SECTION TWO

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99 N. J. L. J. Index Page 393 | NEW JERSEY LAW JOURNAL, THURSDAY, MAY 6, 1976 | Page Seventeen

REPORTS OF THE NEW JERSEY SUPREME COURT'S COMMITTEES

Report Of The Supreme Court's Committee On Criminal Practice

Part I

To the Honorable, the Chief Justice and the Associate Justices of the New Jersey Supreme Court:

The Supreme Court Committee on Criminal Practice herewith respectfully files its 1976 report:

I. Entry of Orders Following Decision on Motions

The Committee, by a vote of 12-0, recommends adoption of proposed R.3:1-4 (Orders; Form; Entry) to provide as follows:

"(a) Time. Except for judgments to be prepared by the court and entered pursuant to R.3:21-5, formal written orders shall be presented to the court within 10 days after its decision is made known, unless such time is enlarged for good cause.

(b) Settlement by Motion or Consent. Except as otherwise provided by paragraph (c) of this rule, by other rule or by law, and except for ex parte matters and for judgments entered pursuant to R.3:21-5, no judgment or order shall be signed by the court unless the form thereof has been settled on motion on notice to all parties affected thereby or unless the written approval of such attorneys or parties to the form thereof is endorsed thereon.

(c) Settlement on Notice. In lieu of settlement by motion or consent, the party proposing the form of judgment or order may forward the original thereof to the judge who heard the matter and shall serve a copy thereof on every other party not in default together with a notice advising him that unless he notifies the judge and the proponent of the judgment or order in writing of his specific objections thereto within 5 days after such service, the judgment or order may be signed in the judge's discretion. If no such objection is timely made, the judge may forthwith sign the judgment or order. If objection is made, the matter shall be listed for hearing by the clerk of the court who shall advise the parties of the time and place thereof."

This rule, based on Civil Rule 4:42-1, would require the entry of an order on every motion in criminal cases and would require the entry of orders on notice to adversaries. At present, orders are not always entered after interlocutory decisions in criminal cases, thus posing problems in the event of collateral attack or establishing an adequate record on direct appeal, and the responsibility for preparing formal orders in criminal cases is not now fixed by the rules. The draft rule is designed to confirm that the Judgment of Acquittal or Conviction must be prepared by the Clerk and entered forthwith. The contents of the proposed rule are otherwise quite clear. **However, the Committee feels that the general relaxation and acceleration rules would permit the court to order or an adversary to request the accelerated preparation and presentation of an order for entry by the court.** The proposed R.3:1-4 is basically designed to make sure that an order is entered on every motion.

The Committee anticipates that, by the adoption of this rule, the practice concerning the preparation and filing of pre-trial and post-trial orders will be uniform in criminal and civil cases. The rule, of course, is not designed to cover rulings at trial. See R.4:42-1.

On a related subject, the Committee was of the view that the setting of a hearing date on motions should be controlled by the motion judge and that no rule change is necessary with respect to the setting of hearing dates.

II. Waiver of Appeal Pursuant to Negotiated Plea

In State v. Gibson, 68 N.J. 499 (1975), the Supreme Court held that a defendant could file a timely appeal irrespective of his waiver of the right to appeal as part of a negotiated plea. The Court stated:

"We think it salutary, in the interests of a thorough understanding by a defendant of his rights, that he be fully apprised thereof by the judge at the time of approval by the court of a plea agreement involving a waiver of appeal and when sentence is pronounced. He should then be explicitly informed that notwithstanding his agreement not to appeal the conviction he may nevertheless file a timely appeal, but that if he does so, then, at the option of the prosecutor, the agreement will become inoperative and he may be resentenced on all convictions and pleas involved in the agreement and that any charges dismissed pursuant thereto may be reinstated." p. 513.

(Continued on page 18, col. 1)

Report Of The Supreme Court's Committee On Civil Practice

I. RULE AMENDMENTS

A. Proposed Rule Amendments Recommended

The Committee recommends for adoption by the Supreme Court the following rule amendments:

1. Adoption of R. 1:20A, Fee Dispute Committees, and Amendment to DR 2-106, Fees for Legal Services

This Committee was asked to consider the problem of matrimonial fees. The Committee conducted both a written and oral survey of the matrimonial judges concerning problems and potential solutions in the matrimonial fee area. From those surveys it was concluded that the largest single problem in matrimonial fees was the resolution of fee dispute matters, either by the court or by the county ethics committees. It was generally agreed that the court should not become involved in matters of fee dispute unless a motion is specifically made for a hearing on the matter. Even at this juncture it was strongly felt that the court does not provide the best forum for the resolution of fee disputes. Having already heard the contested litigation, it was generally agreed that the dissatisfied litigant might well feel that the court was predisposed against his cause, if in fact the court had made prior rulings against the party. Moreover, it was generally agreed that this type of hearing was unduly burdensome on judicial time and resulted in the delay of other litigation being heard.

The only present alternative provided in our rules is to institute a complaint before the county ethics committee. This forum has been widely used; in fact, fee disputes, either in matrimonial or other causes, presently make up approximately one-half of the calendar of the county ethics committees. This Committee is of the opinion that utilization of ethics committees for fee disputes is not the ideal solution, since the filing of an ethics complaint against an attorney which merely concerns a disputed fee is unduly onerous to the attorney. Moreover, burdening the county ethics committee with this type of complaint delays and distracts it from the consideration of serious complaints of alleged unethical conduct.

After consideration of the above factors, the Committee recommends an amendment to Chapter One of the New Jersey Rules to create fee dispute committees. These committees would have initial jurisdiction over all complaints arising from fee disputes, matrimonial or otherwise. Upon finding an indication of overreaching, this Committee would then refer the matter to the appropriate county ethics committee for its consideration.

A fee dispute shall be arbitrated by these committees only upon a client's written request or upon his written consent to his attorney's request. The request or consent shall include a stipulation to be bound by the committee's award. Consequently, provision for further review or right to appeal is deemed unnecessary.

Accordingly, this Committee recommends the adoption of newly-proposed R. 1:20A and a commensurate amendment to DR 2-106. The proposed amendment shall read as follows:

RULE 1:20A. FEE DISPUTE COMMITTEES

1:20A-1. Appointment and Organization

The Supreme Court shall appoint a fee dispute committee for each county. The provisions of R. 1:20-1 governing the membership, organization and quorum of ethics committees shall apply to fee dispute committees, except that members of county fee dispute committees need not either practice or reside in the counties for which they are appointed to serve.

1:20A-2. Jurisdiction

Each county fee dispute committee shall, pursuant to these rules, have the jurisdiction (a) to arbitrate fee disputes and (b) to take

(Continued on page 26, col. 1)

INDEX

Report Of The Supreme Court's Committee On Municipal Courts

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of New Jersey:

1. The Committee, by a unanimous vote, recommends that the Supreme Court amend the rules requiring corporations to be represented by legal counsel in the municipal court (i.e., R. 7:4-2, 7:4-4) to permit "corporate officers and managing or general agents, upon demonstration of corporate approval, to appear pro se in motor vehicle, disorderly person, regulatory and health ordinance offenses where in the opinion of the presiding judge the interest of justice would not require the appearance of counsel."

Comment: Presently a corporation must be represented by counsel in the municipal court. Many small and family businesses are believed to presently use the corporate form of organization to conduct business. The requirement of counsel in all municipal court cases may be unduly burdensome, especially where the fine is small or the matter not complex. The rule recommendation places discretion in the judge because in some cases counsel should be required to appear as the corporate representative.

2. The committee, by a unanimous vote, recommends that the Supreme Court amend R. 7:3-2 to enable Family and Neighborhood Dispute Division units to be implemented thereunder. The following language is proposed:

R. 7:3-2—Notice in Lieu of Complaint

If the offense charged may constitute a minor neighborhood or domestic dispute, a notice may issue to the person or persons charged, requesting their appearance before the court, or such person designated by the court and approved by the County Assignment Judge, in order to determine whether or not a complaint should issue or other appropriate action taken.

Comment: The proposed rule amendment clarifies the prior rule language which suggested that informal types of disposition were not available if the dispute constituted a disorderly persons violation, i.e., simple assault and battery without injury. The proposed amendment also makes it clear that an intake procedure as approved by the Assignment Judge can be utilized. This is envisioned as similar to juvenile intake. A complaining witness always may file a complaint if dissatisfied with the handling at a pre-judicial hearing. The broader scope of the rule permitting some disorderly offenses to be encompassed where appropriate, and the intake provision with concomitant follow-up and supervision may be more productive of resolution than a single court appearance. A complaining witness may always file a complaint if dissatisfied with pre-judicial handling at intake.

3. The Committee, by a unanimous vote, recommends that the Supreme Court amend R. 7:7-3 to delete the words "or impairment" from the phrase ". . . permitting another person who is under such influence (or impairment) to operate a motor vehicle owned by the defendant or in his custody or control; . . ." since N.J.S.A. 39:4-50(b) contains no such violation.

(Continued on page 24, col. 1)

REPORT OF THE SUPREME COURT'S COMMITTEE ON JUVENILE AND DOMESTIC RELATIONS COURTS

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of New Jersey

Your Committee reviewed a number of matters, principal among which were the following:

1. Establishing Uniform Juvenile and Domestic Relations Court Intake Services. The Committee unanimously recommends the establishment of intake services in every Juvenile and Domestic Relations Court in this State for both juvenile and domestic relations matters. Subject to various technical alterations and objections previously made known to the Administrative Office of the Courts, the Committee recommends the approval and implementation of the proposed Operations and Procedures Manual for Juvenile and Domestic Relations Court Intake Services, October, 1975, prepared under the auspices of the Administrative Office of the Courts.

Since intake services, as envisioned in the proposed manual, would exercise a considerable amount of discretion delegated by the Juvenile and Domestic Relations Court, subject to review and approval by that Court, it is extremely important that all activities of the personnel assigned to intake be performed under the direct supervision and control of the Presiding Judge of the Juvenile and Domestic Relations Court. The Presiding Judge must have sole authority as to the identity of the individuals handling intake responsibilities, though administration of intake services would be the responsibility of the chief probation officer.

Upon reviewing A-3331, a majority of the Committee approved the concept of legislation establishing Juvenile and Domestic Relations Court Intake Services; however, numerous questions were raised with regard to the specific provisions of that proposal. The Committee recommends that if a similar bill is reintroduced during the new legislative session, close examination of those provisions should be made by this Committee.

2. Probable Cause Hearings in Juvenile Delinquency Matters. A majority of the Committee approves the following proposed amendment to R. 5:8-6, providing for a probable cause determination in juvenile delinquency matters where the juvenile is detained.

5:8-6. Detention or Shelter Care

(a) . . . no change

(b) . . . no change

(c) . . . no change

(d) **Detention or Shelter Care Hearing.** The detention or shelter care hearing shall be attended by the juvenile and an appropriate adult custodian responsible for him, but shall take place in the absence

(Continued on page 30, col. 1)

Report Of The Supreme Court's Committee On Criminal Practice

Part I

(Continued from page 17)

The Court also noted that the Rules Governing the Courts of New Jersey would be amended to conform with the opinion in Gibson, and the Criminal Practice Committee was subsequently requested to draft same. Gibson at 502. In conformity with the Court's request, the Committee has drafted the following language, designed for easy understanding, to be designated as R.3:9-3(c)[1]:

"Whenever a plea agreement includes a waiver of a right to appeal, the court shall advise the defendant that, notwithstanding the inclusion of the waiver, the defendant has the right to take a timely appeal if the plea agreement is accepted, but that if he does so, at the option of the prosecutor, the plea agreement may be annulled, in which event all charges shall be restored to the same status as immediately before the entry of the plea."

The Committee has also drafted an amendment to R.3:21-4(f) in light of Gibson. It shall read as follows:

"After imposing sentence, whether following the defendant's plea of guilty or a finding of guilty after trial, the court shall advise the defendant of his right to appeal and, if he is indigent, of his right to appeal as an indigent. **If the sentence follows a plea agreement involving the waiver of appeal, the court shall also advise the defendant as provided in R.3:9-3(c).**

While it has drafted these rule amendments, the Committee respectfully recommends that the rule changes not be adopted and that the Court, as a matter of policy, promulgate a directive prohibiting negotiated pleas involving waiver of the right to appeal. There are various reasons why defendants should not be prohibited or discouraged from pursuing their right of appeal. See the dissenting opinion of Justice Pashman in State v. Gibson, supra. See also State v. Spinks, 66 N.J. 568 (1975); A.B.A. Project on Standards for Criminal Justice, Standards Relating to Criminal Appeals, Section 1.3 (Approved Draft 1968); cf. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969); On the other hand, it is well-settled that even constitutional rights may be waived upon entry of a guilty plea. See Justice Schreiber's concurring opinion in State v. Gibson, supra at 513-519; see also Boykin v. Alabama, 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L. Ed. 2d 274)1969); State v. Raymond, 113 N.J. Super. 222 (App. Div. 1971).[2] In holding that a defendant can pursue an appeal despite a waiver (as part of a negotiated plea), but that the prosecutor can elect to withdraw the plea agreement, the Supreme Court endeavored to adopt a policy balancing the competing interests. The Committee respectfully suggests that the appropriate policy is to prohibit negotiated pleas which involve waiver of the right to appeal. The Committee, comprised of judges, prosecutors, and defense counsel, unanimously believes that negotiated pleas involving the waiver of right to appeal rarely occur; that they are unknown in the urban counties; that the adoption of the proposed rules would encourage such negotiated pleas; that such pleas involving the waiver of right to appeal should not be encouraged, and that there are procedural and technical problems which would result from the rule amendments, including those relating to the time in which the prosecutor must make his election and jurisdiction of the trial court to proceed while an appeal is pending.

Accordingly, the Committee respectfully suggests that the Supreme Court prohibit, by directive, the entry of a negotiated plea which involves the waiver of right to appeal, whether or not the waiver involves a matter collateral to the offense on which the plea is entered.

III. Proposed Revision of R.3:13-3

The Committee voted 13-1 to recommend for adoption by the Supreme Court the following rule amendment.

