit matters of ultimate conclusion. The recommendation of the subcommittee was merely to add the above referenced language to the existing Rule, and not to try to clarify the issue further with limiting language in the Rule.

ATTACHMENT 2

SUBCOMMITTEE ON THE OFFER OF JUDGMENT RULE
DRAFT REPORT, PROPOSED AMENDMENTS, AND RECOMMENDATIONS
Supplemental Report - August 2021

This Supplemental Report includes an additional Part III, featuring illustrations of how the Proposed Rule would operate in practice. The Supplemental Report also includes updates to the text of Proposed Rule 4:58-4(b)(1)(E) as had been previously submitted to the Committee, made for the purpose of clarity. The balance of the Report remains as submitted in April 2021.

At the October 22, 2020 Meeting of the Civil Practice Committee, New Business Item **F. Proposed Amendments to *Rule* 4:58** was assigned to the Subcommittee on the Offer of Judgment Rule ("the Subcommittee"). The Subcommittee was convened, in part, to address an ambiguity in the context of a global offer to multiple defendants in the Offer of Judgment Rule. As the Court observed in Willner v. Vertical Reality, Inc., "the rule leaves unclear the circumstances triggering the imposition of sanctions on an individual defendant when a single plaintiff makes a global offer to multiple defendants, there is no acceptance of the offer, and no counteroffer is made in response." 235 N.J. 65, 82-83 (2018).

The Subcommittee includes Assignment Judge Michael A. Toto (Middlesex); Presiding Judge Joseph P. Quinn (Monmouth); Hon. Michael F. O'Neill (Hunterdon); Hon. Jean S. Chetney (Salem); Barry J. Muller, Esq. (Fox Rothschild, LLP); Amos Gern, Esq. (Starr, Gern, Davison & Rubin, PC); Robert B. Hille, Esq. (Greenbaum Rowe Smith & Davis, LLP); Herbert Kruttschnitt, III, Esq. (Dughi, Hewit & Domalewski, PC); Jonathan H. Lomurro, Esq. (Lomurro Munson Comer Brown & Schottland); and Deborah L. Mains, Esq. (Costello & Mains, LLC).

In this Draft Report, the Subcommittee proposes a series of amendments designed to address ambiguities in the Rule, particularly in the area of multiparty litigation.

SUBCOMMITTEE ON THE OFFER OF JUDGMENT RULE
DRAFT REPORT, PROPOSED AMENDMENTS, AND RECOMMENDATIONS
August 2021

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PART I: BACKGROUND & HISTORY OF OFFER OF JUDGMENT RULE, SUBCOMMITTEE

A. Background and History of the Offer of Judgment Rule

Broadly speaking, Rule 4:58, the Offer of Judgment Rule, is designed to promote settlement by shifting litigation expenses incurred when a party unreasonably declines a settlement offer. Initially modeled on Federal Rule of Civil Procedure 68, R. 4:58 now departs in major ways from the Federal Rule. For example, only defendants can make offers of judgment under F.R.C.P. 68, whereas plaintiffs can make offers of judgment under R. 4:58. Also, under F.R.C.P. 68, attorneys' fees are recoverable only if a statute defines such fees to be part of the costs, whereas attorneys' fees are recoverable under R. 4:58 without any such limitation.

Before 1994, R. 4:58 had scant impact because it capped attorney's fees at $750. A 2000 amendment allowed for the recovery of "all reasonable litigation expenses," such as discovery expenses and expert fees, "incurred following non-acceptance" of the offer. With these two amendments, use of R. 4:58 increased, and fears arose that it would undermine the traditional, Federal Rule.

At various points in the early 2000s, the Civil Practice Committee seriously considered eliminating R. 4:58. At the time, R. 4:58 was criticized as functioning "mainly as a good weapon for defense counsel." Memorandum of Suzanne Goldberg 1 (October 27, 2005) (internal quotations and citations omitted). Commentators authored reports favoring retention or abolition of the Rule. Judge Jack M. Sabatino wrote a separate report calling for "an empirical study of the Rule's present application," and specifically proposed that "a segment of civil litigators[,] perhaps the roster of certified civil trial lawyers," be canvassed with "a questionnaire that asks them about their experiences with the Rule." Separate Report of Judge Sabatino on the Offer of Judgment Rule.

The Rule was not abolished. Instead, it was amended in 2006 to include both an "undue hardship" exception and an exception where a fee allowance "would conflict with the policies underlying a fee-shifting statute or rule of court."

Other amendments have addressed more specific issues, including the Rule's application in multi-defendant cases (2000), the elimination of the dichotomy between liquidated and unliquidated damages (2004), and the Rule's application in uninsured and underinsured motorist cases (2016).

B. The 2015-2016 Rules Cycle and Proposals by NJ PURE

During the 2015-2016 rules cycle, the Civil Practice Committee decided to reexamine of the Offer of Judgment Rule, including the Rule's long-standing feature that insulated plaintiffs from fee-shifting in no-cause-verdict situations. A Subcommittee formed to comprehensively review R. 4:58 and to review submissions by Eric Poe, Chief Complex Claims Litigation Officer of New Jersey Physicians United Reciprocal Exchange ("NJ PURE") and the Chief Operating Officer of CURE Auto Insurance. NJ PURE set forth suggested amendments to R. 4:58 in multi-defendant litigation, seeking significant changes that would make R. 4:58 more widely applicable. Poe's Memorandum identified four perceived "major concerns" with the language of the Rule as written:

(1) [T]he language of the OOJ Rule did not fairly apply to both plaintiffs and defendants and resulted in defendants not getting equal protection under the OOJ Rule;

(2) [T]he use of the word "nominal" in the rule causes confusion and ambiguity in the application of the rule when there is a nominal damages award, thus preventing a defendant from recovering fees;

(3) [T]he "undue hardship" exception allows judges to avoid awarding counsel fees and costs if such an exception would prevent plaintiffs from recovering anything, and even having to pay out of pocket to a defendant, thus rendering the penalty under the rule without consequence; and

(4) [T]he application of the OOJ Rule in a multi-defendant litigation is precluded when the offering defendant is less culpable than its co-defendants as there is no provision for a pro rata calculation of the offering defendant's determined liability.

In-depth discussion of these issues, however, was ultimately deferred until the following rules cycle.

C. 2017-2018 Rules Cycle, 2018 Report of the Subcommittee on the Offer of Judgment Rule

In 2017-2018, the Subcommittee reconvened, ultimately drafting a Report whose findings were adopted in the Civil Practice Committee's 2018 Report. The Civil Practice Committee noted that there have long been calls to completely abolish R. 4:58. The Committee recognized, however, that because the Rule is designed to foster settlement, instances where it worked as designed to

produce settlement were unlikely to come to the attention of outside observers. Indeed, even in instances where R. 4:58 failed to produce settlement, litigation expenses might be imposed without controversy under the Rule. More than with other Rules, a focus on written judicial opinions would provide a distorted view of the efficacy of the Rule, exaggerating its costs and hiding its benefits.

Accordingly, the Committee undertook the sort of empirical analysis Judge Sabatino suggested a dozen years earlier. The Subcommittee on the Offer of Judgment Rule prepared another survey and mailed it to certified civil trial attorneys. The Presiding Civil Judges of every county also distributed the survey in their courtrooms for attorneys to complete during Monday morning calendar calls and provided the survey to trial judges for distribution among attorneys in the various civil courtrooms. One hundred and thirty-six (136) attorneys responded. Eighty-nine (89) identified themselves as primarily plaintiffs' attorneys, thirty-six (36) as primarily defendants' attorneys, and eleven (11) identified as both.

The survey's most significant finding was that, among cases in which reporting attorneys served offers of judgment and which ultimately settled, fifty-six percent (56%) believed that the offers of judgment were factors leading to settlement. Similarly, if less dramatically, among cases in which reporting attorneys *received* an offer of judgment and which ultimately settled, thirty-four percent (34%) believed that the offers of judgment were factors leading to settlement. In other words, a majority of those surveyed who had served offers of settlement believed those offers were factors leading to settlement, and about a third of those surveyed who had received offers believed the same.

These results suggested that the Offer of Judgment Rule promoted settlement in a significant number of cases. While a review of judicial opinions would not reveal that impact, a survey of lawyers did. With the survey results as a guide, the Subcommittee recommended that the Offer of Judgment Rule not be abolished. The Committee declined to amend the rule, but stated:

> The Committee determined that there should be a reexamination of the offer of judgment rule, including the Rule's long-standing feature that plaintiffs should be insulated from fee-shifting in no-cause verdict situations. A subcommittee was formed to take a comprehensive review of *Rule* 4:58.

This issue was ultimately deferred until the next rules cycle.

D. Willner Decision

Issues concerning R. 4:58 in the context of multi-party litigation arose shortly thereafter. In Willner v. Vertical Reality, Inc., Plaintiff Josh Willner was injured while climbing a rock wall owned by his employer, Ivy League Day Camp. 235 N.J. 65, 69 (2018). Willner sued the Camp and the entities that manufactured the wall and its parts, Vertical Reality, Inc. and ASCO Numatics, respectively, alleging strict products liability claims and negligence. Id. Before trial, Willner made a single offer of judgment to the defendants under R. 4:58 in the amount of $125,000. Id. No defendant accepted the offer or counteroffered. Id. A jury ultimately returned a verdict in favor of Willner, awarding him $358,000, and assigning Numatics thirty (30) percent of the liability and Vertical Reality seventy (70) percent. Id. The judge then granted Willner's motion for attorney's fees and costs under R. 4:58. Id. Numatics appealed, among other things, the judge's award of attorney's fees and costs under R. 4:58. Id. at 70.

On appeal, the New Jersey Supreme Court concluded that the effect of the Rule, and how it should operate in a multi-defendant joint and several liability situation, was "unclear." Id. at 85. Focusing on R. 4:58-4(b), the Court held that mandating a defendant in a multi-defendant case to consider a global offer of judgment that was more than its share was unfair, and directed that the Rule must balance plaintiffs' and defendants' competing interests. Id. at 84-85. However, the Court did not provide any explanation as to how to achieve that "balance." See id. Also, while the Court ruled in Numatics' favor on the fee-shifting issue, the Court left unresolved whether advance notice of the Rule's consequences to a defendant, regarding that defendant's failure to accept a global offer, would permit fee shifting under R. 4:58. See id. at 85. Willner did not refer these issues to the Civil Practice Committee so they could be addressed.

E. Current Evaluation

At the October 22, 2020 Meeting of the Civil Practice Committee, New Business Item F. Proposed Amendments to R. 4:58 was assigned to the Subcommittee on the Offer of Judgment Rule ("the Subcommittee"). This Subcommittee's current examination of the Offer of Judgment Rule was prompted in part by the Willner decision and the renewal of proposed amendments from NJ PURE in the wake of that decision. Poe and NJ PURE renew their proposal previously considered and rejected by the Committee, and ultimately by the Court in the 2017-2018 rules

cycle. The excerpt setting forth the Committee's decision, as well as the Offer of Judgment Subcommittee report, are appended to this Report as part of Poe's February 21, 2020 letter to the Civil Practice Committee.

In its discussions, the Subcommittee, as it expressed in its 2018 Draft Report, has maintained that R. 4:58 has settlement benefits, and that perceived shortcomings in the Rule should be addressed through amendment rather than abolition. Several members of the Subcommittee proposed working drafts of an amended Rule, which formed the basis for the group's discussion. After additional discussion and revisions, a draft of the Rule was submitted to the Subcommittee for approval. Part II of this Draft Report contains the full drafted Rule, as well as itemized analysis and commentary on the Rule's provisions.

PART II: PROPOSED AMENDMENTS TO R. 4:58 AND DISCUSSION

A. Proposed R. 4:58: As Completed

The following is the Subcommittee's completed, unabridged proposal for R. 4:58:

Rule 4:58-1. Time and Manner of Making and Accepting Offer

(a) Except in a matrimonial action or action adjudicated in the Special Civil Part, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided herein.

(b) If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

(c) Except as otherwise provided under this Rule, prior to the service or filing of a notice of acceptance, an offeror may withdraw an offer by serving on the offeree and filing a notice of withdrawal with the court. An offer voluntarily withdrawn by the offeror shall not be subject to this Rule.

Rule 4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that

such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(c) No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Rule 4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2.

(b) A favorable determination qualifying for allowances under this rule is a judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship or otherwise result in unfairness to the offeree. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

Rule 4:58-4. Multiple Claims; Multiple Parties

(a) Per Quod and Derivative Plaintiffs. If a party joins as plaintiff for the purpose of asserting a *per quod* claim or if one or more plaintiffs seek a claim that is derivative of the claim of another plaintiff, the claimants may make a single unallocated offer. Otherwise, multiple claimants may file and serve any offer individually.

(b) Multiple Defendants. Where there are multiple defendants, offers shall be made as follows:

(1) **Global Offer.** Claimant may make a global offer to multiple defendants. If claimant obtains a money judgment in an amount that is 120% of the global offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, those allowances as prescribed in R. 4:58-2(a). In such case, the assessment of costs and fees shall be applied as follows:

(A) **No Response.** When there is a rejection of, or no response to, plaintiff's global offer, each defendant will be jointly and severally responsible for the entire allocation set forth pursuant to R. 4:58.

