2018 REPORT

OF THE SUPREME COURT

CIVIL PRACTICE COMMITTEE

February 2018

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I. RULE AMENDMENTS RECOMMENDED FOR ADOPTION

A. Proposed Amendments to *R.* 1:2-1 – Proceedings in Open Court; Robes

In December 2016, the Supreme Court issued two rule relaxation orders related to Criminal Justice Reform and requested that the Criminal and Municipal Court Practice Committees propose conforming amendments for the Committee's consideration. *Rule* 1:2-1 was supplemented and relaxed to include the combined first appearance/central judicial processing event. Of note, the Criminal Practice Committee discussed and ultimately determined that those first appearances streamed live on the Internet in virtual courtrooms meet the definition of an open courtroom.

Some Committee members expressed concerns with deeming a virtual courtroom to be an open court. For example, some concerns were raised about personal information disclosed at the proceeding being disseminated over the Internet. Additionally, some Committee members noted that the term "virtual courtroom" is not mentioned in the proposed amendments to the Rule.

Noting the concerns, the Committee recommends to include the term "first appearances" in *Rule* 1:2-1.

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

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

All trials, hearings of motions and other applications, first appearances, pretrial conferences, arraignments, sentencing conferences (except with members of the probation department) and appeals shall be conducted in open court unless otherwise provided by rule or statute. If a proceeding is required to be conducted in open court, no record of any portion thereof shall be sealed by order of the court except for good cause shown, as defined by *Rule* 1:38-11(b), which shall be set forth on the record. Settlement conferences may be heard at the bench or in chambers. Every judge shall wear judicial robes during proceedings in open court.

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 to be effective .

B. Proposed Amendments to *R.* 1:5-1 – Service: When Required

The Advisory Committee on eCourts Civil-Law proposes amending paragraph (a) of *Rule* 1:5-1 to address electronic filing. Specifically, the Advisory Committee suggests that the Rule be amended to reflect that service of an order is only necessary for those parties who are not electronically served through eCourts. This proposal has been endorsed by the Conference of Civil Presiding Judges.

The Committee agreed, and recommends the proposed amendments to *Rule* 1:5-1(a).

The proposed amendments to *Rule* 1:5-1(a) follow.

1:5-1. Service: When Required

(a) Civil Actions. In all civil actions, unless otherwise provided by rule or court order, orders, judgments, pleadings subsequent to the original complaint, written motions (not made *ex parte*), briefs, appendices, petitions and other papers except a judgment signed by the clerk shall be served upon all attorneys of record in the action and upon parties appearing *pro se*; but no service need be made on parties who have failed to appear except that pleadings asserting new or additional claims for relief against such parties in default shall be served upon them in the manner provided for service of original process. The party obtaining an order or judgment shall serve it on all parties who have not been electronically served through an approved Electronic Court System pursuant to *R.* 1:32-2A, nor served personally in court, as herein prescribed within 7 days after the date it was signed unless the court otherwise orders therein.

(b) ...no change.

Note: Source — *R.R.* 3:11-4(a), 4:5-1. Paragraph (a) amended July 16, 1979 to be effective September 10, 1979; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (b) amended August 1, 2016 to be effective September 1, 2016; paragraph (a) amended to be effective .

C. Proposed Amendments to *R.* 2:4-1 - Time: from Judgments, Orders, Decisions and from Rules

The Appellate Division Management Committee proposes amending paragraph (a) of *Rule* 2:4-1 to provide a defendant with the full complement of 45 days to take an appeal in certain instances where the trial court finds ineffective assistance of counsel. The proposed amendments would inform and remind judges that they have the authority to take this action in accordance with *State v. Carson*, 227 *N.J.* 353 (2016).

The Committee agreed with the Management Committee and recommends the proposed amendments to *Rule* 2:4-1(a).

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

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

(a) Except as set forth in subparagraphs (1) and (2), [A]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 taken within 45 days of their entry.

(1) [However] [a]Appeals from final judgments terminating parental rights shall be taken within 21 days of their entry.

(2) Direct appeals from judgments of conviction and sentences shall be taken within 45 days of entry of trial court orders granting petitions for post-conviction relief 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.

(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; paragraph (a) amended _____ to be effective _____.

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

The Appellate Division Management Committee proposes amending subparagraph (a)(1) of *Rule* 2:6-1 to clarify that the requirement to produce the statement of items submitted to the trial court in an appeal of a summary judgment ruling applies regardless of whether the appeal is from the grant or the denial of the motion. It is well established that the statement of items is necessary for appeals of orders granting summary judgment. The proposed amendments are necessary to resolve a split of authority as to whether the Rule applies to denials of motions for summary judgment. The rule proposal would satisfy the intent of the Rule to provide the reviewing courts with full records of decisions on motions for summary judgment, whether granted or denied, in full or in part.

The Committee agreed with the Management Committee, and recommends the proposed amendments to subparagraph (a)(1) of the Rule.

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

2:6-1. Preparation of Appellant's Appendix; Joint Appendix; Contents

(a) Contents of Appendix.

(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.

(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.

(3) 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.

(b) …no change.

(c) …no change.

(d) … no change.

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 to be effective .

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

The Appellate Division Management Committee proposes amending subparagraph (b)(3) of *Rule* 2:11-1 to shorten the presumptive length of time permitted for oral argument in the Appellate Division from 30 minutes to 15 minutes per party. Under the proposal, the court would retain the discretion, as currently provided for in the Rule, to terminate oral argument when it deems that the issues have been adequately argued and, conversely, to lengthen the time for oral argument, if warranted. This change will ensure that Appellate Division calendars remain on track when there are full days of oral argument or when there are appeals argued involving multiple parties and counsel; promote better preparation, focus and advocacy by attorneys; and distinguish the calendars of the Appellate Division (which typically schedules six arguments per morning) from the calendars of the Supreme Court.

While some Committee members were concerned that 15 minutes of argument may not be enough time to present, given that rebuttal time by an appellant has to be reserved, the Committee recommends the proposed amendments to the Rule because the Appellate Division panel will still have the ultimate discretion to shorten or lengthen the allotted time.

The proposed amendments to *Rule* 2:11-1(b)(3) follow.

2:11-1. Appellate Calendar; Oral Argument

(a) …no change.

(b) Oral Argument.

(1) …no change…

(2) …no change.

(3) Counsel 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. Each party will be allowed a maximum of 30 minutes for argument in the Supreme Court, unless the Court determines more time is necessary, and [30] 15 minutes in the Appellate Division, unless the court determines more time is necessary, 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. An attorney 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 to be effective .

F. Proposed Amendment to *R.* 2:11-4 – Attorney's Fees on Appeal

Currently, *Rule* 2:11-4 provides in part that the appellate court may refer the issue of attorney's fees to the trial court for disposition in instances where an award of counsel fees abides the event following the disposition of a motion or remand for further trial court proceedings. The Appellate Division Rules Committee and the Appellate Division Management Committee propose amending *Rule* 2:11-4 to provide that an appellate court may likewise refer the issue of attorney's fees to an administrative agency for disposition on remand at the conclusion of the agency proceedings.

The Committee agrees, and recommends the proposed amendments to *Rule* 2:11-4.

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. The application shall 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) As a sanction for violation by the opposing party of the rules for prosecution of appeals.

In its disposition of a motion or on an order of remand for further trial or administrative agency proceedings, where the award of counsel fees abides the event, the appellate court may refer the issue of attorney's fees for appellate services [to the trial court for disposition] for disposition by the trial court or, if applicable, by the agency if it has the legal authority to award counsel fees.

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; paragraph (c) amended _____ to be effective _____.

G. Proposed New *Rules* 4:5B-4 and 4:24-2(b) re: Affidavit of Merit and Expert Qualification in Professional Malpractice Cases

During the last rules cycle, an attorney submitted a proposal for procedural rules regarding affidavits of merit and experts in medical malpractice cases. The proposal contains three rules to supplement the early screening and later testimonial restrictions in the Patients First Act, *N.J.S.A.* 2A:53A-41, and three rules to supplement the expert testimony section of the statute. The attorney contended that the proposed rules would eliminate the need for *Ferreira* conferences, free up judicial resources, and eliminate most of the reported and unreported decisions involving late technical objections to affidavits of merit or expert qualifications.

A subcommittee was formed to review this issue. Further discussion was tabled pending a decision of the Supreme Court in *Hill International v. Atlantic City Board of Education*, 438 *N.J. Super*. 562 (App. Div. 2014) and *Meehan v. Antonellis*, 2014 *N.J. Super*. Unpub. LEXIS 2066 (App. Div. Aug. 21, 2014). In *Hill International*, the Supreme Court ultimately issued an order dismissing the third-party plaintiff's cross-appeal with prejudice for failure to prosecute and dismissed the third-party defendants' appeal without prejudice as they may move to reopen their appeal should third-party plaintiff prosecute its complaint on the remand ordered by the Appellate Division. The *Hill* case never returned to the Court. *See Hill Int'l v. Atl. City Bd. of Educ.*, 224 *N.J*. 523 (2016). In *Meehan*, 226 *N.J*. 216 (2016), the Court further construed the Affidavit of Merit statute, rejecting a "like-credentialed" requirement for non-medical professionals not covered by the Patients First Act. The Court requested that the Committee consider amending *Rule* 4:5-3 to include all professional negligence actions subject to the

Affidavit of Merit statute. Also, in *McCormick v. State*, 446 *N.J. Super*. 603 (App. Div. 2016), the Appellate Division applied *Meehan* and its discussion of the need for a *Ferreira* conference.

During this rules cycle, the subcommittee determined that procedures regarding the *Ferreira* conference and requirements of the Patients First Act should be addressed in the Court Rules. The subcommittee proposed (1) adoption of a new *Rule* 4:5B-4, which provides for scheduling of the *Ferreira* conference and the required submissions if there is a disagreement on the sufficiency of the affidavit of merit under the Affidavit of Merit statute, *N.J.S.A.* 2A:53A-27, or the Patients First Act, and the contents of the initial case management order; and (2) adoption of a new *Rule* 4:24-2(b) that provides the procedure for contesting qualifications of a plaintiff's expert. The subcommittee determined that there is no need to amend *Rule* 4:5-3, as suggested by the Court in *Meehan*, because the new rule proposal addresses all professional malpractice and *Rule* 4:5-3 does not compel affidavits of merit in non-medical cases. A copy of the subcommittee's report (without attachments) is included in Appendix 1.

The Committee agreed with the subcommittee's rule proposal. In discussing the subcommittee's report, Committee members debated whether the proposed *Rule* 4:24-2(b) should reference "plaintiff" or instead "claimant." Although case law has imposed the obligations on other parties such as third party plaintiffs, cross claimants and counterclaimants, the Committee ultimately concluded that the proposed rules should refer to "plaintiff" in accordance with the wording of the affidavit of merit statute.

This rule proposal was developed and voted on by the Committee prior to the Supreme Court's decision in *A.T. v. Cohen*, 2017 *N.J.* LEXIS 1383 (Dec. 14, 2017). In that opinion, the Court noted that the Judiciary's electronic filing system will be updated to issue notices

regarding the affidavit of merit filing obligation and the scheduling of *Ferreira* conferences. While not addressing electronic notices, the Committee's rule proposal is fundamentally in sync with that opinion.

Proposed new *Rules* 4:5B-4 and 4:24-2(b) follow.

4:5B-4. Professional Malpractice Case Management

(a) Case Management Conference. Within ninety (90) days of the filing of the first answer in all professional malpractice cases, a case management conference shall be conducted by the court to address discovery related issues, including the sufficiency of an affidavit of merit provided pursuant to *N.J.S.A.* 2A:53A-27 and the qualifications of the affiant or other designated medical expert pursuant to the Patients First Act, *N.J.S.A.* 2A:53A-41. For all affidavits of merit that have already been served, the plaintiff shall supply the defendant with a reasonably current curriculum vitae of the affiant no less than thirty (30) days before the conference. No less than fifteen (15) days before the conference, the defendant must serve the court and all parties with specific written objections, if any, to the served affidavit of merit.

(b) A case management order shall memorialize the conference conducted under paragraph (a) of this Rule and shall address: (1) the sufficiency of the affidavit of merit; (2) whether there are any disputes regarding the affidavit of merit; and (3) in medical malpractice cases, any agreements to address by motion the sufficiency of the qualifications of the affiant or the plaintiff's designated medical expert under the Patients First Act.

(c) For any defendants joined after the case management conference, the plaintiff must also serve a copy of the affidavit of merit, along with a reasonably current curriculum vitae of the affiant, within thirty (30) days of joinder of the additional defendant. Any objections to the sufficiency of the affidavit of merit must be in writing and served by the added defendant within fifteen (15) days of its receipt. A consent order to that effect shall be submitted by the plaintiff within sixty (60) days of the service of the affidavit and curriculum vitae. If any dispute

concerning the sufficiency of the affidavit is not resolved within sixty (60) days, the added defendant shall promptly file a motion to resolve the issue.

Note: New 4:5B-4 adopted to be effective .

4:24-2. Motions Required to Be Made During Discovery Period

(a) General. No motion for the relief provided by the following rules may be granted in any action unless it is returnable before the expiration of the time limited for discovery unless on notice and motion, for good cause shown, the court otherwise permits: *R.* 4:8 (motion for leave to file a third-party complaint); *R.* 4:7-6, 4:28-1, or 4:30 (motion for joinder of additional parties); *R.* 4:38-1 (motion for consolidation); and *R.* 4:38-2 (motion for separate trials). Unless the court otherwise permits for good cause shown, motions to compel discovery and to impose or enforce sanctions for failure to provide discovery must be made returnable prior to the expiration of the discovery period.

(b) Disputes Regarding the Credentials of Experts in Medical Malpractice Actions. Any party challenging the credentials of an expert in a medical malpractice action pursuant to the Patients First Act, *N.J.S.A.* 2A:53A-41, shall file a motion in accordance with the following requirements:

(1) If the defendant seeks to challenge the credentials of plaintiff's expert who is someone other than the affiant whose credentials have been the subject of a case management conference in accordance with *R.* 4:5B-4, defendant's motion shall be filed not later than thirty (30) days from the service of that expert's report. The motion shall be accompanied by a certification setting forth the defendant's expert's qualifications under the Patients First Act and a reasonably current curriculum vitae of the expert.

(2) If the plaintiff seeks to challenge the credentials of a defendant's expert, the plaintiff's motion shall be filed not later than thirty (30) days from the service of that expert's report. The motion shall be accompanied by a certification setting forth the plaintiff's expert's

qualifications under the Patients First Act and a reasonably current curriculum vitae of the expert.

Note: Source – *R.R.* 4:28(b); amended June 7, 2005 to be effective immediately; amended December 6, 2005 to be effective immediately; paragraph (a) amended and new paragraph (b) added to be effective .

H. Proposed Amendments to *R.* 4:6-2 – How Presented

In the published opinion of *Tisby v. Camden County Correctional Facility,* 448 *N.J.* Super. 241 (App. Div. 2017), the trial judge did not explicitly specify that he was converting the motion to dismiss to a motion for summary judgment. The trial court relied upon records outside of the pleadings when evaluating the plaintiff's complaint. The Appellate Division discerned no error in the trial judge's approach.

A Committee member inquired whether *Rule* 4:6-2 should be amended to explicitly require notice of conversion of a motion to dismiss for failure to state a claim to a motion for summary judgment. Federal Rule of Civil Procedure 12(d) is nearly identical to *Rule* 4:6-2 and the federal courts require notice of the court's intent to convert the motion.

Some Committee members expressed concern that the proposed amendments may encourage summary judgment motions that are not filed within the time frames required by *Rule* 4:46. After discussion, the vast majority of the Committee determined that the Rule should be amended to provide for reasonable notice of the court's intention to treat a dismissal motion as one for summary judgment. This will provide judges with flexibility while at the same time protecting the parties from surprise.

The proposed amendments to *Rule* 4:6-2 follow.

4:6-2. How Presented

Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by *R.* 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by *R.* 4:28-1. If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion. Special appearances are superseded. If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by *R.* 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.

Source — *R.R.* 4:12-2 (first, second and fourth sentences); amended July 23, 2010 to be effective September 1, 2010; amended to be effective .

I. Proposed New *R.* 4:24A re: High-Low Agreements

An attorney who is the Chief Claims Litigation Officer of NJ PURE and the Chief Operating Officer of CURE Auto Insurance suggests adoption of a rule requiring disclosure of high-low agreements in civil litigation and thereby preventing so-called "Mary Carter" secret agreements between counsel. He contends that there is no clear guidance to litigants, attorneys and judges regarding the disclosure of these settlement agreements, and such a rule would place New Jersey in line with sister states that require disclosure.

A subcommittee was formed to address this issue. The subcommittee determined that there should be a rule requiring a party to a high-low agreement to disclose the existence of such agreement to the court and to all other parties in multiple defendant actions. The proposed requirement would avoid collusion or any disadvantage to other defendants. A jury would not be advised of the high-low agreement except under extraordinary circumstances.

In discussing the subcommittee's report, the Committee determined that the proposed rule should not address disclosure to the jury because the Rules of Evidence will dictate whether there should be any disclosure of high-low agreements to the jury. *See, e.g., N.J.R.E.* 401 and 403. Further, the Committee concluded that the term "high-low agreement" should be defined in the proposed rule. The subcommittee's report, as revised to reflect the full Committee's consensus, is included in Appendix 2.

The Committee recommends the proposed new *Rule* 4:24A.

The proposed new *Rule* 4:24A follows.

4:24A. High-Low Agreements.