R.3:13-3. Discovery and Inspection

(a) Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant

(1) . . . (no change)
(2) . . . (no change)
(3) . . . (no change)
(4) . . . (no change)
(5) reports or records of [prior] **any arrests and convictions** of the defendant;
(6) . . . (no change)
(7) . . . (no change)
(8) record of statements, signed or unsigned, by such persons or by co-defendants which are within the possession, custody or control of the prosecuting attorney and any relevant record of [prior] **any arrest and conviction** of such persons;
(9) . . . (no change)
(10) . . . (no change)
(b)-(f) . . . (no change)

The proposed amendment to R. 3:13-3(a)(5) is designed to make clear that defense counsel should have the right to inspect and copy or photograph defendant's "rap sheet" which is helpful in evaluating plea discussions and sentence recommendations. Moreover, while prosecutors can only produce records of arrest (and conviction) known to them, the additional discovery under R.3:13-3(a)(8) would permit defense counsel to ascertain the status of open or undisposed matters which could be used as the basis for cross examining adverse witnesses in certain circumstances. See State v. Spano, — N.J. — (1976); State v. Carter and Artis, — N.J. — (1976); State v. Baker, 133 N.J. Super. 394 (App. Div. 1975); State v. Hare and Lloyd, — N.J. Super. — (App. Div. 1976).

IV. Proposed Revision of R.3:15-1

The Committee, by a vote of 11-3, recommends the revision of R. 3:15-1 to provide:

R.3:15-1. Trial of Indictments or Accusations Together

(a) Permissible Joinder. The court may order 2 or more indictments or accusations tried together if the offenses and the defendants, if there are 2 or more, could have been joined in a single indictment or accusation. The procedure shall be the same as if the prosecution were under such single indictment or accusation.

(b) Mandatory Joinder. Except as provided by R.3:15-2(b), a defendant shall not be subject to separate trials for multiple indictable offenses based on the same conduct or arising from the same criminal episode or transaction if such offenses are known to the appropriate prosecuting attorney at the time of the commencement of the first trial.

The Committee, by a vote of 14-0, recommends the revision of R.3:15-2 to provide:

(a) . . . (no change)

(b) Motion by Defendant and State. If for any other reason it appears that a defendant or the State is prejudiced by a **permissible or mandatory** joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.

In State v. Gregory, 66 N.J. 510 (1975), the Supreme Court adopted a mandatory joinder requirement to prevent "separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court." The Court adopted the mandatory joinder rule of the Model Penal Code (§1.07 (2) and (3)) pending the "preparation of the precise contours and details of the compulsory joinder rule" by this Committee "for ultimate consideration and promulgation" by the Court. State v. Gregory, supra at 522.

The proposed revision of Rule 3:15 constitutes the Committee's response to the Supreme Court's request.

The existing language of R.3:15-1 has been incorporated as paragraph (a) of the proposed revision to R.3:15-1, and has been entitled "Permissible Joinder." The standard for determining when two or more indictments or accusations may be tried together is actually set forth in R.3:7-6[3] to which proposed R.3:15-1(a) in effect refers when it states that the "procedure shall be the same as if the prosecution were under such single indictment or accusation."[4]

Paragraph (b) of the proposed revision essentially incorporates the language of Section 1.07(c) of the Model Penal Code (Proposed Official Draft 1962) and is entitled "Mandatory Joinder." This distinction between permissible and mandatory joinder of criminal offenses is analogous to that drawn by Standards 1.1 and 1.3 of the A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft).

Proposed R.3:15-1(b) is intended to make clear that the mandatory joinder rule applies only with respect to multiple **indictable** offenses. The Committee considered the difficulties in attempting to draft and implement a rule which would require joinder of indictable and non-indictable offenses. See e.g. State v. Saulnier, 63 N.J. 199 (1973); State v. McGrath, 17 N.J. 41 (1954).

It was determined that the rule should only require that all indictable offenses based on the same conduct or arising from the same criminal episode or transaction must be joined if such offenses are known to the appropriate prosecuting attorney at the time of the commencement of the first trial.[5] See State v. Tamburro, 137 N.J. Super. 51 (App. Div. 1975).

The Committee also decided not to adopt the language of the Model Penal Code providing that offenses need be joined only if "within the jurisdiction of a single court." The problem caused by the distinctive jurisdictions of the State, County, and Municipal Courts was eliminated, to the greatest extent possible, by reference in R.3:15-1(b) exclusively to indictable offenses. See State v. Tamburro and footnote 5, supra.[6]

Proposed R.3:15-1(b) places the burden on the prosecuting attorney to insure that all charges which must be joined are so joined. Some consideration was given to the possibility of placing the burden of moving for mandatory joinder on the defendant. The Model Penal Code provisions place the burden squarely on the prosecuting attorney, but the A.B.A. Standard (§1.3(b)) places it upon the defendant. The Committee noted that the Supreme Court, in State v. Gregory, supra, clearly recognized this distinction (footnote 4, p. 519) in the course of implementing sections 1.07(2) and (3) of the Model Penal Code.

Finally, it should be noted that under the existing rule the Court may, on its own motion, order a severance. Indeed "there are times when the circumstances are such that a trial judge should order a severance, sua sponte, in the interest of a fair trial and justice." State v. Tapia, 113 N.J. Super. 322, 328 (App. Div. 1971). None of the language proposed in the rule revisions would mitigate this duty. However, the duty has not been affirmatively emphasized; the duty remains primarily with the parties although, presumably, if the court plainly erred in permitting a continued joinder of offenses, such error would be reversible, even absent a motion from either party for severance. In State v. Gregory, supra, the Supreme Court adopted section 1.07(3) of the Model Penal Code to affirm the authority of the court, in a mandatory joinder situation, to order separate trials "if it is satisfied that justice so requires." The Committee reviewed existing R.3:15-2(b), providing for relief from prejudicial joinder of offenses, and found that it effectively achieves the same end.

The three dissenters from the proposed R.3:15-1(b) would mandate joinder of indictable and non-indictable offenses and would desire further study of the "jurisdictional" problem. While the views of the three dissenters may vary, it appears that two would like to place upon the prosecutor a burden to discover and simultaneously dispose of all related charges, despite their nature and court of jurisdiction, while one would place the burden for mandatory joinder upon the defendant. Thus, two of the dissenters would go further than the present proposal in assuring mandatory joinder and protecting the defendant.

V. Proposed Revision of R.3:17-1

Rule 3:13-3 was amended effective September 10, 1973, with R. 3:13-3(c)(2) becoming R.3:13-3(a)(8). The reference in R.3:17-1 to R.3:13-3(c)(2) has never been accordingly revised. Therefore, the following revision to R.3:17-1 is required:

R.3:17. Production of a Witness' Statement at Trial.

R.3:17-1. Order for Production at Trial.

If there shall not have been disclosure thereof before trial, the court on defendant's motion made at trial shall order the prosecuting attorney to produce any statement or record of a statement, as described in [R. 3:13-3(c)(2),] **R.3:13-3(a)(8)**, in his possession made by a witness who is about to testify on direct examination on behalf of the State, provided such statement is relevant to the offense charged. If the entire statement is relevant, the court shall order it delivered to the defendant for his examination and use prior to the direct testimony of the witness.

VI. Proposed Revision to R.3:21-2

A question was brought to the attention of the Committee concerning whether the prosecutor should receive a copy of the presentence report prepared pursuant to R.3:21-3. A memorandum to all judges and Chief Probation Officers, dated January 23, 1970, from former Administrative Director Edward B. McConnell, makes clear that, after examining the report and making such deletions as may be necessary, the sentencing judge should forward one copy of the presentence report to the county prosecutor as well as the counsel for defendant. Moreover, the prosecutor should make known to the sentencing judge any inaccuracies or other deficiencies he desires to challenge in the report. See State v. Kunz, 55 N.J. 128 (1969). The confusion, if any, with respect to the question raised, may result from the sentence in R.3:21-2 which states that "The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant." The Committee recommends that the words "and the prosecuting attorney" be added thereto as a means of resolving the issue.

The prosecuting attorney (the Attorney General or county prosecutor) has the right to be heard at sentencing (see ABA Standards Relating to the Prosecutorial Function, Section 6.1), and he has the right to prepare for a Kunz hearing. Moreover, he defends against appeals on which the presentence

(Continued on next page)

1. The present Rule 3:9-3(c) and (d) would have to be redesignated as (d) and (e) respectively.

2. Of course, the plea must be voluntary and made with the full understanding of its consequences, and its entry can be attacked in the absence of same. See Justice Schreiber's opinion, at 514-516, in State v. Gibson; see also State v. Raymond, supra at 226.

3. Rule 3:7-6 entitled "Joinder of Offenses," provides:

"Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged, whether high misdemeanors or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. Relief from prejudicial joinder shall be afforded as provided by R.3:15-2."

4. Rule 3:15-1(a), through R.3:7-6(a), will now identify ". . . the outer limits of permissible joinder of offenses." Commentary to Standard 1.1, A.B.A. Project on Criminal Justice Standards Relating to Joinder and Severance (Approved Draft) page 10. The language of R.3:7-6 is similar to that of A.B.A. Standard 1.1, the "permissible joinder" standard. R.3:15-1 will also provide a vehicle for prosecutors to move for joinder not perfected (under R.3:7-6) in the same indictment or accusation.

5. By virtue of relating the rule exclusively to indictables, the reference to prosecuting attorney would exclude municipal prosecutors. The Committee recognizes the need for strong administrative action to prohibit disposition of non-indictables (at the municipal level) prior to disposition of related indictables. The Committee is also cognizant of the need, consistent with R.3:25-1 and 3:25A, to dispose of the non-indictable, where possible, at the county level at the time of or following disposition of the indictable without remand of the non-indictable to the municipal court. However, the proposed rules do not address themselves to the problems of double jeopardy, due process or collateral estoppel and are not based thereon. See State v. Gregory, supra. See also State v. Davis, 68 N.J. 69, 76 (1975). Such defenses are left for development by case law. See Waller v. Florida, 397 U.S. 387, 90 S.Ct. 1184, 25 L. Ed. 2d 435 (1970); Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 25 L.Ed. 2d 469 (1970); State v. Bell, 55 N.J. 239 (1970); State v. Redinger, 64 N.J. 41 (1973). These defenses might also apply to indictable offenses across county lines as well as within a particular county.

6. The new second paragraph to R.3:15-1, the "mandatory joinder" provision, employs the term "prosecuting attorney" rather than "prosecuting officer" (the language of the Model Penal Code) in order to conform with the use of the former term in other sections of New Jersey's Rules of Court, e.g. R.3:6-2, R.3:6-6(a), R.3:7-2, R.3:7-3, and R.3:9-3(c). By virtue of the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., the "prosecuting attorney" may be the Attorney General or County Prosecutor.

Report Of The Supreme Court's Committee On Criminal Practice

Part I

(Continued from previous page)

reports are evaluated in connection with claims of excessive sentence. See State v. DeGeorge, 113 N.J. 542 (App. Div. 1971). Accordingly, the Committee by a vote of 13-0 recommends the revision of R.3:21-2 as follows:

"R.3:21-2. Presentence Investigation

Before the imposition of a sentence or the granting of probation the probation service of the court shall make a presentence investigation and report to the court. The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing whatever on the sentence and shall be furnished to the defendant[.] **and the prosecuting attorney.** If a custodial sentence is imposed, the probation service of the court shall, within 10 days thereafter, transmit a copy of the presentence report to the person in charge of the institution to which the defendant is committed."

The Committee is of the view, of course, that following delivery of a copy of the presentence report to the prosecutor, he (like the defendant) must treat it confidentially and not disclose the contents thereof to third persons, except as may be necessary to determine the accuracy thereof or as may be necessary in subsequent court proceedings involving the sentence imposed or the disposition made.

VII. Proposed Amendment to R.3:21-5

In 1974, R.3:21-5 was amended to provide that a statement of the reasons for sentence be included in the judgment of conviction which is delivered to the institution with the defendant. See N.J. S.A. 2A:164-18. The statement of reasons is used by institutional authorities at the time of classification and by the Parole Board at the time of considering parole release. However, the institutions are not always obtaining appropriate information with regard to time credits, R.3:21-8, and the Committee therefore suggests that the second sentence to R.3:21-5 be amended to read:

"A judgment of conviction shall set forth the plea, the verdict or findings, the adjudication and sentence, [and] a statement of the reasons for such sentence[.], **and a statement of credits received pursuant to R.3:21-8."**

The Committee recognizes that there are various legal questions with respect to the rights of defendants to time credits and that the decision respecting same should be made by the court. Cf. State v. Lee, 60 N.J. 53 (1972) (defendant entitled to county jail time against commitment as sex offender); State v. Bryant, 68 N.J. 532 (1975) (defendant not entitled to presentence time credit for custodial time being served as parole violater); State v. Council, 137 N.J. Super. 306 (App. Div. 1975) (defendant not entitled to credit for time served when defendant was in custody while serving time and receiving credit on other charges).

VIII. Municipal Appeals

The Criminal Practice Committee was asked to examine (1) whether the county court should be permitted to supplement the record on a trial de novo and (2) whether the county court should be empowered to remand a municipal appeal for further proceedings. The former question, in part, turns upon the resolution of constitutional issues which could be raised in the event supplementation were permitted in the absence of a request by the defendant.

In State v. Higgins, 132 N.J. Super. 64 (App. Div. 1975), the Appellate Division held that there was no double jeopardy problem posed by requiring a plenary trial de novo in the absence of a transcript. In Higgins, there was "a malfunction of the sound recording machine used" at the municipal level, and "it was not possible to obtain a transcript of the proceedings in the municipal court." Moreover, there was "no claim that the malfunction occurred other than by accident." As the appeal, pursuant to R.3:23-8(a), operated as an application for a plenary trial de novo in the absence of a transcript, the Appellate Division found no constitutional error in requiring the plenary trial de novo.