(B) **Global Counteroffer.** When there is a global counteroffer from defendants and plaintiff obtains a favorable determination qualifying for allowances under this rule, each defendant will be responsible for the portion of expenses and fees equal to the percentage that they were individually adjudicated responsible. Subject to R. 4:58-3(c), in the event the defendants obtain a global favorable determination, plaintiff will be responsible for the expenses and fees payable pro rata to each defendant in accordance with that defendant's proportionate share of the Offer.

(C) **Counteroffer to Claimant's Global Offer by One Defendant.** When a single defendant makes a counteroffer to a global offer, it shall be treated as a counteroffer limited to that defendant's share.

a. If that defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.
b. If that defendant's final adjudication is greater than 120% of their counteroffer, they should be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(D) **Counteroffers by Multiple but not All Defendants.** When multiple defendants individually make a counteroffer representing only their individual share of responsibility, they shall indicate that.

a. If any responsive individual defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.
b. If any responsive individual defendant's final adjudication is greater than 120% of their counteroffer, they shall be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(E) **All Defendants Respond Individually.** When all defendants counteroffer individually to a global offer, the individual responses should be combined and treated as a global counteroffer. Each defendant who counteroffered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed 100% of allowances. The allowances will be assessed based on their adjudicated percentage share of responsibility of the allowances and the combination of the remaining defendants must equal 100% of the allowances. However, if all defendants have individually offered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment but 120% of the combined counteroffer amount is less than the

claimant's global offer, then each defendant will be responsible for the portion of expenses and fees equal to the percentage that the defendant was adjudicated responsible.

(2) **Defendants Against Whom No Joint and Several Judgment Is Sought.** If there are multiple defendants and there are defendants against whom no joint and several judgment is sought, claimant may file and serve individual offers on those defendants against whom no joint and several judgment is sought as prescribed by this rule. Similarly, those defendants against whom no joint and several judgment is sought may file and serve individual offers as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3 as the case may be and subject to the provisions of this rule.

(3) **Individual Offer.** If there are multiple defendants, individual offers of judgment may be filed and served as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3 as the case may be.

(c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

Rule 4:58-5. Application for Fee; Limitations

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

Rule 4:58-6. Application for Fee; Limitations

Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

Rule 4:58-7. Acceptance of Offer Not Deemed a Judgment; Payment of Accepted Offer

(a) Except as provided for in (b), acceptance and payment of an offer under R. 4:58 will not be deemed a judgment against the offeree and will not require the filing of a Warrant of Satisfaction.

(b) Absent leave of court, or the agreement of the offeror and offeree, full payment of the accepted offer shall be made within 30 days after the date of service of notice of acceptance. Within 7 days of full payment, the offeror and the offeree shall file a Stipulation of Dismissal With Prejudice as to all claims that are the subject of the accepted offer. If full payment is not made within 30 days, then

the party entitled to receive payment may (i) withdraw its offer or acceptance, or (ii) apply for relief consistent with R. 1:6-2(a) for entry of final judgment. The court shall award reasonable expenses, including reasonable fees and costs for the application for final judgment unless the court finds that the failure to make payment was substantially justified or that other circumstances make an award of expenses unjust.

B. Proposed R. 4:58: As Amended, with Discussion

This Section contains the Subcommittee's completed proposal for R. 4:58 with discussion.

Rule 4:58-1. Time and Manner of Making and Accepting Offer

(a) Except in a matrimonial action or action adjudicated in the Special Civil Part, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature. Any offer made under this rule shall not be withdrawn except as provided herein.

(b) If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counteroffer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

(c) Except as otherwise provided under this Rule, prior to the service or filing of a notice of acceptance, an offeror may withdraw an offer by serving on the offeree and filing a notice of withdrawal with the court. An offer voluntarily withdrawn by the offeror shall not be subject to this Rule.

With the exception of a matrimonial action, Special Civil action, or those where the relief is not solely monetary in nature, ***any party*** *prior to twenty days before the actual trial date may file with the court and serve on* ***any adverse party*** *an offer (1) to take a specified sum as a monetary judgment including costs if the claimant or (2) against it if it is the party responding to a monetary claim such as a defendant or plaintiff defending a counterclaim. R. 4:58-1(a).*[1] *While the Rule says the offer is without prejudice, it does not specify to what. Because the term is not defined in the Rule, it is presumed the offer is "without prejudice" to proving all claims or defenses and to making a subsequent offer under the Rule and not to*

[1] The Rule only says costs. The question of whether to include a prevailing party's entitled court costs was raised but not answered in Kas Oriental Rugs Inc. v. Ellman, 407 N.J. Super. 538, 554 (App. Div.), cert. denied, 200 N.J. 476 (2009) and Comment 2. Perhaps a reference to R. 4:42-8: Whether to define costs should be considered.

the ability to withdraw at any time. That meaning would convert the Rule primarily to a fee-shifting tool against its purpose. Therefore, clarification of that term might be advisable. Further, it may be prudent to clarify within R. 4:58 that it is inapplicable in Special Civil Part matters. See Bandler v. Maurice, 352 N.J. Super. 158, 165 (App. Div. 2002).[2]

An offer is deemed withdrawn if it is not accepted by the earlier of the actual trial date or 90 days of its service. R. 4:58-1(b). If deemed withdrawn, an offer is only admissible in a post-trial proceeding to fix costs, interest, and attorney's fee. Id. An offer is accepted by serving the offer and filing with the court a notice of acceptance. A new offer may be made in the same or another amount or as specified in the offer, but the new offer constitutes a withdrawal of the prior one.[3] *Id.*

The Rule is silent as to whether the offer can be withdrawn prior to its expiration period under the Rule, and there are conflicting trial-level decisions on the issue. See Estate of Okhotnitskaya, ex rel. Gazarkh v. Lezameta-Benalcaz, 400 N.J. Super. 340, 348-349 (Law Div. 2007) (suggesting that an offer cannot be withdrawn except as under the Rule, where defendants accepted an offer within the ninety-day window, despite plaintiff's effort to confirm an arbitration award that fell within that window), but see Order Denying Motion for Reconsideration, Li v. McNay, ESX-L-8096-16 (Law Div. Jul. 6, 2018)(attached hereto) (limiting the holding of Estate of Okhotnitskaya to its unique facts and leaving open the question of whether an offer can be withdrawn prior to its expiration).

Under the existing Rule, it appears that an offer cannot be withdrawn by the party making it unless (1) it is accepted, (2) the time under the Rule expired, or (3) a new offer is made. The rationale behind the prohibition on withdrawal does not make sense given the fact that an offeror can withdraw the prior offer automatically by simply making a new offer. The current prohibition on withdrawal could result in the filing of a new offer for the sole purpose of withdrawing the former offer. Under the current rule, an attorney may not be savvy enough to know that even though the offer cannot be withdrawn, the attorney can simply file a new offer for an amount that would never be accepted, but would accomplish the withdrawal of the offer. The proposed amendment eliminates this anomaly.

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[2] Noting "some ambiguity respecting Part IV applicability" in the Special Civil Part, the comments to R. 6:1-1 specify that the Offer of Judgment rule is inapplicable in that context, citing Bandler for support. Pressler, Current N.J. Court Rules, comment 1 on R. 6:1-1 (2021).

[3] The Rule is silent as to what "or as specified therein" means as to a new offer. R. 4:58-1(b). A counteroffer will not affect the viability of the original offer. That will remain open until accepted or withdrawn. Nor will a second offer negate the first and the date of that first offer will control. See Comment 2 and Palmer v. Kovacs, 385 N.J. Super. 419, 427 (App. Div.), cert. denied, 188 N.J. 356 (2006). In Palmer, plaintiff made an offer that was not accepted under the Rule and later made another offer that was not accepted. The verdict was more than 120% of both offers. In using the date for the first offer as the trigger for the Rule's allowances, the court noted the Rule is designed to promote early settlement and creates a disincentive to reject reasonable offers and requires a recipient to act in a prompt fashion. Subsequent offers promote settlement but giving the recipient a second chance with a late offer should not deprive the effect of the first offer that was rejected under the Rule.

The last sentence of subsection (b) comports with the Rule's purpose of promoting settlement and discouraging its use as a fee shifting tool. See Comments 1 and 3 to R. 4:58-1 et seq., Willner v. Vertical Realty, Inc., 235 N.J. 65, 81 (2018) (as to fundamental purpose to induce settlement); Frigon v. DBA Holdings Inc., 346 N.J. Super. 352 (App. Div. 2002) (fee-shifting use in derogation of Rule); see also R. 4:58-3 and Comment 5 (concerning how the Rule seeks to avoid improper fee shifting use). Clarification is probably warranted here.

Rule 4:58-2. Consequences of Non-Acceptance of Claimant's Offer

(a) In cases other than actions against an automobile insurance carrier for uninsured motorist/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(b) In cases involving actions against automobile carriers for uninsured/underinsured motorist benefits, if the offer of a claimant is not accepted and the claimant obtains a monetary award by jury or non-jury verdict, (adjusted to reflect comparative negligence, if any) in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

(c) No allowances shall be granted pursuant to paragraphs (a) or (b) if they would impose undue hardship or otherwise result in unfairness to the offeree. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

The first part of the Rule excludes claimants in actions against an automobile insurance carrier for UM/UIM benefits. R. 4:58-2(a). For all other claimants to obtain relief under the Rule, they must obtain a money judgment of 120% of the offer or more, excluding prejudgment interest and counsel fees. R. 4:58-1(b). If they do, they ***shall be allowed****, in addition to costs of suit, (1) all reasonable litigation expenses incurred after non-acceptance, (2) pre-judgment interest of 8% inclusive of what R. 4:42-11(b) prescribes from the later of the date of non-acceptance or completion of discovery, and (3) reasonable attorney's fees compelled by the non-acceptance. R. 4:58-2(b). The timing in 4:58-2(b)(2) is designed to afford the offeree a reasonable opportunity to evaluate the offer. See Comment 2.*

In cases involving actions against automobile carriers for UM/UIM benefits, a claimant is entitled to the Rule's allowances if that claimant obtains a jury or non-jury verdict for a net monetary judgment, ***after a reduction for claimant's share of comparative negligence*** *and exclusive of prejudgment interest and counsel fees, that is 120% or more of the offer. R. 4:58-2(b).*[4]

Despite the language in the Rule, the court may refuse to grant any allowances if it would impose undue hardship to the extent of such undue hardship. R. 4:58-2(c).

Rule 4:58-3. Consequences of Non-Acceptance of Offer of Party Not a Claimant

(a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a judgment, or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any), that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2.

(b) A favorable determination qualifying for allowances under this rule is a judgment or in the case of a claim for uninsured/underinsured motorist benefits, a verdict (molded to reflect comparative negligence, if any) in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

(c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship or otherwise result in unfairness to the offeree. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly. The burden is on the offeree to establish the offeree's claim of undue hardship or lack of fairness.

While Mr. Poe proposed eliminating the first three exceptions contained in R. 4:58-3(c), the Subcommittee was provided with nothing to warrant their elimination. R. 4:58-3(c) does, as written, place the claimant in a more advantageous position than the party against whom the claim is made by insulating the claimant from an allocation in the described circumstances. However, these limitations are intended to "prevent the transformation of the offer-of-judgment rule into a general fee-shifting rule." Schettino v. Roizman Development, Inc., 158 N.J. 476, 486 (1999). The inability of a defendant to take advantage of the offer of judgment rule when the plaintiff recovers nothing is also a feature of Federal Rule of Civil Procedure 68, as interpreted by the Supreme Court of the United States. Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

While NJ PURE, along with some survey respondents, contend that the current Rule's "most egregious problem" is its "prohibition against a successful defendant's recovery of counsel fees and costs when a plaintiff's case is dismissed or a no-cause has been rendered." The Subcommittee was presented

[4] Language in bold here reflects the difference between the UM/UIM claimants section and that for other claimants.

with no evidence of how that limitation on the rule's applicability was subverting the Rule's stated purpose to promote settlement while also avoiding its use as a fee shifting tool to undermine the American Rule or as a devise to chill a party from exercising its right to a jury trial. Consequently, the Subcommittee does not recommend deleting the first three exceptions in R. 4:58-3(c).

The Subcommittee also chooses to retain the "undue hardship" exception in this Rule in the face of contentions that it disproportionately benefits plaintiffs' attorneys. The survey data do suggest that plaintiffs are more likely to receive at least a partial award of costs and fees, with only one defense attorney reporting success in obtaining such an award. But even if the exception has a disparate impact upon plaintiffs and defendants, this disparity may adequately be explained by the fact that plaintiffs are more likely to suffer undue hardship when forced to pay their adversary's litigation expenses. If it is suggested that trial judges are not applying a rule evenhandedly, the remedy should be appellate review, not wholesale elimination of this exception.