A high-low agreement is one in which the parties agree that if a verdict is above a specified range of numbers agreed upon by such parties, the defendant's liability for damages shall be the highest number in that range, and if a verdict is less than the lowest number in that range, including a verdict of no cause for action against such defendant, that defendant shall pay the plaintiff the lowest number in the range. If the verdict against the defendant falls within the range, the damages the defendant shall pay is the verdict reached by the jury.

Whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action that is to be tried by jury, the parties shall disclose the existence of that agreement and its terms to the court and to all other parties to the action immediately after entering into the agreement.

Note: New *Rule* 4:24A adopted to be effective .

J. Proposed Amendments to *R.* 4:24-1 – Time for Completion of Discovery

In *Alliance Shippers, Inc. v. Casa De Campo Inc*., 2017 *N.J. Super*. Unpub. LEXIS 1020 (App. Div. Apr. 24, 2017), the Appellate Division noted the effect given on remand to the Superior Court of pleadings filed earlier in federal court while a case was removed to that court implies a matter of state policy. This issue has been discussed in one Chancery Division decision, *Edward Hansen Inc. v. Kearny Post Office Asssocs*., 166 *N.J. Super*. 161 (Ch. Div. 1979). The Appellate Division referred to the Committee the issue of whether *Rule* 4:24-1 should specifically address the post-remand review and adoption of previously-filed federal court pleadings.

A subcommittee was formed to address this issue. The subcommittee concluded that the title of *Rule* 4:24-1 and paragraph (d) of the Rule should be amended to address remands from federal court. As part of its proposal, the Subcommittee recommended that decisions of the federal court would be remain in effect unless and until reconsidered by the Superior Court judge on remand. The subcommittee suggested that a case management conference must be held to address any motions for reconsideration of interlocutory orders and for leave to amend pleadings filed in federal courts, and the completion of all discovery. The case management conference will ensure that all issues in the case are addressed and that interlocutory rulings of the Federal Court that warrant reexamination or modification, or reaffirmation, are likewise addressed.

The Committee agreed with the subcommittee's proposal to amend *Rule* 4:24-1.

The proposed amendments to *Rule* 4:24-1 follow.

4:24-1. Time for Completion of Discovery, and Effect of Remand from the Federal Courts

(a) …no change.

(b) …no change.

(c) …no change.

(d) Remand from the [United States District] Federal Courts. On matters remanded from [the] a United States District Court, or United States Bankruptcy Court, all injunctions, orders, and other proceedings had in such action prior to its remand shall remain in full force and effect until dissolved or modified by the Superior Court. T[t]he computation of the discovery end date in such matters shall exclude the period from the date of the notice of removal to the date the order of remand is filed with the civil division manager in the county of venue in the Superior Court action. [The designated pretrial judge] Unless the court directs otherwise, the court to which the matter has been remanded shall conduct a case management conference pursuant to *R.* 4:5B-2 within thirty days of the filing of the order of remand, to enter a case management order that provides dates for (1) the filing of motions for reconsideration of interlocutory orders entered by the federal court and for leave to amend pleadings filed in the federal court, and for (2) the completion of all discovery.

Note: Source – *R.R.* 4:28(a)(d); amended July 13, 1994 to be effective September 1, 1994; amended January 21, 1999 to be effective April 5, 1999; caption amended, text amended and designated as paragraph (a), new paragraphs (b), (c), and (d) adopted July 5, 2000 to be effective September 5, 2000; corrective amendment to paragraph (d) adopted February 26, 2001 to be effective immediately; paragraph (c) amended July 12, 2002 to be effective September 3, 2002; paragraph (c) amended July 27, 2006 to be effective September 1, 2006; paragraphs (b) and (c) amended July 9, 2008 to be effective September 1, 2008; paragraph (c) amended July 23, 2010 to be effective September 1, 2010; paragraph (d) deleted and new paragraph (d) adopted July 22, 2014 to be effective September 1, 2014; paragraph (d) amended _____ to be effective _____.

K. Proposed New *R.* 4:25-8 re: Motions *in Limine*

In *Cho v. Trinitas Regional Medical Center*, 443 *N.J. Super*. 461 (App. Div. 2015), *certif. denied*, 224 *N.J.* 529 (2016), the defendant filed a "motion *in limine*," that sought the dismissal of the complaint the day before jury selection in a medical malpractice case. The Appellate Division held that the eleventh-hour consideration of the motion and dismissal of the complaint under those the circumstances deprived the plaintiffs of their right to due process.

Rule 4:25-7 and Appendix XXIII do not require motions *in limine* to be exchanged until seven days prior to the initial trial date, unless waived under *Rule* 4:25-7(d), in which instance the information must still be supplied to the court "at the commencement of trial." In some instances, the number and nature of the motions filed are inappropriate or overly burdensome, or the motions are filed too late to enable a fair opportunity for a response by opposing counsel and timely consideration by the trial court.

A subcommittee was formed to examine whether *Rule* 4:25-7 and Appendix XXIII should be amended to regulate motion *in limine* practice. The subcommittee reviewed the law in other jurisdictions regarding motions *in limine*, and determined that New Jersey should join seventeen other jurisdictions that provide a framework, in varying levels of detail, for motions *in limine*. The subcommittee proposed a new *Rule* 4:25-8. The proposed rule in part defines motion *in limine*; sets forth time frames for filing motions *in limine*; provides a 20-page limitation for briefs; and addresses noncompliance with the Rule. The subcommittee's report is included in Appendix 3. The Conference of Civil Presiding Judges reviewed and endorsed the proposed new rule.

The Committee agrees with the proposed new rule because it provides structure and sets forth the obligations of the bar with respect to motions *in limine*. The Committee hopes that the proposed rule will promote earlier preparation, discussion of issues and settlement of cases.

The Committee referred the proposed new rule to the Supreme Court Committee on the Rules of Evidence for comment. The Evidence Committee expressed some concerns regarding the definition of motion *in limine*, specifically what types of motions would be excluded from the rule. The subcommittee, after considering the Evidence Committee's concerns, revised the definition section to clarify the types of dispositive motions that would be outside the purview of the rule.

The Committee agreed with the subcommittee's revisions and recommends the proposed new *Rule* 4:25-8 and revised Appendix XXIII.

The proposed new *Rule* 4:25-8 and revised Appendix XXIII follow.

4:25-8. Motions *in Limine*

(a) Definition; Procedures; Timeframes.

(1) Definition. In general terms and subject to particular circumstances of a given claim or defense, a motion *in limine* is defined as an application returnable at trial for a ruling regarding the conduct of the trial, including admissibility of evidence, which motion, if granted, would not have a dispositive impact on a litigant's case. A dispositive motion falling outside the purview of this rule would include, but not be limited to, an application to bar an expert's testimony in a matter in which such testimony is required as a matter of law to sustain a party's burden of proof.

(2) Confer. Prior to the deadline stated under subparagraph (3), the parties shall confer, either in person, by telephone or in writing, to identify any disputed evidentiary issue that they anticipate will be the subject of a motion *in limine* and attempt to reach agreement on as many issues as possible. In the event a motion is filed, the movant's papers shall include a certification or affidavit certifying compliance with this provision.

(3) Motion Deadlines.

(A) Unless otherwise permitted by the court, the parties shall file and serve all motions *in limine* for which pretrial rulings are sought no later than 14 days before the initial trial date. Answering papers shall be filed and served no later than 7 days after service of the movant's submission. No reply by the movant shall be permitted, unless requested by the court.

(B) Failure to file a motion as aforesaid shall not preclude a party from filing a motion *in limine* before any subsequent trial date that might be set, provided the motion is filed and served no later than 14 days before that subsequent date, with answering papers due to be filed

and served 7 days after service of the movant's submission and with no reply by movant permitted unless requested by the court.

(4) Rulings. The court shall rule on all motions filed under this rule prior to or shortly after the commencement of trial, unless the court determines, in its discretion, that the particular issue of admissibility is better considered at a later juncture at trial.

(5) Briefs. The respective briefs of the movant and respondent shall comply with the line and type-point requirements of *R.* 1:6-5, except that the page limitation shall be 20 pages, exclusive of any tables of contents or authorities. A party may apply to the court to submit an over-length brief in the same manner described under *R.* 1:6-5. As provided under subparagraphs (3)(A) and (B), no reply briefs by movant shall be permitted unless requested by the court.

(b) Calendar. Motions *in limine* filed under this rule shall not be governed by the regular motion calendar and, to the extent practicable, shall be decided by the judge assigned to the trial of the case.

(c) Non-compliance. Motions not filed in accordance with paragraph (a) (3) need not be decided prior to or shortly after the commencement of trial, unless good cause is shown. Good cause shall include but not be limited to the circumstance in which a party receives pretrial information as part of the exchange of information described under *R.* 4:25-7 or as otherwise received, provided such information forms a good faith basis to seek a ruling regarding the admissibility of evidence.

(d) Preservation of rights. The failure to file a motion *in limine* under this rule shall not preclude a party from seeking to admit evidence, or objecting to the admission of evidence, during trial.

(e) Preservation of rulings. A trial court's ruling made on a motion in limine under this rule shall not preclude the court from reconsidering or modifying that ruling, *sua sponte* or at the request of a party, based on later developments at trial.

Note: New *Rule* 4:25-8 adopted to be effective .

APPENDIX XXIII

PRETRIAL INFORMATION EXCHANGE – *R.* 4:25-7(b)

In cases that have not been pretried, attorneys shall confer and exchange the following information seven days prior to the initial trial date, unless such exchange has been waived by written consent of the parties pursuant to *R.* 4:25-7(d):

1. A list of all witnesses (including addresses) to be called in the party's case in chief.

2. A list of all exhibits to be offered in the party's case in chief, including all demonstrative exhibits prepared, prior to trial, by any witness, including an expert witness. All such exhibits shall be premarked for identification and shall be described briefly. Each party shall confer in advance of trial to determine if any such exhibits can be admitted into evidence by agreement or without objection.

3. A list of any proposed deposition or interrogatory reading(s) by page and line number or by question number.

4. Any [*in limine* or] trial motions intended to be made at the commencement of trial, with supporting memoranda. Such motions shall not go on the regular motion calendar. Any objections to the proposed admission into evidence of any exhibit or to any reading by any other party, and any response to a[n *in limine* or] trial motion shall be served on all parties not later than 2 days prior to trial.

   Any motions *in limine* and responses thereto shall be filed and served in accordance with *R.* 4:25-8.

5. A listing of all anticipated problems with regard to the introduction of evidence in each party's case in chief, especially, but without limitation, as to any hearsay problems, and legal argument as to all such anticipated evidence problems. At trial and prior to opening statements, each party shall submit the following to the trial judge:

   (a) copies of any Pretrial Information Exchange materials that have been exchanged pursuant to this rule, and any objections made thereto; and

   (b) stipulations reached on contested procedural, evidentiary and substantive issues.

In addition, in jury trials each party shall submit the following materials to the trial judge and, unless exchange of trial information has been waived in writing pursuant to *R.* 4:25-7(d), also to all other parties:

(a) any special voir dire questions;

(b) a list of proposed jury instructions with specific reference to the Model Civil Jury Charges, if applicable;

(c) any special jury instructions with applicable legal authority; and

(d) a proposed jury verdict form that includes all possible verdicts the jury may return.

Note: Appendix XXIII adopted July 5, 2000 to be effective September 5, 2000; introduction and paragraph 5 amended July 12, 2002 to be effective September 3, 2002; paragraph 2 amended July 28, 2004 to be effective September 1, 2004; paragraph 4 amended to be effective .

L. Proposed New *R.* 4:86-7A – Application for Financial Maintenance for Incapacitated Adults Subject to Prior Chancery Division, Family Part Order

The Civil Practice Division proposes a new rule to provide procedural guidance on the Termination of Obligation to Pay Child Support Law, *N.J.S.A.* 2A:17-56.67 *et seq.* That law permits the conversion of a child support obligation to another form of financial maintenance for a child with a mental or physical disability who has reached the age of 23. Applications for financial maintenance for an adult child age 23 or over who has been or will be adjudicated incapacitated shall be heard in the Probate Part of the Chancery Division. The proposed new rule distinguishes between applications for conversion of a child support obligation to another form of financial maintenance made on behalf of alleged incapacitated persons (paragraph (a)) and on behalf of adjudicated incapacitated persons (paragraph (b)), and sets forth the proofs required to be presented in all such applications (paragraph (c)).

The Committee concluded that the proposed new rule will provide a mechanism for provision of information available to Family Part Judges to Probate Part Judges, which will reduce re-litigation of issues.

The proposed new *Rule* 4:86-7A follows.

4:86-7A. Application for Financial Maintenance for Incapacitated Adults Subject to Prior Chancery Division, Family Part Order

An application for conversion of a child support obligation for an alleged or adjudicated incapacitated person who has reached the age of 23 to another form of financial maintenance pursuant to *N.J.S.A.* 2A:17-56.67 et seq. may be made as follows:

(a) Prior to Adjudication of Incapacity. A plaintiff filing a complaint for adjudication of incapacity and appointment of guardian pursuant to *R.* 4:86-2 may request such conversion in a separate count of the complaint.

(b) After Adjudication of Incapacity. A guardian or custodial parent of an adjudicated incapacitated person may request such conversion by filing a motion on notice to the parent responsible for paying child support and any interested parties setting forth the basis for the relief requested pursuant to *R.* 4:86-7.

(c) Any action brought pursuant to paragraph (a) or (b) above shall set forth the exceptional circumstances pursuant to which such conversion is requested, and shall have the following annexed thereto:

(1) Copies of any prior Chancery Division, Family Part orders related to the child support obligation; and

(2) A financial maintenance statement in such form as promulgated by the Administrative Office of the Courts.

Note: New *Rule* 4:86-7A adopted to be effective .

M. Proposed Amendments to Appendix VI – Notice to Debtor

Paragraph (h) of *Rule* 4:59-1 requires that notice be provided to a debtor advising that a levy has been made and describing the exemptions from levy and how such exemptions may be claimed by qualified persons. The Rule requires that the notice be in the form prescribed by Appendix VI to the Court Rules. The Special Civil Part Practice Committee recommends that Appendix VI be amended to include a Spanish translation of the form that would be served with the English version by the applicable officer. This proposed amendment would benefit a large non-English speaking or reading segment of the population.

The Committee agrees, and recommends Appendix VI be amended to include a Spanish translation of the notice form. If approved by the Court, the Administrative Office of the Courts will prepare the Spanish translation of Appendix VI.

N. Housekeeping Amendments

The Committee recommends the following "housekeeping" amendments:

- Various Part I and Part II Rules - to remove reference to death penalty terminology, as requested by the Supreme Court Criminal Practice Committee.
- *Rule* 4:3-1(a)(4) – to clarify that the civil action should be brought in either the Law Division, Civil Part or the Law Division, Special Civil Part.

The proposed amendments follow.

1:8-1. Jury

(a) Criminal Actions. Criminal actions required to be tried by a jury shall be so tried unless the defendant, in writing and with the approval of the court, after notice to the prosecuting attorney and an opportunity to be heard, waives a jury trial. [In sentencing proceedings conducted pursuant to *N.J.S.A.* 2C:11-3(c)(1), the consent of prosecutor shall be required for such waiver.]

(b) …no change.

Note: Source — *R.R.* 3:7-1(a), 4:40-3; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (a) amended July 13, 1994 to be effective September 1, 1994; captions added to paragraphs (a) and (b) and paragraph (b) amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended to be effective .

1:8-2. Number of Jurors

(a) Number Deliberating in Criminal Actions. A deliberating jury in a criminal action shall consist of 12 persons, but at any time before verdict the parties may stipulate that the jury shall consist of any number less than 12 [except in the trials of crimes punishable by death.] Such stipulations shall be in writing and with the approval of the court.

(b) …no change.

(c) …no change.

(d) …no change.

Note: Source — *R.R.* 3:7-1(b), 3:7-2(d), 4:48-2, 4:49-1(a)(b). Amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 14, 1972 to be effective September 5, 1972; paragraph (d) amended June 29, 1973 to be effective September 10, 1973; paragraph (b) amended July 17, 1975 to be effective September 8, 1975; paragraph (d) amended July 29, 1977 to be effective September 6, 1977; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; paragraph (a) amended to be effective .

1:8-3. Examination of Jurors; Challenges

(a) Examination of Jurors. For the purpose of determining whether a challenge should be interposed, the court shall interrogate the prospective jurors in the box after the required number are drawn without placing them under oath. The parties or their attorneys may supplement the court's interrogation in its discretion. [At trials of crimes punishable by death, the examination shall be made of each juror individually, as his name is drawn, and under oath.]

(b) …no change.

(c) …no change.

(d) Peremptory Challenges in Criminal Actions. Upon indictment for kidnapping, murder, aggravated manslaughter, manslaughter, aggravated assault, aggravated sexual assault, sexual assault, aggravated criminal sexual contact, aggravated arson, arson, burglary, robbery, forgery if it constitutes a crime of the third degree as defined by *N.J.S.A.* 2C:21-1b, or perjury, the defendant shall be entitled to 20 peremptory challenges if tried alone and to 10 such challenges when tried jointly; and the State shall have 12 peremptory challenges if the defendant is tried alone and 6 peremptory challenges for each 10 afforded defendants when tried jointly. In other criminal actions each defendant shall be entitled to 10 peremptory challenges and the State shall have 10 peremptory challenges for each 10 challenges afforded defendants. [The trial judge shall have the discretionary authority to increase proportionally the number of peremptory challenges available to the defendant and the State in any case in which the sentencing procedure set forth in subsection c. of *N.J.S.* 2C:11-3 might be utilized.] When the case is to be tried by a foreign jury, each defendant shall be entitled to 5 peremptory challenges, and the State 5 peremptory challenges for each 5 peremptory challenges afforded defendants.

(e) …no change.

(f) …no change.

(g) …no change.