Higgins was a relatively easy case to resolve. See Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L. Ed. 2d 584 (1972) describing and upholding two-tier systems of plenary trials for minor offenses. However, there are problems which might result, in the absence of a plenary trial de novo, if a transcript were partially (but not totally) defective or if the defendant was improperly prohibited from presenting evidence or cross-examining witnesses at the trial level, and the matter was being reviewed de novo on the record. Both Colten and Higgins involved plenary trials de novo. On the other hand, it would be neither economical nor constitutionally required to have a plenary trial de novo every time a piece of evidence was improperly (but harmlessly) excluded below or if a sentence or two of the transcript was inaudible.

While R.3:23-8(a) specifically states that an appeal shall be heard on the record "unless by reason of the application of subsection (c) hereof it shall appear that the rights of either party may be prejudiced, in which event there shall be a plenary trial de novo," subsection (c) does not relate to a partially defective transcript or to any other municipal court trial error. Thus, it has been held that the county court does not have the option of substituting a plenary trial for a trial de novo on the record. See State v. Horn, 120 N.J. Super. 203 (App. Div. 1972).

However, our rules have also been construed as to prohibit a remand, see State v. Telada, 134 N.J. Super. 463 (App. Div. 1975).[7]

The Committee, after exhaustive review of this subject, recommends amendment to R.3:23-8(a) to read as follows:

(a) Plenary Hearing; Hearing on Record; **Correction or Supplementation of Record;** Transcript for Indigents. If a verbatim record or sound recording was made pursuant to R.7:4-5 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the county clerk, and a certified copy served on the prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless [by reason of the application of subsection (c) hereof] it shall appear that the rights of either party may be prejudiced by a **substantially unintelligible record or that the rights of defendant were prejudiced below** in which event there shall be a plenary trial de novo. **The county court may also hear witnesses and admit additional testimony whenever (1) the defendant claims that the municipal court erred in excluding evidence, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the tape being reviewed is partially unintelligible or defective.** If the appellant, upon application to the county court, is found to be indigent, the county court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. [If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.]

The Committee decided it would be appropriate to spell out the grounds now not clear with regard to when plenary trials de novo may take place. The Committee is of the view that plenary trials de novo should take place when there is a substantially unintelligible record, as provided in State v. Horn, supra, and also where the defendant is prejudiced by a decision of the court below. (The desire to introduce evidence directed to new assertions raised on appeal or prejudice not resulting from the proceedings or a ruling below should not give rise to a plenary trial de novo.) However, Colten v. Kentucky notwithstanding, the Committee feels, as a matter of policy, that there should be no right in the State to seek a plenary trial de novo other than when necessitated by a substantially defective record.

The Committee is also of the view that the rules should permit supplementation, where that can easily and non-prejudicially be done, whenever there are matters which can be easily supplemented without lengthy proceedings in the county court. The proposed rule endeavors to spell out when such supplementation can be permitted just as it endeavors to spell out when a plenary trial de novo is permissible.

The Committee's vote was 12-3 with the dissenters being of the view that there should be recognition of (1) the ability of the county court to remand for new trial, and (2) the concept of "acquittal or conviction," i.e., that if there is a mistake below which is apparent from the record that there should be no plenary trial to remedy same, and that the review should in all instances be based upon the record unless there was an unintelligible record.

Finally, the last sentence of R. 3:23-8(a) is deleted because of the presence of sound recording equipment in all municipal courts.

IX. Work Release Eligibility for Defendants Convicted of Drunk Driving

The Committee was asked to consider, in advance of case law decision on the subject, whether defendants convicted as second or subsequent offenders under N.J. S.A. 39:4-50(a) should be permitted to enter work release programs. Defendants convicted as second offenders under N.J.S.A. 39:4-50(a) must be imprisoned for three months. State v. Sheppard, 125 N.J. Super. 332 (App. Div. 1973) certif. den. 64 N.J. 318 (1973).

The constitutionality of the mandatory three month sentence for second offenders has been upheld in State v. Housman, 131 N.J. Super. 478 (App. Div. 1974). Despite the fact that neither the applicable work release statute nor the applicable regulations promulgated thereunder by the Department of Institutions and Agencies, see N.J. S.A. 30:8-44, prohibit work release where mandatory jail sentences (or second and subsequent drunk driving offenders specifically) are involved, some argue that second offenders should not be eligible in light of the mandatory jail sentence.[8]

R.3:21-10(b) permits an order to be entered at any time permitting a defendant to enter a custodial or non-custodial alcoholic rehabilitation program. As this Committee's 1975 report suggests, however, such an order cannot be entered reducing a mandatory jail term. If a sentence cannot be suspended, a defendant cannot be placed in a (non-custodial) treatment facility during that term (or during the mandatory minimum if the mandatory is only a minimum).[9] This is particularly true because entry into a drug or alcoholic treatment or rehabilitation program under R.3:21-10 is generally made a condition of probation; and probation requires a partially or completely suspended sentence.[10] With the rare exception referred to in footnote 1, second or subsequent drunk driving offenders cannot receive sentences which are suspended in whole or in part. See State v. Sheppard, supra.

The Committee concludes, however, that pending judicial review of the subject, the Supreme Court should not prohibit work release eligibility by defendants if convicted as second or subsequent offenders under N.J.S.A. 39:4-50. The county work release legislation (N.J.S.A. 30:8-44 et seq., L. 1968, C. 372, amended L. 1969, C. 243) was adopted after N.J.S.A. 39:4-50 and -51 and various amendments thereto. There was a minor amendment to N.J.S.A. 39:4-50 in 1971, but it did not affect this issue. Accordingly, the Committee concludes that in light of the legislative history, such defendant should not be precluded from work release eligibility.

Respectfully submitted,
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7. Some Assignment Judges have been permitting remands where the county court would otherwise have to re-try in instances where counsel was not properly assigned below, see Rodriguez v. Rosenblatt, 58 N.J. 281 (1971), and in other circumstances where a lengthy plenary trial de novo was otherwise indicated.

8. There is an exception to the rule that the mandatory three-month jail sentence cannot be suspended if the second (or subsequent) offense occurred 10 or more years after the previous conviction.

9. Whether "imprisonment" can be served in a "custodial" treatment facility is an open question.

10. Generally, State Prison sentences can be completely suspended and county institutional sentences can be completely or partially suspended. See N.J.S.A. 2A:164-16; 2A:168-1 et seq.; Bonilla v. Heil, 126 N.J. Super. 538, 546 (App. Div. 1974); State v. Pietrowski, 136 N.J. Super. 383 (App. Div. 1975).

Report Of The Supreme Court's Committee On Criminal Practice

Part II

General Introduction

The Committee recognizes that adoption and implementation of the proposed rules hereinafter described may depend, in part, on financial resources and will definitely require substantial education of the bench and bar. Accordingly, some of the sections of the proposed rules may be deemed severable without destroying the fundamental purposes of the proposal as a whole. (The commentary notes where additional resources will be required and the severability aspects with respect to the appropriate sections.) In addition, the Committee notes that the rules described hereinafter need not be adopted with effective dates in advance of the time necessary to assure proper education and promulgation of necessary forms.*

It must also be emphasized that the proposed rules with regard to summons in lieu of continued detention and the proposed rules with regard to pretrial release, require adoption of conforming amendments to other sections of the rules governing the courts of New Jersey. Essentially because of time and space limitations, we are not setting out herein all the necessary conforming amendments. However, conforming amendments to other parts of the rules, particularly with respect to Part VII concerning the municipal courts, are in the possession of the Director of Criminal Practice in the Administrative Office of the Courts.

I. Use of Summons or Warrant

The Committee (by a vote of 14-0) recommends the following rule changes with respect to the use of summons or warrant upon complaint:

R. 3:3-1. Issuance; Authority.

(a) Warrant or Summons. An arrest warrant may be issued by a judge of a court having jurisdiction in the municipality in which the offense is alleged to have been committed or in which the defendant may be found, or by the clerk or a deputy clerk of that court, if it appears to such judge, clerk or deputy clerk from the complaint, or from an affidavit or deposition taken under oath, that there is probable cause to believe that an offense has been committed and that the defendant has committed it. The warrant may issue to any officer authorized by law to execute it. [A summons may issue instead of a warrant if the person issuing the warrant has reason to believe that the defendant will appear in response thereto, or if the defendant is a corporation. Instead of arresting a person without a warrant, the officer may give such persons a summons.] **A summons may be issued instead of a warrant by any such judge, clerk or deputy clerk, pursuant to R. 3:3-3, or by a law enforcement officer pursuant to R. 3:3-2.**

(b) Failure of Defendant to Appear After Summons. If a defendant who has been duly summoned fails to appear, or if there is reasonable cause to believe that he will fail to appear, an arrest warrant shall issue. If a defendant corporation fails to appear after having duly been summoned, a plea of not guilty shall be entered by the court if it is empowered to try the offense for which the summons was issued, and it may proceed to trial and judgment without further process; if the court is not so empowered it shall proceed as if the defendant had appeared.

(c) Additional Warrants or Summonses. More than one warrant or summons may issue on the same complaint.

R. 3:3-2. [Form and Contents of Warrant and Summons] **Summons in Lieu of Continued Detention Following Arrest.**

(a) Mandatory Issuance by Law Enforcement Officer. Subject to paragraph (b) of this Rule, whenever a law enforcement officer has effected a lawful arrest without a warrant for any offense except treason, murder, kidnapping, manslaughter, sodomy, rape or armed robbery, the officer shall issue a summons to

(Continued on page 20)

* The Committee also feels that, if these rules are adopted, continuous monitoring of the practices developed thereunder is necessary to insure uniformity, compliance and evaluation.

Report Of The Supreme Court's Committee On Criminal Practice

Part II

(Continued from page 19)

the arrested person and release him in lieu of continued detention. If a summons is not issued, the arrested person shall be taken to a police station where the officer in charge shall issue a summons to him and release him in lieu of continued detention unless he determines that any of the conditions set forth in paragraph (b) of this Rule exists.

(b) Exception to Mandatory Issuance of Summons by Law Enforcement Officer. A law enforcement officer shall have the discretion not to issue a summons to an arrested person when any of the following conditions exists:

1) The person has previously failed to respond to a summons;

2) The officer reasonably believes that a person is dangerous to himself, to others or to property;

3) There are one or more outstanding arrest warrants for the person;

4) The prosecution of the offense or offenses for which the person is arrested or the prosecution of any other offense or offenses would be jeopardized by immediate release of the person;

5) The person cannot provide satisfactory evidence of personal identification;

6) The officer reasonably believes the person will not appear in response to a summons; or

7) The person demands to be taken before a judge.

When an officer fails to issue a summons pursuant to this Rule, he shall record the specific reasons therefor in writing.

R. 3:3-3 [Execution or Service; Return] **Issuance of Summons in Lieu of Warrant by Judicial Officer.**

(a) Mandatory Issuance of Summons. Whenever application for a warrant or summons is made before any judicial officer authorized by R. 3:3-1(a) to issue a warrant, a summons shall issue instead of a warrant unless the judicial officer finds that any of the following conditions exists.

1) The accused is charged with treason, murder, kidnapping, manslaughter, sodomy, rape or armed robbery;

2) The accused has previously failed to respond to a summons.

3) The judicial officer reasonably believes that the accused is dangerous to himself, to others or to property;

4) There are one or more outstanding arrest warrants for the accused;

5) The whereabouts of the accused are unknown and an arrest warrant is necessary to subject him to the jurisdiction of the court; or

6) The judicial officer reasonably believes that the accused will not appear in response to a summons.

(b) Discretionary Issuance of Summonses. Notwithstanding a finding that any of the above conditions exists, a judicial officer may issue a summons.

[R. 3:3-2] **R. 3:3-4** Form and Content of Warrant or Summons.

. . . (unchanged)

[R. 3:3-3] **R. 3:3-5** Execution or Service; Return.

. . . (unchanged)

[R. 3:3-4] **R. 3:3-6** Defective Warrant or Summons.

. . . (unchanged)

Commentary to Part I

In keeping with the Committee's resolve to evaluate the criminal justice system at every level, the Committee has reviewed the present practices with regard to the use of summonses instead of warrants. Under existing law, a summons can issue in lieu of warrant if the case is commenced by complaint before arrest (R. 3:3-1) or following arrest without warrant (R. 3:4-1). See also R. 3:7-8 concerning warrant or summons upon indictment or accusation.

Despite the fact that a summons should issue if there is reason to believe that the defendant will respond thereto, the practice of issuing summonses is not well respected and varies within the State. In situations where a formal arrest has been made by a police officer without a warrant, the complaint warrant form (CDR 2) is almost always used. But see R. 3:3-1. The complaint summons form (CDR 1) is sometimes used where the case is commenced by complaint or indictment without prior arrest.

As a result of its review, the Committee noted various apparent problems caused by the excessive use of warrants. Included are the resulting overcrowded cell blocks and detention facilities, discrimination against the poor who are without ready access to counsel and bail in many cases, and the reduced police resources available on the streets by virtue of the time and effort expended in present arrest and booking procedures. The Committee also noted that summons are infrequently used because of police and judicial concerns about the absence of a warrant following arrest, the fear of reprimand in the event that a summoned suspect should not appear on the return date and resistance to changing established procedures.

In light of the deficiencies in the present system, the Committee recommends the above amendments to the rules of court which would mandate the issuance of a summons either at the street level or at the police station level except in certain situations. The thrust of the proposed amendment to the rules of court is to require the issuance of a summons instead of a warrant by the police officer on the streets or by the police officer in responsible charge of the police station, see N.J.S.A. 2A:8-27, State v. Ruotolo, 52 N.J. 508 (1968), except in situations where there is a valid reason (established by Rule or fact) for issuing a warrant and detaining a suspect in lieu of pretrial release. In addition, the proposed amendments mandate the issuance of a summons in lieu of warrant by a judicial officer except in situations where there is good reason (established by rule or fact) not to issue a summons.