The Subcommittee also declines to modify the exception for cases where a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court. Some survey respondents called to amend the rule to flatly exempt certain statutory fee-shifting cases; the Subcommittee declines to adopt this change for two reasons. First, a list of such statutes risks being incomplete when drafted and will become incomplete as more such statutes are enacted. Second, the case law is clear that while "a defendant can never he awarded fees under R. 4:58 in a case involving CEPA, the PWA, or a similar fee-shifting statute," it is permissible for a trial judge to "take into account a plaintiff's unreasonable rejection of an offer of judgment in calculating plaintiffs award under such a statute." Best v. C&M Door Controls, Inc., 200 N.J. 348, 354 (2009). Changing the Rule to provide that it does not apply at all would suggest that offers in such cases are impermissible and risks being interpreted to change the governing principle that a plaintiff's unreasonable rejection of an offer of judgment can be relevant in calculating a fee award.

Rule 4:58-4. Multiple Claims; Multiple Parties

The Subcommittee's most extensive revisions pertain to R. 4:58-4, specifically in the context of multidefendant cases. Essentially, this Rule attempts to fairly apply its mechanism for inducing settlement to three complex situations. These are where there are multiple plaintiffs, multiple defendants, and multiple claims. These situations are addressed in turn:

(a) Per Quod and Derivative Plaintiffs. If a party joins as plaintiff for the purpose of asserting a *per quod* claim or if one or more plaintiffs seek a claim that is derivative of the claim of another plaintiff, the claimants may make a single unallocated offer. Otherwise, multiple claimants may file and serve any offer individually.

*R. 4:58-4(a), as written, focuses only on those who join to assert a per quod claim. In that instance, the claimants **may** make a single unallocated claim. This was a codification of Wiese v. Dedhia, 354 N.J. Super. 356, 364-65 (App. Div. 2002), aff'd. 188 N.J. 587, 590 (2006).*

*As Comment 6.2 points out, this section of the Rule addresses situations such as when spouses are joined **only** to assert a per quod claim **and** there is **no conflict between them**. Although the use of "may" suggests that these plaintiffs have the option of making separate offers, Comment 6.2 notes that the "Wiese rule" has not been extended to allow a single unallocated offer beyond the per quod context where there is no conflict. See also Jacobsen v. Dara, 430 N.J. Super. 190, 195-96 (Law Div. 2011). Therefore, in those situations, outside the permissive exception scenario contemplated under the Wiese rule as embodied in R. 4:58-4(a), the Rule suggests that individual claimants should file individual offers. Consequently, clarification may be warranted here.*

The Subcommittee's revisions to R. 4:58-4(b) are its most extensive. Below is the Subcommittee's analysis of the current rule:

*As to multiple defendants, the first part of subsection R. 4:58-4(b) focuses on the situation where a joint and several judgment is sought against them and one of the defendants offers less than its pro-rata share in response to a claimant's offer (was "less than" intended and if not, should it be removed). In that case, claimant's offer is deemed not accepted. However, the second part of R. 4:58-4(b) allows one of the multiple defendants to gain the benefits of the allowances under the rule. To do so, it must offer to take judgment against it that includes all the monetary claims by the offeror against all defendants. R. 4:58-4(b); see also Willner, supra. While R. 4:58-1 suggests that any defendant may file an offer on co-defendants, R. 4:58-4 is silent on whether a defendant can serve and file an offer for contribution against the other joint and several defendants. Confusing is the language in R. 4:58-4(b) that deems a non-acceptance of claimant's offer because one defendant (or less than all) offers in response **less than** a pro-rata share. This language raises questions.*

The first is whether by inference a claimant is required or permitted by Rules 4:58-1 and 4:58-4(b) to serve and file an offer on a claimant or in response to a claimant's offer that is based only on that party's share of claimed responsibility. If so, the next question is whether that option is equally applicable where the defendants are jointly and severally liable.

Another question is whether there are situations involving multiple defendants where some are, and some are not jointly and severally liable. Does the Rule require or permit claimant to file separate offers as to the defendants who are not jointly and severally liable and a global offer as to those who are?

Another question is, if not permitted, whether the Rule should permit joint and several defendants to make separate offers based on their share of responsibility. As a question of fairness where one or more

defendants were willing to accept their share of responsibility, should those defendants be entitled to relief from the Rule's allowances under those circumstances?

Another question is whether all defendants should be required to participate in an offer.

Comment 6.1 describes the intention of R. 4:58-4 to ***permit*** *claimant to deal exclusively with a total judgment rather than* ***require*** *acceptance of individual defendant's pro-rata shares. Because each defendant's responsibility is dependent upon the outcome as to all, the claimant is spared the risk of miscalculating the defendant's shares in accepting partial offers for less than the total value of the ultimate judgment. It also relieves the claimant from facing an empty chair defense at trial. Comment 6.1 notes that an offer by a single defendant to pay that defendant's pro-rata share should not be considered an offer proposition under the Rule. In support, Comment 6.1 cites Schettino v. Roizman Development, 310 N.J. Super. 159, 167-68 (App. Div. 1998), aff'd., 158 N.J. 476 (1999). Comment 6.1 also cites Debrango v. Summit Bancorp., 328 N.J. Super. 219, 225-26 (App. Div. 2000) and Wiese v. Dedhia, 354 N.J. Super. 356, 364-65 (App. Div. 2002), aff'd. 188 N.J. 587, 590 (2006).*

In the multiple-defendant context, Comment 6.1 notes the lack of clarity as to the circumstances that trigger the imposition of the Rule's sanctions, and references in support Willner v. Vertical Realty, Inc., 235 N.J. 65, 81-85 (2018).

Comment 6.1 also suggests that where a defendant offers to pay a pro-rata share that is 80% or less of that defendant's obligation after trial, it may be inequitable to charge that defendant with the financial consequences of R. 4:58-2. In that circumstance, Comment 6.1 presumes the court will take that defendant's offer into account when fixing the award and allocating responsibility under the Rule to respective defendants. However, R. 4:58-2(c) only limits relief to circumstances of undue hardship and not where the result to an individual defendant would be inequitable. Further, caselaw is not instructive. Therefore, clarification appears to be warranted for R. 4:58-4 generally and revision to R. 4:58-2(c) necessary to prevent inequitable results beyond undue hardship.

As a consequence of Schettino, Comment 6.1 notes the Rule was changed to allow a single defendant to gain the benefit of the OOJ allowances if it met the Rule's requirement as to total damages regardless of whether that offer was intended to represent that defendant's pro-rata share. However, Willner did not deem the Schettino decision or the Rule's language sufficient to put the defendant on notice of that consequence and to sustain allowances thereunder.

Comment 6.1 to this subsection of R. 4:58-4(b) ends by noting that the rule has been construed to require all defendants to participate in an offer to claimant citing Cripps v. DeGregorio, 361 N.J. Super. 190, 194-95 (App. Div. 2003) (holding that the OOJ Rule did not apply where two of three defendants made individual offers totaling more than plaintiff's recovery) and Finderne Mgt. Co., v. Barrett, 402 N.J. Super. 546, 581-82 (App. Div. 2008), cert. denied, 199 N.J. 542 (2009) (defendant's individual offers after their

aggregate offer was rejected by Plaintiff were deemed a withdrawal of their aggregate offer and no longer imposing on Plaintiff the obligation to accept the aggregate offer). In this latter case, one can question whether the outcome might have been different if defendants had not made subsequent individual offers.

Relying on the analysis above, the Subcommittee proposes a systemized approach to R. 4:58-4(b), reworking the current iteration in its entirety in order to expand the range of scenarios directly addressed under the Rule. The Subcommittee's full proposal for R. 4:58-4(b) is as follows:

(b) Multiple Defendants. Where there are multiple defendants, offers shall be made as follows:

(1) **Global Offer.** Claimant may make a global offer to multiple defendants. If claimant obtains a money judgment in an amount that is 120% of the global offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit, those allowances as prescribed in R. 4:58-2(a). In such case, the assessment of costs and fees shall be applied as follows:

(A) **No Response.** When there is a rejection of, or no response to, plaintiff's global offer, each defendant will be jointly and severally responsible for the entire allocation set forth pursuant to R. 4:58.

(B) **Global Counteroffer.** When there is a global counteroffer from defendants and plaintiff obtains a favorable determination qualifying for allowances under this rule, each defendant will be responsible for the portion of expenses and fees equal to the percentage that they were individually adjudicated responsible. Subject to R. 4:58-3(c), in the event the defendants obtain a global favorable determination, plaintiff will be responsible for the expenses and fees payable pro rata to each defendant in accordance with that defendant's proportionate share of the Offer.

(C) **Counteroffer to Claimant's Global Offer by One Defendant.** When a single defendant makes a counteroffer to a global offer, it shall be treated as a counteroffer limited to that defendant's share.

a. If that defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.
b. If that defendant's final adjudication is greater than 120% of their counteroffer, they should be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

The intent of the language in Section (b)(1)(C) is to address fee-shifting statutes and other restrictions.

(D) **Counteroffers by Multiple but not All Defendants.** When multiple defendants individually make a counteroffer representing only their individual share of responsibility, they shall indicate that.

a. If any responsive individual defendant's final adjudicated share is less than 120% of their individual counteroffer, they shall not be assessed any allowances under the rule and the remaining non-responsive defendants will remain jointly and severally responsible for the total allowances under the rule.

b. If any responsive individual defendant's final adjudication is greater than 120% of their counteroffer, they shall be responsible for the allowances equal to their percentage of adjudicated responsibility and the non-responsive defendants shall be joint and severally liable for the balance of the allowances to which claimant is entitled under this rule.

(E) **All Defendants Respond Individually.** When all defendants counteroffer individually to a global offer, the individual responses should be combined and treated as a global counteroffer. Each defendant who counteroffered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed 100% of allowances. The allowances will be assessed based on their adjudicated percentage share of responsibility of the allowances and the combination of the remaining defendants must equal 100% of the allowances. However, if all defendants have individually offered an amount where 120% of that amount is determined to be more than their adjudicated responsibility of the monetary judgment but 120% of the combined counteroffer amount is less than the claimant's global offer, then each defendant will be responsible for the portion of expenses and fees equal to the percentage that the defendant was adjudicated responsible.

a. (as previously submitted to the Committee): ***All Defendants Respond Individually.*** *When all defendants counteroffer individually to a global offer, the individual responses should be combined and treated as a global counteroffer. Each defendant who counteroffered an amount less than 120% of their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed allowances under this rule based on their adjudicated share of responsibility. However, if all Defendants have individually offered an amount less than 120% of their adjudicated responsibility of the monetary judgment but the combined counteroffer is greater than 120% of the claimant's global offer, then each Defendant will be responsible for the portion of expenses and fees equal to the percentage that the Defendant was adjudicated responsible.*

(2) **Defendants Against Whom No Joint and Several Judgment Is Sought.** If there are multiple defendants and there are defendants against whom no joint and several judgment is sought, claimant may file and serve individual offers on those defendants against whom no joint and several judgment is sought as prescribed by this rule. Similarly, those

defendants against whom no joint and several judgment is sought may file and serve individual offers as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3 as the case may be and subject to the provisions of this rule.

Section (b)(2) is intended to apply most specifically in non-tort contexts or the mixed non-tort/tort context.

(3) **Individual Offer.** If there are multiple defendants, individual offers of judgment may be filed and served as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the allowances as prescribed by R. 4:58-2 or -3, as the case may be.

(c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

The Subcommittee proposes no change to the language of R. 4:58-4(c). The focus of R. 4:58-4(c) is on two multiple claim scenarios. The first is where a claimant asserts multiple claims for relief and the second is where a counterclaim is asserted. In such circumstance, a claimant shall include in its offer all claims asserted by or against it. In the case of a counterclaimant, that party shall include in is offer all claims by and against it. R. 4:58-4(c) does not specify crossclaims, but where there are counterclaims and crossclaims, it has been held that a party may make an offer to settle all claims. Comment 6.2 and Firefreeze v. Brennan Assoc., 347 N.J. Super. 435, 441-442 (App. Div. 2002).

Rule 4:58-5. Application for Fee; Limitations

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.

The Subcommittee proposes no changes to R. 4:58-5. This Rule provides for renewal of a rejected offer within 10 days after the fixing of the first trial date for a retrial by serving actual notice on offeree of the intent to renew the prior offer. The effective date is that of the original offer. Alternatively, a party may make a new offer effective as of that new offer's date. The Rule does not address the impact of the original offer where a new trial is ordered only as to some parties or issues. Therefore, clarification might be useful here.

Rule 4:58-6. Application for Fee; Limitations

Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.

The Subcommittee proposes no changes to R. 4:58-6.

This Rule addresses the mechanism for awarding allowances and incorporates the court approval process under R. 4:42-9(b). Applications to the court must be made within 20 days after entry of final judgment. That date is when the judgment is entered on the civil docket. Comment 7 and Reid v. Finch, 425 N.J. Super. 196, 202-203 (Law Div. 2011).