Note: Source — R.R. 3:7-2(b)(c), 4:48-1, 4:48-3. Paragraphs (c) and (d) amended July 7, 1971 to be effective September 13, 1971; paragraph (d) amended July 21, 1980 to be effective September 8, 1980; paragraph (a) amended September 28, 1982 to be effective immediately; paragraph (d) amended July 22, 1983 to be effective September 12, 1983; paragraph (d) amended July 26, 1984 to be effective September 10, 1984; paragraph (d) amended November 5, 1986 to be effective January 1, 1987; paragraph (c) amended November 7, 1988 to be effective January 2, 1989; paragraph (e) added July 14, 1992 to be effective September 1, 1992; paragraph (b) amended July 13, 1994 to be effective September 1, 1994; paragraph (f) added July 5, 2000 to be effective September 5, 2000; paragraph (f) amended July 27, 2006 to be effective September 1, 2006; paragraph (g) added July 9, 2013 to be effective September 1, 2013; paragraphs (a) and (d) amended to be effective .

1:8-5. Availability of Petit Jury List

The list of the general panel of petit jurors shall be made available by the clerk of the court to any party requesting the same at least ten days prior to the date fixed for trial. [In cases where the death penalty may be imposed, the list shall be made available to any party requesting it at least twenty days prior to the date fixed for trial.]

Note: Source — *R.R.* 3:7-2(a). Amended July 16, 1979 to be effective September 10, 1979; amended September 28, 1982 to be effective immediately; amended _____ to be effective _____.

2:2-1. Appeals to the Supreme Court From Final Judgments

(a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State; (2) in cases where, and with regard to those issues as to which, there is a dissent in the Appellate Division; (3) [directly from the trial courts in cases where the death penalty has been imposed and in post-conviction proceedings in such cases; (4)] in such cases as are provided by law.

(b) …no change.

Note: Source — *R.R.* 1:2-1(a) (b) (c) (d) (e). Paragraph (a)(2) amended February 28, 1979 to be effective immediately; paragraph (a) amended to be effective .

2:2-2. Appeals to the Supreme Court From Interlocutory Orders

Appeals may be taken to the Supreme Court by its leave from interlocutory orders:

[(a) Of trial courts in cases where the death penalty has been imposed.]

[(b)](a) Of the Appellate Division when necessary to prevent irreparable injury;

[(c)](b) On certification by the Supreme Court to the Appellate Division pursuant to *R.* 2:12-1.

Note: Source — *R.R.* 1:2-3(a); amended July 17, 1975 to be effective September 8, 1975; amended September 28, 1982 to be effective immediately; paragraph (a) deleted and paragraphs (b) and (c) redesignated paragraphs (a) and (b), respectively, to be effective _____.

2:5-1. Notice of Appeal; Order in Lieu Thereof; Case Information Statement

(a) …no change.

(b) …no change.

[(c) Service in Capital Cases. In criminal actions in which the death penalty has been imposed the defendant's attorney shall forthwith serve upon the principal keeper of the state prison a copy of the notice of appeal, certified to be a true copy by the clerk of the Supreme Court.]

[(d)] (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.

[(e)] (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.

[(f)] (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 said 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. [Notices of appeal in capital causes shall also include the appropriate attorney's certification in respect of transcripts.] 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 Appendix VII and VIII of 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.

(A) 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.

(B) 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.

(C) 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(f)(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.

[(g)] (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[; and the principal keeper of the state prison if the appeal is in a criminal action in which the death penalty has been imposed]. The trial judge shall file an opinion or may supplement a filed opinion as provided in paragraph (b) of this rule.

[(h)] (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.

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, paragraphs (d) and (e) redesignated paragraphs (c) and (d), respectively, paragraph (f)(1) amended and redesignated paragraph (e)(1), paragraph (g) amended and redesignated paragraph (f), paragraph (h) redesignated paragraphs (g) to be effective .

2:9-3. Stay Pending Review in Criminal Actions

[(a) Death Penalty. Unless the Supreme Court by leave granted otherwise orders, a sentence of death shall be stayed only as follows:

(1) during the pendency of defendant's direct appeal to the New Jersey Supreme Court and, on the affirmance of defendant's conviction and sentence, during the period allowed for the timely filing of a petition for a writ of certiorari to the United States Supreme Court and, if filed, while that petition is pending disposition;

(2) during the pendency of a first petition for post-conviction relief that is filed within thirty days after the United States Supreme Court's disposition of defendant's application under paragraph (a)(1), and, on the denial or dismissal of that petition for post-conviction relief, during the pendency of defendant's appeal to the New Jersey Supreme Court and, on the affirmance of defendant's conviction and sentence, during the period allowed for the timely filing of a petition for a writ of certiorari to the United States Supreme Court and, if filed, while that petition is pending disposition; and

(3) during the pendency of a timely first petition for a writ of *habeas corpus* in the United States District Court and, if the petition is denied or dismissed, during the pendency of a timely appeal to the Third Circuit and petition for a writ of certiorari to the United States Supreme Court for review of the disposition of the habeas petition.

The State shall notify defendant and defense counsel, the judge authorized to issue the death warrant pursuant to *N.J.S.A.* 2C:49-5, and the New Jersey Supreme Court forthwith on the expiration of any stay of the death sentence provided for herein or on the expiration of a stay ordered pursuant to this Rule.]

[(b)] (a) Imprisonment. A sentence of imprisonment shall not be stayed by the taking of an appeal or by the filing of a notice of petition for certification, but the defendant may be admitted to bail as provided in *R.* 2:9-4.

[(c)] (b) Fine; Probation. A sentence to pay a fine and an order placing the defendant on probation may be stayed by the trial court on appropriate terms if an appeal is taken or a notice of petition for certification is filed. If the court denies a stay, it shall state its reasons briefly, and the application may be renewed before the appellate court. Pending the appellate proceedings, the court may require the defendant to deposit, in whole or part, the fine and costs with the official authorized by law to receive the same in the county in which the conviction was had, or may require a bond for the payment thereof, or may require the defendant to submit to an examination of assets, and may make an appropriate order restraining the defendant from dissipating any assets.

[(d)] (c) Stay Following Appeal by the State. Notwithstanding paragraphs (b) and (c) of this rule, execution of sentence shall be stayed pending appeal by the State pursuant to *N.J.S.A.* 2C:44-1(f)(2) or *N.J.S.A.* 2C:35-14(c). Whether the sentence is custodial or non-custodial, bail pursuant to *R.* 2:9-4 shall be established as appropriate under the circumstances. A defendant may elect to execute a sentence stayed by the State's appeal but such election shall constitute a waiver of the right to challenge any sentence on the ground that execution has commenced.

[(e)] (d) Stay of Order of Enrollment in a Pretrial Intervention Program. An order of the trial court enrolling a defendant into a pretrial intervention program over the objection of the prosecutor shall be automatically stayed for fifteen days following the date of its entry, and if

the prosecutor files a notice of appeal within said fifteen-day period, during the pendency of the appeal.

[(f)] (e) Court to Which Motion Is Made. Pending appeal or certification to the Supreme Court respecting a judgment of the Appellate Division, application for a stay pending review shall be first made to the Appellate Division.

Note: Source — *R.R.* 1:2-8(a) (sixth sentence), 1:4-3(a) (first sentence) (b)(c)(d); paragraph (c) amended and paragraph (d) deleted July 29, 1977 to be effective September 6, 1977; paragraph (c) caption amended July 24, 1978 to be effective September 11, 1978; paragraph (d) adopted September 10, 1979 to be effective immediately; paragraph (d) amended July 16, 1981 to be effective September 14, 1981; paragraph (e) adopted November 1, 1985 to be effective January 2, 1986; paragraphs (c) and (d) amended July 13, 1994 to be effective September 1, 1994; paragraph (e) redesignated as paragraph (f) and new paragraph (e) adopted June 28, 1996 to be effective September 1, 1996; paragraph (a) amended July 12, 2002 to be effective September 3, 2002; paragraph (d) amended July 28, 2004 to be effective September 1, 2004; paragraph (a) deleted and paragraphs (b), (c), (d), (e) and (f) redesignated paragraphs (a), (b), (c), (d) and (e), respectively, to be effective .

2:9-4. Bail after Conviction

Except as otherwise provided by *R.* 2:9-5(a), the defendant in criminal actions shall be admitted to bail on motion and notice to the county prosecutor pending the prosecution of an appeal or proceedings for certification only if it appears that the case involves a substantial question that should be determined by the appellate court, that the safety of any person or of the community will not be seriously threatened if the defendant remains on bail and that there is no significant risk of defendant's flight. Pending appeal to the Appellate Division, bail may be allowed by the trial court, or if denied, by the Appellate Division, or if denied by the Appellate Division, by the Supreme Court. Following disposition in the Appellate Division and pending proceedings in the Supreme Court, bail may be allowed by the Appellate Division or if denied by it, by the Supreme Court. A copy of an order entered by an appellate court granting bail shall be forwarded by the clerk of the appellate court to the sentencing court and clerk of the trial court. A trial court denying bail shall state briefly its reasons therefor. A judge or court allowing bail may at any time revoke the order admitting to bail. [In no case shall a defendant who has received a sentence of death be admitted to bail.]

Note: Source — *R.R.* 1:4-3(e), 1:4-4. Amended June 29, 1973 to be effective September 10, 1973. Amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 10, 1998 to be effective September 1, 1998; amended to be effective .

[2:9-12. Proportionality Review in Capital Cases

All hearings conducted by the Standing Master appointed by the Supreme Court to oversee data collection for the proportionality review of death sentences shall be confidential. The transcripts of such hearings, the written and oral submissions of the parties, and the records maintained for proportionality review by the Administrative Office of the Courts shall be confidential. The arguments or representations of counsel at or in contemplation of such hearings shall not be used for any purpose other than proportionality review.]

Note: Adopted July 5, 2000 to be effective September 5, 2000; rule deleted _____ to be effective _____.

4:3-1. Divisions of Court; Commencement and Transfer of Actions

(a) Where Instituted.

(1) …no change.

(2) …no change.

(3) …no change.

(4) Law Division. All actions in the Superior Court except those encompassed by subparagraphs (1), (2) and (3) hereof shall be brought in the Law Division, Civil Part or Law Division, Special Civil Part.

(b) …no change.

Note: Source — *R.R.* 4:41-2, 4:41-3, 5:1-2. Paragraphs (a) and (b) amended and caption amended July 22, 1983 to be effective September 12, 1983; new paragraph (a) adopted and paragraph (b) amended December 20, 1983 to be effective December 31, 1983; paragraphs (a) and (b) amended November 7, 1988 to be effective January 2, 1989; subparagraph (a)(1) amended, subparagraph (a)(2) recaptioned and adopted, former subparagraphs (a)(2) and (a)(3) redesignated (a)(3) and (a)(4) respectively, and subparagraph (a)(4) amended June 29, 1990 to be effective September 4, 1990; paragraph (a)(4) amended to be effective .

II. RULE AMENDMENTS CONSIDERED AND REJECTED

A. Proposed Amendments to *R.* 1:7-1 – Opening and Closing Statements

During the last rules cycle, a Committee member suggested amending *Rule* 1:7-1 to permit attorneys to suggest a specific dollar sum in opening and closing arguments. The Committee member contended that in light of *Brodsky v. Grinnell Haulers*, 181 *N.J.* 102 (2004), there is no legitimate distinction between being able to argue percentages of liability and a specific dollar sum. He argued that the sum-specific argument by advocates will reduce aberrational verdicts, motions for additur or remittitur, and possible appellate issues. He noted that focus groups that he conducts typically cannot comprehend why a dollar sum cannot be suggested and are puzzled, despite the standard jury instruction, how to arrive at an award of non-economic damages.

The Committee member requested that this item be held over to the next rules cycle so that a more formal proposal can be submitted for the Committee's consideration. The Committee agreed to hold this issue over.

During this rules cycle, a subcommittee was formed to consider this rule proposal. A majority of the subcommittee proposed that *Rule* 1:7-1 be amended to permit counsel to advocate for a sum-certain for non-economic losses (pain and suffering, disability, loss of quality of life). The subcommittee majority agreed that the proposed amendments to the Rule will help to reduce aberrational verdicts; will redirect jurors' attention away from irrelevant and non-existent economic damages to support their appraisal of non-economic damages; and will require counsel to make a thoughtful and reasonable dollar-sum suggestion, or risk losing credibility with the jurors. The subcommittee majority report is included in Appendix 4a.

A minority of the subcommittee disagreed with the rule proposal, contending that it would be a sea change in New Jersey's system. There has been no comparison of the standards for setting aside an unreasonably high verdict in the states that allow attorney comment on pain and suffering value. The minority of the subcommittee contended that without changing New Jersey law as set forth by the Supreme Court in *Botta v. Brunner*, 26 *N.J.* 82 (1958) to permit trial courts to set aside verdicts based on the standard used by other state courts, New Jersey should not adopt a rule permitting lawyers to suggest the amount of pain and suffering juries should award. The minority report is included as Appendix 4b.

In discussing the subcommittee's majority and minority reports, one Committee member (not a personal injury lawyer) who supported the proposed rule change described his service on a jury in a personal injury case a few years ago. The member recalled that it had been very challenging for the jurors to discuss and quantify pain and suffering damages, in the absence of some concrete numerical guidance from the court or counsel. The member's jury experience was similar to those portrayed in the focus groups.

Other Committee members agreed with the minority report, contending that the rule proposal will likely result in significantly increased award amounts that would not be reasonable based on the evidence. While acknowledging that there is no guidance for juries, these members noted that if the rule is amended, juries will rely upon attorney opinion and opt for the higher amount. These members believe that juries "get it right" in most instances.

After a vote, the vast majority of the full Committee opposed amending *Rule* 1:7-1.

B. Proposed Amendments to *R.* 2:5-6 – Appeals From Interlocutory Orders, Decisions and Actions

The Appellate Division Rules Committee (ADRC) received a letter from an attorney questioning the wording of *Rule* 2:5-6 with respect to (1) whether his opposition should address both whether leave to appeal should be granted and the merits and (2) the timing of the response. The ADRC determined no amendment to the Rule was necessary because the questions raised are answered by *Rules* 2:5-6, 2:8-1 and 2:2-4. This issue was referred to the Civil Practice Committee to consider whether the Rules need to be clarified.

The Committee agreed with the ADRC that the Rules are clear. The Committee determined that an amendment to *Rule* 2:5-6 is unwarranted at this time.

C. Proposed Amendments to *R.* 2:9-5 - Stay of Proceedings in Civil Actions, Contempts, and Arbitrations

A practitioner suggested that paragraph (c) of *Rule* 2:9-5 be amended to address more fully and explicitly the standards for denying a stay of arbitration pending appeal. The practitioner views the rule as providing that where a trial court denies a motion to compel arbitration and there is an appeal as of right, the same presumption in favor of a stay applies as would exist had the motion to compel arbitration been granted. He contends that the current language of the Rule does not reflect his understanding, if his understanding is correct.

The Committee discussed that if a judge denies a motion to compel arbitration and the party appeals as of right, the trial court loses jurisdiction on that issue. *See, GMAC v. Pittella*, 205 *N.J.* 572, 587 (2011). Thus, a stay would not be required on the issue of arbitration although it may be necessary for other issues.

The Committee concluded that no change to *Rule* 2:9-5(c) is warranted at this time.

D. Proposed Amendment to *R.* 4:3-2 - Venue in the Superior Court

In *Crepy v. Reckitt Benckiser, LLC*, 448 *N.J.* Super. 419 (Law Div. 2016), a wrongful termination case, the trial court concluded that the term "actually doing business" within *Rule* 4:3-2(b) requires a level of business activity by a business entity defendant in the county of venue that exceeds merely conducting a minimal or incidental amount.

A Committee member suggests that the Committee consider amending paragraph (b) of the Rule to define the phrase "actually doing business." This language has been used in the Rule, without explanation, since 1948 with regard to where matters involving business entity defendants may be venued.

A subcommittee was formed to address this issue. The subcommittee presented two alternatives: (1) do not amend the Rule and let case law develop to provide guidance on the issue; or (2) amend the Rule to provide venue based on residence – "in the county where the principal office is located or in which the cause of action accrued." After discussion, the Committee agreed with alternative one and determined that there should be no rule amendment to *Rule* 4:3-2(b) at this time, in part with an expectation the issue might be addressed in future case law.

Subsequent to the Committee's decision, the *Crepy* opinion was published. The Committee reopened discussion as to whether *Crepy* has provided sufficient guidance on the standard of "actually doing business." While noting that the opinion provides helpful guidance, it does not clearly specify exactly what level of business activities or nexus will suffice to create venue in a particular county. A subcommittee member presented various scenarios regarding venue for the Committee's consideration:

- If the cause of action arose in New Jersey, venue should be in the county where the cause of action arose;

- A business entity with a principal office in New Jersey "resides" in the county of the principal office;

- A business entity with one office in New Jersey but a principal office in a different state or nation "resides" in the county of the New Jersey office;

- A business entity with multiple offices in New Jersey but a principal office in a different state or nation "resides" in the county of the principal New Jersey office;

- A business entity with no offices in New Jersey, "resides" in the New Jersey county with which it has the most significant contacts; and

- For a business entity with no contacts with New Jersey (as in situations of personal jurisdiction based on consent, or a contractual forum selection clause designating New Jersey as the forum state but not any particular county), if venue in New Jersey is not otherwise available, venue should be available in any New Jersey county.

The member proposed that *Rule* 4:3-2(b) be amended to provide that a business entity should be deemed to reside in the county in which its principal office in New Jersey is located, and if there is no office in New Jersey, in the county with the most significant contacts. A new paragraph (d) of the Rule would provide that if there is no county in which venue would be proper, venue is proper in any county. The subcommittee's report, including the subcommittee member's detailed proposal, is included as Appendix 5.