In making its recommendations, the Committee realizes that there may be a need for a delayed effective date with respect to adoption of this Rule, thereby permitting the Administrative Director of the Courts and the Supreme Court to approve and promulgate new complaint forms and also permitting law enforcement authorities to educate the police with respect to these amendments. It has been suggested that N.J.S.A. 53:1-15 should be amended so that fingerprinting need not be "immediate" upon the arrest for an indictable offense. However, as fingerprinting must occur upon arrest for indictable offenses or for narcotics offense (even if the narcotics offense involves a non-indictable charge, N.J.S.A. 53:1-15, 18.1 as well as upon confinement on any charge, see N.J.S.A. 53:1-14), the defendant may be fingerprinted on the street (if practicable) or at the station house before released on summons. In this way, the "tracking" system and ability to check against outstanding warrants is not jeopardized. Similarly, the Committee concludes that because the proposed rule change, being recommended for implementation as part of the Supreme Court's rule-making power, does not affect the power of the police to make arrests, the decision to issue a summons at the street or precinct level following arrest does not affect the officer's right to conduct a warrantless search incident to a lawful arrest.

In light of the wide variance found in present practice, the Committee feels that the proposed rules embody strong statements of policy needed to remind judicial officers and law enforcement personnel that summonses should presumptively issue in certain cases and under appropriate circumstances, as particularized in the Rule.

II. PRETRIAL RELEASE

The Committee recommends adoption of the following rules:

Rule 3:4 [Proceedings Before the Committing Judge] **Pretrial Release**

3:4-1. Procedure After Arrest

(a). A person arrested [under a warrant issued upon a complaint] shall be **issued a summons and released pursuant to R. 3:3 or** [taken] informed without unnecessary delay [before the court named in the warrant.] **of the conditions he must satisfy for pretrial release, which conditions shall be determined by a person authorized to do so under these Rules.**

(b). [A person making an arrest without a warrant shall take the arrested person, without unnecessary delay, before the nearest available committing judge and] **Whenever an arrest is made without a warrant,** a complaint shall be filed forthwith and either a warrant [issued thereon or, if the person taking the complaint has reason to believe that the defendant will appear in response to a summons, a summons issued] **or a summons shall be issued in accordance with R. 3:3.** [The judge before whom the arrested person is taken shall advise such person of his rights in accordance with R. 3:4-2.]

(c). A person remaining in custody shall be taken before a judge authorized to determine or redetermine pretrial release conditions for a hearing pursuant to R. 3:4-6 without unnecessary delay, but in no event later than 48 hours after arrest.

(New Rule)

3:4-2. Inquiry Before First Appearance

In all cases in which the defendant remains in custody and in which release conditions have not been determined at a hearing before a court, or in which such hearing was held prior to the inquiry hereinafter described, an inquiry into the facts relevant to pretrial release shall be conducted forthwith by the probation department or other agency or person(s) approved by the Assignment Judge. The inquiry shall determine, if possible, from any available source and without being restricted by rules of evidence, facts relevant to the criteria set forth in R. 3:4-5. The approved agency or persons may make recommendations regarding the conditions, if any, which should be imposed with respect to pretrial release. The result of the inquiry and any recommendations shall be made known to the prosecution and the defendant at the first appearance or at any hearing thereafter wherein a pretrial release decision is to be made.

[3:26-2 Authority to Admit to Bail]

3:4-3. Authority to Determine Pretrial Release Conditions

(a). A judge of the Superior Court **sitting in or a judge of the** [c]County [c]Court [in] **of the** county in which the offense was committed or the arrest made may [admit to bail.] **determine pretrial release conditions.** Any other judge may [admit to bail] **determine pretrial release conditions for** any person charged with any offense except treason, murder, kidnapping, manslaughter, sodomy, rape or armed robbery. [When a person charged with an offense shall have been committed to jail after hearing by reason of bail having been denied, only a judge of the Superior Court or county court may thereafter admit him to bail.]

[7:5-3 Authority to Admit to Bail]

(b). [In any case in which the municipal court judge has fixed the amount of bail, he may designate the taking of the recognizance by the clerk or any other person authorized by law to take recognizances, other than the arresting officer.] In the absence of the **municipal court** judge, a person arrested and charged with [a non-indictable offense which may be tried by the judge] **an offense with respect to which such judge may determine pretrial release conditions** may, before his appearance before [him] **the judge, be released on his promise to appear or** [admitted to bail] **upon execution of a secured or unsecured recognizance in an amount determined by any** other person authorized by law to admit persons to bail other than the arresting officer, designated for such purpose by the judge.

(c). Upon application by the defendant, a judge of the Superior Court sitting in or a judge of the County Court of the county in which the defendant is in custody may determine pretrial release conditions with respect to all charges pending against the defendant in any county or municipality in the State, provided that the prosecutors of all other counties in which such charges are pending shall be given notice and opportunity to be heard concerning such determination.

[3:4-2 Procedure After Filing of Complaint]

3:4-4. First Appearance.

(a). At the defendant's first appearance before the court following the filing of a complaint, the judge thereof shall inform the defendant of the charge made against him and if a copy of the complaint has not previously been furnished to the defendant, shall furnish him with a copy thereof. The judge shall also inform the defendant of his right not to make a statement as to the charge against him and that any statement made by him may be used against him. In counties where a pretrial intervention program is approved by the Supreme Court for operation under R. 3:28, the judge shall also inform the defendant of the existence of such program, the name of the program director and the location at which application may be made for enenrollment in such program.

(b). The judge shall also inform the defendant of his right to retain counsel or, if indigent and constitutionally or otherwise entitled by law to counsel, of his right to have counsel furnished without cost. If the defendant asserts he is indigent, unless he affirmatively and with understanding [of his waiver of his right] states his intention to proceed without counsel, the judge shall have him complete the appropriate form as prescribed by the Administrative Director of the Courts[, if such form has not yet been completed]. If the complaint charges the defendant with an indictable offense, the court shall refer him to the Office of the Public Defender. If the complaint charges the defendant with a non-indictable offense and the court is satisfied that he is indigent and that he is constitutionally or otherwise entitled by law to have counsel furnished, the court shall assign counsel to represent him in accordance with R. 3:27-2. The court shall allow the defendant a reasonable time and opportunity to consult counsel before proceeding further.

(c). If the complaint charges the defendant with an indictable offense, the court shall inform him of his right to have a hearing as to probable cause, and of his right to indictment by the grand jury and trial by jury, and if the offense charged may be tried by the court upon waiver of indictment and trial by jury, the court shall so inform the defendant. All such waivers shall be in writing, signed by the defendant, and shall be filed and entered on the docket. If the complaint charges an indictable offense which cannot be tried by the court on waiver, it shall not ask for or accept a plea to the offense.

(d). If the defendant is in custody, the court shall determine, from the complaint or from an affidavit, deposition or testimony under oath whether probable cause exists to believe that an offense has been committed and that the defendant has committed it if there has been no such previous determination by a judicial officer.

(e). The court shall [admit the defendant to bail] **determine pretrial release conditions** as provided in [R. 3:26 and R. 7:5] **these Rules. Inquiry of the defendant regarding the facts relevant to pretrial release pursuant to R. 3:4-2 may be conducted by the judge in open court where such inquiry has not yet been made or to supplement such inquiry which has been made prior to the first appearance.**

[3:26-1 Right to Bail Before Conviction]

3:4-5. Criteria for Pretrial Release.

(a) [Persons Entitled; Standards for Fixing]

[All persons, except those charged with crimes punishable by death when the proof is evident or presumption great, shall be bailable before conviction on such terms as, in the judgment of the court, will insure their presence in court when required, having regard for their background, residence, employment and family status and, particularly, the general policy against unnecessary sureties and detention. In its discretion the court may order the release of a person on his own recognizance and may impose terms or conditions appropriate to such release.]

In all cases the defendant shall be released on his promise to appear unless it is found that there is substantial risk that he will not appear at appropriate times. Promise to appear means the written promise of the defendant that he will appear when required until final disposition of the case. In determining whether there is a substantial risk of non-appearance, the court shall take into account the following factors:

1) the nature of the offense presently charged, whether violence is involved, the apparent probability of conviction and the extent of the probable sentence insofar as these factors are relevant to the risk of non-appearance.

2) the length of defendant's residence in the community;

3) his employment status and history and his financial condition;

4) his family ties and relationships;

5) his reputation, character, physical and mental condition;

6) his prior criminal record, including any record of prior release on promise to appear or with conditions and history of response to legal process;

7) the identity of any responsible members of the community who would vouch for defendant's reliability;

[(b) On Failure to Indict. If a person committed for a crime punishable by death shall not be indicted within 3 months after his commitment, a judge of the Superior Court or county court, for good cause shown, may admit him to bail.]

[(c) On Failure to Move Indictment. If an indictment or accusation shall not be moved for trial within 6 months after arraignment, a judge of the Superior Court or county court, for cause shown, may discharge the defendant upon his own recognizance.]

[(d) Extradition Proceedings. Where a person has been arrested in any extradition proceeding, he may be admitted to bail except where he is charged with a crime punishable by death.]

(New Rule)

3:4-6. General Procedures.

(a) Hearing. Whenever a court conducts a hearing to determine or redetermine pretrial release conditions, the defendant shall have the right to present witnesses and documentary or other evidence.

(b) Statement of Reasons. If following such hearing, the court determines that the release of a defendant on his promise to appear is unwarranted in accordance with R. 3:4-5, that a secured recognizance is required in accordance with R. 3:4-8(a) or that new or additional release conditions are required in accordance with R. 3:4-10, it shall include a statement of its reasons and of the evidence relied on in the record.

(c) Review on Motion by Defendant. Whenever a defendant is in custody pursuant to an order imposing conditions of release, he may move the court in which the

(Continued on next page)

Report Of The Supreme Court's Committee On Criminal Practice

Part II

(Continued from previous page)

offense is to be tried to modify such order. Said motion shall be determined promptly. If said motion is the first one filed by the defendant under the order imposing conditions pursuant to which he is detained, the court shall conduct a hearing at which the provisions of paragraph (a) above shall apply. Such a hearing may be held on a second or subsequent motion if the court concludes from a review of the motion papers that it is required in the interest of justice.

(New Rule)

3:4-7. Conditions Upon Release.

Upon a finding that release on the defendant's promise to appear is unwarranted, the court shall impose the least onerous conditions reasonably likely to assure defendant's appearance when required. The court may impose one or more of the following conditions:

(1) the execution and signing by the defendant of an unsecured recognizance in an amount specified by the court;

(2) release the defendant into the care of some responsible person or organization agreeing to supervise the defendant and assist him in appearing in court;

(3) place the defendant under the supervision of an appropriate public agency or official;

(4) any reasonable restriction or requirement with respect to the activity, movement, associations or residence of defendant which is designed to assure the defendant's appearance; or

(5) any other reasonable conditions including a secured recognizance subject to R. 3:4-8.

[3:26-4]

3:4-8. Secured Recognizances; Form and Place of Deposit; Location of Real Estate; Record of Recognizances, Discharge and Forfeiture Thereof

[(a) Deposit of Bail]

(a) **Secured Recognizances. A secured recognizance may not be required by a court as a condition of pretrial release unless it is found that no other conditions on release will reasonably assure the defendant's appearance in court. The amount of such recognizance shall be no higher than that reasonably required to assure the defendant's appearance in court. In determining the amount of such recognizance, the court shall take into account the factors enumerated in R. 3:4-5. Upon a finding that a secured recognizance should be required, the court may require the execution and signing by the defendant of a recognizance in an amount specified by the court which may be secured at the defendant's option:**

(1) by the obligation of qualified sureties from whom additional security may be required;

(2) by the deposit in court of cash equal to ten percent of the face amount thereof, which deposit shall be returned at the conclusion of proceedings provided the defendant has not defaulted in the performance of the conditions of the recognizance, or

(3) by real estate.

(b) **Terms; Place of Execution and Deposit.** A [person admitted to bail] **defendant of whom a recognizance is required** shall, together with his sureties if required, sign and execute a recognizance before the person authorized to take [bail] **recognizances** or, if the defendant is in custody, the person in charge of the place of confinement.

The recognizance shall contain the terms set forth in R. 1:13-3(b) and shall be conditioned upon [his] **the defendant's** appearance at all stages of the proceedings until final determination of the matter, unless otherwise ordered by the court. [One or more sureties may be required. Cash may be accepted, and in] In proper cases no security need be required **of a surety.** A corporate surety shall be one approved by the Commissioner of Insurance and shall execute the recognizance under its corporate seal, cause the same to be duly acknowledged and shall annex thereto proof of authority of the officers or agents executing the same and of corporate authority and qualification. [Bail] **Recognizances and security** in the Superior Court or [c]County [c]Court shall be deposited with the clerk of the county in which the offense was committed. [In any county, with the approval of the Assignment Judge, a program may be instituted for the deposit in court of cash in the amount of ten percent of the amount of bail fixed.]

[(b)] **(c)** Limitation on Individual Surety. Unless the court for good cause otherwise permits, no surety, other than an approved corporate surety, shall enter into a recognizance [or undertaking for bail] if there remains undischarged any previous recognizance [or bail undertaken] **entered into by** [him] the surety.

[(c)] **(d)** Real Estate in Other Counties. Real estate owned by a surety **or by the defendant which is** located in a county other than the one in which the [bail] **recognizance** is taken may be accepted, in which case the clerk of the court in which the [bail] **recognizance** is taken shall forthwith transmit a copy of the recognizance certified by him to the clerk of the county in which the real estate is situated, who shall record it in the same manner as if the recognizance had been taken in his county.

[(d)] **(e)** Record of Recognizance. The clerk of every court, except the municipal court, before which any recognizance shall be entered into shall record immediately, in alphabetical order in a book kept for that purpose, the names of the persons entering into the recognizance, the amount thereof and the date of its acknowledgment. Such book shall be kept in the clerk's office of the county in which such court shall be held, and be open for public inspection. In municipal court proceedings the record of the recognizance shall be entered in the docket book maintained by the clerk.

