



## NEW JERSEY STATE BAR ASSOCIATION

TIMOTHY F. MCGOUGHAN, PRESIDENT  
Law Office of Timothy F. McGoughran, LLC  
802 West Park Avenue, Suite 222  
Ocean, NJ 07712  
732-660-7115  
tmcgoughran@mcgoughranlaw.com

March 29, 2024

Hon. Glenn A. Grant  
Acting Administrative Director of the Courts  
ATTN: Rules Comments  
Hughes Justice Complex  
25 W. Market Street/P.O. Box 037  
Trenton, NJ 08625-0037

Re: Comments on 2024 Rules Reports

Dear Judge Grant:

Thank you for the opportunity to review and provide feedback on the 2024 Rules Reports. I am pleased to submit recommendations and comments from the New Jersey State Bar Association (NJSBA) in connection with the Report of the Supreme Court Civil Practice Committee. The NJSBA does not have any comments to share on the Report of the Tax Court Committee.

The NJSBA appreciates the efforts of the Court's committees in researching, discussing and debating potential rule amendments in an effort to improve the administration of justice in our court system. The NJSBA recognizes the importance of ensuring our rules are clear, establish procedures that are fair to all parties, and, most importantly, advance the interests of and access to justice.

### R. 1:5-2 and R. 1:11-2

The NJSBA supports the proposed amendments to R. 1:5-2 and R. 1:11-2. Those amendments will (1) allow service of discovery demands and motions by email on opposing counsel, (2) require contact information for *pro se* litigants when an attorney withdraws from litigation, and (3) allow limited appearances in landlord/tenant matters. These proposals reflect practical, reasonable amendments to the Court Rules, will help to streamline communications among counsel, and will provide attorneys with critically needed information in *pro se* matters.

R. 2:11-4

The NJSBA supports the proposed amendments to R. 2:11-4 to clarify that, in fee shifting cases, an application for attorney’s fees in connection with an appeal that is remanded should be made to the trial court at the conclusion of the remand proceedings. The NJSBA suggests the language in paragraph (b) could be more expansive in addressing post-remand scenarios. The NJSBA recommends additional language in the last sentence of that paragraph as follows:

## 2:11-14 Attorney’s Fees on Appeal

...

(b) . . .The motion shall be filed no later than 30 days after the completion of the remand proceedings or, if a motion for reconsideration is filed with any appellate court, 10 days after the ruling on the motion for reconsideration by the last appellate court to rule on a reconsideration motion.

R. 4:14-2

The NJSBA suggests some clarification to the proposed amendments to R. 4:14-2. The amendments are meant to reflect Federal Rule 30(b)(6) in connection with organizational depositions. They seek to require non-party organizations to confer with parties about those individuals who will appear at a deposition on behalf of the organization to ensure they possess information about the matters that will be examined. For clarity, the NJSBA recommends that the reference to “conferring in good faith about the matters for examination” contained in R. 4:14-2(d) be moved to subparagraph (c) since paragraph (d) focuses on the “production of things” not the examination of a witness. This language also reinforces the intent of the proposed changes that all parties have an opportunity to participate in any pre-deposition discussions with a non-party about the scope of the non-party’s deposition in order to prevent any biased manipulation of the testimony.

The NJSBA’s proposed changes are:

## 4:14-2 Notice of Examination; General Requirements; Deposition of Organization

...

(c) Organizations. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with

reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination on notice to all parties and with opportunity for all to participate in that good faith conference. ~~the parties and any nonparty organization must confer in good faith about the matters for examination.~~ A subpoena must advise a nonparty organization of its duty to confer with all parties and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization.

(d) Production of Things. The notice to a party deponent may be accompanied by a request made in compliance with and in accordance with the procedure stated in R. 4:18-1 for the production of documents and tangible things at the taking of the deposition. ~~Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination on notice to all parties and with opportunity for all to participate in that good faith conference.~~

#### R. 4:19-1, -2

The NJSBA believes the proposed amendments to R. 4:19-1, -2 are needed to provide a framework to allow for a third-party observer or the recording of an independent medical exam, pursuant to *Defiore v. Pezic*.

The NJSBA proposes additional amendments to (1) eliminate reference to matters pending solely in the Law Division, Civil Part, to ensure the provisions apply to any matter to which the Part IV Rules apply, not just civil matters filed in the Law Division, (2) remove the reference to “business” address to account for single individuals acting as an observer not affiliated with a business, (3) clarify that a curriculum vitae is only required from individuals who will serve as an expert witness, and (4) clarify the reference to the parties in the last sentence of the Rule.

#### 4:19-1 Physical And Mental Examination Of Persons

In an action ~~in the Law Division, Civil Part,~~ in which a claim is asserted by a party for personal injuries or in which the mental or

physical condition of a party is in controversy . . . This rule shall be applicable to all actions ~~in the Law Division, Civil Part~~, whenever commenced, in which a physical or mental examination has not yet been conducted.

