

NOTICE TO THE BAR

APPELLATE DIVISION GUIDELINES FOR ENTERTAINING EMERGENT APPLICATIONS

The Appellate Division is issuing new guidelines setting forth the criteria considered by the court in reviewing applications for permission to file an emergent motion. These guidelines clearly explain the standards examined by the court in its determination of these applications. The guidelines, together with the revised Application for Permission to File Emergent Motion, take effect on September 14, 2015.

An attorney or litigant who seeks relief on an emergent basis must contact the Clerk's office at (609)815-2950 ext. 52614 between regular business hours of 8:30 a.m. to 4:30 p.m. The Clerk's office shall arrange for the completion by the applicant of an application for permission to file an emergent motion in the form set forth on the Judiciary's website njcourts.com. If an attorney or litigant seeks emergent relief after regular business hours, on holidays or weekends, he or she must contact the State Police Operational Dispatch Bureau duty trooper at (609)963-6900, option #1. The duty trooper will then contact the emergent duty judge.

1. What matters are emergent. In deciding if a matter is emergent, the court considers the nature of the alleged impending harm, in addition to the time frame in which it will occur. A matter is not emergent just because something will occur before the court could normally decide an ordinary motion. The threatened occurrence must also involve either irreparable injury or some similar showing that the interests of justice require our hearing the matter on short notice.

For example, the fact that two parents have a dispute over ordinary child visitation on an upcoming weekend is not emergent, under that definition, because the trial court can order that a lost visitation opportunity be made up at a later time. On the other hand, a court-ordered requirement to turn over privileged information is emergent, under that definition, because the privilege will be destroyed as soon as the documents are disclosed. In that example, however, the court will also consider whether the turnover is imminent or whether the trial court has set a deadline that would allow the court to decide a stay application within three to four weeks.

2. **Deciding the application.** In deciding whether to allow the filing of a short-notice motion, the court ordinarily does not consider the merits of the proposed motion. That is, the court considers whether the matter is emergent but does not consider whether the application for permission to file, itself, demonstrates that the motion will be meritorious. For example, the court will not attempt to decide, at the application stage, whether a tenant seeking permission to file a short-notice motion for a stay of eviction will ultimately be able to meet the Crowe v. DeGioia, 90 N.J. 126 (1982), factors.

3. **Deciding the application - special situations.** The court applies a different standard to applications filed either on the eve of a scheduled trial or during the trial. Short-notice appellate motions filed during a trial, or close to the start of a scheduled trial, are uniquely disruptive and burdensome to both the adversary and to the trial court. Additionally, such motions typically involve interlocutory review of a trial court's order and therefore must also satisfy the demanding standards for a grant of leave to appeal. For those reasons, when a case is either in trial or about to go to trial, the Appellate Division will not grant an application for permission to file a short-notice motion, unless the applicant can make at least a prima facie showing that the proposed motion would satisfy the standards for granting leave to appeal.

There is, however, an exception to this policy for situations in which an attorney has been ordered by two different judges to appear for trial in two different places at the same time. For example, if an attorney has been ordered on a Friday to appear for trial in Atlantic County on the following Monday, when the attorney is already scheduled to appear for trial in Passaic County on that Monday, the court will ordinarily permit the attorney to file an emergent motion for relief. That does not, of course, mean that all such motions will ultimately be granted. It means that the court will ordinarily permit the filing of a motion for relief on short notice and then judge each motion on its individual merits.

4. **Self-generated emergencies.** Emergent applications place a burden on the adversary and the court to "drop everything" and turn immediate attention to that application. An applicant who claims to have an emergency must behave as though the matter is genuinely emergent. The court will be reluctant to grant permission for a short-notice filing when the timing of the application indicates that the applicant is responsible for a "self-generated emergency." For example, if a trial judge has ordered on June 1 that a defendant must take some action by June 30, and the

defendant waits until June 28 to seek permission to file an emergent motion, that would be considered a self-generated emergency unless the defendant provides a good explanation for the delay.

In reviewing a last-minute application, the court will consider whether the applicant has unreasonably delayed filing the application, to the point where it cannot fairly be heard on short notice without prejudice to the adversary. The court will, for example, consider whether the application has been filed so late (e.g., 4:30 on Friday afternoon seeking a stay of an event due to occur on Monday morning) that the adversary would not have a fair chance to file opposition before the court would have to decide the application. The court may also consider whether its own schedule allows for consideration of an unreasonably-delayed application within the time frame sought by the applicant.