[(e)] **(f)** Record of Discharge; Forfeiture. When any recognizance shall be discharged by court order upon proof of compliance with the conditions thereof or by reason of the judgment in any matter, the clerk of the court shall enter the word "discharged" and the date of discharge at the end of the record of such recognizance. When any recognizance is forfeited, the clerk of the court shall enter the word "forfeited" [,] and the date of forfeiture at the end of the record of such recognizance, and shall give notice of such forfeiture to the county counsel. When real estate [of the surety] located in a county other than the one in which the [bail] **recognizance** was taken is affected, the clerk of the court in which such recognizance is given shall forthwith send notice of the discharge or forfeiture and the date thereof to the clerk of the county where such real estate is situated, who shall make the appropriate entry at the end of the record of such recognizance.

[(f)] **(g)** Cash Deposit. When cash is deposited [in lieu of bond] by a person other than the defendant, the defendant shall file an affidavit as to the lawful ownership thereof and upon discharge, such cash may be returned to the owner named in the affidavit.

[3:26-5]

3:4-9. Justification of Sureties

Every surety, except an approved corporate surety, shall justify by affidavit and be required to describe therein the property by which he proposes to justify and the encumbrances thereon, the number and amount of other recognizances [and undertakings for bail] entered into by him and remaining undischarged, if any, and all his other liabilities. No recognizance shall be approved unless the surety thereon shall be qualified.

(New Rule)

3:4-10. Violations of Release Conditions.

(a) Application. Upon failure by defendant to appear in court when required or upon written application based upon a showing under oath:

(1) that a defendant has violated any condition of his release or

(2) alleging facts relevant to the risk that the defendant will not appear in court at appropriate times which were not known or considered at the time release conditions were last determined;

the court, if it is shown that there is reasonable cause to believe the defendant will not otherwise appear, may issue a warrant directing that the defendant be arrested and produced without delay for a hearing. Such hearing shall be held within 72 hours of the defendant's arrest, provided that continuanecs may be granted at his request.

(b) Sanctions. If it is found that the defendant has willfully violated any condition of his release or that the facts shown justify an alteration of release conditions, the court may order the institution of proceedings to detain the defendant pursuant to R. 3:4-11 or impose different or additional release conditions.

(New Rule)

3:4-11. Detention Order.

(a) Application. In any case in which the defendant is charged with an indictable offense, an application by the prosecutor for a detention order may be made in the Superior Court. Upon such written application, based on a showing under oath of facts giving reasonable cause to believe a detention order is justified under the requirements set forth in paragraph (d) of this rule, the court may order the defendant produced for a hearing if he is in custody or may issue a warrant for his arrest if he is not.

(b) Hearing. If the court is satisfied that an application is sufficient under paragraph (a) of this rule, it shall schedule a hearing to be held within 72 hours if the defendant is in custody. If the defendant is not in custody such hearing shall be held within 72 hours of his arrest. Continuances may be granted at the request of the defendant. At such hearing, the State shall have the burden of proving the necessity for detention by clear and convincing evidence.

(c) Procedures. The defendant shall have the right to be represented by counsel at the hearing and to the assignment of counsel if he is indigent. He shall also have the right to disclosure of the evidence against him, to confront and cross-examine adverse witnesses and to present witnesses and other evidence on his own behalf. If the defendant testifies on his own behalf, he may be cross-examined but his testimony shall not be admissible against him in any proceeding thereafter. A verbatim record of the hearing shall be made.

(d) Findings; Order. If the court finds there is a high degree of probability that:

(1) if the defendant is released or continued upon release he will threaten or inflict serious bodily harm upon another for the purpose of intimidating or incapacitating witnesses or of otherwise interfering with the prosecution; or

(2) if the defendant is released or continued upon release, he will flee the State for the purpose of avoiding trial or of secreting or disposing of the fruits of the alleged crime;

and that no release conditions or restraints upon defendant are adequate to insure against such acts, the court may order the defendant detained pending trial. The court shall include in the record a statement of the specific reasons for each of its findings and of the evidence relied on therefor.

(e) Restraining Order. If the court finds that a detention order is not warranted, it may nevertheless release the defendant subject to an order:

(1) restraining him from frequenting certain geographical areas or premises;

(2) restraining him from initiating contact or communication with designated persons or classes of persons;

(3) restraining him from possessing any dangerous weapon;

(4) requiring him to report to a law enforcement agency or probation office at frequent intervals;

(5) imposing any other reasonable restrictions calculated to prevent anticipated threats, harm or flight.

(f) Violation of Restraining Order. A hearing to determine whether the defendant has violated a restraining order may be initiated in the manner provided in R. 3:4-10(a). Such hearing shall be held in accordance with the procedures set forth in this rule. If the court finds that the defendant has willfully violated such order, the court may impose different or additional restraints upon his release. If the court makes the findings required in paragraph (d) of this rule, it may revoke release and issue a detention order.

(New Rule)

3:4-12. Mandatory Release on Failure to Commence Trial.

(a) Time Limits; Sanction. Whenever a defendant has been incarcerated in New Jersey for ninety days by reason of a criminal charge and the trial thereon has not been commenced within that time, upon the defendant's motion, the court shall order him released upon conditions he is able to meet. Whenever a mistrial is declared or a new trial is ordered by the trial court or an appellate or other reviewing court, an incarcerated defendant shall, upon his motion, be released upon conditions he is able to meet if a re-trial or new trial is not commenced within thirty days of such declaration or order.

(b) Excluded Time Periods. The following time periods are excluded in calculating the time limits set forth in paragraph (a) of this rule:

(1) Any period occasioned by proceedings and examinations to determine the defendant's competency or physical capacity to stand trial and any period during which the defendant is incompetent or physically incapable to stand trial.

(2) Any period resulting from a pretrial motion involving matters of unusual complexity, including not more than 15 days while the matter is under advisement.

(3) Any period during which proceedings in the case are delayed because of proceedings relating to the prosecution of the defendant on other charges.

(4) The periods of continuance granted at the request of the defendant.

(5) Any period between a plea of guilty or non-vult by the defendant and a subsequent withdrawal or rejection thereof.

(c) Extensions in Exceptional Circumstances. The court may order an extension of time upon a finding that exceptional circumstances exist which have made it impossible to commence trial within the period specified in paragraph (a). Such exceptional circumstances shall not include general congestion of the court's calendar or lack of diligent preparation or failure to obtain available witnesses on the part of the State.

Whenever the court orders an extension of time hereunder, it shall set forth on the record the exceptional circumstances found to exist. The order of extension shall set a date for trial within a reasonable time subject to further extension hereunder.

[3:4-3.]

3:4-13. Hearing as to Probable Cause

If the defendant does not waive indictment and trial by jury, but does waive a hearing as to probable cause, or if the defendant does waive indictment and trial by jury but the judge is not an attorney, the court shall forthwith bind him over to await final determination of the cause. If the defendant does not waive a hearing as to probable cause and if before the hearing an indictment has not been returned against the defendant with respect to the offense charged, **in addition to the hearing required by R. 3:4-4(d) relating to defendants in custody,** the court shall hear the evidence offered by the State within a reasonable time and the defendant may cross-examine witnesses against him. If, from the evidence, it appears to the court that there is probable cause to believe that an offense has been committed and the defendant has committed it, the court shall forthwith bind him over to await final determination of the cause, otherwise, the court shall discharge him; provided, however, that if the offense charged is indictable, a court shall not discharge the defendant without first giving the county prosecutor notice and an opportunity to be heard. Such notice may be oral, or may be in writing, and shall state when the county prosecutor may appear and be heard. An entry shall be made on the docket as to when and how such notice was given. After concluding the proceeding the court shall transmit, forthwith, to the county prosecutor all papers in the cause in the event the defendant is discharged. The court shall [admit the defendant to bail] **determine the conditions of pretrial release** as provided in [R. 3:26] **these rules** and any [bail] **recognizance** taken by him shall be transmitted to the county clerk.

[3:4-4.]

3:4-14. Proceedings in Arrest Under Uniform Fresh Pursuit Law and Extradition Proceedings.

(a) If an arrest is made in this State by an officer of another state in accordance with the provisions of N.J.S. 2A:155-1 to N.J.S. 2A:155-7, inclusive (Uniform Law on Fresh Pursuit), he shall take the arrested person, without unnecessary delay, before the nearest available [committing] judge who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If he determines that the arrest was lawful, he shall commit the person to await, for a reasonable time, the issuance of an extradition warrant by the Governor of this State, or admit him to bail for such purpose. If the court determines that the arrest was unlawful it shall discharge the person arrested.

(b) **Where a person has been arrested in any extradition proceeding, he may be admitted to bail until such time as the Governor's extradition warrant issues, except where he is charged with a crime punishable by death or life imprisonment under the laws of the State in which it was committed.**

[3:4-5.]

3:4-15. Effect of Technical Insufficiency or Irregularity in the Proceedings

A defendant held in custody under a commitment after a hearing as to probable cause shall not be discharged nor shall such hearing be deemed invalid because of any technical insufficiency or irregularity in the commitment or prior proceedings not prejudicial to the defendant, or because the offense for which the defendant is held to answer is other than that stated in the complaint or arrest warrant.

Rule 3:26 [Bail] Supplemental Pretrial Release Proceedings

[3:26-3.]

3:26-1. [Bail] Pretrial Release for Witness

Every judge shall, when the interest of justice requires, [bind with sufficient surety] **determine pretrial release conditions, in accordance with the provisions of R. 3:4** for all persons who can give testimony against one accused of a crime punishable by death or by imprisonment in state prison, whether or not the offender is arrested, imprisoned, released or bailed.

[3:26-6.]

3:26-2. Forfeiture

(a) Declaration. Upon breach of a condition of a recognizance, the prosecuting attorney shall move the court for a declaration of forfeiture [of the bail] and the clerk of the court shall forthwith send notice of

(Continued on page 22)

Report Of The Supreme Court's Committee On Criminal Practice

Part II

(Continued from page 21)

the forfeiture to the county counsel or the municipal attorney, as appropriate, who shall forthwith proceed to collect the forfeited amount.

(b) Setting Aside. The court may direct that a forfeiture be set aside if its enforcement is not required in the interest of justice upon such conditions as it imposes.

(c) Enforcement; Remission. When a forfeiture is not set aside, the court shall on motion enter a judgment of default and execution may issue thereon. After entry of such judgment, the court may remit it in whole or in part in the interest of justice.

[3:26-7.]

3:26-3 Exoneration

When the condition of the recognizance has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligors and release any [bail] **deposit.** A surety may be exonerated by a deposit of cash in the amount of the recognizance or by a timely surrender of the defendant into custody.

Commentary to Part II

Pretrial release is closely related to the area of summons in lieu of continued detention following arrest. A subcommittee of the Criminal Practice Committee has studied this subject for more than a year. It drafted the rules which the Committee reviewed and now recommend for promulgation under the Court's rule-making power.* The Committee has concluded that our present release system relies too heavily upon money bail as a condition of release. Since most indigent defendants cannot make even nominal bail, the result is that an excessive number of defendants are detained in overcrowded jails wherein convicted and unconvicted persons are sometimes indiscriminately mixed. Moreover, release decisions are now often made upon insufficient information regarding the likelihood of non-appearance. As a result, the Committee concludes that many defendants are detained when they should otherwise be released. Similarly, some defendants are released without adequate assurance that they will appear for trial.

As a beginning toward correcting these problems, these proposed rules are designed to codify present New Jersey law with respect to pretrial release. See e.g. State v. Johnson, 61 N.J. 351 (1972); State v. Obstein, 52 N.J. 516 (1968). The range of possible nonfinancial release conditions referred to in Johnson, supra are set forth explicitly and their use is encouraged, where appropriate, as a matter of policy. The scheme provides that financial release conditions should be used only as a last resort.

The rules also spell out procedures permitting more restrictive conditions and the basis for outright detention when necessary in order to provide alternatives to the setting of unreasonable bail in "high risk" cases. In addition, provision is made for the institution of programs for the gathering of relevant information needed to facilitate pretrial release determinations.

The Committee feels that the proposed rules are a necessary first step toward the development of full-time "bail" officers (and "bail" judges) available 24 hours a day, 7 days each week, in all vicinages.

Finally, an endeavor has been made to place all rules relating to pretrial release in one location, leaving in Part VII only an incorporation by reference of the applicable rules and the rules peculiarly applicable to the municipal courts.

A. Draft Rule 3:4-1 (Procedure After Arrest) constitutes a substantial revision of present R. 3:4-1. The amendments were derived from the American Bar Association Project on Standards for Criminal Justice, **Standards Relating to Pretrial Release,** Standard 4.1 (Approved Draft 1968) [hereinafter: A.B.A. Standards]; National Advisory Commission on Criminal Justice Standards and Goals, **Corrections,** Standard 4.5 (1973) and **Courts,** Standard 4.5 (1973) and Fla. R. Crim. P. 3.130 (b) (1). Paragraph (a) applies to all arrests and is designed to insure that in all cases release conditions are determined as soon as possible. Paragraph (b) retains the present requirement that a complaint be filed following a warrantless arrest and that either a warrant or a summons be issued thereon. The requirements of proposed Rule 3:3 are incorporated by reference.

Paragraph (c) applies only to those arrested persons to whom summonses are not issued and who are unable to meet release conditions initially set without a hearing. (See proposed Rule 3:4-4.) Paragraph (c) requires that such detainees be taken before a judge "without unnecessary delay but in no event later than 48 hours after arrest." This phrase is designed to insure that the maximum time limit is not construed to authorize detention for 48 hours as a matter of course. The phrase "or redetermine pretrial release conditions" is designed to emphasize that a hearing must be conducted within 48 hours even if a judge telephonically or otherwise originally set the terms of pretrial release.

The implementation of paragraph (c), as in the case of many of the rules recommended by this Committee, is of course dependent upon the availability of judicial and related resources. The 48 hour time limit may require hearings to be held over weekends or on holidays. The Committee does not see, however, why a designated "bail" judge could not be "on call" in each county at all times. Nonetheless the Committee realizes the Court may feel that 48 hours is too short a period in which to require a hearing. In that event, the Committee recommends a longer period, perhaps 72 hours or "two court days," irrespective of when a municipal court may be "in session," rather than elimination of a time limit. Cf. R. 5:8-6.