Committee members again discussed whether the Rule should be amended. A majority of Committee members continued to believe that a rule amendment is not necessary at this time, but there was substantial sentiment to favor the member's proposed alternative if a rule amendment is pursued at the Supreme Court's direction.

E. Proposed Amendments to *R.* 4:11-1 - Before Action

A Civil Presiding Judge suggests amending *Rule* 4:11-1 to clarify the limited situations in which a party may file a petition to preserve evidence before filing suit and to clarify that both prospective plaintiffs and defendants can utilize this rule. He contends that *Rule* 4:11-1 is improperly utilized and misunderstood based on the plain language of the Rule. The Judge suggests amending the Rule to alert the reader that there must be a genuine risk that testimony could be lost or evidence destroyed for a prospective plaintiff or defendant to file a petition under the Rule.

The Committee concluded that case law is clear regarding use of the Rule to preserve evidence. It is not a tool for an attorney to determine if he or she has a case.

The Committee does not recommend the proposed amendments to *Rule* 4:11-1.

F. Proposed Amendments to *R.* 4:14-7(c) – Notice; Limitations

During the last rules cycle, a practitioner suggested that paragraph (c) of *Rule* 4:14-7 be amended to require that where the records of an individual who is not a party to litigation are being sought by subpoena from another nonparty, the individual whose records are being sought should be served with a copy of the subpoena as well as the witnesses and parties to the litigation. The practitioner stated that in a particular case a defendant sought cell phone records of three individuals who were not parties to the litigation by subpoenaing three cell phone companies. The practitioner noted that *Rule* 4:14-7(c) only requires notice to all witnesses and parties to litigation. He contended that the Rule deprives the individual whose records are being sought of their constitutional rights to privacy and to due process. The practitioner requested that the Rule be amended to cover all situations in which a subpoena seeks to compel production of records from a business that has an individual's private personal information.

Initially, the Committee agreed that the issue raises privacy concerns of nonparties to litigation. A subcommittee was formed to consider the rule proposal. This item was held over to the next rules cycle.

During this rules cycle, the subcommittee determined that no change to the rule is necessary. It found that the issue raised by the practitioner is an anomaly and inconsistent with normal practice and procedure. Usually, if a nonparty is served with a subpoena requiring disclosure of an individual's private information, the nonparty would be able to object to the production under *Rule* 1:9-5 if there is an express or implied confidentiality agreement or applicable state/federal privacy law. The collective experience of the subcommittee was that

telephone and internet providers always notify their customers when their information is being sought through a subpoena.

The Committee agreed with the subcommittee that the proposed changes to *Rule* 4:14-7(c) are unwarranted at this time.

G. Proposed Amendments to *R.* 4:16-1 – Use of Depositions

During the last rules cycle, the Committee discussed a New Jersey Law Journal article in which the author discusses the use of deposition testimony for an out-of-state witness at trial and the perceived ambiguity of paragraph (c) of *Rule* 4:16-1. The author contended that although *Rule* 4:16-1(c) generally follows Federal Rule of Civil Procedure 32(a)(4)(D), the language of the Rule creates ambiguity when the witness is "out of state" and also is unclear regarding the "exercise of reasonable diligence" that must be shown in trying to procure the witness's attendance by subpoena. The author suggested a simplification of *Rule* 4:16 to permit use of such deposition testimony at trial when the party offering the testimony does not "control" the witness. The author contended that the simplification will reduce unnecessary motion practice and avoid the harm to a party that takes an out-of-state deposition on the belief that testimony will be admissible at trial.

On a related aspect, a Committee member inquired whether paragraph (c) of the Rule should be clarified to state that the admissibility and the deposition testimony should still be subject to the limitations of the evidence rules on relevance, hearsay, undue prejudice, character, and so forth. *See, N.J.R.E.* 804. The item was referred to the discovery subcommittee and held over to the next rules cycle.

During this rules cycle, the discovery subcommittee considered this item, and determined that no rule amendment is warranted. The discovery subcommittee concluded that there is no untenable conflict between the Rule and *N.J.R.E.* 804. *Rule* 4:16-1(c) is more expansive than the Evidence Rule because the trial judge has discretion, if exceptional circumstances exist, to permit the use of a deposition of a declarant who is absent from trial, but not unavailable. The

subcommittee suggested a comment to the Rule that an amendment of an expert's report to include additional facts or data relied upon by the expert is governed by *Rule* 4:17-7.

This item was presented to the Evidence Rules Committee to advise whether to conform *N.J.R.E.* 804 with the Rule, or whether the Rule should conform with the *N.J.R.E.* 804. The Evidence Rules Committee noted that there could be a potential *Winberry v. Salisbury* issue of separation of powers as there is a conflict between a rule of procedure and a rule of evidence. Ultimately, although without taking a formal vote, the Evidence Rules Committee advised that since there does not seem to be any pressing problems with the current version of either the Evidence Rule or Court Rule, it discerned no need for either rules to be changed, despite their inconsistency.

As a result, the Committee does not recommend an amendment to *Rule* 4:16-1(c).

H. Proposed Amendments to *Rules* 4:10-2(d)(1) and 4:17-4(a), (e)

In *Delvechhio v. Township of Bridgewater*, 224 *N.J.* 599 (2016), the Supreme Court considered whether a plaintiff may rely on the testimony of a treating physician, who has not been designated as an expert witness, to establish a disability claim under the New Jersey Law Against Discrimination. The Court determined the testimony of a treating physician is admissible to support a plaintiff's disability provided that the proponent gives notice of the testimony to the adverse party, responds to discovery requests, and the testimony satisfies the Rules of Evidence. The Court referred the following issue to the Committee:

> We request that the Civil Practice Committee consider whether *Rules* 4:17-4(a), (e) and 4:10-2(d)(1) should be amended to clarify the form and content of a report that must be served, if requested, in advance of a treating physician's testimony. We suggest that the Committee evaluate, among other options, an amendment permitting the service of a summary of the treating physician's opinions and the basis for those opinions, as an alternative to a written report prepared by the physician. *See, e.g., R.* 3:13-3(b)(1)(I), -3(b)(2)(E) (authorizing, in criminal case in which expert is expected to testify, service of "a statement of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion").

This item was referred to the discovery subcommittee for consideration. The discovery subcommittee determined that no change to *Rules* 4:10-2 and 4:17-4 is necessary. Case law is clear that a trial court may admit a treating physician's testimony regarding the diagnosis and treatment of a patient. See *Stigliano v. Connaught Labs., Inc*., 140 *N.J.* 305 (1995). A treating physician can be a fact witness, in which case the adversary will receive the physician's records and know the subject matter of the physician's testimony.

The Committee agreed with the discovery subcommittee, and concluded that no changes to *Rules* 4:10-2(d)(1) and 4:17-4(a), (e) are warranted at this time.

I. Proposed Amendments to *Rules* 4:24-1, 4:25-4 and 4:36-3

During the last rules cycle, two practitioners suggested that Rules 4:24-1, 4:25-4 and 4:36-3 be amended to aid in the prompt adjudication of civil cases. The practitioners contend that discovery extensions and adjournments are slowing down the resolution of civil cases. They state that in a particular case there were numerous discovery extensions, the case was listed eight times and the case was not tried until 15 months after the first trial listing. The practitioners suggest amending:

- *Rule* 4:24-1(c) – to add the following language: "No non-consensual extension of the discovery period will be permitted without the moving party demonstrating good faith effort to complete discovery in the discovery period and good cause for the extension."

- *Rule* 4:25-4 – to replace the last sentence of the Rule with the following: "Designations of trial counsel will be waived by the Court in all cases pending for more than three years." They contend that the recent amendments to *Rule* 4:25-4 (Designation of Trial Counsel) are inadequate because they only apply to Track III medical malpractice cases.

- *Rule* 4:36-3 – to add new paragraphs:

  (d) Adjournments, Conflicting Trial Listings. No request for adjournments shall be granted where the party requesting the adjournment previously agreed to the listing date they are seeking to have adjourned.

  (e) Adjournments, Number of Requests. After an adjournment request has been granted, all trial counsel designations shall be waived by the Court.

At that time, the Committee discussed that the Supreme Court recently amended *Rule* 4:25-4, which provide that the designation of trial counsel in medical malpractice cases will presumptively expire after three years. That amendment did not become effective until January 2015. The Committee held this item over to the next rules cycle so that the effect of the new rule amendment can be measured.

During this rules cycle, after consideration, the Committee opposed the proposed amendments to *Rules* 4:24-1, 4:25-4 and 4:36-3 as unnecessary.

J. Proposed Amendments to *R.* 4:58 – Offer of Judgment

During the last rules cycle, the New Jersey Physicians United Reciprocal Exchange (NJ PURE), a writer of medical malpractice insurance in New Jersey, suggested that the offer of judgment rule be amended to address what it perceives as "paradoxical sections that lead to unjust results for defendants." NJ PURE proposed that paragraph (c) of *Rule* 4:58-3 be amended to delete the following exceptions to the award of counsel fees and costs to a defendant who has made an offer of judgment: (1) the claimant's claim is dismissed; (2) a no-cause verdict is returned; (3) only nominal damages are awarded; and (5) an allowance would impose undue hardship. NJ PURE argued that these exceptions lead to an unjust result for a defendant who is "too successful" and plaintiffs are incentivized to reject reasonable offers of judgment without fear of consequences.

NJ PURE further contended that paragraph (b) of *Rule* 4:58-4 should be amended as it "precludes effective use of the [offer of judgment rule] in multi-defendant litigation where the offering defendant is less culpable than its co-defendants. The Rule in its present form can preclude an award of fees and costs for a defendant that has offered at least 20% above its ultimate share of the damages." NJ PURE suggested that the Rule be amended to ensure that reasonable offers made by single defendants may be effective against "unreasonable" plaintiffs that reject them.

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 deferred until the next rules cycle.

During this rules cycle, the subcommittee conducted, with the Administrative Office of the Court's permission, a survey regarding the offer of judgment that was submitted to certified Civil trial attorneys and attorneys appearing before civil judges in all counties. The results of the survey tended to show that counsel who commonly represent plaintiffs in tort actions generally favor retaining the offer of judgment rule, that counsel for defendants generally disfavor the rule in its present form, and that commercial litigators are more neutral on the subject. Some plaintiffs' counsel who responded to the survey opined that the present rule is not strong enough. The survey results, although they were inconclusive in many respects, did appear to reflect that the making or receipt of an offer under the rule frequently provides some impetus in producing settlements.

The subcommittee recommended that there be no rule change at this time. In its report, the subcommittee addressed why each suggestion of NJ Pure was not favored. The subcommittee's report is included as Appendix 6.

The Committee agreed with the subcommittee's report, and does not recommend the proposed amendments to *Rule* 4:58 at this time.

K. Proposed Amendments re: Production of Radiographic Studies

A practitioner suggests amending the Court Rules to require plaintiffs, in personal injury cases, to provide radiographic films, MRIs, CT scans and the like at or in advance of independent medical examinations arranged by defendants. The practitioner contends that plaintiffs often make radiographic films, MRIs, CT scans available to their medical experts for use in formulating opinions on which the experts are expected to testify at the time of trial. Plaintiffs through counsel allegedly refuse to provide those materials to defense counsel, relying on *Rule* 4:17-4(f), which provides that plaintiffs must serve executed HIPAA authorizations with their answers to interrogatories. Plaintiffs argue that defendants can obtain these materials directly from the healthcare providers.

The practitioner requested that the Rules be amended to provide that in the event that plaintiffs obtain radiographic films, MRIs, CT scans, etc. and provide them to their medical experts for review and comment, plaintiffs should be required to make the same materials available in discovery so that defendants' medical professionals may have the same opportunity to review and comment on them. Defendants would return the materials to plaintiffs after they are reviewed by defendants' medical experts. If plaintiffs stipulate that no such materials will be reviewed by their medical experts and will not be part of any future testimony in the case, then they would not be required to provide the materials to defendants.

This item was referred to the discovery subcommittee. The discovery subcommittee determined that no rule change is necessary because the proposed change would create issues with the allocation of costs.

The Committee agreed that the rule as currently written is sufficient and no rule change is warranted.

III. RULES HELD FOR CONSIDERATION

A. Proposed Amendments to *R.* 4:17-4(e) – Expert's or Treating Physician's Names and Reports

A Superior Court Judge requested that the Committee consider amending paragraph (e) of *Rule* 4:17-4 to address an apparent conflict with New Jersey Rule of Evidence 703. Currently, *Rule* 4:17-4(e) provides that the expert's report "shall contain a complete statement of that person's opinion and the basis therefore." On the other hand, *N.J.R.E.* 703 states, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing."

Initially, the Committee discussed that the Court Rule should conform to the standard of the Evidence Rule. The issue was referred to the discovery subcommittee.

The discovery subcommittee proposed that instead of a rule amendment, an explanatory comment be added to the Rule to the effect that an amendment of an expert's report to include additional facts or data relied upon by the expert is governed by *R.* 4:17-7.

This item was held over to seek the reaction of the Evidence Committee.

B. Proposed Amendments to *R.* 4:22-1 – Request for Admission

A practitioner suggests that that *Rule* 4:22-1 be amended to mirror Federal Rule of Civil Procedure 36(a), which permits requests for admission as to facts as well as opinions. The attorney contended that changing the Rule to allow requests for admission as to opinions will result in a reduction of disputed issues that need to be decided by the trier of fact.

This item was referred to the discovery subcommittee for consideration. Initially, the discovery subcommittee determined that there should be no change to the rule. Federal Rule of Civil Procedure 26(b)(1) does not permit a party to request an admission of "opinions" of the type that are reserved for experts. If amended to include the term "opinion," *Rule* 4:22-1 would be broader than Federal Rule of Civil Procedure 26(b)(1). *Rule* 4:10-2 would have to be amended or *Rule* 4:22-1 would have to be limited to requests to admit matters that have been the subject of factual discovery in order to mirror the federal rule.

A Committee member disagreed with the Subcommittee's interpretation of Federal Rule of Civil Procedure 26(b)(1), contending that it covers anything within the scope of discovery. Another Committee member suggested that the Committee may want to consider amending *Rule* 4:22-1 to clarify that requests for admission must be related to fact or lay opinion but not expert opinion.

This item was held over to provide the discovery subcommittee with sufficient time to address Committee member concerns.

IV. RULES AMENDED OUT OF CYCLE

A. Amendments to *R.* 4:21A-6 – Entry of Judgment; Trial De Novo

To address payment of trial *de novo* fees through the Judiciary's electronic filing system, paragraph (c) of *Rule* 4:21A-6 was amended, effective May 30, 2017, to remove reference to the submission of a check for the required $200 fee and replace it with reference to submission of a the required fee.

V. RULES REFERRED

A. Proposed Amendments to *R.* 1:4-1 – Caption: Name and Addresses of Party and Attorney; Format

A self-represented litigant suggests that paragraph (a) of *Rule* 1:4-1 be supplemented to set forth an exhaustive list of all permissible exceptions to the full name and address disclosure requirements. The litigant notes that the comments to the Rule in the Gann publication set forth the exceptions, but contends they should be set forth in the actual rule. He also suggests that the court/court staff should be required to review complaints and ensure that there is a valid reason for suppressing the names and addresses of the parties. Moreover, an attorney or party should be required to submit a detailed certification setting forth the justification if they depart from the requirements of the Rule.

While some Committee members suggested that the complaint indicate why initials are being used, the Committee acknowledged that it is not feasible for court staff to review complaints and determine the sufficiency of the reasons for utilizing initials. Because *Rule* 1:38 sets forth the process to seal a record and to use initials, this item was referred to the Advisory Committee on Public Access to Court Records for consideration.

VI. RULES WITHDRAWN FROM CONSIDERATION

A. Proposed Amendments to *Rules* 2:12-7(b) and 2:12-8

A Committee member suggests that *Rules* 2:12-7(b) and 2:12-8 be amended to clarify that all Appellate Division briefs should be filed with the Supreme Court on petitions for certification. He indicates that in his experience parties have interpreted the reference to "Appellate Division brief and appendix" to mean only the main brief, and not reply briefs. In those instances, the Supreme Court Clerk's Office has issued deficiency notices to those parties requesting that they submit the reply briefs.

The Supreme Court Clerk has indicated that the proposed amendments are unnecessary because there is no widespread issue warranting clarification.

As a result, the Committee member withdrew the rule proposal.

VII. OTHER MATTERS CONSIDERED

A. Working Group on the Clarification as to Where Certain Categories of Cases Should be Heard — Civil, Family and General Equity

In 2016, the Supreme Court acted on a series of recommendations detailing in which divisions of the Superior Court – Civil, Family or General Equity – particular categories of matters should be heard, where there was some uncertainty and some inconsistency statewide. The Administrative Director of the Courts established a joint working group of the Supreme Court Civil Practice Committee and Family Practice Committee to develop and recommend implementing rule amendments. The specific areas in which rule amendments are needed are name change, partition, enforcement of judgments, palimony, parenting time/visitation, pets, personal possessions, ejectment, request for transcripts of closed Family Court proceedings made in Civil action, birth certificates and marriage certificates, and post-judgment relief relating to incapacitated adult children of parents subject to a Family Part order.

In its report, the working group determined that *Rule* 4:3-1 should be amended to address these areas. Additionally, the working group proposed amendments to *Rules* 5:1-2, 6:1-2, 4:72-1. The Civil Practice Committee was supportive of the content of the report and endorsed the recommendations of the working group. The Committee, however, did not comment on the format of the Rule, which it determined should be left to the Court.