This Rule also prohibits a double recovery. This Rule contemplates application for allowances and not setoffs. Presumably, the latter will only occur in response to a prevailing party's fee application. However, this Rule may be an appropriate place to reference any right to a setoff as it adopts the process in R. 4:42-9(b) and incorporates the reasonableness standards in RPC 1.5 Fees. The factors listed in RPC 1.5 (a)(1), (4) and (5) might be particularly relevant in a reduction to a fee request.

Here, consideration also needs to be given to the 2006 amendment to R. 4:58-3(c)(4) where denial of a full fee to the prevailing party would conflict with policies underlying a fee-shifting statute or rule of court. See Comments 1 and 5. Consequently, absent an express prohibition against a reduction in a fee-shifting statute or rule, an examination to ascertain the absence of a conflict with their underlying policy would be required before reducing a fee allowance under the OOJ Rule. R. 4:58-3(c) seems to address this concept, unless the Committee believes further clarification is required.

Rule 4:58-7. Acceptance of Offer Not Deemed a Judgment; Payment of Accepted Offer

(a) Except as provided for in (b), acceptance and payment of an offer under R. 4:58 will not be deemed a judgment against the offeree and will not require the filing of a Warrant of Satisfaction.

(b) Absent leave of court, or the agreement of the offeror and offeree, full payment of the accepted offer shall be made within 30 days after the date of service of notice of acceptance. Within 7 days of full payment, the offeror and the offeree shall file a Stipulation of Dismissal With Prejudice as to all claims that are the subject of the accepted offer. If full payment is not made within 30 days, then the party entitled to receive payment may (i) withdraw its offer or acceptance, or (ii) apply for relief consistent with R. 1:6-2(a) for entry of final judgment. The court shall award reasonable expenses, including reasonable fees and costs for the application for final judgment unless the court finds that the failure to make payment was substantially justified or that other circumstances make an award of expenses unjust.

The Subcommittee proposes this additional Section to the Rule to clarify that acceptance of an offer does not result in an automatic judgment against the offeree. Thus, assuming payment is made

pursuant to subsection (a), attorneys need not execute a warrant of satisfaction. However, to protect against potential abuse, delay, further litigation, and costs, the Subcommittee proposes a 30-day time period in which payment must be made absent (i) agreement by the offeror and offeree, or (ii) leave of court. The Subcommittee believes an offeree should not be penalized by accepting an offer that the offeror either refuses to or cannot pay. The language allowing for an agreement between the parties may be needed in those circumstances where the parties agree to a payment plan over time, or for parties such as government entities that may need a little longer to issue payment (although less likely where they would already have to hold a meeting to authorize acceptance of the offer). The addition of the language at the end of subsection (b) gives the court some guidance on whether the fee award is discretionary or mandatory.

The requirement of filing a Stipulation of Dismissal upon full payment (or entry of Final Judgment under subsection (b)) will assist the parties and the court in determining the date of finality for purposes of appeal in multi-party actions.

PART III: APPLICATION OF REVISED RULES

This Part provides illustrations of various scenarios involving an Offer of Judgment, both under the current iteration of R. 4:58 as well as under the Subcommittee's proposed Amended Rule. The illustrations rely exclusively on the text of the Rule, without incorporating Comments or pertinent case law.

For purposes of this discussion, "the Allowances" shall refer to, in addition to costs of suit, (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance. See R. 4:58-2(a); R. 4:58-2(b).

Illustration #1: One plaintiff makes a demand upon one defendant

- Under the current Rule:
    - If the claimant obtains a money judgment in an amount that is 120% or more of an offer, the claimant shall be entitled to the Allowances from the defendant.
        - Example: Plaintiff obtains $120,000 after issuing a $95,000 Offer of Judgment, plaintiff will be entitled to the Allowances
- This outcome would be unchanged in the proposed Amendments to the Rule. See R. 4:58-2(a).

Illustration #2: One plaintiff makes a global offer upon multiple defendants, and no defendant responds: R. 4:58-4(b)(1)(A)

- Under the proposed Amended Rule:
    - Each defendant would be jointly and severally responsible for the entire allocation of Allowances. See Proposed Rule 4:58-4(b)(1)(A).

Illustration #3: One plaintiff makes a global offer, defendants make a global counteroffer: R. 4:58-4(b)(1)(B)

- Where a claimant offers $95K, receives a global counteroffer from defendants of $60K and obtains a $120K judgment, each defendant shall be responsible only for its adjudicated share of liability of the total allowances awarded claimant under the Rule. Therefore, if claimant is allowed granted $45K in Allowances under the rule and there were three defendants who made a global counter-offer who were each adjudicated 1/3 liable, each would be only responsible for $15K as their one-third share.

Illustration #4: One plaintiff makes a global offer upon multiple defendants, and only one defendant responds: R. 4:58-4(b)(1)(C)

- Under the current Rule:
    - If the responding defendant offers in response less than a pro rata share, that defendant shall be deemed not to have accepted the claimant's offer.

- The current rule does not expressly contemplate a scenario where Plaintiff makes a global offer upon multiple defendants, and only a single defendant responds

- Under the proposed Amended Rule:
  - The defendant's counteroffer shall be treated as a counteroffer limited to that defendant's share.
  - Examples. The total adjudicated responsibility in these illustrations is $100,000.
    - Example 1
      - For the claimant to be entitled to the Allowances, the global offer must not exceed $83,333.33. See Proposed Rule 4:58-4(b)(1).
      - If a defendant is adjudicated liable for $40,000 after a $35,000 counteroffer, the defendant will not be assessed any allowances under the Rule. See Proposed Rule 4:58(b)(1)(C)(a).
        - $40,000 liability is **LESS** than 120% of the $35,000 counteroffer amount = $42,000
        - The remaining non-responsive defendants will remain jointly and severally responsible for 100% of the total Allowances to which claimant may be entitled
      - If a defendant is adjudicated liable for $40,000 after a $30,000 counteroffer, that defendant shall be responsible for 40% of the allowances, equal to their percentage of adjudicated responsibility. See Proposed Rule 4:58(b)(1)(C)(b).
        - $40,000 liability is **GREATER** than 120% of the $30,000 counteroffer amount = $36,000
        - The non-responsive defendants shall be jointly and severally liable for the 60% balance of Allowances to which claimant is entitled.
    - Example 2
      - Plaintiff sues 4 defendants. P makes a global offer of judgment to all four defendants for $75K. D2, D3, and D4 (the main target) do not make a counteroffer. D1 makes a counteroffer of 30K, but P rejects it. The case goes to trial and P gets an award of 100K. The jury finds D1 is 10% negligent (10K), D2 is 20% negligent (20K), D3 is 30% negligent (30K) and D4 is 40% negligent (40K). The verdict of 100K is more than 20% above P's offer of 75K, so P is entitled to allowances.
        - If the defendants want to split it up based on their percentage of responsibility, the calculation would be amongst those remaining defendants. D2, D3, and D4 made up 90% of the verdict in varying amounts. The math would look like this: D1(.2x) + D2(.3x) + D3(.3x) = 100. X = 111.11. While D2, D3, and D4 are jointly and severally liable for all allowances, the total responsibilities of all defendants would be:

- D1 ($30,000 offer) (Verdict 10% - $10,000) = Doesn't owe or receive any allowances under the rule
- D2 (No offer) (Verdict 20% - $20,000) = (.2x) * 111.11 = D2 is responsible for 22.3% of the allowances
- D3 (No offer) (Verdict 30% - $30,000) = (.3x) * 111.11 = D3 is responsible for 33.3% of the allowances
- D4 (No offer) (Verdict 40% - $40,000) = (.4x) * 111.11 = D4 is responsible for 44.4% of the allowances

Illustration #5: One plaintiff makes a global offer upon multiple defendants, and multiple, but not all, defendants respond: R. 4:58-4(b)(1)(D). For this illustration to apply plaintiff would have had to prevail and obtain a verdict in plaintiff's favor.

- Under the current Rule:
  - The current Rule does not differentiate between scenarios where multiple defendants submit an Offer of Judgment.
- Under the proposed Amended Rule:
  - The defendants must indicate that their counteroffer only represents an individual share of responsibility. If they do so, the counteroffer shall be treated as a counteroffer limited to that defendant's share.
  - Example. The total adjudicated responsibility in these illustrations is $100,000.
    - For the claimant to be entitled to any Allowances, the global offer must not exceed $83,333.33. See Proposed Rule 4:58-4(b)(1).
    - If Defendant 1 is adjudicated liable for $40,000 after a $35,000 counteroffer; Defendant 2 is adjudicated liable for $20,000 after a $15,000 counteroffer; Defendants 3 and 4 do not respond:
      - Defendant 1 will not be assessed any Allowances under the Rule. See Proposed Rule 4:58(b)(1)(D)(a).
        - $40,000 liability is **LESS** than 120% of the $35,000 counteroffer amount = $42,000
      - Defendant 2 will be assessed 20% of the Allowances. See Proposed Rule 4:58(b)(1)(D)(b).
        - $20,000 liability is **GREATER** than 120% of the $15,000 counteroffer amount = $18,000. As a responsive offeree, however, the assessment of Allowances would be capped at the portion of liability.
      - Defendants 3 and 4, as non-responsive offerees, will remain jointly and severally responsible for the remaining 80% of the total Allowances to which claimant is entitled.
    - In this situation the individual defendant making the counter-offer is not entitled to an allowance even if the counter-offer is above 80% of that

defendant's adjudicated share of damages awarded. The reason for not permitting such an allowance is that the risk of such post-verdict cost-shifting otherwise could induce a plaintiff to settle with individual defendants who are anticipated to be found less culpable than other "primary target" defendants who have made no counter-offers or only "token" counter-offers.

Illustration #6: One plaintiff makes a global offer upon multiple defendants, and all defendants respond, either individually or as a global counteroffer: R. 4:58-4(b)(1)(E)

- Under the current Rule:
  - The current Rule does not set forth clear instructions for where one plaintiff makes a global offer, and all defendants respond.
- Under the proposed Amended Rule:
  - Global Counteroffer:
    - Where plaintiff qualifies for Allowances, each defendant will be responsible for the portion of Allowances to the percentage that they were individually adjudicated responsible. See Proposed Rule 4:58-4(b)(1)(B).
    - Plaintiff makes an $80,000 global offer; defendants make a $60,000 global counteroffer; judgment of $100,000 issued to plaintiff. Defendant 1 was 30% responsible, Defendant 2 was 70% responsible.
      - 120% of $80,000 offer = $96,000, **less** than the adjudicated amount, qualifying Plaintiff for Allowances
      - Defendant 1 will be responsible for 30% of the Allowances; Defendant 2 will be responsible for 70% of the Allowances.
  - All Defendants Respond Individually:
    - Individual responses combined and treated as global counteroffer. Each defendant who counteroffered an amount **LESS** than 120% of their adjudicated responsibility of the monetary judgment will not be responsible for any allowances. Any defendant or defendants who did not obtain a favorable determination will be assessed allowances under this rule based on their adjudicated share of responsibility. See Proposed Rule 4:58-4(b)(1)(E).
      - Example 1. Plaintiff makes an $80,000 global offer; defendants make counteroffers totaling $70,000; judgment of $100,000 issued to plaintiff. Defendant 1 was 30% responsible but offered $40,000, Defendant 2 was 60% responsible but offered $30,000. Defendant 3 was 10% responsible but offered $10,000.
        - 120% of $80,000 offer = $96,000, **less** than the adjudicated amount, qualifying Plaintiff for Allowances
        - Defendant 1
          - 120% of $40,000 counteroffer = $48,000. $48,000 is **more** than Defendant 1's $30,000 responsibility.

Defendant 1 will not be responsible for any Allowances

- Defendant 2
  - 120% of $30,000 counteroffer = $36,000. $36,000 is **less** than $70,000 responsibility. Defendant 2 will be responsible for all of the Allowances

- Example 2. Plaintiff makes an $80,000 global offer; defendants make counteroffers totaling $50,000; judgment of $100,000 issued to plaintiff. Defendant 1 was 30% responsible but offered $27,500, Defendant 2 was 60% responsible but offered $22,000. Defendant 3 was 10% responsible but offered $5,500.
  - 120% of $80,000 offer = $96,000, **less** than the adjudicated amount, qualifying Plaintiff for Allowances
  - Defendant 1
    - 120% of $27,500 counteroffer = $33,000. $48,000 is **more** than Defendant 1's $30,000 responsibility. Defendant 1 will not be responsible for any Allowances
  - Defendant 2
    - 120% of $22,000 counteroffer = $26,400. $26,400 is **less** than $70,000 responsibility.
  - Defendant 3
    - 120% of $5,500 counteroffer = $6,600. $6,600 is **less** than $10,000 responsibility.
  - Defendant 2 and 3 are assessed all allowable allowances. Their responsibility was Defendant 1 (70%) and Defendant (10%). ((.7x)+(.1x)) = 100. x=125. Defendant 1 is responsible for 87.5% of the allowances. Defendant 2 is responsible for 12.5% of the allowances.