B. Draft Rule 3:4-2 (Inquiry Before First Appearance) is entirely new. It is derived from A.B.A. Standard 4.5, N.A.C. Corrections Standard 4.5, N.A.C. Courts Standard 4.5 and National Conference of Commissioners on Uniform State Laws, Uniform Rules of Criminal Procedure 342 (b) (Approved Draft 1974) [hereinafter: Uniform Rules]. This Rule requires the conducting of a pretrial release investigation by the probation department or other agency approved by the Assignment Judge. It is designed to insure that judicial release determinations be made upon adequate and relevant information respecting the defendant and the offense charged.

It is hoped that probation departments can provide more service with respect to the conduct of investigations relating to appropriate conditions of pretrial release in conformity with the Supreme Court's desire for a statewide unified probation service. Before that day, however, it is suggested that investigations related to the consideration of pretrial release be conducted in the manner appropriate in each county. See Rule 1:33-3 (b); N.J.S.A. 2A:168-5. This rule obviously requires additional manpower and resources, and a report on this subject is being prepared by the Administrative Office of the Courts. Accordingly, this rule may be deemed severable. The Committee wishes, however, to emphasize that it considers the gathering of information required by this rule to be essential to the efficient operation of a meaningful pretrial release system.

The Committee feels it important to express its opinion that the information obtained from the defendant personally in the course of an investigation must be deemed confidential and cannot be admitted against the defendant in any later proceedings, at least on the issue of guilt. See R. 1:38(f); State v. Davis, 67 N.J. 222 (1975); State v. Miller, 67 N.J. 229 (1975). The Committee could not agree as to whether or not such information could be used against the defendant if he testified falsely, either to impeach or to prove perjury. See Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed 2d 1 (1971); State v. Davis, supra; State v. Miller, supra; cf. State v. Boone, 66 N.J. 38 (1974).

C. Draft Rule 3:4-3 (Authority to Determine Pretrial Release Conditions) is a combination of present R. 3:26-2 and a portion of present R. 7:5-3. It is designed to clarify who may determine the conditions of pretrial release.

Paragraph (a) of proposed Rule 3:4-3 is essentially a minor revision of present R. 3:26-2. It is intended to make clear that the jurisdiction of Superior and County Court judges, sitting in the county where the offense was committed or the arrest was made, to determine the conditions of pretrial release is coextensive. The last sentence of present Rule 3:26-2 has been deleted as unnecessary.

Paragraph (b) is a revision of the second sentence of present R. 7:5-3. This paragraph authorizes persons other than a judge, who are authorized by law to admit to bail, to release defendants on their "promise to appear" (defined in draft Rule 3:4-5) or upon the execution of secured or unsecured recognizances. The Committee feels that only judges should be authorized to require any of the other conditions set forth in draft Rule 3:4-7.

Paragraph (c) of proposed Rule 3:4-3 is new and would permit a judge sitting in the county where the defendant is in custody to determine pretrial release conditions with respect to all charges pending against the defendant in this State upon notice to the appropriate County Prosecutors so that release can be more easily effected. Cf. R. 3:25A-1. It is hoped that this provision will also enable the elimination of the expense involved in transporting defendants having several detainers lodged against them from county to county for separate release determinations.

D. Proposed Rule 3:4-4 (First Appearance) basically contains the provisions of present R. 3:4-2. However, paragraph (d) contains an addition to conform New Jersey practice with the mandate of Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) requiring a determination of probable cause to detain a defendant. That determination may be made after ex parte, non-adversarial proof and must be made "promptly after arrest." 95 S. Ct. at 868-869. It should be noted that this determination is made at the first appearance which is conducted, for defendants detained in custody, within the time limit described in proposed R. 3:4-1(c). Because this determination of probable cause may be made after an ex parte presentation in a non-adversarial context, it obviously differs from the determination made at the traditional probable cause hearing required under draft Rule 3:4-13 (present R. 3:4-3).

E. Draft Rule 3:4-5 (Criteria for Pretrial Release) is essentially a new rule replacing the present R. 3:26-1 but covering the same subject matter. It is derived from A.B.A. Standard 5.1, N.A.C. Corrections Standards 4.4 and 4.5, Uniform Rule 341(a) and 18 U.S.C.A. Section 3146(b). A general statement is set forth in paragraph (a) that a defendant is entitled to release on his promise to appear unless it is found that there is a substantial risk that he will not appear at appropriate times. The Committee approved draft Rule 3:4-5 by a vote of 9-2 with the dissenters of the view that crimes of violence should be excluded from the general statement. A statement of criteria with respect to the determination of the risk of non-appearance is also embodied in paragraph (a) of the rule. One committee member dissents from the consideration of criterion No. 1 and particularly with regard to the consideration of the "probability of conviction and the extent of probable sentence." The Committee as a whole, however, felt that these factors were generally accepted as relevant to risk of non-appearance. See United States v. Alston, 420 F. 2d 176 (D.C. Cir. 1969).

The paragraph defines "promise to appear" as release without any conditions except the defendant's written agreement to appear when required. Such a condition is generally known as "release on recognizance" (R.O.R.). The change in terminology to "promise to appear" is necessary to prevent confusion since traditional "bail bonds" are termed "recognizances" throughout the Rules and in many New Jersey statutes on the subject.

F. Draft Rule 3:4-6 (General Procedures) is entirely new and is derived from A.B.A. Standards 4.4, 5.1(d) and 5.9, N.A.C. Corrections Standard 4.5, Ariz. R. Crim. P. 7.4 and 18 U.S.C.A. Sec. 3146(d) and 3147. Paragraph (a) requires that the defendant be allowed to present witnesses and other evidence when a hearing to determine release conditions is held. See State v. Obstein, supra. It should be noted that such a hearing would be required within the time limits embodied in proposed Rule 3:4-1(c) if the defendant is in custody. Paragraph (b) requires statements of reasons to be included in the record when certain determinations are made. The Committee feels this requirement is necessary to help insure adequate attention to the relevant criteria for such determinations and to facilitate appellate review. Cf. R. 3:21-4(e); Monks v. N.J. State Parole Board, 58 N.J. 238 (1971).

Paragraph (c) requires that a hearing be held upon the first motion of a detained defendant to modify his release conditions but provides that hearings on subsequent motions relating to the same order imposing conditions are discretionary. This provision is designed to prevent judge-shopping by detained defendants and to prevent the waste of judicial time in conducting duplicative hearings. The paragraph is not meant by the Committee, however, to affect the presently existing right of defendants not in custody to seek review of release conditions by motion. The Committee considered, but rejected, a requirement in this paragraph that counsel be appointed to represent indigent detainees upon such motions. See A.B.A. Standard 4.2. The Committee feels that present procedures for the assignment of counsel are adequate. See N.J.S.A. 2A:158-1 et seq.; Rodriquez v. Rosenblatt, 58 N.J. 281 (1971).

G. Draft Rule 3:4-7 (Conditions Upon Release) is also entirely new and is derived from A.B.A. Standard 5.2, N.A.C. Corrections Standard 4.4, Uniform Rule 341 (a) and 18 U.S.C.A. Sec. 3146(a). It requires that only the least onerous conditions likely to assure the defendant's appearance may be imposed, and in order of increasing severity, sets forth permissible conditions of pretrial release. See State v. Johnson, supra; R. 3:26-1(a). The Committee considers condition (1), the execution of an unsecured recognizance, to be a non-financial condition, at least for the purpose of release, since it requires no deposit. It is also considered to be the least onerous condition listed in terms of actual restraint on the defendant's liberty.

H. Draft Rule 3:4-8 (Secured Recognizances; Form and Place of Deposit; Location of Real Estate; Record of Recognizances; Discharge and Forfeiture Thereof) is present R. 3:26-4 in substantially amended form. The amendments are derived from A.B.A. Standards 5.3 and 5.4, N.A.C. Corrections Standard 4.4 and Courts. Standard 4.5, Smith-Hurd Ill. Ann. Stat., Ch. 38, Sec. 110-7 (Supp. 1974) and 18 U.S.C.A. Sec. 3146(a).

The amendments to this Rule are designed to simplify the terminology used with respect to traditional bail, to limit its use to those cases wherein there is a genuine need for it and to extend the 10% cash alternative to all counties.

Paragraph (a) substitutes the words "secured recognizance" for traditional "bail," the meaning of which is not always consistent throughout the present Rules. This paragraph also prohibits the requirement of such a recognizance by a Court unless a finding is made that no other condition of release (see draft Rule 3:4-7) will reasonably assure the defendant's appearance. When such a finding is made under this paragraph, the amount of the recognizance is set by the court and the defendant is accorded the option of providing security in three alternative forms: 1) the obligation of a qualified surety of whom additional security may be required, e.g., real estate, 2) the deposit of 10% of the face amount of the recognizance in cash or 3) the deposit of real estate.

The remainder of the proposed Rule is essentially identical to present R. 3:26-4 but with appropriate cnanges in terminology to conform it to the first paragraph.

The Committee notes that consideration should be given to the form of security the defendant is able to furnish in setting the amount of the recognizance. For instance, the obligation of a surety on a recognizance in any amount may be less effective in assuring the defendant's appearance than the deposit of cash or property belonging to a defendant or his family.

The Committee considered but rejected a provision in this Rule which would have prohibited the acceptance by any Court of a recognizance secured by the obligation of a surety acting for compensation, i.e., a professional bail bondsman, as recommended in A.B.A. Standard 5.4 and Commentary thereto and in N.A.C. Courts Standard 4.6. The Uniform Rules follow this recommendation in Rule 341. Although the Committee is of the opinion that a rule prohibiting acceptance of such recognizances by our courts is within the rule-making authority of this Court (see Winberry v. Salisbury, 5 N.J. 240 cert. den. 340 U.S. 877 (1950), the conclusion was reached that defendants should not be deprived of the option of utilizing bail bondsmen should they so desire.

Nonetheless, the Committee wishes to express its opinion that the traditional bail bondsman business has become counter-productive to the goals of a rational pretrial release system. The major effect of widespread use of bail bondsmen, the Committee believes, is to shift the decision whether to release from the Courts to the bondsmen. See Pannell v. United States, 320 F. 2d 698, 699 (D.C. Cir. 1963) (Wright, J. concurring). The bondsmen essentially have the power to frustrate the expectations of the judiciary in setting the amount of bail. Moreover, defendants utilizing bail bondsmen are often faced with no real risk of immediate financial loss as a deterrent to flight once they have paid the premium. The Committee believes that these, and many other well known problems and inequities perpetuated by the traditional bail bond system (see A.B.A. Standard 5.4 and Uniform Rule 341(b) and commentaries thereto) substantially outweigh any advantage which may be offered to the criminal justice system by bail bondsmen, e.g., obtaining the return of fugitives. See commentary to Smith-Hurd Ill. Ann. Stat., Ch. 38, Sec. 110-1 et seq. at p. 300.

Accordingly, the Committee recommends that the use of professional bail bondsmen should be discouraged in New Jersey and hopes that the provisions of draft Rule 3:4-8 will result in substantial elimination thereof.

I. Draft Rule 3:4-9 (Justification of Sureties) is present R. 3:

(Continued on next page)

*The Committee vote on the entire package was 11-0 with one abstention. Particular votes on controversial sections are set out hereinafter.

Report Of The Supreme Court's Committee On Criminal Practice

Part II

(Continued from previous page)

with a minor amendment to conform its terminology to draft Rule 3:4-8.

J. Draft Rule 3:4-10 (Violations of Release Conditions) is entirely new and is derived from A.B.A. Standards 5.6, 5.7 and 5.8, N.A.C. Corrections Standard 4.5, Ariz. R. Crim. P. 7.5, Uniform Rule 341(d) and (e), and 18 U.S.C.A. Sec. 3146 (e).

Paragraph (a) provides that a defendant may be summoned or arrested and produced for a hearing when he fails to appear as required, or when a verified showing is made to the Court that he has violated any release condition or that facts bearing upon the risk of non-appearance not previously known or considered have come to light. The Committee believes that the requirement of a showing under oath is necessary in the latter circumstances because the arrest which may result is in effect a temporary revocation of release without adversarial due process. Compare Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) with Gerstein v. Pugh, supra.

The further requirement of this paragraph that a hearing must be held within 72 hours of defendant's arrest is deemed necessary for essentially the same reason. The Committee does not believe a previously released defendant should be detained beyond this time limit without an opportunity to be heard and that the prescribed limit provides sufficient time for the prosecutor to prepare for the hearing. Accordingly, the only continuances authorized are those the defendant requests.

Paragraph (b) provides that where the Court finds a willful violation of release conditions or that an alteration of conditions is necessary, it may alter such conditions or order the institution of proceedings for outright detention of the defendant pursuant to draft Rule 3:4-11.[1]

The Committee rejected the recommendation of both the A.B.A. and the N.A.C. that revocation of release be authorized when it is shown that a court or grand jury has found probable cause to believe a defendant has committed a "serious crime" while on release. The Committee is of the opinion that the constitutionality of the revocation of release upon a mere finding of probable cause is questionable at best since it has been held to be impermissible in the parole revocation setting. White v. N.J. State Parole Board, 136 N.J. Super. 360, 367-68 (App. Div. 1975).

It should be noted, however, that a finding of probable cause to believe a defendant has committed a new crime while on release can be dealt with as a violation of release conditions or a previously unknown fact bearing upon the risk of non-appearance under paragraph (a) of draft Rule 3:4-10.

K. Draft Rule 3:4-11 (Detention Order) is also entirely new and is derived from A.B.A. Standards, Appendix C., Sec. 1.4 through 1.8 and Uniform Rules 341 (e) and 344. The Rule sets forth what the majority of the Committee considers to be constitutionally adequate criteria and procedures for the purpose of determining whether defendants should be denied release entirely. This Rule was approved by the Committee for recommendation by a vote of 8-5.

Paragraph (a) (Application) is similar to the first paragraph of draft Rule 3:4-10 and sets forth requirements for initiating the detention procedure. Applications for detention orders are limited to cases in which an indictable offense is charged and may be made only in the Superior Court. A showing under oath is required for the same reasons as noted in the commentary to draft Rule 3:4-10(a).