A Notice to the Bar including the working group's report was published for public comment in November 2017. The Court will consider the working group's recommendations separately from the Committee report.

B. Proposal Regarding the Complex Business Litigation Program

A subcommittee was formed outside of the Civil Practice Committee to review the practices and procedures of other state business or commercial courts and with exploring and making recommendations for court rules for complex commercial and construction actions. The subcommittee also was charged with investigating and reporting on the feasibility of creating standalone rules for the Complex Business Litigation Program.

The subcommittee has proposed rules for the Complex Business Litigation Program that will be submitted to the Court for consideration. The proposed rules, which the Committee did not vote upon, will be published for public comment separate from the Committee's report.

Respectfully submitted,

Hon. Jack M. Sabatino, P.J.A.D., Chair
Justice Peter G. Verniero (Ret.), Vice-Chair
Joy Anderson, Esq.
Hon. Jeffrey B. Beacham, J.S.C.
Hon. Thomas F. Brogan, P.J.Cv.
Hon. Karen M. Cassidy, A.J.S.C.
Hon. Paula T. Dow, P.J.Ch.
Philip J. Espinosa, Esq., DAG
Hon. Clarkson S. Fisher, Jr., P.J.A.D.
Lloyd Freeman, Esq.
Amos Gern, Esq.
Hon. Kenneth J. Grispin, P.J.Cv.
Professor Edward A. Hartnett
Robert B. Hille, Esq.
Craig S. Hilliard, Esq.
Hon. Paul Innes, P.J.Ch.
Herbert Kruttschnitt, III, Esq.
Julia A. Lopez, Esq.
Professor J. C. Lore, III
Deborah L. Mains, Esq.
Hon. Jessica R. Mayer, J.A.D.
Renita McKinney, Civil Division Manager
Mary McManus-Smith, Esq.
Barry J. Muller, Esq.
Hon. Amy O'Connor, J.A.D.
John R. Parker, Esq.
Elizabeth A. Pascal, Esq.
Hon. Robert L. Polifroni, P.J.Cv.
Hon. Joseph P. Quinn, P.J.Cv.
Arthur J. Raimon, Esq.
Hon. Rosemary E. Ramsay, P.J.Cv.
Dean Andrew J. Rothman
Hon. Laura Sanders, Acting Chief A.L.J.
Hon. Barry P. Sarkisian, P.J.Ch.
Thomas Shebell, III, Esq.
Willard C. Shih, Esq.
Michelle M. Smith, Superior Court Clerk
Hon. Edwin H. Stern (Ret.)
Kevin D. Walsh, Esq.
Kevin M. Wolfe, Esq., Staff
Taironda E. Phoenix, Esq., Staff

Dated: February 2018

LMJG

APPENDIX 1

SUPERIOR COURT OF NEW JERSEY
HUDSON VICINAGE

Chambers of
Barry P. Sarkisian
Presiding Judge
Chancery-General Equity

Brennan Courthouse
583 Newark Avenue
Jersey City, NJ 07306

TO: Civil Practice Committee Members

CC: Taironda Phoenix
Lisa Janowski-Glagola
Hon. Jack Sabatino, J.A.D.

FROM: Hon. Barry P. Sarkisian, P.J.Ch.
Chairman, Affidavit of Merit Subcommittee

DATE: January 31, 2017

Dear Civil Practice Committee Members:

This memo will serve as an outline of the work of our subcommittee regarding our recommendation, for the CPC's consideration of new Rule amendments, which attempt to grapple with the inconsistency of the trial courts' decisions when faced with random motion practice, sometimes on the eve of trial, in addressing the adequacy of the qualifications of affiants/experts in all professional malpractice actions pursuant to the affidavit of merit requirements under N.J.S.A. 2A-53A-26 to -29 and in medical malpractice actions pursuant to the Patient's First Act pursuant to N.J.S.A. 2A:53A-41.

First, I can report to the full Committee that there **was** consensus among the subcommittee members that **to do nothing** to engraft the Ferreira conference procedures and the added requirements under the Patient's First Act, which have generated, in Judge Cuff's opinion in the Meehan case, a "procedural minefield" and "veritable avalanche of litigation**"** (Id. 226 N.J. at 228-29), would be **a mistake**. I enclose the following attachments, which our subcommittee have approved subject to comments that may be provided by subcommittee members at the meeting, for your consideration:

1. Proposed new Rule 4:5B-4
2. Proposed appendix referenced in Rule 4:5-4

3. Proposed new Rule 4:24-2(b)

First, some of the more recent background which led to our assignment from the CPC. As discussed at the September 28, 2016 meeting, during the last rules cycle, an attorney, Dennis M. Donnelly, Esq., with a significant practice in representing plaintiffs in medical malpractice actions, had submitted a proposal in February 2015 for procedural rules regarding affidavits of merit and experts in medical malpractice cases. Since almost 2 years had passed since his submission, and cases including the Meehan case and other cases had been published, I invited him to update his proposal, which he did on December 26, 2016 which is an attachment to this memo.

A Subcommittee was formed to review this issue. Further discussion was tabled, however, pending a decision of the Supreme Court in the affidavits of merit cases: Hill International v. Atlantic City Board of Education, 438 N.J. Super. 562 (App. Div. 2014) and in Meehan v. Antonellis, 2014 N.J. Super. Unpub. LEXIS 2066 (App. Div. Aug. 21, 2014). Note: The Supreme Court dismissed plaintiff's cross-appeal with prejudice in Hill International for failure to prosecute and dismissed defendants' appeal without prejudice. See Hill Int'l v. Atl. City Bd. of Educ., 224 N.J. 523 (2016).

In August 2016 the Supreme Court in Meehan v. Antonellis, 226 N.J. 216 (2016), further construed the Affidavit of Merit statute, rejecting a "like-credentialed" requirement for non-medical professionals not covered by the Patients First Act, and also requested that the Civil Practice Committee consider amending R. 4:5-3 to include all professional negligence actions subject to the Affidavit of Merit statute.

The reference of Judge Cuff's opinion in Meehan to the request to our Committee can be found at page 241 and reads as follows:

> This appeal also illustrates the need for a timely and effective Ferreira conference in all professional negligence actions. The conference is designed to identify and resolve issues regarding the affidavit of merit that has been served or is to be served. To that end, all participants must be prepared to identify at the conference the general area or specialty involved in the action and whether the defendant was providing professional services within that profession or specialty. We request that the Civil Practice Committee consider whether Rule 4:5-3 should be amended to embrace all professional negligence actions subject to the AOM statute.

Meehan v. Antonellis, 226 N.J. 216, 241 (2016).

For your easy reference, Rule 4:5-3 provides as follows with the relevant section underlined:

> An answer shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or deny the allegations upon which the adversary relies. A physician defending against a malpractice claim who admits to treating the plaintiff must include in his or her answer the field of medicine in which he or she specialized at that time, if any, and whether his or her treatment of the plaintiff involved that specialty. A pleader who is without knowledge or information sufficient to form a belief as to the truth of an allegation shall so state and, except as otherwise provided by R. 4:64-1(c) (foreclosure actions), this shall have the effect of a denial. Denials shall fairly meet the substance of the allegations denied. A pleader who intends in good faith to deny only a part or a qualification of an allegation shall specify so much of it as is true and material and deny only the remainder. The pleader may not generally deny all the allegations but shall make the denials as specific denials of designated allegations or paragraphs." R. 4:5-3 (emphasis added).

The underlined amendment of Rule 4:5-3 was implemented as a result of the Supreme Court's decision in the case of Buck v. Henry, 201 N.J. 377 (2011) which addressed the importance of the Ferreira conference addressing similarly credentialed requirements set forth in the Patient's First Act, N.J.S.A. 2A:53A-41 enacted in in 2004.

The Court in Buck indicated that the improper filing of non-conforming medical affidavits should be addressed and resolved at a Ferreira conference and a defendant physician must indicate in his answer if he acknowledges treating the patient and the specialty, if any, in which he was involved when tendering treatment. See also, Triarsi v. BSC Group Services, 442 N.J. Super. 106 (App. Div. 2011).

The following language of the Supreme Court in Ferreira v. Rancocas Orthopedic Assoc., 178 N.J. 144 (2003) in addressing the need for Affidavits of Merit issues—not First Patient Act issues which had not been enacted at the time of the Ferreira decision -- to be resolved early on in a case management conference,

> [To] weed out frivolous lawsuits early in the litigation while, at the same time, ensuring that plaintiffs with meritorious claims will have their day in court. [Citations omitted]

Id. at 150.

The Court further addressed the issue, noting:

> To ensure that discovery related issues, such as compliance with the Affidavit of Merit statute, do not become sideshows to the primary purpose of the civil justice system -- to shepherd legitimate claims expeditiously to trial -- we propose that an accelerated case management conference be held within ninety (90) days of the service of an answer in all malpractice actions. Our rules already provide for case management conferences in civil cases. See R. 4:5B-1; R. 4:5A-1 (exempting civil commitment). Expediting the schedule in malpractice cases will

> further the intent of our Best Practice rules: to resolve potential discovery problems before they become grist for dueling motions. At the conference, the court will address all discovery issues, including whether an affidavit of merit has been served on defendant. If an affidavit has been served, defendant will be required to advise the court whether he has any objections to the adequacy of the affidavit. If there is any deficiency in the affidavit, plaintiff will have to the end of the 120-day time period to conform the affidavit to the statutory requirements. If no affidavit has been served, the court will remind the parties of their obligations under the statute and case law.
>
> Id. at 154-55

The Supreme Court in the case of Paragon Contractors v. Peachtree Condominium Assoc., 202 N.J. 415 (2010), in a professional engineering third-party complaint, also commented upon " the confusion" in the courts over the scheduling of a Ferreira conference and the effect of its omission, justifying lenience in applying the 120 day deadline in the AOM statute.

There appears to be no uniform procedure in the Civil Divisions throughout the state in dealing with these issues and therefore the subcommittee was charged with engrafting a procedure in Court Rules which would: (1) provide for the Court's notification to the attorneys on the setting of the Ferreira conference and the requirements for submissions in the event there is a disagreement on the sufficiency of the AOM under the AOM statute or in medical malpractice cases under the Patient's First Act; (2) the contents of the initial case management order as it affects these issues; and (3) since the Patient's First Act's scope includes not only an affiant's affidavit of merit, which should be addressed early on in a Ferreira conference, but also plaintiff's medical experts who may not be the affiant in an affidavit of merit, a need to have the credentials of plaintiffs' medical expert flushed out well before the trial date. The two (2) rules attached attempt to meet these concerns.

We also attach the following documents which are referenced in this memo:

--AOM statute NJSA 2A:53A-26 to 29
--Patient's First Act statute 2A:53A-41
--Meehan v Antonellis, 226 N.J. 216 (2016)
--Ferriera v Rancocas Orthopedic Assocs., 178 N.J. 144 (2003)
--Buck v Henry, 201 N.J. 377 (2011)

--Dennis Donnelly letter of December 26, 2016

Respectfully submitted.
BPS

APPENDIX 2

Report of the Subcommittee on High-Low Agreements

The Civil Practice Committee empanelled a subcommittee to consider recommending a rule requiring a party to a high-low agreement disclose the existence of such agreement to all other parties in a matter.

"A high-low agreement is a device used in negligence cases in which a defendant agrees to pay plaintiff a minimum recovery in return for plaintiff's agreement to accept a maximum sum regardless of the outcome of the trial." Benz v. Pires, 269 N.J. Super. 574, 578 (App. Div. 1994). The obvious purpose of such an agreement is to protect "a plaintiff from the danger of receiving less than the floor amount and protects a defendant from exposure to a judgment higher than the agreed ceiling." Id. at 579.

However, complications can arise in the multi-defendant action where one defendant enters into a high-low agreement with the plaintiff and the remaining defendants are not advised of the agreement. After entering into such an agreement, the relationship among the parties usually shifts. As a result, at trial, plaintiff may be motivated to emphasize the liability of those who did not sign the agreement, because the damages for those defendants have not been capped by an agreement.

Similarly, the signing defendant may be motivated to support the plaintiff’s efforts to enhance the likelihood any judgment against such defendant will be less and the judgment against the other defendants will be more than what it otherwise would have been. For example, a high-low agreement may include a "side deal" in which the signing defendant agrees to not call an expert who would have benefitted all defendants, or engage in some similar tactic to undermine those defendants who are not signatories to the agreement.

Thus, unaware of the agreement and that the dynamics among the parties have been realigned, the non-signors of the agreement may well be prejudiced because they do not have an accurate perception of the true posture of the case. To remedy this problem, all members of the subcommittee agreed a high-low agreement between or among any parties in a multi-defendant action must be disclosed to all other parties as soon as the

agreement is made. That way, the non-signors can adjust their trial strategy accordingly.

All members were of the opinion the jury should not be advised of the agreement. However, a majority recommended there be a provision in the rule that, upon the application of counsel, provides the court the discretion to advise the jury of the agreement under extraordinary circumstances. For example, there may be an instance where a witness's testimony appears to be influenced by the existence of a high-low agreement, and an adversary may want to cross-examine such witness about the agreement and its influence over his or her testimony.

Seven of the eight members were in favor of the court being informed of any high-low agreement entered into between a plaintiff and defendant in a multi-defendant action, even if the court is the fact-finder, and that the court be advised of the agreement as soon as it is formed. These members did not think it necessary to disclose the existence of such agreement if there are only two parties in the matter at the time of trial.

One member was against informing the court of any high-low agreement under any circumstances. This member was concerned the agreement might influence the court's rulings. This member recommended that if the court has to be informed of such agreement, then it should occur only after the jury has commenced deliberations.

The majority of the subcommittee proposed the following language:

> Whenever a plaintiff and defendant enter into a high-low agreement in a multi-defendant action, the parties shall disclose the existence of that agreement and its terms to the court and the non-agreeing defendant(s) immediately after entering into the agreement. The existence of the agreement, including its terms and provisions, shall presumptively not be disclosed to the jury, expect under extraordinary circumstances.

After this report was reviewed by the full committee, members of such committee requested various revisions to the subcommittee's proposed language. Specifically, these members

suggested a brief description of what comprises a high-low agreement be included and that the last sentence in the subcommittee's proposal be deleted, noting whether a jury should be informed of a high-low agreement is one that should be governed by the New Jersey Rules of Evidence. It is our understanding the language below reflects the full committee's preference:

> A high-low agreement is one in which the parties agree that if a verdict is above a specified range of numbers agreed upon by such parties, the defendant's liability for damages shall be the highest number in that range, and if a verdict is less than the lowest number in that range, including a verdict of no cause for action against such defendant, that defendant shall pay the plaintiff the lowest number in the range. If the verdict against the defendant falls within the range, the damages the defendant shall pay is the verdict reached by the jury.
>
> Whenever a plaintiff and a defendant enter into a high-low agreement in a multi-defendant action that is to be tried by jury, the parties shall disclose the existence of that agreement and its terms to the court and to all other parties to the action immediately after entering into the agreement.

Respectfully submitted,

Jeffrey Beacham, J.S.C. and Hon. Amy O'Connor, J.A.D – Subcommittee Co-Chairs

Phillip Espinosa, Esq.
Amos Gern, Esq.
Herbert Kruttschnitt, Esq.
John Parker, Esq.
Arthur Raimon, Esq.
Thomas Shebell, III, Esq.

APPENDIX 3

TO: Hon. Jack M. Sabatino, P.J.A.D.

Chair, Civil Practice Committee

FROM: Hon. Peter G. Verniero (Ret.)
Chair, Subcommittee on Motions in Limine

DATE: April 10, 2017

RE: Rule Proposal/Motions in Limine

At your direction, the Subcommittee on Motions in Limine was formed in the aftermath of the Appellate Division's published decision in Cho v. Trinitas, 443 N.J. Super. 461 (App. Div. 2015), certif. denied, 224 N.J. 529 (2016). There, the court expressed concern over the late or last-minute filing of motions that are labeled as motions in limine but in reality have dispositive effect on an adversary's case.

The Subcommittee includes appellate and trial judges as well as practitioners with considerable litigation experience. Our main task was to consider whether it would be useful for our Rules of Court to include a specific framework for the filing and disposition of motions in limine and, if so, to suggest particular provisions for review and consideration by the full Civil Practice Committee.

Initially, the Subcommittee set out to research the law in other jurisdictions as a context for what we might want to accomplish in New Jersey. In so doing, we found that seventeen jurisdictions have some form of rule regarding motions in limine, with varying degrees of detail.

On one end of the spectrum, there are rules that merely mention that motions in limine may be filed with little or no guidance on timeframes, page limitations or consequences for noncompliance. On the other end of the spectrum, there are rules that speak to such requirements with varying degrees of specificity. The rules and a chart summarizing them are annexed to this memorandum.

In the course of our discussions, which consisted of numerous conference calls and email exchanges, the Subcommittee formed a general consensus that New Jersey should join those jurisdictions that offer a detailed framework governing motions in limine. Our consensus included a cautionary note that any such proposal be flexible and not overly burdensome to either the Bench or Bar.

The rationale for a New Jersey rule is threefold:

(1) to maintain uniformity in the system (some of our members reported that there are wide differences among particular judges or vicinages in how they approach motions in limine);

(2) to avoid the late filing of motions that might have dispositive effect as was the case in Cho; and

(3) to encourage prompt resolution of admissibility questions to enhance overall certainty at trial.

As you know, under the present rules, motions in limine are mentioned briefly and only in the context of the pretrial exchange of information as described under Rule 4:25-7(b), which exchange must take place within seven days of trial, unless waived pursuant to Rule 4:25-7(d). There is no mention of: i) when such motions need to be decided, ii) the page limitations of any brief or supporting materials, iii) how and when opposing counsel might respond, and iv) what is meant by a motion in limine itself. All those questions are addressed in the Subcommittee's proposal.