Illustration #7: One plaintiff makes an individual offer upon an individual defendant in a multi-defendant case R. 4:58-4(b)(3)

- Under the current Rule:
  - The current Rule does not set forth clear instructions for where one plaintiff makes an individual offer upon an individual defendant in a multi-defendant case
- Under the proposed Amended Rule:
  - Individual offers of judgment may be filed and served as prescribed by R. 4:58-1. If such offeror is successful as prescribed by R. 4:58-2 or -3, such claimant or defendant shall be entitled to the Allowances. See Proposed Rule 4:58-4(b)(3).
    - Example. Plaintiff makes an $50,000 individual offer to Defendant 1 in a two-defendant case; Defendant 1 does not accept the offer. Verdict is for Plaintiff in the amount of $100,000. Defendant 1 was adjudicated 65% responsible. Defendant 2 was adjudicated 35% responsible.

- Defendant 1 was adjudicated responsible for $65,000. 120% of the $50,000 offer, less than the adjudicated amount. Defendant 1 is responsible for the allowances.
- Defendant 2 was adjudicated responsible for $35,000. Plaintiff did not make an offer to Defendant 2. Defendant 2 is not responsible for any allowances.

ADDITIONAL RESOURCES

ATTACHMENT 3

M E M O R A N D U M

TO:	Sub-Sub-committee Regarding Interrogatory Questions of the Discovery Subcommittee
FROM:	Jonathan H. Lomurro
DATE:	April 15, 2021
RE:	Interrogatory Drafting Assignment

Committee's Charge

At the October 22, 2020 Meeting of the Civil Practice Committee, New Business Item **G. Appendix II – Interrogatory Forms** was assigned to the Discovery sub-committee regarding Interrogatory Questions. The Discovery sub-committee assigned the task to the sub-sub-committee regarding interrogatory questions. The assignments were:

(1). Proposed Amendments to *Form C*

An attorney suggested that Form C and Form C(1) Interrogatories be amended as follows:

Form C interrogatories should include Form A Interrogatory No. 20:

> 20. If you or your representative and the defendant have had any oral communication concerning the subject matter of this lawsuit, state: (a) the date of the communication; (b) the name and address of each participant; (c) the name and address of each person present at the time of such communication; (d) where such communication took place; and (e) a summary of what was said by each party participating in the communication.

Form C(1) should include the following inquiries:

- If the Defendant(s) or any occupant of the vehicle consumed any alcoholic beverage or took any drugs or medication within twenty-four (24) hours before the subject incident, state what was consumed

- If at the time of the accident you were in the course of your employment, logged on to a Transportation Network Company's digital network or engaged in a prearranged ride for a Transportation Network Company (TNC), state the name and address of your employer or TNC.

(2). Proposed Amendments to *Form C* and *Form C(3)*

An attorney suggested that Form C and Form C(3) be amended as follows:

Form C interrogatories should add language to Form C Interrogatory No. 5:

> 5. State (a) the name and address of any person who has made a statement regarding this lawsuit or the subject matter of this lawsuit; (b) whether the statement was oral or in writing; (c) the date the statement was made; (d) the name and address of the person to whom the statement was made; (e) the name and address of each person present when the statement was made; and (f) the name and address of each person who has knowledge of the statement.

Form C(3)'s title be clarified to apply to non-physician medical malpractice defendants:

> Form C(3). Uniform Interrogatories to be Answered by Defendant(s) [~~Physicians~~] in Medical Negligence Cases Only: Superior Court

G(3). Proposed Amendments to *Form C* and *Form C(3)*

The committee also wished to clarify a common issue with Form C Interrogatory # 2:

> "Describe the alleged occurrence, incident, accident, [~~or occurrence~~] or act of negligence asserted in this action in detail, setting forth the date, location, time and weather."

The committee also wished to clarify a common issue with Form C(3) Interrogatory # 1:

> "Identify and describe the appearance of each and every person who was present in the vicinity of the alleged occurrence, incident, accident, or act of negligence asserted in this action, giving the name, address and occupation of each such person and stating your relationship to each."

Interrogatory Sub-Committee Discussions

The sub-committee reviewed the suggestions and discussed the requests by e-mail and at several Teams meetings. For some background, the current examination was prompted by the receipt of two attorney letters:

a) The first request was from Andrew F. Garruto, Esq. He requested adding Form A interrogatory #20 to the Form C interrogatories. After careful consideration, the sub-committee agreed that

the interrogatory served a legitimate purpose and should logically be included in the Form C Interrogatory questions. The request seeks communications regarding the subject matter of the lawsuit. The request would provide advanced knowledge of statements prior to depositions, identify potential witnesses, and clarify the knowledge of the potential witnesses.

b) The second request was from Andrew F. Garruto, Esq. He requested adding two additional questions to the Form C(1) interrogatories. The first additional question seeks information about consumption of alcoholic beverages, drugs, or medication prior to the subject incident. The second additional question seeks information about employment with a Transportation Network Company. The committee discussed the two requests and felt that the additional questions were proper additions to the Form C(1) interrogatory questions. By having the questions included, potential third parties may be identified early in the proceedings and prior to depositions. The inquiry would protect parties from the necessity of moving late into the litigation to amending complaints and the need to seek redepositions once new parties have been added. Further, it would decrease the length of litigation by including necessary parties at an early stage of litigation.

c) The third request was from Jonathan H. Lomurro, Esq. It seeks to clarify Form C interrogatory question 5 by adding "or the subject matter of this lawsuit." The committee agreed that the language would provide clarity to the question.

d) The fourth request was from Jonathan H. Lomurro, Esq. The request was to change the heading to Form C(3). After discussions, the suggestion was amplified with additional clarification to confirm that the questions were to be answered by all defendants in medical or nursing professional negligence actions.

e) The committee uniformly wished to clarify a common issue with the terminology that arose with Form C Interrogatory #2 and Form C(3) Interrogatory question #1. The proposed change recommended by the committee would be to amend the term "alleged occurrence" to state "alleged occurrence, incident or act of negligence asserted in this action."

After a meeting with the full committee, our sub-committee was tasked with reevaluating the full interrogatories for clarity and consistency for both Plaintiff and Defendant Form interrogatories. The interrogatories were reviewed and the subcommittee agreed to provide the requested mirroring changes between Form A interrogatories and Form C interrogatories.

Conclusion

For these reasons, the Subcommittee recommends that the following changes be made to the Form Interrogatories:

Recommended Rule Revisions to the Subcommittee for Consideration

Add Form A interrogatory #20 to the Form C interrogatories as #16

16. If you or your representative and the defendant have had any oral communication concerning the lawsuit or the subject matter of this lawsuit, state: (a) the date of the communication; (b) the name and address of each participant; (c) the name and address of each person present at the time of such communication; (d) where such communication took place; and (e) a summary of what was said by each party participating in the communication.

Add Form A interrogatory #21 to the Form C interrogatories as #17

17. If you have obtained a statement from any person not a party to this action, state: (a) the name and present address of the person who gave the statement; (b) whether the statement was oral or in writing and if in writing, attach a copy; (c) the date the statement was obtained; (d) if such statement was oral, whether a recording was made, and if so, the nature of the recording and the name and present address of the person who has custody of it; (e) if the statement was written, whether it was signed by the person making it; (f) the name and address of the person who obtained the statement; and (g) if the statement was oral, a detailed summary of its contents.

Add same two questions to Form C(1) interrogatories [#21 & 22] and A(1) interrogatories [#38 and 39]

Form C(1)

21. If the Defendant(s) or any occupant of the vehicle consumed any alcoholic beverage or took any drugs or medication within twenty-four (24) hours before the subject incident, state what was consumed

22. If at the time of the accident you were in the course of your employment, logged on to a Transportation Network Company's digital network or engaged in a prearranged ride for a Transportation Network Company (TNC), state the name and address of your employer or TNC.

Form A(1)

38. If the Plaintiff(s) or any occupant of the vehicle consumed any alcoholic beverage or took any drugs or medication within twenty-four (24) hours before the subject incident, state what was consumed

39. If at the time of the accident you were in the course of your employment, logged on to a Transportation Network Company's digital network or engaged in a prearranged ride for a Transportation Network Company (TNC), state the name and address of your employer or TNC.

Add clarification wording to Form C interrogatory #2

2. Describe your version of the alleged occurrence, incident, accident, or act of negligence asserted ~~accident of occurrence~~ in detail, setting forth the date, location, time, and weather.

Add clarification wording to Form C interrogatory #5

5. State (a) the name and address of any person who has made a statement regarding this lawsuit or the subject matter of this lawsuit; (b) whether the statement was oral or in writing; (c) the date the statement was made; (d) the name and address of the person to whom the statement was made; (e) the name and address of each person present when the statement was made; and (f) the name and address of each person who has knowledge of the statement.

Add Form C interrogatory #5 to Form A interrogatories

40. State (a) the name and address of any person who has made a statement regarding this lawsuit or the subject matter of this lawsuit; (b) whether the statement was oral or in writing; (c) the date the statement was made; (d) the name and address of the person to whom the statement was made; (e) the name and address of each person present when the statement was made; and (f) the name and address of each person who has knowledge of the statement.

Correct wording in heading of Form C(3)

Form C(3). Uniform Interrogatories to be Answered by Defendant(s) ~~Physicians in Medical Malpractice~~ in all Professional Malpractice Cases involving Healthcare Providers ~~Cases~~ Only: Superior Court

Add clarification wording to Form C(3) interrogatory #1

1. Identify and describe the appearance of each and every person who was present in the vicinity of the alleged occurrence, incident, accident, or act of negligence asserted in this action, giving the name, address and occupation of each such person and stating your relationship to each.

ATTACHMENT 4

Final Report of the

Technology and Social Media Subcommittee

At the request of Judge Glenn A. Grant, the Acting Administrative Director of the Courts, the Civil Practice Committee formed a Technology and Social Media Subcommittee (Subcommittee) to consider whether the New Jersey Court Rules governing service of process should be revised to account for technological and social media advances. Membership on the Subcommittee includes individuals serving on the Special Civil Practice Committee, the Committee on the Tax Court, and the Family Practice Committee. The Subcommittee specifically considered whether Rule 4:4-4 should be amended to expressly permit service of process via social media platforms.

After considering a comprehensive survey of all state courts, federal courts, and international courts, the Subcommittee recommends Rule 4:4-4 not be revised. The majority of the Subcommittee members believe the Rule, as worded, allows judges flexibility to issue orders permitting service of process by way of social media after he or she conducts a thorough, fact-specific analysis on a case-by-case basis, and considers due process protections to ensure the party being served receives actual notice.

Rule 4:4-4 provides:

> If service can be made by any of the modes provided by this rule, no court order shall be necessary.[1] If service cannot be made by any of the modes provided by this rule, any defendant may be served as provided by court order, consistent with due process.
>
> [R. 4:4-4(b)(3).]

[1] The modes of service for summons, writs, and complaints pursuant to Rule 4:4-4 include personal service, Rule 4:4-4(a); service by mail, Rule 4:4-4(b)(1); service "as provided by law," Rule 4:4-4(b)(2); and service "[b]y court order," Rule 4:4-4(b)(3).

As explained in the comments to Rule 4:4-4(b)(3), this provision "is evidently intended to fill a gap in the rules by permitting the court to direct service to be made in a particular manner where service cannot be effected pursuant to the other provisions of this rule; so long as the order is consistent with due process of law." Pressler & Verniero, Current N.J. Court Rules, cmt. 3.3.1 on R. 4:4-4 (2020).

At least six state courts, in addition to New Jersey courts, allow for service of process by court order where traditional modes of service are impossible or impractical. For state courts allowing service of process by social media, a plaintiff must demonstrate the traditional modes of service were unsuccessful and establish that service by social media would protect a defendant's due process rights by ensuring actual notice upon the party.

Oregon amended its court rules to allow service of process by social media upon obtaining permission from the court. O.R.C.P. 7(D)(6). In Alaska and Nevada, service by social media may be obtained with the permission of the court, coupled with another method of service. A.R.C.P. 4(e)(3); N.R.C.P. 4.4(d)(1). Utah and New York allow service by social media but have not amended their court rules to reflect this additional method of service. U.R.C.P. 4(d)(5)(A); N.Y.C.P.L.R. 308(5). Texas amended its court rules, effective December 31, 2020, to allow for service of process "electronically by social media, email, or other technology" when other methods of service are unsuccessful. Tex. R. Civ. P. 106.

The consensus of the Subcommittee members was that Rule 4:4-4 is sufficiently broad and need not be amended to specifically include service by social media. The Subcommittee members who disfavored amending the Rule noted judges in this State have reviewed requests for alternative methods of service on a case-by-case basis upon the filing of a motion by a plaintiff. In granting such motions, judges have required a plaintiff to demonstrate the other methods of service are impracticable and why service by social media is reasonably calculated to apprise a defendant of the action.

There may be specific instances where a social media platform is the only viable means of effectuating service. In its current form, Rule 4:4-4(b)(3) provides flexibility and permits a plaintiff to seek a court order allowing service by social media if the litigant can demonstrate the defendant frequents the social media platform to ensure (1) the defendant's due process rights are protected; (2) the defendant is apprised of the action; and (3) the defendant is accorded an opportunity to be heard.