Paragraph (b) (Hearing) requires a hearing to be held within 72 hours if the defendant is in custody or within 72 hours of his arrest if he is not. The reasons for this requirement are again the same as noted in the commentary to proposed Rule 3:4-10(a). Paragraph (b) also provides that the State must carry the burden of proving the necessity of detention by clear and convincing evidence. The Committee feels this requirement is necessitated by the obviously drastic consequences resulting to defendants detained without possibility of release under this Rule. See A.B.A. Standards at 2, 3 and authorities cited therein.

Paragraph (c) (Procedures) sets forth the procedural rights of defendants subjected to detention proceedings. These are basically the same as those accorded probationers and parolees in revocation proceedings. See Morrissey v. Brewer, supra; Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). The defendant's right to counsel is also set forth because the Committee believes defense counsel to be essential at such hearings even if the Public Defender has not yet been appointed for the indigent defendant or if he has previously waived such right. See R. 3:4-2. The defendant may, of course, waive his right to counsel.

Paragraph (c) also requires a verbatim record of the hearing to be made, for obvious reasons, and further provides that any testimony by the defendant may not be admitted against him in later proceedings. This latter provision is believed to be constitutionally required by the Committee. See Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968); cf. Avant v. Clifford, 67 N.J. 496 (1975).

Paragraph (d) is the heart of the rule, setting forth the findings which must be made before a detention order may issue and requiring a detailed statement of reasons on the record if such findings are made. The reasons for the latter requirement are expressed in the commentary to draft Rule 3:4-6(b) ante.

Under Paragraph (d), before a detention order may issue, the court must find there is a "high degree of probability" that the defendant if released will: (1) threaten or inflict serious harm upon another in order to intimidate or incapacitate witnesses or interfere with the prosecution or (2) flee to avoid trial. The court must also find that no release conditions or restraints will suffice to insure against such acts.

The Committee is of the opinion that complete denial of release is clearly permissible under N.J. Const. Art. 1, ¶ 11 after a finding is made that the defendant will flee regardless of release conditions. State v. Johnson, supra at 360.

There are apparently no New Jersey cases regarding whether a defendant may be detained outright to prevent intimidation or harm to witnesses or other interference with the conduct of trial. There is, however, a substantial body of federal law which is summarized succinctly in United States v. Gilbert, 425 F. 2d 490 (D.C. Cir. 1969) as follows:

> A trial court has the inherent power to revoke a defendant's bail during the trial if necessary to insure orderly trial processes. Fernandez v. United States, 81 S. Ct. 642, 5 L. Ed. 2d 683 (1961) (Harlan, Circuit J.); Carbo v. United States, 288 F. 2d 282, 686 (9th Cir. 1961); United States v. Bentvena, 288 F. 2d 442, 443 (2d Cir. 1961). This is so even though it is recognized that a "defendant in a noncapital case has an absolute right to be enlarged on bail prior to conviction." 81 S. Ct. at 644. The necessities of judicial administration prevail, and the right to bail is not literally absolute.
>
> In Carbo v. United States, 82 S. Ct. 662, 7 L. Ed. 2d 769 (1962), Circuit Justice Douglas acknowledged that this inherent power may even extend to custody in advance of trial when the court's own processes are jeopardized by threats against a government witness. He took the view that this inherent power should be exercised, however, only in an "extreme or unusual case." 82 S. Ct. at 668.
>
> We are satisfied that courts have the inherent power to confine the defendant in order to protect future witnesses at the pretrial stage as well as during trial. Yet this power should be exercised with great care and only after a hearing which affords the defendant an ample opportunity to refute the charges that if released he might threaten or cause to be threatened a potential witness or otherwise unlawfully interfere with the criminal prosecution.

Id. at 491-92 (footnotes omitted); accord, Bitter v. United States, 389 U.S. 15, 88 S. Ct. 6, 19 L. Ed. 2d 15 (1967); United States v. Wind, 527 F. 2d 672 (6th Cir. 1975); see F. R. Crim. P. 46(b).

The opinion of the majority of the Committee is that the rationale of these federal authorities is applicable in New Jersey. The justification for revocation of release for intimidation of witnesses and the like stems from the court's inherent authority to protect its own processes and is unrelated to the traditional purpose of bail (or other release conditions), i.e., to assure the defendant's appearance. It therefore appears to the majority of the Committee that Art. I, ¶ 11 of the New Jersey Constitution should not preclude the exercise of this power in appropriate circumstances.

The Committee considered, but rejected, the idea of including a provision in draft Rule 3:4-11 which would authorize denial of release based upon a finding that the defendant posed a danger to the general community or based on the likelihood that he would commit new crimes if released. Denial of release on such bases may be permissible under the Eighth Amendment which by its terms prohibits only excessive bail. See United States v. Wind, supra; A.B.A. Standard 5.5, commentary at 66-67. However, the Committee is of the opinion that N.J. Const. Art. I, ¶11 goes much further than the Eighth Amendment in mandating that all non-capital offenses are bailable and that detention upon any basis unrelated to the likelihood of flight or the inherent power of the court to protect the trial process is prohibited thereby. See State v. Pray, 346 A. 2d 227 (Sup. Ct. Vt. 1975); A.B.A. Standard 5.5 at 68.

Paragraph (e) of the Rule authorizes the court to release the defendant, where appropriate, subject to an order placing him under restraints designed to prevent anticipated flight or threats to witnesses by the defendant even if a detention order is found to be unjustified. Paragraph (f) sets forth the procedures to be followed and the permissible dispositions upon violation of restraining orders.

L. Draft Rule 3:4-12 (Mandatory Release on Failure to Commence Trial) is a "try or release" rule whereby a defendant who has been incarcerated in New Jersey for 90 days by reason of a criminal charge, without movement of the case against him, shall be released upon conditions he is able to meet. The proposed rule specifically details how the 90-day time period shall be calculated, excludes specific periods of time and permits extensions "in exceptional circumstances." However, the rule expressly states that "general congestion of the court's calendar" does not constitute an exceptional circumstance.

The Committee recognizes that the criminal justice system does not, at present, have sufficient resources to try all defendants in jail within 90 days. The proposal, in essence, would permit the prosecutor and the courts to decide which defendants should remain in jail subject to trial within prescribed time limits and which can be released subject to trial within the periods permitted by the State and Federal Constitution. See Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); State v. Szima, 133 N.J. Super. 469 (App. Div. 1975), certif. granted, 68 N.J. 170 (1975); State v. Smith, 131 N.J. Super. 354 (App. Div. 1974), leave to appeal granted 67 N.J. 95-96 (1975); State v. Davis, 131 N.J. Super. 484 (App. Div. 1974); R. 3:25-3.

While dismissal of charges are required for the violation of the constitutional right to speedy trial, Strunk v. United States, 412 U.S. 434, 92 S. Ct. 2260, 37 L. Ed. 2d 56 (1973); State v. Szima, supra at 473; see also State v. O'Leary, 25 N.J. 104 (1957); State v. Coolack, 43 N.J. 14 (1964); State v. Masselli, 43 N.J. 1 (1964) (involving claims of the denial of State constitutional rights), the States, of course, can adopt rules more liberal than the federal constitutional requirement. "Try or release" rules have a far different impact than "try or dismiss" rules from both a constitutional and resource point of view.

The Committee's consideration of a "try or release" rule was not made in the context of "speedy trial" rights, and was made without a complete analysis of the resource problem or an evaluation of the impact the proposal would have on the number of defendants who would be released by its terms. The Committee has been advised that reports are being studied relating to additional judicial and related manpower necessary to have indictment and accusation dispositions equal filings as well as the amount of resources needed to dispose of the backlog of pending indictments and accusations (27,930 of which 16,910 are "active") and indictable complaints pending before the county grand juries (14,726 as of February 29, 1976) within various time limits.

Nevertheless, the Committee feels that the "try or release" rule should be an integral part of a pretrial release scheme, and it was approved for inclusion in this report after a consideration of standards adopted in other jurisdictions which give, in some instances, even more protection to defendants. See Ill. Code Crim. Proc. § 103-5; Criminal Rule 4, Indiana Rules of Criminal Procedure; Kansas Code of Criminal Procedure, § 22-3402; Michigan General Court Rule 789; North Carolina Criminal Procedure Act, § 15A-702; Ohio Revised Code, § 2945.73; Virginia Criminal Procedure Code, § 19.2-242. As to time limitations generally, see National Advisory Commission on Criminal Justice Standards and Goals, "Courts" § 4.1; Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform State Laws (App. Draft 1974) § 722; 18 U.S.C.A. § 3161 et seq. The Committee recognizes that other jurisdictions have adopted additional specific exception and tolling provisions, but the Committee is satisfied that the "exceptional circumstances" provisions of the proposed rule is sufficient to protect the rights of the State in the context of "try or release" rules and properly requires judicial review of each case on its own merits.

Finally, in the absence of adequate resources to adopt a "try or release" rule at the present time and with the remainder of this proposal, the Committee respectfully suggests adoption of this recommendation as soon as practical.[2]

M. Proposed Rule 3:4-13 (Hearing as to Probable Cause) is present R. 3:4-3 with minor amendments. A phrase has been added to the second sentence for the purpose of distinguishing our traditional probable cause hearing embodied in this rule from the determination of probable cause to detain required by proposed Rule 3:4-3(d).[3] In addition, the last sentence of present R. 3:4-3 has been altered to conform its terminology to the remainder of the scheme.

N. Draft Rule 3:4-14 (Proceedings in Arrest Under Uniform Fresh Pursuit Law and Extradition Proceedings) is a consolidation of present R. 3:4-4 and R. 3:26-1(d). The second paragraph of the draft rule is an amended version of R. 3:26-1(d), regarding extradition proceedings, to conform it with the holding in In re Lucas, 136 N.J. Super. 24 (Law Div.), aff'd o.b., 136 N.J. Super. 460 (App. Div. 1975). The amendment would also disallow bail where the arrested person is charged with a crime punishable by life imprisonment in the demanding state in conformance with N.J.S.A. 2A:160-24.

O. Proposed Rule 3:4-15 (Effect of Technical Insufficiency or Irregularity in the Proceedings) is the present R. 3:4-5.

P. Proposed Rules 3:26-1, -2 and -3 are present Rules 3:26-3, -6 and -7 respectively with minor language changes to conform with the terminology of the other draft rules. These rules cover release for material witnesses and forfeiture and exoneration of bail. They were not included within proposed Rule 3:4 because they involve essentially collateral proceedings and are not integral to the proposed scheme relating to defendants charged with violation of New Jersey law.

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[1] Although both A.B.A. Standard 5.7 and N.A.C. Corrections Standard 4.5 recommend the authorization of complete revocation of release as a sanction for violation of release conditions, the Committee declined to include authorization for such a sanction in draft Rule 3:4-10(b). The opinion of the Committee is that the complete denial of release would violate Article 1, paragraph 11 of the New Jersey Constitution unless such denial is effected under the circumstances and pursuant to the procedures prescribed in draft Rule 3:4-11.

[2] The vote to include this proposal in the report was 9-3. The dissenters are of the view that the time periods were too short and that insufficient facts relating to resources were before the Committee. The Committee recognized that, if need be, crimes of violence could be excluded from this rule, one member dissenting from this view, or that the time limits could be enlarged.

[3] It has been suggested by some that either the traditional probable cause hearing or the grand jury proceeding should be abolished because they are substantially duplicative. Some feel that the grand jury should be abolished (at least in complaint cases) and substituted by a more meaningful probable cause hearing, particularly because the Federal Constitution requires a probable cause finding for those in custody. See Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975). Others take the position that abolition of the traditional probable cause hearing (except to the extent required by Gerstein) would lead to the more expeditious handling of indictable cases without need of amending our State Constitutional right to indictment. The Criminal Practice Committee is now studying this subject in connection with a sub-committee report on grand juries and related matters. The inclusion of draft Rule 3:4-13 (retention of the present R. 3:4-3) is not intended as an expression of opinion by the Committee on this subject.

Report Of The Supreme Court's Committee On Municipal Courts

(Continued from page 17)

[Note: R. 7:6-6(a) was similarly amended in 1975.]

4. The Committee, with a single dissent, recommends that legislation be proposed reducing the penalties for violations of N.J.S.A. 39:4-50(a), operating a motor vehicle while under the influence of intoxicating liquor, and N.J.S.A. 39:4-50(b), operating while ability is impaired. It is recommended that revocation of the right to operate a motor vehicle on the highways of this State for a first conviction under (a) be reduced from not less than 2 years to not less than six months. A maximum period of revocation for a first conviction under (a) should be provided of up to one year. For a first conviction under (b), revocation of the right to operate a motor vehicle on the highways of this State should be reduced from not less than six months to not less than 3 months. A maximum period of revocation for a first conviction under (b) should be provided of up to 6 months.

The Committee recommends that N.J.S.A. 39:4-50.4 be amended to reduce the mandatory penalty for refusing to submit to the taking of breath samples for chemical analysis from six months' revocation to three months.'

It is further recommended that there be a period of probation for conviction under N.J.S.A. 39:4-50(a) or (b) of not less than six months nor more than two years for purposes of alcoholic rehabilitation and driver education.

For those convicted as a first offender under N.J.S.A. 39:4-50 (a) or (b), it is recommended that the judge be given the discretion to permit the issuance of work transportation licenses during the period of revocation.

The Committee unanimously recommends that legislation be adopted permitting the trial court to use its sound discretion in the sentencing of second offender (a) offenses in substitution for the present requirement of mandatory sentencing in such cases.

5. The Committee unanimously recommends that there be a municipal prosecutor who must appear in all contested matters in all municipal courts. This recommendation should be implemented either by order of the Supreme Court or by legislation, whichever is deemed appropriate.

6. The Committee recommends that plea negotiation and disposition by agreement be permitted in all municipal courts in all cases where there is a municipal prosecutor and where defendant is represented by counsel.