The attached proposal drew wide support among Subcommittee members. That said, at least four members expressed concern over limiting the number of pages for briefs. In addition, one member is concerned over the proposed timeframes and questions the need for any new rule, preferring no change at this juncture.

Also, I wanted to note in particular the provision in the proposal requiring that in limine motions not be included as part of the regular motion calendar and that they be decided, to the extent practicable, by the judge assigned to the trial of

the case. Presumably, the feasibility of that provision would be included in the vetting and discussions to follow.

Thank you for the opportunity to submit this proposal for the next level of vetting. I also wish to thank the members of the Subcommittee, copied on this memorandum and noted below, who worked cooperatively and diligently to bring us to this juncture.

Copy to:

Joy Anderson, Esq.
Hon. Paula T. Dow, P.J.Ch.
Amos Gern, Esq.
Robert B. Hille, Esq.
Professor J. C. Lore, III
Deborah L. Mains, Esq.
Hon. Jessica R. Mayer, J.S.C.
Barry J. Muller, Esq.
Hon. Amy O'Connor, J.A.D.
John R. Parker, Esq.
Hon. Rosemary E. Ramsay, P.J.Cv.
Hon. Laura Sanders, A.L.J.
Hon. Barry P. Sarkisian, J.S.C.
Willard C. Shih, Esq.

APPENDIX 4A

To: SUPREME COURT CIVIL PRACTICE COMMITTEE MEMBERS

FROM: THOMAS F. SHEBELL, III

SUBJECT: Proposed Rule Amendment to Rule 1:7-1

DATE: OCTOBER 26, 2016

I. INTRODUCTION:

In our system of jurisprudence, we trust jurors to make decisions that are often life- changing for litigants. We call on jurors to assess the credibility of witnesses, evaluate facts in dispute, and, in the civil system, to set the amount of an award for damages. In the criminal context, jurors are entrusted with the power to deprive a defendant of liberty, and, in the most extreme circumstances, to determine who should live and who should die.

Yet, New Jersey is one of only 13 states that prohibit counsel from advocating for a sum-certain for non-economic losses – pain, emotional suffering, disability, a loss of quality of life. Instead, we allow counsel to use a "time-unit" argument in summation, pursuant to Rule 1:7-1(b). Thus, the current state of our law trusts jurors are capable of making the most difficult of decisions by wading through often esoteric and complex facts and legal concepts. At the same time, the system lacks faith that a juror can separate argument of counsel on a sum certain, even when that argument is based on reasonable inferences drawn from the evidence.

I submit that the current prohibition that prevents counsel from arguing a sum-certain is outdated, and serves only to cause jurors to speculate and improperly use facts not in evidence to arrive at an award of non-economic damages. There is a growing body of literature that supports the proposition that jurors pay attention to the law as charged, make a concerted effort to follow

the law, and expect guidance from the litigants and trial court, especially when determining fair and reasonable compensatory damages.

As Justice O'Hern aptly noted in Dehanes v. Rothman, 158 N.J. 90 (1999): "Law is an incremental process. We have learned much about the ability of jurors to digest complex evidence. New Jersey jurors do not now, if they ever did, fit the portrait of rustics, in the style of Norman Rockwell, who have come to court to be entertained by lawyers. Jurors today are far more sophisticated." Id. at 99. Jurors today have seen the legal system unfold on TV, have access to the drum beat that is 24-hour news, and have garnered from those media sources various suppositions about how the legal system works.

Justice O'Hern noted as much when he observed that jurors bring "suppositions into the courtroom sufficient to counter the influence of 'undue psychological impact' . . . " Ibid. Justice O'Hern continued:

> A recent survey noted that before they step into a jury box, a large majority of jurors already believes that jury awards inflate their own costs for products (73.2%), medical care (89.3%) and insurance (91.0%). Jurors: A Biased Independent Lot, 154 N.J.L.J. 365, 367 (November 2, 1998). Almost half of the potential jurors believe that "expert witnesses only say what they are paid to say." Ibid. In short, "[j]urors do not trust civil litigants. Period." Id.

Below, we will look at the history of New Jersey law before the Supreme Court issued its opinion in Botta v. Brunner, 26 N.J. 82 (1958), the rational underlying the decision, and how other state courts have addressed this issue. I will then be propose that a sub-committee be formed for the purpose of further studying the issue of whether a sum-certain argument should be permitted in New Jersey.

II. HISTORY PRE-BOTTA

Before the oft-cited decision of Botta v. Brunner, supra, 26 N.J. 82, New Jersey courts long-permitted trial counsel to argue a specific dollar sum to the jury that she felt represented fair and reasonable compensatory damages for non-economic damages. Rhodehouse v. Director General, 95 N.J.L. 355 (1920). In Rhodehouse, the defense argued that the trial judge improperly permitted counsel for the plaintiff to state to the jury that the plaintiff sought $40,000 in damages. In affirming the trial court, our Supreme Court concluded:

> [we see] no legal impropriety in this. It has been the *common practice in this state from time immemorial for plaintiff's counsel to state to the jury the amount that the plaintiff claims he is entitled to recover*. The damage clause is a part of the complaint, and the right of counsel to read to the jury the complaint on file as an opening has never been seriously questioned, and we do not see how it can be. Id. at 362.

The Court noted that the jury could be instructed that counsel's suggestion as to the appropriate damage award was "mere argument" that does not constitute evidence as to the amount of damage.

At that time other state courts regularly found that this argument was appropriate. In Dean v. Wabash R. Co., 229 Mo. 425 (Sup. Ct. 1910), the Missouri Supreme Court noted that:

> It was a mere argumentative suggestion to the jury as to the amount he thought his client was entitled to. The argument of defendant's attorney as to the amount of damages which he thought ought to be awarded is not set out in the record, but if in his argument to the jury he said that in his opinion the plaintiff's injury was trivial and his damages should be nominal or small, as he would have had a right to, and as he has argued before this court, the argument would have been of the same kind as that complained of. We see no error in the overruling of that objection. Id. at 455.

Indeed, the Appellate Division in Botta v. Brunner, 42 N.J. Super. 95 (App. Div. 1956), expressly held that they could see "no logical reason why the fair scope of argument in summation by trial counsel should not be permitted to include mention of recovery in terms of amount." Id. at 108. They went on to note that the "argument is sometimes advanced that since there is no evidence in the case as to how much pain and suffering, or a given physical disability,

is worth in dollars, and since it is the exclusive function of the jury to fix the amount by its verdict, counsel should not be allowed to ask the jury to return a named amount." Id. at 108. (citation omitted) The court answered that question by noting that they did not think this followed, they perceived:

> no sound reason why one of the most vital subjects at issue, the amount of recovery, should not be deemed within the permitted field of counsel's persuasion of the jury by argument. This, within reasonable limits, includes his supporting reasoning, as in the present case, whether soundly conceived on the merits or not. (citations omitted). If necessary, the trial court can in its instructions caution the jury that the argument does not constitute evidence as to the amount of damages. Id.

This remained the unquestioned law of this State until 1958. When the Supreme Court in Botta issued its ruling, it overturned no less than five well- established and regarded opinions, including Rhodehouse, supra.. See Balog v. F.M. Mitchell Motor Co., 3 N.J. Misc. 1000 (Sup. Ct. 1925), Lukasiewicz v. Haddad, 24 N.J. Super. 399 (App. Div. 1953), Kulodzej v. Lehigh Valley Railroad Co., 39 N.J. Super. 268 (App. Div. 1956), Budden v Goldstein, 43 N.J. Super. 340 (App. Div. 1957).

III. RADICAL CHANGE CREATED BY BOTTA v. BRUNNER

Justice Francis wrote the Botta opinion for the Weintraub Court. The Court claimed that for "hundreds of years, the measure of damages for pain and suffering following in the wake of a personal injury has been "fair and reasonable compensation." This general standard was adopted because of universal acknowledgment that a more specific or definitive one is impossible. There is and there can be no fixed basis, table, standard, or mathematical rule which will serve as an accurate index and guide to the establishment of damage awards for personal injuries." Botta, supra., 26 N.J. at 92. Justice Francis then argued that it "is just as futile to undertake to attach a

price tag to each level or plateau which could be said to have a reasonable basis in scientific or economic fact. Any effort to do so must become lost in emotion, fancy and speculation." Id. at 94.

The Court then asked this basic question: "may counsel for the plaintiff or the defendant state to the jury, in opening or closing, his belief as to the pecuniary value or price of pain and suffering per hour or day or week, and ask that such figure be sued as part of a mathematical formula for calculating the damages to be awarded?" Id. In answering no to that question, the Court adopted the practice of our sister state, Pennsylvania, relying heavily on Goodhart v. Pennsylvania R. Co., 177 Pa. 1 (1896) and its later developed state case law. Justice Francis quoted Stassun v. Chapin, 324 Pa. 125, 188 (Sup. Ct. 1936), restating the Pennsylvania court's view that:

> "[i]n cases, where the damages are unliquidated and incapable of measurement by a mathematical standard, statements by plaintiffs' counsel as to the amount claimed or expected are not to be sanctioned, because they tend to instill in the minds of the jury impressions not founded upon the evidence." Botta, supra, 26 N.J. at 98.

Justice Francis thereafter concludes that suggestions of "valuations or compensation factors for pain and suffering have no foundation in evidence." Id. at 100.

Thus, the rational for the Botta decision is based upon the argument that a *per diem* or time-unit rule is inappropriate. The Botta Court barely comments on the rationale for its prohibiting sum-certain arguments. Justice Francis simply opines in the final three paragraphs that informing the jury of an total amount of damages requested serves no purpose and that it is "extremely doubtful" that admonitions a jury receives that counsel's comments in summation is mere argument "are insufficient to eliminate the figure from their minds as a conscious or unconscious factor in reaching their verdict." Id. at 104-105.

Botta was not a unanimous decision, as Justice Jacobs voted to affirm the Appellate Division, and Justice Wachenfeld dissented, arguing that overturning Rhodehouse was incorrect. He succinctly stated that the "practices approved of in these adjudications have prevailed for years and have resulted in no inequities or difficulties warranting our interference with them. Id. at 105.

IV. RULE 1:7-1(b) AND BRODSKY v. GRINNELL HAULERS, INC.

In 1982, Rule 1:7-1(b) was promulgated and effectively overruled the Botta Court's finding that a per-diem argument was inappropriate. Following the adoption of that Rule, courts of this State have permitted counsel, in closing argument, to "suggest to the trier of fact, with respect to any element of damages, that unliquidated damages be calculated on a time-unit basis without reference to a specific sum." Under the Rule, "counsel may suggest to the trier of fact that it calculate damages on the basis of specific time periods, for example, the amount of pain that a plaintiff will suffer each day for the rest of his life." Friedman v. C & S Car Serv., 108 N.J. 72, 74 (1987). The Rule provides, however, that when such comments are made, "the judge shall instruct the jury that they are argument only and do not constitute evidence." Rule 1:7-1(b). Nevertheless, while reference to time unit is permissible, mention of specific dollar amounts remains prohibited. Weiss v. Goldfarb, 154 N.J. 468, 481 (1998).

Justice Albin, writing for a unanimous Court in Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102 (2004), addressed the question of whether counsel may suggest in opening or closing statements that the jury find a party responsible for a specific percentage of fault. Id. at 123. The trial and appellate courts initially extended the scope of Botta, holding that the "assertion of

specific percentages" as to fault was comparable to counsel's quantification of unliquidated damages. Id. at 123-24.

Justice Albin noted in footnote four (4) that Botta was overruled by Rule 1:7-1(b), but then observed that a jury's determination of percentages of fault is different from its open-ended evaluation of damages for pain and suffering. Id. at 124. The crux of the Court's reasoning was that the standard for pain and suffering damages is governed by the amorphous "fair and reasonable compensation" standard because the "universal acknowledgement" that a precise calculation is "elusive." Id. at 125. The Court found that jurors are able resolve the difficult issue of determining percentage of fault based on "their collective experience and common sense." Id. at 126.

Ultimately, the Court concluded that jurors will view counsels' statements as argument, and permitting lawyers to make a percentage of fault statement held little risk of causing a jury to reach an incorrect conclusion. Id. at 125-126. Justice Albin reasoned that "*we have great faith that our jurors have the capacity to digest complex evidence and render fair verdicts*". Id. at 125 (emphasis added).

V. THE MAJORITY APPROACH

As of 2002, thirty-seven states and the District of Columbia adhere to the approach that an attorney may make a specific dollar-sum argument for pain and suffering damages, if supported by logical inferences from the evidence. Those States may be viewed as both politically and geographically diverse, such as states like Vermont, New York, Kentucky, Minnesota, Rhode Island, and California. See Paducah Area Public Library v. Terry, 65 5 S.W.2d 19, 25 (Ky. Ct. App. 1983), Cafferty v. Manson, 360 N.W.2d 414, 417 (Minn. Ct. App.

1985), Worsely v. Corcelli, 377 A.2d 215, 219 (R.I. 1977) and Beagle v. Vasold, 417 P2d 673 (1966).

The Vermont Supreme Court observed that "a per diem argument is a tool of persuasion used by counsel to suggest to the jury how it can qualify damages based on the evidence of pain and suffering presented." Debus v. Grand Union Stores of Vermont, 159 Vt. 537 (Vt. 1993). The Debus Court noted that in "cases where claims for pain and suffering are made, juries are forced to equate pain with damages. The jury can benefit by guidance offered by counsel in closing argument as to how they may construct that equation. We permit counsel reasonable latitude in this phase of the trial to summarize the evidence, to persuade the jury to accept or reject a plaintiff's claim, and to award a specific lump sum. If a lump sum is to be suggested to the jury it cannot be impermissible to explain how the lump sum was determined." Id. at 540.

In Beagle v. Vasold, 417 P2d 673 (1966), the California Supreme Court held that "it has long been a courtroom practice of attorneys in this state to tell the jury the total amount of damages the plaintiff seeks, and no questioning of the technique has come to our attention. (See dissenting opinion of Carter, J., in Sanguinetti v. Moore Dry Dock Co., (1951) 36 Cal.2d 812, 823, 842 [228 P.2d 557]; Ritzman v. Mills, (1929) 102 Cal.App. 464, 472 [283 P. 88]). Moreover, an attorney may and frequently does read the complaint, including the prayer, to the jury. (Knight v. Russ, (1888) 77 Cal. 410, 414-415 [19 P. 698]; see Ritzman v. Mills, supra, at p. 472.)" Beagle, supra, 417 P2d at 679.

The Beagle court reasoned that one of the "most difficult tasks imposed on a jury is deciding a case involving personal injuries awarded as compensation for pain and suffering." Beagle, supra., 417 P2d at 675. The Beagle Court did an expansive review of the state of the law

on this issue nationally and of law review articles on this subject. They found that an "examination of a large number of articles on the subject indicates that a substantial majority of the authors are of the view that a substantial majority of the authors are of the view that it is desirable to permit "per diem" argument." Id. at 677 (Citations Omitted).

The Court then conducted an expansive analysis and review of Botta and found our Supreme Court's reasoning lacking. Quoting a Rutgers note on the topic critical of Botta, the court observed that:

> [t]he plaintiff sues for money. The defendant defends against an award of money. The jury is limited to expressing its findings in terms of money. Nevertheless, the jury must be precluded from hearing any reference whatever to money. It must retire to the jury room in vacuum on this essential [issue] of the case where the unmentionable and magical conversation of broken bones to hard cash may then take place. Id. at 678, citing Guide 69; Note (1958) 12 Rutgers L.Rev. 522.
>
> The California Supreme Court then reasoned that:
>
> it does not follow, as averred in Botta, that the suggestion of a sum for damages can have no foundation in the evidence. Indeed it is necessarily inferred from observation of the plaintiff in the courtroom and from expert testimony regarding the nature of his injuries and their consequences. If a jury must infer from what it sees and hears at the trial that certain amount of money is warranted as compensation for the plaintiff's pain and suffering, there is no justification for prohibiting counsel from making a similar deduction in argument. An attorney is permitted to discuss all reasonable inferences from the evidence. Beagle, supra, 417 P2d at 678. (Citations Omitted)

In Braun v. Ahmed, 515 N.Y.S.2d 473 (1987), a well-reasoned decision by the Supreme Court of New York, Appellate Part, observed that New York has long-permitted mention of the figure stated in the *ad damnum* clause. New York embraces the fact that there is advocacy in the trial process. Regarding the role of counsel, the court noted, as a general principle, that there exists a right of fair comment on the evidence, described as follows:

> It is the privilege of counsel in addressing a jury to comment upon every pertinent matter of fact bearing upon the questions which the jury have to decide. This privilege it is most important to preserve and it ought not to be narrowed by any close construction, but should be interpreted in the largest sense * * * The jury system would fail much more

> frequently than it now does if freedom of advocacy should be unduly hampered and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation or appeal in advocating his cause" Id. at 475. (citations omitted).