The Subcommittee members who favored a rule amendment suggested the following: amending the Rule to additionally provide "alternate or substituted service by social media must be consistent with due process of law"; providing a motion packet on the judiciary's website with specific instructions regarding service of process by social media; and offering guidance to judges considering a request to allow service by social media. The last suggestion included a specific showing by the party requesting service by social media to certify why service could not be made by any other means and to confirm that the alternative method of service would ensure receipt by demonstrating the other party regularly uses a particular social media platform. The Subcommittee members recommending a Rule change agreed that service via social media must be consistent with due process of law.

Respectfully submitted,

William Anklowitz, J.S.C.
Jeffery B. Beecham, J.S.C.
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Michelle M. Smith, Esq.
Mala Sundar, J.T.C.

ATTACHMENT 5

TO: Hon. Jack M. Sabatino, P.J.A.D., Chair, Supreme Court Civil Practice Committee

FROM: Andrew J. Rothman, Esq. Chair, Service-by-Mail Sub-Committee

RE: REPORT OF THE SUBCOMMITTEE

By letter dated August 7, 2020 (attached), Hon. Glenn A. Grant, J.A.D., Acting Administrative Director directed the Civil Practice Committee to consider whether some amendment to the current rules permitting service of process by regular and certified mail is needed. Although referencing a letter complaining about service by mail he received Philip Geron, President of Guaranteed Subpoena Service, Inc. (also attached), Judge Grant specifically raised the concern that "to the extent that USPS mail delivery may not be consistently reliable in all areas of New Jersey, continued reliance on service by mail would be misplaced and potentially incompatible with our Judiciary-wide commitment to access and fairness" and that review of the issues raised concerning service by mail was part of the Supreme Court's renewed "commitment to eliminate systemic barriers to equality." Citing the objectives "to identify, confront, and seek to remedy institutional bias and inequality in order to ensure justice for all court users," Judge Grant has asked this Committee to look closely at the service by mail rules.

This Subcommittee was formed last fall in response to Judge Grant's request. We have been provided by Diane with a fairly voluminous bundle of reports and other documents held by the Administrative Office of the Courts describing the history of the rule, its implementation, and various reports of its impact. Among this material were various reports highlighting the success of the service by mail program, in terms of low cost, efficiency, and reduction of backlog in the Special Civil docket. Also included was a 2019 report by Judge Anklowitz, showing that for *small claims* courts only Alaska, Colorado, Delaware, Massachusetts, Minnesota, New Hampshire, New York, and Wisconsin permitted service by regular and certified mail, where service was deemed made as in New Jersey so long as the regular mail was not returned undeliverable, and *no other State* allowed such service for its intermediate courts like our Special Civil Part. That report is attached to this report.

However, none of the materials provided data relating specifically to the issue Judge Grant spoke to: whether the seeming efficiency of the program was due to the mail not actually being received by some defendants, and whether these defendants were disproportionately among certain strata of the population.

Reports that were furnished to the Committee that were compiled after the program was instituted drew from data readily available to the Court: number of Special Civil cases filed, number of cases resolved, and amount of time between filing and resolution. (Also reported was the administrative burden on the Special Civil Court Clerk's Office in processing the summons and complaints and effectuating the regular and certified mailings.) But the reports the Subcommittee had did not show such statistics as comparative numbers of default judgments entered before and after the service by mail program began, or the racial/ethnic/socio-economic distribution of defendants against whom default judgments were being entered. And the reports did not consider impact in other courts beside the Special Civil Part: service by mail is also employed in the Family Court for non-dissolution matters, and in the Criminal Court, where service by mail is used to send notices of indictment and fi, and failure to appear following mailing of that notice results in a warrant for the arrest of the defendant, which impacts subsequent bail considerations.

This Subcommittee met twice in teleconference since it was formed and had robust interchange via email, during which we considered and discussed the material with which we were provided. At bottom the consensus of the Subcommittee was that there was substantial anecdotal evidence from those members who typical serve indigent and low-income clients that transiency is extraordinarily commonplace in the communities they serve, and that in those communities it is very *un*common for mail received for a person no longer living at the address to which it was delivered to be returned to the mailbox marked "no longer at this address." Rather, the anecdotal evidence suggests, that mail is simply discarded.

Lacking more concrete evidence, the Committee looked elsewhere for reports of disproportion in mail receipt among different communities. Our research was far-reaching but not very productive. The most informative report uncovered was a study performed by the Director of Data & Analysis for the non-partisan, non-profit Voter Registration Center, looking at 2020 data related to mailed voter registration efforts in the 50 States. That data did indeed show some disparity in mail deliverability: whereas in New Jersey, the Center found 79.1% of white registered voters had "mailable addresses," the percentage among Black and Hispanic registered voters was only 60.7% and 57.7% respectively. The relevant excerpt from the data provided by the Voter Registration Center is attached as well.

The consensus of the Subcommittee was that the issue we were charged to address was serious, and that the anecdotal evidence was very troubling, but there was not unanimity in that regard. Arthur Raimon, on behalf of the creditor's bar, expressed the success of the service by mail program, and provided the Subcommittee with a letter Richard Eichenbaum, a trustee of the New Jersey Creditors Bar Association, strongly disagreeing with the concerns raised by the Geron letter that prompted the request from Judge Grant that we look at this issue. Mr. Eichenbaum's letter is also attached, and Arthur asks that it be considered the minority report of this Subcommittee.

But the Subcommittee all agreed that anecdotal evidence is simply not a sufficient basis upon which to base any recommendation for a change in the rules. Rather, it was suggested that the Administrative Office of the Court itself conduct further data collection, more specifically to analyze the percentages of cases in Special Civil part and Family Court ending in default judgments when mailed service is employed, and comparing these percentages to the percentages when personal service was required. If possible, it was suggested that a study of the racial/ethnic/socio-economic characteristics of the defaulting defendants be conducted. Although it was recognized that collecting that data directly would likely prove impossible, because the Court does have the record of the address to which the mail was sent, indirect evidence could be developed based on the addresses, and on the racial/ethnic/socio-economic make up of the neighborhoods surrounding the addresses. Without further data or guidance from the Court, the Subcommittee determined that it could not move forward with a proposal for arule change.

Civil Courts of Small Causes

New Jersey – 2019

William Anklowitz, J.S.C.

g. Service of process, public information

Ease or difficulty of service of process is a factor to consider in balancing access and due process. Legal research shown in the table below showed that there were 12 U.S. states and jurisdictions that did not have a service by mail program. New Jersey was one of the 44 states and jurisdictions (42 states plus Guam and Puerto Rico), that had a small claims service by mail program.

Research for online information on courts' websites and small claims handbooks as shown in the table below, at page 133, showed that 33 jurisdictions provided service of process through the clerk's office. Of the jurisdictions that had service by mail programs, 27 indicated online that the mailing was done through the clerk's office. New Jersey was one of those 27.

Publicly available information online varies from jurisdiction to jurisdiction. However, it seemed that there was at least some information online in every jurisdiction. Sometimes from the courts, and sometimes from legal aid societies or others, there was information readily available. New Jersey had information and forms online and, so, ranked among the higher levels of access to small claims.

Table 11 - Small Claims - service of process by state and jurisdiction

state	service by mail program	cite
Alabama	mail, refused or acknowledged	*Ala. Small Claims Ct. R.* D; *Ala. R. Civ. P.* 4(e); *Fuller v. Fuller*, 991 So. 2d 285 (Ala. Civ. App. 2008)(mail marked merely unclaimed is not sufficient, but mail refused is sufficient for a basis for a default if regular mail was also sent).
Alaska	mail, refused or acknowledged	*Alaska Dist. Ct. R. Civ. Proc.* 11(e)(mail refused is sufficient for a basis for a default if regular mail was also sent)
Arizona	mail, signed by defendant only	*Ariz. Rev. Stat.* § 22-513(must be signed by defendant)
Arkansas	mail, refused or acknowledged	*Ark. Dist. Ct. R.* 10(a)(3)(service by mail is the first attempt, but by reference to the regular civil rules, failure to claim certified mail is not sufficient for refusal of mail to constitute service)
California	mail, signed by defendant only	*Cal. Civ. Proc. Code* § 116.340(must be signed by defendant

state	service by mail program	cite
Colorado	mail, refused or acknowledged	*Colo. R. Civ. P.* 504(c)(service by mail is complete upon delivery or refusal)
Connecticut	mail, signed or delivery confirmation	*Conn. Practice Book* § 24-10; *see also* form JD-CV-123 which requires an indication of acceptable service.
Delaware	mail, refused or acknowledged	*Del. Code Ann.* tit. 10, § 9524(unclaimed certified mail with a copy sent by regular mail too, signed and delivered at defendant's address)
Florida	mail, signed by defendant only	*Fla. Sm. Cl. R.* 7.070(allows service by mail pursuant to the regular civil rules); *Fla. R. Civ. P.* 1.070(i)(provides that service by mail is allowed if defendant waives formal service and provides that failure to respond to service by mail can result in costs against the defendant)
Georgia	Personal or acknowledged	*Ga. Code Ann*. § 15-10-43(no mail program)
Hawaii	mail, signed by defendant only	*Haw. Rev. Stat. Ann.* § 633-28(must be signed by defendant)
Idaho	Personal or acknowledged	*Idaho R. Sm. Cl.* 2(requires use of court provided forms and that includes form for affidavit of service that requires personal service) and *Idaho R. Civ. P.* 4(personal service required and mere mailing is not enough)
Illinois	mail, signed as delivered	*Ill. Sup. Ct. R.* 284(mail must be signed for)
Indiana	mail, signed as delivered	*Ind. S.C.* 3(unclaimed certified mail is not good service, *Eicher v. Walter A. Doerflein Ins. Agency*, 384 N.E.2d 1126 (Ind. Ct. App. 1979)
Iowa	mail, signed as delivered	*Iowa Code* § 631.5(4)(service by mail requires signed receipt)
Kansas	Personal or acknowledged	*Kan. Stat. Ann.* § 61-3003(although mail can work, it does not appear to be primary or preferred method)
Kentucky	mail, signed by defendant only	*Ky. R. Civ. P.* 4.01(1)(a)(must be signed by defendant)
Louisiana	mail, signed as delivered	*La. Code Civ. Proc. Ann.* art. 4919(D)(mail must be signed for)

state	service by mail program	cite
Maine	mail, signed by defendant only	*Me. R. Sm. Cl. P.* 4(mail service can be attempted first, but if the mail is not acknowledged, then regular service can proceed)
Maryland	mail, signed by defendant only	*Md. R. Civ. P.* 3-121(must be signed by defendant)
Massachusetts	mail, first class mail that is not returned as undelivered	*Mass. Ann. Laws* ch. 218, § 22; *Mass. Unif. Sm. Cl. R.* 3(first class mail service only is good service unless the mail is returned)
Michigan	mail, signed by defendant only	*Mich. Comp. Laws Serv.* § 600.8405(must be signed by defendant)
Minnesota	mail, first class mail by the clerk that is not returned as undelivered	*Minn. Stat.* § 491A.01, subd. 3b(mail served by first class mail by the clerk for claims up to $2,500 and by plaintiff by certified mail above that amount)
Mississippi	Personal or acknowledged	Miss. Code Ann. § 11-9-107; Miss. Unif. Justice Ct. R. 2.08
Missouri	mail, signed by defendant only	*Mo. Sup. Ct. R.* 142.02(must be signed by defendant)
Montana	Personal or acknowledged	*Mont. Code. Ann.* § 25-35-604(service as in Justice Courts, which is arranged by the party pursuant to *Mont. Unif. R. Just. and City Ct.* 10)
Nebraska	mail, signed as delivered	*Neb. Rev. Stat. Ann.* §§ 25-2701(county court follows general rules of procedure in District Court) and 25-505.01(provides for personal or acknowledged service)
Nevada	mail, signed as delivered	*Nev. Just. Ct. R. Civ. P.* 5(Justice Court) and 91(small claims)
New Hampshire	mail, first class mail that is not returned as undelivered	*N.H. Rev. Stat. Ann.* § 503:6(first class mail that is not returned as undelivered)
New Jersey	mail, refused or acknowledged	*R.* 6:2-3(d)(unclaimed certified mail with a copy sent by regular mail too or signed and delivered at defendant's address)
New Mexico	Personal or acknowledged	N.M. R. Civ. P. Mag. Ct. 2-202 and N.M. R. Civ. P. Met. Ct. 3-202(no mail program)
New York	mail, certified and regular mail with regular mail not returned within 21 days	*N.Y. Unif. City Ct. Act* § 1803(certified and regular mail with regular mail not returned within 21 days)