#### 4:19-2 Observation and Recording of Physical and Mental Examination of Persons

Once a notice for exam has been issued pursuant to Rule 4:19-1, the receiving party must, within fourteen (14) days, inform the party serving notice of any intent to utilize a third-party observer or to record the examination, set forth the identity and ~~business~~ address of the third-party observer, ~~provide the third party observer's curriculum vitae,~~ advise if the third-party observer will serve as an expert or fact witness, provide the third party observer's curriculum vitae if they are serving as an expert witness, and, if any recording will be taken, state the method of recording. If the party serving notice of the exam objects, the parties shall confer orally and if they cannot come to an agreement, the party serving notice may move for a protective order under Rule 4:10-3.

#### R. 4:21-5 and -6

The NJSBA believes the proposed amendments to R. 4:21-5 and -6 are important to confirm that an arbitration award should be filed with the civil division manager, who is then responsible for uploading it into the court's electronic filing system. Once uploaded, the award is deemed filed and provided to the parties.

To avoid confusion about when an arbitrator's report is actually filed, though, the NJSBA recommends changing the first reference to the term "file" to "transmit" so it is clear the award is only *transmitted* from arbitrator to civil division manager, not filed. Furthermore, the NJSBA recommends that the Rule be amended to clarify, consistent with the Court's last Order in connection with Court Operations, that arbitrations should be held virtually unless all parties consent to an in-person arbitration. This is important to ensure uniformity in all counties.

#### R. 4:22-1

The NJSBA supports the proposed amendments to R. 4:22-1, which aim to reflect the federal rule allowing requests for admissions that relate to the facts, the application of law to fact, or opinions about either. The NJSBA appreciates that the proposal reflects previous comments submitted by the NJSBA on similar proposals.

R. 6:1-2, 6:3-4 and 6:4-3

The NJSBA opposes the proposed amendments to R. 6:1-2, 6:3-4 and 6:4-3 that seek to limit the available relief in an “ejectment” action to possession of the premises only, requiring a separate action to be filed for damages. There are several reasons for the NJSBA’s concerns:

- A. Contrary to the Statute - The statutes that govern these actions (N.J.S.A. 2A:35-1 and -2; 2A:39-8) permit both possession and monetary damages to be awarded at the same time in a summary action. Directing something contrary to the statute raises questions about overriding the Legislature’s intent to provide quick relief to a party who has had their property illegally taken from them. Also, if the amendments are adopted, it is unclear how and when the statute’s provisions for attorney’s fees and treble damages would be considered and awarded.
- B. Judicial Economy - To require a separate action to recover monetary damages would unnecessarily require additional judicial resources to consider two actions instead of one.
- C. Unknown Defendants - In a trespasser/squatter situation, the defendant is oftentimes unknown, requiring a plaintiff to file against a John Doe. It would be difficult to file a subsequent action for damages if the plaintiff does not know the trespasser/squatter’s identity and cannot properly serve them.
- D. Proposed Rule Rewards Wrongdoers (i.e., the trespasser/squatter or landlord who illegally evicts) - The proposed rule gives a tremendous advantage to the trespasser/squatter and a landlord who illegally evicts. By requiring a plaintiff to file two actions, many of those plaintiffs who have been damaged will elect not to file the subsequent action, given the costs involved in doing so. In keeping the actions together - as the Legislature intended - the rightful party is permitted to get both possession and all of their damages at once, with the burden and expense being placed primarily on the wrongdoer.
- E. Same DC Docket creates confusion - Unlike landlord-tenant actions, there is no separate docket for ejectment actions as written. So, both the possession action and the action for monetary damages would be designated as "DC Dockets" which could lead to confusion for all involved.

If the proposals for amendments to R. 6:1-2 and 6:3-4 are not adopted, as the NJSBA recommends, the proposed changes to R. 6:4-3 will be moot. In any event, the NJSBA recommends that discovery should only be permitted in ejectment actions if a judge determines it is warranted following a request.

Again, the New Jersey State Bar Association thanks the Supreme Court for publishing these reports and allowing the bar to submit comments and recommendations. We commend the extensive volunteer efforts that contribute to the work of the various committees and hope that our comments represent a meaningful contribution to their debate.

Our leadership also look forward to addressing the Court at the public hearing. The opportunity to participate in all aspects of the rule-making process, which has a significant impact on the practice of law in New Jersey, is appreciated. If you have any questions regarding these recommendations, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim McGoughran".

Timothy F. McGoughran, Esq.  
President

cc: William H. Mergner Jr., Esq., NJSBA President-Elect  
Angela C. Scheck, NJSBA Executive Director