The Court in Braun was critical of the rational used by our Court in Botta. They observed that "the inherent weakness in this [Botta] analysis is that it posits the jurors' duty as having to do the impossible, i.e., from evidence which is 'not capable of proof in dollars and cents' they must fix dollars and cents damages, and, under the New Jersey rule, must do so without guidance." Id. at 477. The Braun Court went onto offer the following rebuttal:

> [o]n the other hand, the following arguments are offered in support of guidance: 'Authorities approving such arguments give numerous reasons: (1) that it is necessary that the jury be guided by some reasonable and practical considerations; (2) that a trier of the facts should not be required to determine the matter in the abstract, and relegated to a blind guess; (3) that the very absence of a yardstick makes the contention that counsel's suggestions of amounts mislead the jury a questionable one; (4) the argument that the evidence fails to provide a foundation for per diem suggestion is unconvincing, because the jury must, by that or some other reasoning process, estimate and allow an amount appropriately tailored to the particular evidence in that case as to the pain and suffering or other such element of damages; (5) that a suggestion by counsel that the evidence as to pain and suffering justifies allowance of a certain amount, in total or by per diem figures, does no more than present one method of reasoning which the trier of the facts may employ to aid him in making a reasonable and sane estimate; (6) that such per diem arguments are not evidence, and are used only as illustration and suggestion; (7) that the claimed danger of such suggestion being mistaken for evidence is an exaggeration, and such danger, if present, can be dispelled by the court's charges; and (8) that when counsel for one side has made such argument the opposing counsel is equally free to suggest his own amounts as inferred by him from the evidence relating to the condition for which the damages are sought' Id. (citing Franco v Fujimoto, 47 Haw. 408 (1964)).

Because of changing times, juror sophistication, and in light of the erosion of the logic underlying Botta due to the operation of Rule 1:7-1(b), there is a real need to comprehensively study the last limitation imposed by Botta -- the prohibition of a sum-certain argument, to determine if this prohibition is proper and necessary in the 21st century. Mark Geistfeld explained in his article "Placing A Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries" 773 Cal. Law Review ,Vol. 83 (1995) that

"because jurors are given little guidance on how to determine pain and suffering damages, the process leading to these awards provides a variety of reasons for concern. At minimum, a large element of arbitrariness likely exists in any award because jurors are unsure of how to derive the award." Id. at 783. Given the results and issues identified by focus groups we have conducted, it is now clear to us that this issue needs a comprehensive review and analysis.

VI. FOCUS GROUP EXPERIENCES

Over the course of the past two and one-half years, my office has conducted forty-two (42) focus groups. The purpose of each focus group relates to specific cases that are or were pending either in Monmouth or Ocean Counties. Focus group members were and are currently selected by advertisements on Craigslist and Facebook. In order to participate in a focus group, each candidate must enter extensive demographic information into an electronic form that must be submitted to my office before being selected to participate.

The information supplied includes: name, date of birth, marital status, political affiliation, religion, occupation, prior jury service, if any, and town of residence. A conflict check is then performed within our office to ensure that no focus group participant is a party, witness, or former defendant in litigation with a client in our office. Additionally, focus group members must sign confidentiality and non-disclosure agreements, as well as consent forms permitting my office to video and audio record the session. The sole purpose for conducting each of focus groups, to date, has been to help my clients achieve a favorable result (either by settlement or verdict). The representative sampling to date consists of a total of 129 men and 157 women from Monmouth and Ocean Counties, fitting the demographic makeup of the jury pool in these jurisdictions.

Each focus group consists of six to eight residents from Monmouth or Ocean County, the vast majority of which have never served as a juror. Focus group sessions usually run from four to six hours, depending on the complexity of the case. Each participant is paid for her time. In an effort to obtain truthful and accurate information that will help our clients, I spend a great deal of time talking with the "jurors" about the seriousness of the meeting, the critical nature of confidentiality (I ask each person one-by-one to promise never to discuss anything that occurs in our courtroom), and how important "brutal honesty" is when discussing the strengths and weaknesses of our cases, especially when rendering a verdict.

Because thirty-nine of the forty-two focus groups that I have conducted involve clients that I represent, I am keenly aware of the potential for a biased outcome – people simply telling me what I want to hear because I am paying them. As a result, I preface all of the sessions with a comment, such as – "I think I know the strengths of my case, but I want you to challenge me and show me the weaknesses. You will be doing my client a great disservice if you just tell me what you think I want to hear." *Voir dire* follows those preliminary remarks, and then a brief opening statement is presented. During a "deliberative focus group session," I will present testimony from the plaintiff, who is then subject to direct and cross-examination. If doctors (plaintiff and defendant, preferably) are on video, the "jurors" will watch the medical testimony. Alternatively, reports and records of the doctors will be presented to the members. A brief closing argument will follow, which may or may not use a time-unit argument, depending on the facts of the case. Because each case involves damages issues, I will read and visually project the standard model charge regarding recovery of non-economic damages.

On occasion, focus groups are conducted as a "conceptual session" on limited issues: such as a theoretical discussion on how to best address damages, the impact, if any, of individual pieces of evidence that may be damaging, and any other potential problems that may exist in a client's case. I preface my observations and comments below with the following caveats. I am, and always will be, an advocate for injured people. Despite that bias, my observations as indicated below, should be of equal concern to defense counsel and the court system.

Video and audio recording began approximately 6 months ago [any member who would like to watch any or all of the sessions is welcome to view them]. Although I have frequently argued time-unit to the focus group "jurors", I have not used a sum-specific or ad damnum arguments to date.

A. Observations

Focus group participants universally (10/10) expect, both plaintiff's and defense lawyers, to tell them how much the plaintiff is seeking in damages as compensation for injuries. Focus jurors also expect a counter dollar figure or an explanation as to why the plaintiff is entitled to nothing, or a lesser sum. When I explain that our Court Rules do not permit any dollar-sum suggestion by counsel, the response is one or more of the following: "why not?", "how are we supposed to know how much to award?", "you should know better than us…", or "that makes no sense." When the Model Jury Charge on non-economic damages is read and shown to focus jurors, the overwhelming majority of participants claim to receive little to no guidance on how to arrive at an award of fair and reasonable compensation.

Focus jurors, regardless of education level, know, universally, that businesses, individuals, and corporations are insured for losses, and have thus far not expressed concern over

potential increases in premiums if a large verdict is rendered. However, inevitably, in *voir dire*, at least one juror brings up a distorted version of "the McDonald's coffee case", as an example that there are too many frivolous claims. When I explain, and reinforce the goal of compensatory damages as the only method to make an injured person "whole", and is intended to return an injured person to her pre-injury health and activities, jurors understand the "concept". I use the word "concept", because despite repeated admonitions and explanations by me during a session that a given case does not involve past or future medical expenses, lost wages, or any other economic consideration, *focus jurors will systematically, by default, inject those facts into their calculations that are not evidential. Despite using a time-unit argument, or any other method that I have attempted to persuade jurors to arrive at an award of non-economic damages, the anchor point, invariably, defaults to completely artificial constructs that have nothing to do with the case presentation.*

Routinely, in the absence of an anchor, such as a lost-wage claim, past and/or future medical expenses, or a life-care plan, focus group jurors rely on personal or family experiences to arrive at an award of non-economic damages. When arriving at an award of non-economic damages, focus group members often make wholly-fabricated assumptions, such as costs of future medical expenses (when not in issue), a person's inability to work in the future and lost wages (when no medical or economic loss evidence is presented), an amount that someone received in workers' compensation, or will go so far as to speculate that a person's knee injury that required arthroscopic surgery will eventually lead to hip or back injuries (despite a complete lack of medical evidence to support the theory).

In cases that will certainly result in a trial, or involve devastating injuries where settlement in probable, I will focus group the same case on three occasions, using different people from the same County. One case, involving a trip and fall that required a multi-level neck fusion with a poor recovery, ultimately settled for $2,700,000. One of the principal reasons for settling concerned aberrational decisions by three focus groups in Monmouth County. Despite the use of a time-unit argument, compelling testimony from plaintiff and her son, and strong medical evidence, there was no uniformity between the groups. The values between the three groups ranged from as low as $250,000, to a high of $20,000,000.

In that instance, the facts, presentation of the evidence, use of demonstratives, and argument remained unchanged from group-to-group. Why such wildly different decisions?

In part, because some members of the first group felt that the elderly plaintiff was so badly injured that no amount of money could compensate her. The members of that group perceived the plaintiff's son (who they deemed unlikable) as the only person who would ultimately benefit financially from any recovery. The second group, while recognizing the severity of plaintiff's injures, again assumed facts not in evidence and apportioned damages for future medical expenses (including such items as transport and massages), as well as pain, suffering, and loss of quality of life. The third group, comprised primarily of middle-aged women, awarded what amounted to a punitive verdict. While the majority of the jurors used a time-unit calculation using different equations, future medical care entered the equation, as well. Clearly, the driving force of that "verdict" resulted from aggravating liability circumstances (including prior notice of the condition and the ease with which the property owner could have corrected the defective condition) that "spilled-over" into the analysis of damages.

B. Conclusion

At the November 3, 2016 meeting, I will offer a DVD for your review that shows focus-group deliberations in a case involving a bicycle versus car collision. A bus struck a young, athletic woman in the rear. The young plaintiff suffered knee and back injuries in the crash. I moderated the focus group for another plaintiff's attorney, who presented the case to the focus group.

The plaintiff and her husband testified, and plaintiff's counsel read the treating doctor's medical records. I gave a brief summation that suggested ways that the panel could arrive at an award of non-economic damages, and the jury deliberated, with an unexpectedly large damages award.

Based on my experiences with numerous focus groups, I suggest that counsel should be given greater latitude in *voir dire*, opening statements, and closing arguments to argue a sum certain. Jurors are plainly and simply looking for guidance to make a reasoned decision that is supported by the evidence. A sum-certain argument is precisely that – argument of counsel.

As long as the dollar amount that counsel advances is based on reasonable inferences drawn from the evidence (testimony from plaintiff, medical experts, and the life expectancy table), the argument should be permissible, subject to a limiting instruction. In my view, such a Rule amendment will help to reduce aberrational verdicts, will redirect jurors' attention away from irrelevant and non-existent economic damages to support their appraisal of non-economic damages, and will require counsel to make a thoughtful and reasonable dollar-sum suggestion, or risk losing credibility with the jurors. As such, I propose a sub-committee be formed to review this issue.

APPENDIX 4B

Response to Botta Subcommittee memo

My concern with the proposal is that, although there are many states that allow attorneys to suggest a dollar amount for pain and suffering to a jury, there is another issue which we have not discussed; and which we must discuss before we change this portion of our trial practice. That is, how do those other jurisdictions handle it when an attorney suggests an unreasonably high dollar amount and the jury awards that amount. As Mr. Shebell points out in his memo, juries may be inclined to rely on the guidance and perceived expertise of the attorneys when it comes to deciding what a case is worth.

The concern I have with the proposal is that we have not compared the standards for setting aside an unreasonably high verdict in the states that allow attorney comment on pain and suffering value. Before we decide to overrule Botta we should study how trial courts in the states that allow attorneys to ask for specific dollar amounts review unreasonably high verdicts. I have not taken the time to review the law in all of the states that allow attorneys to suggest a specific dollar amount to juries. However, I have done some research on NY law, as that is one of the states referenced in the Botta Subcommittee memo. NY law is very different than NJ law with regard to the standard for granting a motion to set aside a verdict.

Specifically, under NY law, a court may set aside a verdict if it is not "reasonable." And, the determination of reasonableness is based on a comparison of the verdict under review to other verdicts in cases involving similar injuries. NJ law does not allow trial judges to do this. Thus, it is much easier in NY for a court to set aside a jury verdict that is unreasonably high. This gives trial judges in NY broad latitude to fix a high jury verdict, and probably also has the effect of reining in the amount plaintiff counsel asks the jury to award.

In NJ, however, trial courts have much less power to set aside an unreasonably high verdict. Comparison of the verdict under review by the Court to other verdicts in similar cases (an exercise routinely followed in NY) has been expressly disallowed by the NJ Supreme Court. Rather, each case is supposed to be viewed by the court as sui generis and the verdict disturbed only if the "judicial conscience" is "shocked."

Thus, under NJ law, the power of the Court to set aside verdicts is much more restrictive than under NY law. NY law allows a trial judge to set aside an "unreasonable verdict" and to reach the decision of its unreasonableness by comparing it to other verdicts for similar injuries. In NJ, a verdict that is "unreasonable", but not shocking to the conscience of the court , cannot be disturbed, and in reaching even the high bar of "shocking to the judicial conscience" courts my not compare the case under review to the verdicts in other similar cases.

New York Law:

" 'While the amount of damages to be awarded for personal injuries is a question for the jury, and the jury's determination is entitled to great deference, it may be set aside if the award *deviates materially from what would be reasonable compensation*' " (Kusulas v. Saco, 134 A.D.3d 772, 774, 21 N.Y.S.3d 325, quoting Vainer v. DiSalvo, 107 A.D.3d 697, 698, 967 N.Y.S.2d 107; see CPLR 5501[c]). *"Prior damages awards in cases involving similar injuries are not binding upon the courts but serve to 'guide and enlighten' them in determining whether a verdict constitutes reasonable compensation"* (italics added) (Kusulas v. Saco, 134 A.D.3d at 774, 21 N.Y.S.3d 325, quoting Taveras v. Vega, 119 A.D.3d 853, 854, 989 N.Y.S.2d 362). Sawh v. Bally Contracting Corp., Supreme Court, Appellate Division, Second Department, New York, March 8, 2017, 148 A.D.3rd 852, 853.

New Jersey Law:

"A judge's personal knowledge of verdicts from experiences as a private practitioner or jurist is information outside the record and is not subject to the typical scrutiny evidence receives in the adversarial process. The cohort of cases within a judge's personal knowledge may not be statistically relevant and the reliability of the judge's knowledge cannot be easily tested. A judge therefore should not rely on personal knowledge of other verdicts. The standard is not whether a damages award shocks the judge's personal conscience, but whether it shocks the judicial conscience.

We also disapprove of the comparative-verdict methodology that allows parties to present supposedly comparable verdicts based on case summaries. The singular facts and particular plaintiffs in different cases that lead to varying awards of damages are not easily susceptible to comparison. That is especially so because the information about other seemingly similar verdicts is very limited. A true comparative analysis would require a statistically satisfactory cohort of cases and detailed information about each case and each plaintiff. That information is unlikely to be available, and therefore any meaningful comparative approach would be impracticable to implement." Cuevas v. Wentworth Group, 226 N.J. 480, 486-7 (2016)

THE BOTTOM LINE: NY Courts, which permit an attorney to ask for a specific dollar award, also permit a jury verdict to be set aside by the use of a "reasonableness" standard, which compares the verdict under review to other verdicts in similar cases. NJ law, on the other hand, does not permit trial courts to disturb jury verdicts based on a comparison to verdicts in other cases with similar injuries. And, verdicts in NJ can only be set aside if they "shock the judicial conscience" – a standard which permits very few verdicts to be disturbed.

Without changing NJ law to permit our courts to set aside verdicts based on the standard used by the NY courts, we should not adopt the NY practice of permitting lawyers to suggest the amount of pain and suffering awards to the jury. If Botta v. Brunner is overruled, then (for starters) Cuevas v. Wentworth Group should also be overruled. NJ judges should also be permitted to apply a "reasonableness standard" for setting aside verdicts; and they should also be allowed to compare the verdict under review to verdicts in other cases involving similar injuries as the benchmark for whether the verdict under review is "unreasonable".

APPENDIX 5

FINAL REPORT OF
BUSINESS ENTITY VENUE RULE SUBCOMMITTEE

The subcommittee twice considered the need to amend Rule 4:3-2 in light of the Law Division opinion in *Crepy v. Reckitt-Benckiser*. After the full Committee, on its first review, agreed that no action was required because the opinion was unpublished and did not present a recurring problem in need of attention, at least given then present experience, the question was re-examined after *Crepy* was approved for publication in February 2017. *See Crepy v. Reckitt-Benckiser*, 448 N.J. Super. 419 (Law Div. 2016). On reconsideration, the Subcommittee and full Committee adhered to the same position.

In *Crepy* a foreign employee filed a discriminatory termination action in Essex County against a Delaware LLC registered in Mercer County with a principal place of business in Morris County. Venue was transferred to Morris County under *R*. 4:3-2, permitting venue where the Corporation [now any "business entity"] is "actually doing business," because business activities in Essex County were insufficient notwithstanding that defendant's representatives made sales calls and performed marketing activities there. The court held that, for venue purposes, the contacts had to be more extensive than "minimum contacts" required for jurisdiction. The Appellate Division granted leave to appeal, but the case settled and the appeal was dismissed. The opinion stated "actually doing business" does not equate with minimum contacts for jurisdiction purposes, but does not state what is sufficient for venue or provide a test.

The present Rule was amended, effective September 1, 2016, to change the title from "corporate parties" and the body from reference to "corporations" to "business entity," which will now apply to more defendants. The present Rule provides that, for purposes of the venue rule, "a business entity shall be deemed to reside in the county in which its registered office is located or in any county in which it is actually doing business." It is believed that the term "actually doing business" in today's world may be vague and include places which were not contemplated by the Rule when first drafted or adopted, and may no longer be appropriate given the various places an entity could be considered as "doing business." As a result, the selected venue may be selected essentially to secure a favorable jury.

Rule 4:3-3 expressly provides for change of venue "(1) if venue is not laid in accordance with R. 4:3-2; or (2) if there is a substantial doubt that a fair and impartial trial can be had in the county where venue is laid; or (3) for convenience of parties and witnesses in the interest of justice; or …"

The Committee has decided to let the issue "play out" by case law, and perhaps a decision at the appellate level. Stated differently, the *Crepy* opinion and New Jersey Law Journal article about it has called attention to the issue, the expansion of the Rule to include "business entities" also has focused more attention to the problems or concerns with the Rule, and case law may develop more guidance on the issue. Furthermore, Rule 4:3-3 provides flexibility and case law may help to develop factors and standards under that Rule. Therefore, it may simply be too soon to make an appropriate recommendation given the present limited experience with the "business entity" rule.

However, there is a respectable view that fairness requires guidance and an appropriate recommendation now because of the caseload and cases pending which could be affected by the issue, and that waiting to take action will not improve upon what should be recommended. As a result, the Subcommittee has presented a draft substitute for Rule 4:3-2(b) in case the Supreme Court believes an amendment is necessary. The full Committee endorsed that approach. It was drafted by Professor Edward Hartnett and is attached hereto.