state	service by mail program	cite
North Carolina	mail, signed as delivered	*N.C. Gen. Stat.* § 7A-217 citing *N.C. Gen. Stat.* § 1A-1, Rule 4(j)(2)(mail signed for at a defendant's address raises presumption of agency to accept mail on their behalf)
North Dakota	mail, signed by defendant only	*N.D. Cent. Code* § 27-08.1-02(must be signed by defendant) and *Bernhardt v. Dittus*, 265 N.W.2d 684, 687 (N.D. 1978)
Ohio	mail, signed as delivered	*Ohio Rev. Code Ann.* § 1925.05(A) and *Ohio Civ. R.* 4.1(signed as delivered) and *Akron-Canton Regional Airport Authority v. Swinehart*, 406 N.E.2d 811 (Ohio 1980)(served at a place of business is not the same as service at a residence, and so service at a business looks like it must be by restricted delivery to defendant or someone demonstrably their agent)
Oklahoma	mail, signed by defendant only	*Okla. Stat.* tit. 12, § 1755(the clerk attempts service by certified mail first, and if undelivered, then the clerk directs service by Sheriff)
Oregon	mail, signed by defendant only	*Or. Rev. Stat.* § 55.045(as allowed in Circuit Court); *Or. R. Civ. P.* 7; *Or. Rev. Stat.* § 46.445; *Davis Wright Tremaine v. Menken*, 45 P.3d 983, 986 (Or. Ct. App. 2002)(mail must be signed for by defendant to have effective service)
Pennsylvania	mail, signed as delivered	*Pa. R. Civ. P. D.M.J.* 307 to 314(signed as delivered)
Rhode Island	Personal or acknowledged	*R.I. Dist. Ct. Sm. Cl. R.* 2.03, but *R.I. Gen. Laws* § 10-16-6 states that mail undelivered but not refused is good service when service by mail is allowed
South Carolina	mail, signed by defendant only	*S.C. R. Mag. Ct.* 6(d)(6)(signed by defendant)
South Dakota	mail, refused or signed by defendant	*S.D. Codified Laws* §§ 15-39-53 and 55(refused or signed by defendant)
Tennessee	mail, signed as delivered	*Tenn. Code Ann.* § 16-15-903(10) and see also § 16-15-902(c)(signed as delivered)
Texas	mail, signed by defendant only	*Tex. R. Civ. P.* 501.2(b)(2) and 501.3(c)(must signed by defendant)

state	service by mail program	cite
Utah	mail, signed by defendant only	*Utah R. Sm. Cl. P.* 3 and *Utah R. Civ.* P. 4(must be signed by defendant)
Vermont	mail, first class mail only and is good service if defendant files an answer	*V.R.S.C.P.* 3(b)(must be signed by defendant)
Virginia	Personal or acknowledged	*Va. Code Ann.* § 16.1-122.3(C)(service arranged by the clerk by methods used in District Court); *Va. Code Ann.* § 8.01-293(Sheriff or private process server may serve process)
Washington	mail, signed by defendant only	*Wash. Rev. Code Ann.* § 12.40.040(must be signed by defendant)
West Virginia	mail, refused or signed by defendant	*W. Va. Code Ann.* § 50-4-1(clerk collects the fee and forwards to the Sheriff for service); *see also W. Va. Code* § 50-4-4(service is the same as in trial courts of record); *W. Va. Mag. Cts. Civ. Proc. R.* 3
Wisconsin	Mail, good service presumed on mailing unless the mail is later returned	*Wis. Stat.* § 799.12 and .14(service by mail can be later challenged by defendant appearing in the case)
Wyoming	mail, signed by defendant only	*Wyo. Stat. Ann.* § 1-21-203(must be signed by defendant)
American Samoa	Personal or acknowledged	*Am. Samoa Code Ann.* § 43.0504(no mail program)
Guam	Personal or acknowledged	*Guam Misc. R.* 5.1.17(served by Marshal)
District of Columbia	mail, signed by defendant only	*Super. Ct. Sm. Cl. R.* 4(c)(signed by defendant)
Northern Mariana Islands	Personal or acknowledged	N. Mar. I. R. Civ. Proc. 83(d)(no mail program)

state	service by mail program	cite
Puerto Rico	mail, signed by defendant only	*P.R. R. Civ. P.* 4.5("Enviarse por correo certificado con acuse de recibo y entrega restringida a la parte demandada o a la persona autorizada por ésta.")and 60(for claims of $15,000 or less service and the section 4 rules or "por correo certificado"); PUERTO RICO CONSUMER DEBT MANAGEMENT CO., INC., Apelada v. BRENDA L. ADORNO FELICIANO, Apelante, 2018 PR App. LEXIS 2592 (August 31, 2018)(upholding service by certified mail)
U.S. Virgin Islands	Personal or acknowledged	*V.I. R. Civ. P.* 4(no mail program)

f. Service by mail

Just under half of intermediate claims courts, 15 out of 33, shown in the table below permitted service by mail. The average jurisdictional limit for jurisdictions that allowed service to be attempted by mail was about $58,500. The others required more traditional personal service. For the more traditional, hand delivery jurisdictions the average limit was about $26,300. If service by mail is a convenience and higher limits increase access, there was a direct correlation between convenience and access.

Table 25 - Special Civil - service of process by state and jurisdiction

state	Service of process	cite
Alabama	mail, refused or acknowledged	*Ala. R. Civ. P.* 4(e); *Fuller v. Fuller*, 991 So. 2d 285 (Ala. Civ. App. 2008)(mail marked merely unclaimed is not sufficient, but mail refused is sufficient for a basis for a default if regular mail was also sent).
Alaska	mail, signed by defendant	*Alaska Dist. Ct. R. Civ. P.* 1(refers to Rules of Civil Procedure); *Alaska R. Civ. P.* 4(h)(service by mail is allowed if signed for, but also allows for potential email and social media service)
Arizona	Personal or acknowledged	*Ariz. R. J. C. Civ. P.* 113
Arkansas	Personal or acknowledged	*Ark. Dist. Ct. R.* 5
California	mail, acknowledged by defendant	*Cal. Code Civ. Proc.* § 90(regular civil rules apply); *Cal. Code Civ. Proc*. § 415.30(service by mail permitted, defendant to pay costs if acknowledgment of service is not returned)
Colorado	Personal or acknowledged	*Colo. R. Civ. Cty. Ct. Proc.* 304
Connecticut		
Delaware	Personal or acknowledged	*Com. P. Ct. Civ. R.* 4
Florida	mail, acknowledged by defendant	*Fla. R. Civ. P.* 1.070(i)(3)(if defendant does not accept service by mail costs may be imposed)
Georgia		
Hawaii	Personal or acknowledged	*Haw. Rev. Stat. Ann.* § 634-21

state	Service of process	cite
Idaho	Personal or acknowledged	*Idaho R. Civ. P.* 4(personal service required and mere mailing is not enough for in state residents)
Illinois		
Indiana		
Iowa	Personal or acknowledged	*Iowa R. Civ. P.* 1.305
Kansas	mail, signed as delivered	*Kan. Stat. Ann.* § 61-3003(c)(mail has to be actually delivered and signed for, but may be sent, "certified mail, priority mail, commercial courier service, overnight delivery service, or other reliable personal delivery service ")
Kentucky	mail, signed by defendant	*Ky. R. Civ. P.* 4.01(1)(a)
Louisiana	Personal or acknowledged	*La. Code Civ. Proc. Ann.* art. 1231 and 1232
Maine		
Maryland	Personal or acknowledged	*Md. R. Civ. P.* 3-121
Massachusetts	Personal or acknowledged	*Mass. R. Civ. P.* 4
Michigan	mail, signed by defendant	*Mi. R. Civ. P.* 2.105(A)(1)(service by mail must be acknowledge to be good service, *Berger v. King World Productions, Inc.*, 732 F. Supp. 766, 768 (E.D. Mich. 1990)
Minnesota		
Mississippi	mail, acknowledged by defendant	*Miss. R. Civ. P.* 4(c)(3)(if defendant does not accept service by mail costs may be imposed)
Missouri	Personal or acknowledged	*Mo. Ann. Stat.* § 506.120
Montana	mail, acknowledged by defendant	*Mont. Code. Ann.* § 25-23-1(D)(1)(b), *Mont. Just. and City Ct. R. Civ. P.* 4(D)(1)(b)(if defendant does not accept service by mail costs may be imposed)
Nebraska	mail, signed as delivered	*Neb. Rev. Stat. Ann.* §§ 25-2701(county court follows general rules of procedure in District Court) and 25-505.01(1)(c)(of the methods of service, service by mail is allowed if the mail was signed for)
Nevada	Personal or acknowledged	*Nev. Just. Ct. R. Civ. P.* 5(Justice Court)

state	Service of process	cite
New Hampshire	Personal or acknowledged	*N.H. Rev. Stat. Ann.* § 510:2
New Jersey	mail, refused or signed	*R*. 6:2-3(d)
New Mexico		
New York	mail, acknowledged by defendant	*N.Y. C.P.L.R.* § 312-a(if defendant does not accept service by mail costs may be imposed)
North Carolina	mail, signed by defendant	*N.C. Gen. Stat.* § 7A-193(general rules of civil procedure apply), *N.C. Gen. Stat.* § 1A-1, Rule 4(j)(1)(restricted delivery to defendant)
North Dakota		
Ohio	Personal or acknowledged	*Ohio Civ. R.* 4.6(C)(mail unclaimed is not considered refused, but mail refused followed by regular mail, first class postage prepaid, is good service)
Oklahoma		
Oregon		
Pennsylvania		
Rhode Island	Personal or acknowledged	*R.I. D.C.R.* 4
South Carolina		
South Dakota		
Tennessee		
Texas	mail, signed or refused	*Tex. R. Civ. P.* 106 and 107; "The mailing was returned with a post office notation that it was undeliverable and could not be forwarded." This was good service. *Katy Venture, Ltd. v. Cremona Bistro Corp*., 436 S.W.3d 415, 419 (Tex. App. 2014). However, the case was reversed because the address for service was made at an old address. Plaintiff failed "to properly certify the petitioners' 'last known mailing address.'" *Katy Venture, Ltd v. Cremona Bistro Corp.*, 469 S.W.3d 160, 162 (Tex. 2015).
Utah		
Vermont		

state	Service of process	cite
Virginia	Personal or acknowledged	*Va. Code Ann.* § 16.1-80; *Va. Code Ann.* § 8.01-293(Sheriff or private process server may serve process)
Washington	Personal or acknowledged	*Wash. Rev. Code Ann.* § 12.04.040
West Virginia		
Wisconsin		
Wyoming	mail, acknowledged by defendant	*Wyo. R. Civ. P.* 4(u) applies pursuant to *W.R.C.P.C.C.* 2((if defendant does not accept service by mail costs may be imposed)
American Samoa	Personal or acknowledged	*A.S. Dist. Ct. R.* 2("so far as applicable" trial court rules apply in District Court); A.S. T.C. R. Civ. P. 4(service of process requirements)
District of Columbia		
Guam		
Northern Mariana Islands		
Puerto Rico		
U.S. Virgin Islands		

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December 8, 2020

Arthur Raimon
Supreme Court Civil Practice Committee
13 Caruso Rd
Rockaway, NJ 07866

RE: Service by Mail – Correspondence from Philip Geron, President of Guaranteed Subpoena Service, Inc.

Dear Mr. Raimon,

In his correspondence dated July 20, 2020, Philip Geron, President of Guaranteed Subpoena Service, Inc., alleges serious flaws in the Special Civil Part service by mail process set forth in Rule 6:2-3(d). Mr. Geron implies the Special Civil Part's service by mail program should be eliminated to make way for private service of process.

Our organization strongly disagrees with the "concerns" raised by Mr. Geron. For over 30 years, service by Mail in the Special Civil Part has withstood the test of time and should not be abolished.

Service by mail is a cost-effective, efficient and reliable method of serving summons and complaint

Service by mail is a cost-effective, efficient and--above all--reliable method of serving summons and complaint. Elimination of service by mail would not only do a grave disservice to litigants in the Special Civil Part but would likely impose increased administrative burdens upon the judiciary and court staff. For these reasons, New Jersey's service by mail program is envied by practitioners in other jurisdictions

The Special Civil Part is a forum for *pro se* litigants as well as attorneys. Notably,

Mr. Geron is silent about the cost of his services – an amount considerably higher than the current service by mail fee of $7.00 per defendant. As of December 7, 2020, the website for Mr. Geron's business, Guaranteed Subpoena Service, Inc., https://www.served.com) shows litigants are charged $75.00 for successful service of process.

Requiring litigants to use private process servers would add a significant cost to practice in the Special Civil Part. Access to the Special Civil Part would become prohibitive for many *pro se* litigants. Process management would also become an issue: the service by mail program places responsibility for service of summons and complaint in the hands of the court – assuring consistency and reliability for court staff, *pro se* litigants and attorneys alike.

Court Rules governing service by mail in the Special Civil Part have powerful safeguards.

Rule 6:2-3 contains strong safeguards maximizing reliability of service by mail. If mail is returned to the court by the postal service with a marking indicating it has not been delivered, or the court has other reason to believe service was not effected, Rule 6:2-3(d)(4) makes clear the simultaneous mailing does not constitute effective service.

Rule 6:2-3(d)(4) provides, in relevant part:

> **(4) Effective Service.** Consistent with due process of law, service by mail pursuant to this rule shall have the same effect as personal service, and the simultaneous mailing shall constitute effective service unless the mail is returned to the court by the postal service with a marking indicating it has not been delivered such as "Moved, Left No Address," "Attempted-Addressee Not Known," "No Such Number/Street," "Insufficient Address," "Not Deliverable as Addressed-Unable to Forward," or the court has other reason to believe that service was not effected.