Unless an applicant provides a persuasive, written explanation for the delay, the court may either (a) decline to hear a "self-generated emergency" application, or (b) set a briefing schedule that allows the adversary a fair chance to respond, and the court a reasonable time to decide the motion, even if that schedule leaves the applicant at risk that the threatened harm may occur in the interim.

For example, the court would ordinarily allow a tenant to file a short-notice motion to stay an eviction, if the application is timely. However, if the tenant waits until late Friday afternoon to seek permission to apply on short notice for a stay of Monday morning's impending eviction, the court nonetheless may not consider the stay application until Monday in order to give the landlord a fair chance to respond. If the tenant is evicted before the application is decided, the remedy, if one is appropriate, may consist of ordering that the landlord let the tenant back into the premises.

In deciding whether to entertain a last-minute application and on what schedule, the court will consider the magnitude of the threatened harm to the applicant if the short-notice motion is not heard in time to prevent the harm from occurring. In other words, the court will not mechanically refuse to hear an application solely because it is submitted late, but will do what is just and consistent with fairness and common sense.

5. **Legal effect of granting permission to file.** The fact that the court grants permission to file a short-notice stay motion does not, by itself, operate as a stay. In an appropriate case, where

the threatened harm is severe and will occur very quickly, the court may enter an interim stay to preserve the status quo for a day or two while the court considers the stay motion. However, the court will rarely enter a stay in favor of the applicant without first hearing from the other side. Litigants who unreasonably delay filing their applications should not expect to thereby "rush" the court into giving them an immediate stay without hearing from the other side.

Carmen Messano
Presiding Judge for Administration
Appellate Division

Dated: August 26, 2015

Superior Court of New Jersey
Appellate Division
Application for Permission to File Emergent Motion

To: Appellate Division Emergent Judge _____

Date: _____

From: _____

Telephone: _____

The following questions are to be answered by the attorney or self-represented litigant requesting permission to file an emergent motion. This questionnaire is designed to assist the court's determination respecting its further instructions. **COMPLETION OF THIS APPLICATION DOES NOT IN ANY SENSE CONSTITUTE THE FILING OF AN APPEAL OR MOTION.** There is no right to be heard orally on an emergency application. Further instructions will come from the court.

Except by permission of the court, the only documents you may submit with this application are: a copy of the decision being appealed, any opinion or statement of reasons given by the trial judge or agency, and any order or decision denying or granting a stay. A copy of this application must be served simultaneously on both your adversary and the trial judge or agency. No answer shall be filed unless directed by the court.

If the court grants you permission to file an emergent motion and you have not previously filed a motion for leave to appeal or notice of appeal (whichever is applicable), you must simultaneously file one. See njcourts.com for notice of appeal and Court Rules. You must also pay the applicable filing fee (\$50 for a motion for leave to appeal; \$250 for a notice of appeal), direct the charging of an attorney's account with the Superior Court, or file a motion to proceed as an indigent and supporting certification.

Case Name: _____

Appellate Division Docket Number: (if available): _____

Trial Court or Agency Docket Number: _____

1. What is the vicinage of the matter? (i.e., what judge, in what county or what agency entered the decision?)

2. a) What is your name, address, including any e-mail address, phone number and fax number?

- b) Who do you represent? (i.e., client, yourself)

3. List the names of all other parties and name, address, including any known e-mail address, phone number and fax number of attorney for each.
4. What is the nature of the emergency?
5. What is the irreparable harm, and when do you expect this harm to occur?
6. What relief do you seek?
7. Do you have a written order or judgment entered by the trial judge or a written agency decision?
You must attach a copy of the order, judgment or decision.
8. a) Have you filed for a stay before the trial court or agency?
- b) If so, do you have a court order or agency decision denying or granting same?
Attach a copy of any such order or decision. Before you seek a stay from the Appellate Division, you must first apply to the trial court or agency for a stay and obtain a signed order or decision or other evidence of the ruling on your stay application. (Court Rules 2:9-5 and 2:9-7)

9. If you did not immediately seek a stay from the trial court or agency, or if you did not immediately file this application with the Appellate Division after the trial court or agency denied your stay application, explain the reasons for the delay.

10. Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees?
If so, the decision is not final, but rather interlocutory, and leave to appeal must be sought. (Court Rules 2:2-4 and 2:5-6)

11. If the order or agency decision is interlocutory (i.e., not final), are you filing a motion for leave to appeal?

12. If interlocutory, are you filing a motion to stay the trial court or agency proceeding?

13. If the order, judgment or agency decision is final, have you filed a notice of appeal?

14. What is the essence of the order, judgment or agency decision?

15. a) Has any aspect of this matter been presented to or considered by another judge or part of the Appellate Division by emergent application or prior appeal proceedings? If so, which judge or part?
- b) Have the merits briefs been filed in this matter? If so, has the matter been calendared to a part of the Appellate Division?
16. a) Have you served simultaneously a copy of this application on both your adversary and the trial judge or agency?
- b) If so, specify method of service.
17. a) Have any transcripts been ordered (particularly of the trial judge's challenged ruling)?
- b) If so, when will the transcript(s) be available?

18. Please give a brief summary of the facts of your case.

19. What legal citation (i.e., statute, regulation, court case) is most important for the proposition that you are likely to prevail on appeal?

By signing below, I certify that this application is made in good faith, and not for any improper purpose such as to harass or to cause unnecessary delay or expense. I further certify that the factual statements contained in this application are true to the best of my knowledge.

Date: _____

Print/Type Name of Attorney or Self-Represented Litigant

Signature of Attorney or Self-Represented Litigant

**Superior Court of New Jersey
Appellate Division**

Disposition on Application for Permission to File Emergent Motion

Case Name: _____

Appellate Division Docket Number: (if available): _____

Trial Court or Agency Below: _____

Trial Court or Agency Docket Number: _____

DO NOT FILL IN THIS SECTION – FOR COURT USE ONLY

I. The application for leave to file an emergent motion on short notice is **Denied** for the following reasons:

- The application on its face does not concern a threat of irreparable injury, or a situation in which the interests of justice otherwise require adjudication on short notice. The applicant may file a motion with the Clerk's Office in the ordinary course.
- The threatened harm or event is not scheduled to occur prior to the time in which a motion could be filed in the Clerk's Office and decided by the court. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.
- The applicant did not apply to the trial court or agency for a stay, and obtain a signed court order, agency decision or other evidence of the ruling before seeking a stay from the Appellate Division.
- The application concerns an order entered during trial or on the eve of trial as to which there is no prima facie showing that the proposed motion would satisfy the standards for granting leave to appeal.
- The timing of the application suggests that the emergency is self-generated, given that no good explanation has been offered for the delay in seeking appellate relief. Due to the delay, we cannot consider a short-notice motion within the time frame the applicant seeks, without depriving the other party of a reasonable time to submit opposition. And the magnitude of the threatened harm does not otherwise warrant adjudicating this matter on short notice despite the delay. If the applicant promptly files a motion with the Clerk's Office it shall be forwarded to a Panel for decision as soon as the opposition is filed.
- Other reasons:

J.A.D.

Date

Superior Court of New Jersey
Appellate Division

Disposition on Application for Permission to File Emergent Motion

Case Name: _____

Appellate Division Docket Number: (if available): _____

Trial Court or Agency Below: _____

Trial Court or Agency Docket Number: _____

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II. The application for leave to file an emergent motion on short notice is **Granted** on the following terms:

A. By no later than _____, one copy of the motion for emergent relief must be delivered to the chambers of Judges _____ and _____, **and** to all counsel/self-represented litigants. Copies must also be sent to the trial judge or agency whose decision is being appealed. If this is a newly-filed appeal, one copy each of the notice of appeal or motion for leave to appeal, and any indigency motion, must also be delivered to the judges and all counsel/self-represented parties.

The applicant must file the original and one copy of the motion for emergent relief with the Clerk of the Appellate Division in Trenton, by no later than the day after those papers are due to the judges' chambers, _____. If the matter is not yet pending in the Appellate Division, the applicant must, on that same schedule, file with the Clerk's Office, attention Emergent Applications Unit, the original and one copy of a notice of appeal or motion for leave to appeal, together with the required fees or a motion to proceed as an indigent. [Note: This schedule anticipates that copies may be faxed to the judges' chambers and to adversaries, but they must be overnight mailed or hand delivered to the Clerk's Office. Failure to file with the Clerk's Office or to submit the required fees may result in dismissal of the appeal and vacating of any stays granted.]

B. Opposition must be served and filed by no later than _____.

C. Other terms:

_____ J.A.D. _____ Date