Edwin H. Stern, Chair for the Subcommittee
Hon. Karen M. Cassidy, A.J.S.C.
Hon. Clarkson S. Fisher, Jr., P.J.A.D.
Edward A. Hartnett, Esq.
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Assad Siddiqi, Esq.

October 16, 2017

To: Business Entity Venue Subcommittee

From: Edward Hartnett

Re: Venue

Date: June 6, 2017

After the last meeting of the Civil Practice Committee, I discussed the proposal by the Business Entity Venue Subcommittee with Judge Stern. In accordance with that discussion, I worked on a revised proposal in an attempt to meet some of the concerns raised at the last meeting. This memo explains the revised proposal.

Here is a redlined version of the proposed venue Rule:

> 4:3-2. Venue in the Superior Court
>
> (a) Where Laid. Venue shall be laid by the plaintiff in Superior Court actions as follows:
>
> ***
>
> (3) except as otherwise provided *** the venue in all other actions in the Superior Court shall be laid in the county in which the cause of action arose, or in which any party to the action resides at the time of its commencement, or in which the summons was served on a nonresident defendant; ***.
>
> (b) Business Entity. For purposes of this rule, a business entity shall be deemed to reside in the county in which <u>its principal</u>

office in New Jersey is located or, if it has no office in New Jersey, in the county with which it has the most significant contacts. ~~its registered office is located or in any county in which it is actually doing business.~~

(c) Exceptions in Multicounty Vicinages. With the approval of the Chief Justice, the assignment judge of any multicounty vicinage may order that in lieu of laying venue in the county of the vicinage as provided by these rules, venue in any designated category of cases shall be laid in any single county within the vicinage.

(d) If there is no county in which venue would otherwise be proper under this Rule, venue is proper in any county.

Rule 4:3-2(a) makes venue available in the county in which the cause of action arose, as well as in the county in which any party resides. Residence of a natural person is relatively straightforward; residence of a business entity less so. Accordingly, Rule 4:3-2(b) defines residence of a business entity for venue purposes. This structure of 4:3-2—providing for venue based, in part, on residence, and then defining residence—mirrors the structure of the federal venue statute that students learn in civil procedure. See 28 U.S.C. § 1391.

To my mind, the venue rule should be as easy to apply as possible, direct cases to reasonably convenient courthouses, and provide some venue in every case in which the courts of New Jersey have personal jurisdiction.

The current definition of residence for a business entity is problematic. Its provision for venue where the entity is "actually doing business" is not so easy to apply, as the decision in *Crepy* reveals. *See Crepy v. Reckitt Benckiser, LLC*, 448 N.J. Super. 419 (Law. Div. 2016).

Crepy's determination that "actually doing business" is a higher standard than the standard for personal jurisdiction makes application of that standard more complex. *See id*. at 439-40. Moreover, if *Crepy* is correct that the "actually doing business" standard is a higher standard than the one for personal jurisdiction, there is a substantial risk that there will be business entities subject to personal jurisdiction in New Jersey but not understood to reside in any county in New Jersey for venue purposes.

On the other hand, if *Crepy* is not correct in this regard, and the "actually doing business" standard is the same (or perhaps even lower than) the one for personal jurisdiction, there will be business entities who reside in many counties for venue purposes. Given that the Rule allows for venue where any party resides—not only where defendants reside—this possibility could allow significant forum shopping by business entities.

At the last meeting, there seemed to be some support for the idea that a business entity should be understood to reside in one county. One possibility considered was to define the residence of a business entity as the place where its principal office is located.

The problem with that definition is that many business entities will have their principal office located outside New Jersey.

This problem is highlighted by the decisions of the Supreme Court of United States regarding both federal diversity jurisdiction and general (all-purpose) personal jurisdiction. On the diversity front, the Court has interpreted the phrase "principal place of business" in the statutory definition of corporate citizenship, 28 U.S.C. § 1332(c), to typically be its corporate headquarters. *Hertz Corp. v. Friend*, 559 U.S. 77 (2010).

In the context of general personal jurisdiction, the Court has insisted on contacts so pervasive that the corporation is "at home" in the state, and explained that a corporation will usually be at home in (at most) two states: its state of incorporation and the state where it has its principal place of business. *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *see also Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011). It is possible, in an exceptional case, for general jurisdiction to exist beyond state of incorporation and principal place of business, but doing business—even substantial business—is not enough to make a corporation "at home" in a state. *BNSF Ry. Co. v. Tyrrell*, No. 16-405, 2017 WL 2322834, at *9–10 (U.S. May 30, 2017) (holding that BNSF is not subject to general jurisdiction in Montana even though it "has over 2,000 miles of railroad track and more than 2,000 employees in Montana"). "General jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A

corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." *Daimler*, 134 S. Ct. at 762, n.20.

To deal with business entities that have one or more offices in New Jersey, but have their principal office outside New Jersey, the proposed rule defines the residence of a business entity, for venue purposes, as the county in which its principal office in New Jersey is located. That is, for a business entity that has one or more New Jersey offices, its residence is defined as its principal *New Jersey* office, even if its principal office overall is in some other state or some other nation.

To deal with business entities that have no offices in New Jersey, the proposed rule defines the residence of a business entity, for venue purposes, as the county with which it has the most significant contacts.

This approach, I believe, comes close to guaranteeing that, in every case in which New Jersey has personal jurisdiction over a business entity, that business entity will be understood to reside, for venue purposes, in some county—and therefore venue in some county will be proper—regardless of the number of offices it has in New Jersey and regardless of whether its principal office is in New Jersey at all. It also hones in on a single county of residence: either the principal New Jersey office or the county with which it has the most significant contacts. Moreover, particularly in cases where there is no New Jersey office, litigants and courts will

already be examining the business entity's contacts in New Jersey to determine personal jurisdiction, so they can look to those contacts for the venue analysis as well.

While I believe that this approach comes close to guaranteeing that, in every case in which New Jersey has personal jurisdiction over a business entity, that business entity will be understood to reside, for venue purposes, in some county, it does not quite guarantee it. While I hope this would be rare, I can imagine a case in which New Jersey has personal jurisdiction but the defendant has no contacts with any county in New Jersey: if there is a forum selection clause that selects New Jersey but not any particular county in New Jersey.

Accordingly, the proposal includes a new subsection (d)—modelled on 28 U.S.C. § 1391(b)(3)— as follows:

<u>If there is no county in which venue would otherwise be proper under this Rule, venue is proper in any county.</u>

Situation	**Existing (Crepy)**	**Earlier proposal**	**Curren**
Cause of action arose in NJ	Venue in county where cause of action arose	Venue in county where cause of action arose	Venue action arose

Business entity with principal office in NJ	Probably resides in county of principal office	Resides in county of principal office	Resides office
Business entity with one office in NJ, but principal office in different state or nation	Probably resides in county of NJ office	Does not reside in any county based on existence of NJ office	Resides
Business entity with multiple offices in NJ, but principal office in different state or nation	Perhaps resides in every county in which it has an office	Does not reside in any county based on existence of NJ offices	Resides NJ office
Business entity with no offices in NJ	Perhaps does not reside in any county in NJ	Does not reside in any county in NJ (except based on where cause of action arose)	Resides it has the mos
Business entity with no contacts with NJ (Personal jurisdiction based on	Does not reside in any county in NJ	Does not reside in any county in NJ (except based on where cause of action arose)	If venu available, ven

consent)			

Venue based on residence is most important for cases where the cause of action does not arise in New Jersey.

Personal jurisdiction in New Jersey in such cases might be based on general jurisdiction, if the defendant is incorporated in New Jersey or has its principal place of business in New Jersey.

Personal jurisdiction could also be based on specific jurisdiction, if the defendant has purposeful contacts with New Jersey that are sufficiently related to the claim, even though the cause of action did not arise in New Jersey. For example, a defendant might manufacture a car that is advertised and sold in New Jersey and that, years later, proves defective and causes harm when involved in an accident in Pennsylvania. *Cf. World Wide Volkswagen Corp. v. Woodson*, 440 U.S. 907 (1979).

APPENDIX 6

Draft Report of the Subcommittee on the Offer of Judgment Rule

Background

Broadly speaking, Rule 4:58, the Offer of Judgment Rule, is designed to promote settlement by shifting litigation expenses that are incurred because a party unreasonable fails to accept an offer to settle the case. Initially modeled on Federal Rule of Civil Procedure 68, it now departs in major ways from the Federal Rule. For example, only defending parties can make offers of judgment under Federal Rule of Civil Procedure 68, while plaintiffs can make offers of judgment under Rule 4:58. Similarly, under Federal Rule of Civil Procedure 68, attorneys' fees can be recovered only if there is a statute that defines such fees to be part of the costs, while attorneys' fees are recoverable under Rule 4:58 without any such limitation.

Prior to 1994, Rule 4:58 had scant impact, because it capped attorney's fees at $750. A further amendment in 2000 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 the Rule grew, and fears arose that it would broadly undermine the traditional American rule.

At various points in the early 2000s, the Civil Rules Committee seriously considered whether the Rule simply be eliminated. At the time, it was criticized as functioning "mainly as a good weapon for defense counsel." Memorandum of Suzanne Goldberg 1 (October 27, 2005) (internal quotation marks and citations omitted). Reports favoring retention and abolition were written, and Judge 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 deleted; instead it was amended in various ways in 2006, including to add 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 dealt with issues including the elimination of the previous dichotomy between liquidated and unliquidated damages (2004), the application of the Rule in multi-defendant cases (2000), and in UM/UMI cases (2016).

Current Examination

The current examination of the Offer of Judgment Rule was prompted by the receipt of a memorandum from New Jersey Physicians United Reciprocal Exchange (NJ PURE) seeking significant changes to Rule 4:58 that would make it more widely available. In striking contrast to the concerns expressed when calls to eliminate the Rule were made previously, NJ PURE now contends that Rule 4:58 is unjust to defendants. NJ PURE Memorandum (Aug. 24, 2015).

In examining Rule 4:58, the Civil Rules Committee again noted that some had long called for abolishing the Rule completely. The Committee recognized, however, that because the Rule is designed to foster settlements, instances where it

worked as designed to produce a settlement would be unlikely to come to the attention of outside observers. Indeed, even in instances where it failed to produce a settlement, litigation expenses might be imposed without controversy under the terms of the Rule. Even more than with other Rules, written 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 data that Judge Sabatino had suggested a dozen years ago. A survey was prepared by the Subcommittee on the Offer of Judgment Rule and mailed to certified civil trial attorneys. In addition, the Civil Presiding Judges in each county distributed copies in their courtrooms for attorneys to complete during the Monday morning calendar calls, and distributed the surveys to their respective trial judges for distribution among the attorneys who came into the various civil courtrooms. One hundred thirty-six attorneys responded. Eighty-nine of those identified as primarily plaintiffs' attorneys, thirty-six as primarily defendants' attorneys, and eleven identified as both.

Evaluation

Overall

The most significant survey finding was that, among cases in which the reporting attorney served an offer of judgment and ultimately settled, 56% believed that the offer of judgment was a factor in leading to the settlement. Similarly, if less dramatically, among cases in which the reporting attorney received an offer of

judgment and ultimately settled, 34% believed that the offer of judgment was a factor in leading to the settlement. That is, a majority of those serving offers believe that it was a factor leading to the settlement, and about a third of those receiving offers believe the same.

These results suggest that the Offer of Judgment Rule does promote settlement in a significant number of cases. While a review of judicial opinions would not reveal this impact, the survey of lawyers does.

Accordingly, the subcommittee recommends that the Offer of Judgment Rule not be deleted.

Exceptions in Rule 4:58-3

Some comments submitted along with the survey echoed the concerns expressed by NJ PURE; other comments raised concerns about the one aspect of Rule 4:58-3 that NJ PURE does not propose to change.

Rule 4:58-3(c) provides that a defending party may not recover litigation expenses in five circumstances:

(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. 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.

NJ PURE (along with some of the survey respondents) proposes to eliminate all but exception 4. It contends that the "most egregious problem" is "the 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." NJ PURE at 9.

But these limitations are included by design 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). Indeed, the inability of a defendant to take advantage of the offer of judgment rule when the plaintiff recovers nothing is 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).

NJ PURE also suggests that the exception for nominal damages should be deleted because of its imprecision. It asserts that if the injuries in a case are sufficiently severe, a verdict of $150,000 is likely to be considered nominal. NJ PURE at 10. It cites no authority for this assertion, which flies in the face of the definition of nominal damages. Black's Law Dictionary (10th ed. 2014) ("A trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated."). "Nominal damages, unlike compensatory damages, do not attempt to compensate the plaintiff for an actual loss. Rather, they are a trivial

amount awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage. The award of nominal damages is made as a judicial declaration that the plaintiff's right has been violated." *Nappe v. Anschelewitz, Barr, Ansell & Bonello*, 97 N.J. 37, 48 (1984) (internal punctuation and citations omitted). For example, a court must "award nominal damages when a plaintiff establishes the violation of his right to procedural due process but cannot prove actual injury." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992).

NJ PURE also seeks the deletion of the undue hardship exception, noting that while the exception applies to both plaintiffs and defendants, compare Rule 4:58-2(c) (claimant's offer rejected) with Rule 4:58-3(c) (non-claimant's offer rejected), trial judges do not apply the exception evenhandedly to plaintiffs and defendants. NJ PURE at 11. 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 there is a disparate impact on plaintiffs and defendants, this may simply reflect an evenhanded application of an undue hardship exception if, in fact, plaintiffs in the relevant cases are more likely to suffer undue hardship if forced to pay their adversary's litigation expenses. And if trial judges are not applying a rule evenhandedly, the remedy is appellate review, not elimination of an exception for undue hardship.

While NJ PURE does not seek to disturb the exception for cases where a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, a number of survey respondents called for the Rule to be amended to flatly exempt certain statutory fee-shifting cases by name. This seems unwise for at least 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 be awarded fees under Rule 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 plaintiff's award under such a statute." *Best v. C&M Door Controls, Inc.*, 200 N.J. 348, 354 (2009). Changing the Rule to provide that the Rule 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.

Multi-defendant cases

Finally, NJ PURE seeks an amendment to Rule 4:58-4(b) governing multi-defendant cases. In 1999, the New Jersey Supreme Court held that, under the Rule as then written, a "plaintiff who has asserted that multiple defendants are jointly and severally liable for a claim is not subject to the financial consequences of Rule 4:58-3 for rejecting an offer by a single defendant to settle its share of liability." *Schettino v. Roizman Dev., Inc.*, 158 N.J. 476, 484 (1999). It observed, "Perhaps the

interests of litigants and the public would be better served by a Rule of Court providing that a court may award counsel fees to a single defendant in a multiple-defendant action if the defendant offers to settle the claim against it for a sum greater than the judgment that a plaintiff obtains against all defendants," and asked the Civil Practice Committee to look into the question. *Id*. at 488-89. As a result, the Rule was amended in 2000, to provide the benefits of the Rule to a single defendant who makes an offer that is "at least as favorable to the offeree as the determination of total damages to which the offeree is entitled." Rule 4:58-4.

NJ PURE seeks to go further, and provide the benefits of the Rule to a single defendant in a multi-defendant litigation who makes a reasonable pro rata offer that the plaintiff unreasonably rejects. It notes that a defendant in a three defendant case who offers $100,000 but is ultimately found liable for a mere 10% of a $300,000 verdict cannot take advantage of the Rule. But this argument seems to simply ignore what joint and several liability is all about.

As *Schettino* explained:

> The imposition of a financial penalty on a plaintiff for rejecting a settlement offer by a single joint defendant would undermine the purpose of joint and several liability. "Joint and several liability was designed to obviate a plaintiff's burden of proving which share of the injury each of several defendants was responsible for; the burden of proof is removed from the innocent plaintiff and placed upon the wrongdoers to determine among themselves." J.D. Lee & Barry A. Lindahl, Modern Tort Law: Liability &

Litigation § 19.02 at 652 (Rev. ed.1994). Applying the offer-of-judgment rule, however, would shift to plaintiffs, when evaluating the fairness of a settlement offer, the burden of determining a single defendant's share of liability.

Schettino, 158 N.J. at 484.

It is true that application of the Rule in multi-defendant cases is not wholly unproblematic. For example, in *Cripps v. DiGregorio*, 361 N.J. Super. 190 (2003), two defendants each offered $15,000 on the same day. The court held that they could not take advantage of the Rule because presenting their offers that way was an "impermissible attempt to hedge their bets," by enabling them to opportunistically characterize the offer as either a joint $30,000 offer or two separate $15,000 offers after the verdict. *Id.* at 195-96. Moreover, difficulties can arise in cases where not all claims in a case seek joint and several liability. *Id.* at 198. But the subcommittee is not convinced that an attempt—at least at this juncture—to revise the Rule to anticipate and cover all possible permutations in multi-defendant cases is likely to produce more good than harm. The 2000 amendment made the Rule useful in a broader range of circumstances in multi-defendant cases than previously, the *Cripps* holding discourages gamesmanship, and efforts to make the Rule more broadly useful in multi-defendants runs the risk of either undermining joint and several liability or increasing confusion.

High-low agreements

The application of Rule 4:58 to high-low agreements is currently before the Supreme Court. *Serico v. Rothberg*, certif. granted (May 19, 2017). Particularly since that question has to date been considered as a matter of contract law, *Malick v .Seaview Lincoln Mercury*, 398 N.J. Super. 182 (App. Div. 2008), the subcommittee does not see any reason to address the issue now.

Conclusion

For these reasons, the subcommittee recommends that no change be made to Rule 4:58 at this time.