Rule 6:2-3(d)(5) sets forth another crucial safeguard: it requires the clerk to vacate defaults or default judgments if the postal service returns mail as undelivered. *Rule* 6:2-3(d)(5) specifies:

> **(5) Vacation of Defaults.** If process is returned to the court by the postal service subsequent to entry of default and displays any of the notations listed in the preceding paragraph [6:2-3(d)(4)], or other reasons exists to believe that service was not effected, the clerk shall vacate the default or default judgment and shall immediately notify the plaintiff or attorney of the action taken."

The service by mail program has additional important benefits. It offers an element of privacy by avoiding the awkwardness and embarrassment of having a process server appear at a defendant's door—possibly in full view of neighbors. There is the added dimension of safety: avoidance of personal contact with a stranger and maintaining

appropriate "social distancing" during the current COVID-19 pandemic. Service by mail also avoids issues with "sewer service" and questionable practices encountered in other jurisdictions.

Over the years, the Committee of Special Civil Part Supervising Judges and the Supreme Court Special Civil Part Practice Committee have recognized the value of New Jersey's service by mail program.

New Jersey's service by mail program in the Special Civil Part has been in place for over 30 years. It was gradually implemented on an optional county-by-county basis – eventually replacing personal service of process by "constables," who later became known as Special Civil Part Court Officers.

Over the years, service by mail in the Special Civil Part has been addressed by both the Committee of Special Civil Part Supervising Judges and the Supreme Court Special Civil Part Practice Committee.

In its September 2000 *Report on Standardization of Operating Procedures and Best Practices,* the Committee of Special Civil Part Supervising Judges recommended that "initial process in small claims and DC docket-type cases (torts and contracts) should be served, in all 21 counties, simultaneously by certified mail, return receipt requested and regular mail."[1]

Addressing the question of whether the method for service of initial Special Civil Part process should be uniform throughout New Jersey, the Committee examined "background materials for this item," including the 1986 Report of the Special Civil Part Subcommittee Studying Service by Mail, "which became the basis for the service by mail program set forth in *Rule* 6:2-3(d)."[2]

The following excerpt from the 2000 Committee Report is instructive:

> With regard to service of process in small claims, the Committee favors requiring service by mail statewide. The Committee also favors requiring service by mail statewide in DC docket-type cases. These conclusions were reflected in a tentative recommendation that nine organizations comments[sic] upon. It is endorsed by all but one, the Hudson County Bar Association, who felt that the default rates for personal and mail service should be compared before opting for the latter because mail in inner city neighborhoods can be ineffective. *The Committee concluded, however, that*

[1] This Recommendation (No. 3) was agreed to at the Committee's July 14, 1999 meeting. Preface, P. 1.
[2] September 2000 *Report on Standardization of Operating Procedures and Best Practices,* P8.

the study of this particular issue by the Special Civil Part Practice Committee in 1986 found no appreciable difference in the default rates. [Emphasis added].[3]

In its 2004 Supplemental Report, the Supreme Court Committee of Special Civil Part Practice "considered correspondence from a private process server proposing and justifying an amendment justifying an amendment to R. 6:2-3(b) that would permit private process servers to serve Special civil Part summonses and complaints in the same manner as now permitted in Civil Part matters." [4]

Holding the matter for future consideration, the Committee noted it had addressed subject in its 2002 report to the Supreme Court "and concluded that no changes should be made because mailed service has been shown to be more effective than personal service of original process in Special Civil Part cases." [5]

The Committee further "observed that service by Mail is much less expensive than personal service by process servers, who charge as much as $49.95 per defendant, and that calling the individual who is asserted to have actually served the process to testify may be difficult in those instances where the company contracted to serve the summons frequently uses independent contractors rather than employees."[6]

Finally, the Committee noted "the procedure for the automatic entry of default by the clerk depends on the clerk keeping track of the time that has elapsed after service and this would be complicated by the use of private process servers since their returns would have to be entered into the docket (ACMS) to start the calculation of time."

More recently, the Special Civil Part Practice Committee's 2016-2018 report cited commentary by "judicial committee members" that "mail service process in the Special Civil Part . . . has been effective and successful for over thirty years." The Practice Committee considered service by mail to be effective and "a proven mail service system." Indeed, the Report observed "the judiciary recently adopted a centralized printing/mailing system which dramatically reduced costs and increased effectiveness of Special Civil Part's mail service." [7]

Mr. Geron offers no evidence supporting his bald and hyperbolic assertions.

Mr. Geron asserts service by mail is "devastating the public." His characterization

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[3] September 2000 *Report on Standardization of Operating Procedures and Best Practices,* P10.
[4] March 2004 Supplemental Report of the Supreme Court Committee on Special Civil Part Practice P. 30.
[5] March 2004 Supplemental Report of the Supreme Court Committee on Special Civil Part Practice P. 30.
[6] March 2004 Supplemental Report of the Supreme Court Committee on Special Civil Part Practice P. 30.
[7] 2016-2018 Report of the Supreme Court Committee on Special Civil Part Practice P. 56.

of the United States Postal Service as a "defunct, failed system of delivery" that "can only produce failure" is both absurd and entirely unsubstantiated. It lacks supporting evidence, independent statistics, or studies of any kind. The source of Mr. Gernon's information remains unknown.

Claiming "my research indicates that almost twenty percent of the default judgments are a result of the defendant not having received the Summons and Complaint," Mr. Geron provides none of this "research." In fact, he does little to conceal the apparent driving force behind his letter: "My studies and surveys are valueless in that I am motivated to promote my business."

He contends "an additional twenty percent [of defendants] do not understand or comprehend what their responsibility and consequences are not to respond." Again, the source of this data remains a mystery. Mr. Geron's contention implies private process servers would have the additional duty of providing advice and guidance to the persons they serve with summons and Complaint. This is an untenable notion and quite possibly unauthorized practice of law.

This year's election, with its millions of mail-in ballots, demonstrates the fundamental fairness and reliability of the United States Postal Service. To be sure, no delivery system is perfect; however, Mr. Geron's self-serving anecdotes are no substitute for careful analysis - especially when he urges scrapping a successful practice in effect for nearly 30 years.

In conclusion, the service by mail program in the Special Civil Part has long been a successful, efficient, reliable and cost-effective method of serving summons and Complaint. The concerns raised by Mr. Geron are without any factual basis. The service by mail program should not be disturbed.

Thank you for your attention.

THE NEW JERSEY CREDITORS BAR ASSOCIATION

By: _____
Richard Eichenbaum

Guaranteed Subpoena Service, Inc.

"If we don't serve it, you don't pay"®

July 20, 2020

Administrative Office of the Court
Richard J. Hughes Justice Center
P.O. Box 037
Trenton, NJ 08626
Attn: Hon. Glenn A. Grant

RE: Special Civil Part

Dear Judge Grant,

I know that you do not want to hear from me, especially when I keep repeating myself and pursue the same issues. As a process server with fifty plus years of experience, I most probably see the prevailing problem of service by mail differently than the Court. Using a defunct, failed system of delivery can only produce failure. It is common knowledge that seventy-five to eighty percent of Special Civil Part summons end up in default judgments. There is definitely something wrong here. The Courts failure to acknowledge its own deficiency is baffling.

I was not wrong when I alluded to the Court generating a criminal element but I accepted your reprimand because I lacked positive proof. My studies and surveys are valueless in that I am motivated to promote my business. My research indicates that almost twenty percent of the default judgements are a result of the defendant not having received the Summons and Complaint. An additional twenty percent do not understand or comprehend what their responsibility and consequences are not to respond. The threshold of fifteen thousand dollars ($15,000.00) is too high and judgments cannot be satisfied causing those with excessive judgment to make wrong decisions.

This is complex and although it may be working out for the Court, it is devastating the public. Those most hurt are those on the lowest rung of the social ladder. You will be told that mailed service is not a problem and is working well. It is, for the Court, not so much for the public. The only reason mail is used is to reduce cost of service. The court officers could not handle the work load. This led to corruption in that the officers were not serving the process for the then $5.00 fee. All of this occurred before the private sector became involved with the service of process. We can identify as many as 62 companies in New Jersey serving what was once the sole domain of the Sheriff and Court Officers.

Attorneys do not want the public sector to serve out of the Special Civil Part. The cost of processing, court, clerks, postage and other cost are next to nothing. As a matter of fact, the Court and the tax payers are subsidizing the cost of litigation for the attorneys/plaintiffs. It's a good deal. The litigants should be paying for their litigation.

The private sector can and does with infrequency serve Special Civil Part process. Rule 6:2-3 (E) allows us to serve with an acknowledgment of service signed by the defendant. The only other method is to apply for an ex-parte petition naming the person who will serve the process. One method is impossible and the other is so rare that in 50 years we have never had it occur.

As we suggested in the past, the threshold is too high. The fifteen thousand dollar threshold effects the poorest in our state. A mailed summons of over three thousand dollars is reasonable but still high. A simple question to anyone who has stolen another's identity or purchased a new identity should be asked. I believe, the most common response would be to overcome credit card debt or court judgements they would never be able to overcome.

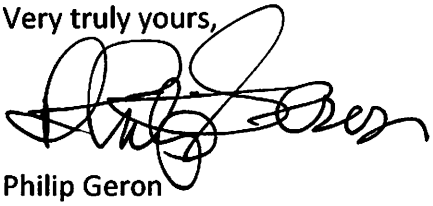
I again ask that you look at this prevailing unjust method of serving process be reviewed. Ask those that do respond to a summons why they seek the default to be vacated. The answer in most, but not all cases, is that they never received the summons.

Do a survey on the 75 to 80 percent of those who failed to respond to the summons the answer in most is that they never received it. We conducted a survey of 20 employees at our firm and found that 4 of the 20 surveyed had default judgments that they were unaware of. I was one of them for a medical bill in 1990.

I would not be hounding you with something that I did not feel was of major importance. You may dismiss me on this issue but at age 87, a disabled veteran of the Korean Conflict and a businessman. I feel my arguments have merit.

Please Advise.

Very truly yours,



Philip Geron
President

New Jersey Courts
Independence • Integrity • Fairness • Quality Service

Administrative Office of the Courts

GLENN A. GRANT, J.A.D.
Acting Administrative Director of the Courts

Richard J. Hughes Justice Complex • P.O. Box 037 • Trenton, NJ 08625-0037 njcourts.gov • Tel: 609-376-3000 • Fax: 609-376-3002

MEMORANDUM

TO: Hon. Jack M. Sabatino, P.J.A.D., Chair,
Supreme Court Civil Practice Committee

FROM: Hon. Glenn A. Grant, J.A.D., Acting Administrative Director

SUBJ: Service by Mail - Correspondence from Philip Geron, President of Guaranteed Subpoena Service, Inc.

DATE: August 7, 2020

We received the attached letter dated July 20, 2020 from Philip Geron, raising concerns regarding the Special Civil Part service by mail process prescribed by Rule 6:2-3(d). While Mr. Geron's immediate focus is on the Special Civil Part, his arguments would apply to all case types that rely on service via regular and certified mail through the U.S. Postal Service. To the extent that USPS mail delivery may not be consistently reliable in all areas of New Jersey, continued reliance on service by mail would be misplaced and potentially incompatible with our Judiciary-wide commitment to access and fairness.

As you know, the Supreme Court in a June 5, 2020 statement renewed its commitment to eliminate systemic barriers to equality. Building on that promise, the Court on July 16, 2020 announced an Action Plan for Equal Justice, which includes specific interim goals and areas of focus for the coming year. Following the Court's guidance, all areas of the Judiciary will expand on efforts to identify, confront, and seek to remedy institutional bias and inequality in order to ensure justice for all court users.

Given the current social climate and the New Jersey Judiciary's renewed commitment to equity, it would seem timely to examine service by mail and its possible unintended consequences. By this memorandum, I thus am referring Mr. Geron's concerns to the Civil Practice Committee for its consideration and recommendation in due course. I also am asking Civil Practice staff to provide the Committee with research materials relevant to this topic.

Thank you.

Attachment

cc: Steven D. Bonville, Chief of Staff
Jennifer M. Perez, Director
Taironda E. Phoenix, Asst. Director
Special Assistants to the Adm. Dir.
Diane G. Lanza, Committee Staff

registeration_addr_mailability

U.S.	Mailable Address	Mailable Address
asian	5,064,715	69.10%
black	17,390,948	66.70%
caucasian	117,338,881	75.90%
hispanic	14,453,732	64.40%
nativeAmerican	163,095	44.90%
other	528,653	66.90%
unknown	2,820,070	63.70%

NJ Only	Mailable Address	Mailable Address
asian	280,364	72.30%
black	461,987	60.70%
caucasian	3,322,341	79.10%
hispanic	484,617	57.70%
nativeAmerican	270	67.80%
other	2,141	61.00%
unknown	128,382	66.10%