7. The Committee recommends that R. 7:4-2 (g) be amended to read as follows:

> Discovery is available as a matter of right as provided by R. 3:13-3 in all criminal matters triable in the municipal court and in all other cases triable in the municipal court involving consequences of magnitude to the defendant. Upon written request by the defendant, the prosecuting authority shall permit defendant to inspect and copy all relevant and discoverable items as set forth in R. 3:13-3 (a). The court may order depositions to be taken in such cases as provided in R. 3:13-3.

Comment: The Committee is of the opinion that the right to discovery should be broadened to include not only criminal actions triable in the municipal courts, but should be extended to any action involving a "consequence of magnitude" to the accused. Thus the right to discovery is made essentially co-extensive with the right to counsel.

7a. The procedure for implementation is upon written request of defendant to the prosecuting authority thereby not involving the municipal judge in any additional paper flow prior to trial. The rule change recommendation is further intended to clarify the application of the rule to matters triable in the municipal court, thereby disavowing the speculation that discovery was available prior to indictment on indictable offenses. Since depositions under R:13-2 are not considered within the scope of discovery in criminal matters but are a device for preserving testimony otherwise unavailable for trial, the recommendation retains reference to the right to depositions as previously permitted within the scope of R. 3:13-2.

8. Involuntary Commitment proceedings.

Two involuntary civil commitment proceedings are on occasion invoked which tend to involve directly or indirectly the municipal courts. Under N.J.S.A. 30:4-26.3 the police authorities may bring a person "whose behavior suggests the appearance of mental illness, who shall on inspection be deemed to be dangerous to the public" before the nearest county district court or municipal court for summary inquiry to determine whether an order for temporary hospitalization shall be issued. If no physician is available to conduct an examination the court may commit the person for examination at a mental hospital. The commitment may not exceed 15 days under this statute. Under N.J.S.A. 30:4-46.1 a person who upon an examination by a licensed physician is found to be suffering from a mental illness or psychosis caused by drugs or alcohol may be committed for a period of seven days not including Saturdays, Sundays and holidays.

Neither of these statutory procedures for commitment are within the present ambit of R. 4:74-2 governing involuntary civil commitments. The committee is of the opinion that a court rule governing procedural aspects of such commitments might serve several constructive ends. This could be implemented by way of a new rule relating to the practices in the municipal courts or by an amendment to R. 4:74-7. The committee believes that a judge ordering a commitment under N.J.S.A. 30:4-26.3 should be required to forward a copy of the order immediately to the assignment judge of the vicinage or the judge of the county assigned the responsibility of supervising the commitment procedure under R. 4:74-7. This would insure a continuity of handling in the event the hospital contemplated a later involuntary commitment under classes "A," "B" or "C," N.J.S.A. 30:4-36 to 30:4-38. Such a procedure would insure more "expertise" in the judicial supervision and may serve to prevent "piggy backing" or "revolving type" of short term commitments, which might otherwise escape effective judicial scrutiny. Similarly, the institution to which a person is committed under a seven days' physician's certificate should be required to submit a copy of the commitment promptly to the appropriate judicial authority. On some occasions this type of procedure, a seven-day single physician commitment, is initiated by municipal court judges who are called upon for assistance in a crisis.

Such a procedure should require further prompt notification to the judicial authority, preferably within five days of commitment if the institution under either type of commitment contemplates proceeding under an "A," "B" or "C" type involuntary commitment upon the expiration of the initial commitment. The Committee also recommends that an adjournment of ten days as now allowed under R. 4:74-1(c)(1) not be permitted in such cases. This approach should assist in approaching achievement of the enunciated policy of accomplishing a judicial hearing within 20 days of the date of admission and serve to curtail possible abuses. The sense of the Committee reveals a belief that the municipal court judges should prefer immediate referral of such matters to upper court judges specialized in the review of institutional commitments.

9. Self representation in serious cases.

The Committee recommends that a municipal court directive issue detailing a suggested proper technique for the acceptance of knowledgeable, non-coercive waivers of counsel. This would seem indicated by the United States Supreme Court's decision in Ferretta v. California, 45 L. Ed. 2d 562 (1975) establishing a defendant's right to self representation in criminal matters. The judges should be told that a warning must be given to defendants who refuse the assistance of court appointed counsel and opt for pro se representation in cases involving consequences of magnitude to the accused. A defendant should be advised of the potential dangers and disadvantages inherent in such a decision. The judiciary should further be advised to have all guilty pleas and counsel waivers clearly placed on the record for appellate review in such cases involving more serious consequences to the defendant. It is further recommended that this advisory bulletin be sent out in conjunction with the new waiver form being developed by the Administrative Office.

It is recommended that R. 3:27-2 be amended by adding the following language:

> In any case involving a waiver of counsel where the penalty involves a consequence of magnitude to the defendant such waiver shall be made in open court on the record and shall be accompanied by the execution of a written form prescribed by the Administrative Director of the Courts. The Court shall establish on the record that the waiver is voluntary, knowledgeable and non-coercive in all respects.

10. The Committee is concerned with the present situation where private counsel are required to represent indigent defendants without compensation. The matter is further complicated by the apparent inability of the Public Defender to furnish legal representation to any person charged with a violation of law triable in the municipal court punishable by imprisonment or other consequence of magnitude as required by the provisions of N.J.S.A. 2A:158A-5.2 (effective date, June 1, 1976), except for certain pilot programs in several counties. The Public Defender's office advises the committee that the funding necessary to fulfill this statutory duty will probably not be available in the foreseeable future because of the current state budgetary crises. Alternatives were discussed by the committee including regional public defenders for consolidated trial lists of certain offenses, compensation of private counsel which would be paid by the municipality pursuant to court rule, court assessment of fees to be paid in the future, etc. No consensus of the Committee was reached and therefore no recommendation is made, especially in view of the present economic situation. The Committee was concerned that the present obligation of the bar to provide free representation not erode the legitimate interests of the bar to be adequately compensated in those cases where an accused is indeed able to afford counsel. The Committee therefore recommends the mandatory use of income and asset affidavits for all individuals asserting indigency status in municipal courts. It is further recommended that the individual's ability to afford representation should be re-examined at the time of the final disposition of the matter, if this occurs subsequent to the initial appointment of counsel.

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Dated: March 15, 1976

MINORITY REPORT OF THE SUPREME COURT'S COMMITTEE ON MUNICIPAL COURTS

N.J.S.A. 30:4-26.3 was meant by the legislature to provide an essential means for emergency hospitalization of a mentally ill individual under crisis circumstances. Most other States have statutes that are similarly intended to deal with such emergency situations in which absolutely no physician is available to examine the individual who appears to the layman to be clearly dangerous as the result of mental illness. This New Jersey statute could be preserved for this original and very limited use if its provisions were followed by the municipal and county district courts to the fullest possible extent. Without strict compliance to the letter of all of its clauses, this emergency commitment statute has easily been perverted to serve as a cursory means of depriving an individual of liberty in a manner which clearly denies him his right to due process of law, and has been used too frequently in this manner in situations of a non-crisis nature to which the legislature clearly did not intend that it be applied.

If Rule 4:74-7 were imposed in its entirety, two strong questions would immediately arise: first, the validity of the Rule's application under the Rule-making power granted to the Court by the Constitution, and second, the actual desirability of the result, if the Rule's application were valid, for N.J.S.A. 30:4-26.3 would in effect be totally repeated by the Court, and there would be no emergency commitment statute.

There are three statutory means available for involuntary temporary hospitalization in New Jersey. N.J.S.A. 30:4-25 et seq. regarding application and proceedings for the commitment of the mentally ill were obviously intended to serve as the major statutory means for the hospitalization of an individual suffering from mental illness. In an action for either a Class B or a Class C commitment, N.J.S.A. 30:4-29 provides that "there shall be submitted the certificate in writing of two physicians," and §30:4-30 specifies the details which such certificates of mental illness must provide. Temporary confinement in either a Class B or a Class C commitment cannot exceed twenty days: by the twentieth day, if further hospitalization on a non-voluntary basis is sought, the individual is entitled to a final commitment hearing, under N.J.S.A. 30:4-41, 42, and 44.

Rule 4:74-7, which became effective September 8, 1975, was adopted by the New Jersey Supreme Court as a valid exercise of rule-making power under Article VI, §2, ¶3 of the New Jersey Constitution of 1947 which gives the Supreme Court the power to "make rules governing the administration of all courts in the State, and subject to law, the practice and procedure in all such courts." Rule 4:74-7 imposes no substantive change upon the statutes to which it is applied; but the Rule only applies to commitment procedures under N.J.S.A. 30:4-25 et seq., the major statutory means of commitment.

Rule 4:74-7 does not apply to N.J.S.A. 30:4-45.1 which provides for the temporary commitment to an institution after an examination by only one physician, when a person is "found to be suffering from a mental or nervous illness or from a psychosis caused by drugs or alcohol which renders him or her incapable of executing a voluntary application for admission." In such drug- or alcohol-related cases, commitment is for a period not exceeding seven days, "unless such person is thereafter detained under the authority of a formal commitment," again under N.J.S.A. 30:4-41, 42, and 44.

N.J.S.A. 30:4-26.3, used much more frequently than the seven-day commitment statute, is the "emergency" commitment provision, which was enacted in 1965, the same year in which 30:4-25 et seq. were amended following their enactment in 1918, and twelve years after 30:4-46.1 was enacted. 30:4-26.3 differs from the two previous temporary commitment statutes in three respects: (1) it provides a means of hospitalization without certification of mental illness by any physician, rather than by two or one physicians; (2) it allows the Court itself to apply for admission for the individual, rather than the next-of-kin or friend of the individual; and (3) it provides for a 15-day commitment, rather than one of seven- or twenty-day duration.

This "emergency" commitment statute gives the constables and police officers the authority to arrest any person "whose behavior suggests the existence of a mental illness, who shall on inspection be deemed to be dangerous to the public." Such a person must be taken immediately before the nearest county district court or municipal court, which is empowered to inquire "in a summary way" and to determine whether an order for temporary hospitalization shall be issued. The next paragraph carefully specifies the circumstances which must be satisfied in order for the Court to order temporary hospitalization under this statute, which does not first require certification of mental illness by a physician. (See ¶.3 in Statute, attached.)

It must be recognized that late at night, particularly on holidays, and particularly in areas of the State of New Jersey that are less populated than Essex County, it is possible that no physician can be found to examine an individual even after the most diligent of searches. And yet the Court may be confronted with a person whom the police have arrested for blatantly irrational destructive conduct. It is only in such a situation as this that the "emergency" commitment statute was meant to be applied. When temporary commitment is ordered under N.J.S.A. 30:4-26.3 by a Court in East Orange or South Orange, during a normal weekday or evening, it is strikingly clear that the full requirements of this statute have not been fulfilled by the Court, and as a result, the "emergency" commitment statute has been used inappropriately.

By imposing the application of Rule 4:74-7 in its entirety and thus eradicating the statute altogether, the Court would exceed the power granted to it by Article VI, §2, ¶3 of the Constitution as interpreted in Winberry v. Salisbury, 5 N.J. 240 (New Jersey 1950), where Judge Vanderbilt found that the phrase "subject to law: in this provision serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of substantive law as such. Rules of Court are ma

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MINORITY REPORT OF THE SUPREME COURT'S COMMITTEE ON MUNICIPAL COURTS

(Continued from previous page)

y experts who are familiar with he specific problems to be solved nd the various ways of solving hem."

In Burton et al v. Sills, 53 N.J. 86 (New Jersey 1968), the Court further stated this limit when it said, "We do not sit here as a super legislature, and we accept the legislative judgment as to the wisdom of the statute." Rule 4:74-7 clearly deals only with the practice and the procedure in New Jersey courts, when it is applied to the twenty-day temporary commitment statutes. It does not conflict in any way with the legislative enactments to which it is applied. But §(b) of the Rule, regarding commencement of the action for commitment, requires that the written application for commitment must have the typewritten certificates of two licensed physicians attached to it. While this is in accord with the generally used Class B and Class C commitment provisions, it would directly conflict with the "emergency" commitment statute, which allows for temporary commitment without such certificates under extreme circumstances.

And such an infringement upon the legislature is unnecessary. Rather, four requirements could be imposed by the Court under its rule-making power, which would not infringe upon the legislature, and which would provide the procedural and administrative means that would assure that the "emergency" commitment statute in fact serves the purpose for which the legislature intended it.

First, the Court should require that the court initiating the 15-day emergency commitment determine at the very outset whether the arrest by the constables or police *is* a valid arrest. The statute itself, according to its title, deals with an "arrest." ¶2 authorizes constables and police officers to "apprehend" a person "whose behavior suggests the existence of a mental illness, who shall on inspection be deemed to be **dangerous to the public**" (emphasis added). It is important to note that the statute itself does not empower the police or constables to apprehend an individual who is possibly dangerous only to himself. The phrase "dangerous to the public" further suggests, along with the use of the word "arrest" in the title, that an actual criminal offense must have been committed.

First of all, there must be a valid arrest: the individual apprehended would have to be chargeable with having committed an actual criminal offense as the result of mental illness. Some such offense would be necessary to constitute an emergency. The existence of mental illness in itself is not a criminal offense for which an individual may be arrested. There must be probable cause at the outset that an actual criminal offense has been committed, in order for the individual to be apprehended. An initial probable cause inquiry should be required. Such a requirement by Rule would not conflict with the legislative intent, which refers to "arrest" in the statute's very title.

Since the New Jersey "emergency" commitment statute was enacted, in Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wisc. 1972) (3 judge court), vacated and remanded for lack of specificity in the injunctive order, 414 U.S. 473 (1974), 379 F. Supp. 1376 (E.D. Wisc. 1972) (3 judge court) (revised injunctive order on remand), vacated and remanded for further consideration in light of Huffman v. Pursue, Ltd., (420 U.S. —) (mem.) — U.S. —, 43 U.S.L.W. 3600 (1975) it was held that the emergency commitment provisions of the State of Wisconsin were constitutionally invalid, because they

. . . permit detention of persons for periods in excess of 48 hours without a judicial hearing to determine whether or not probable cause exists to believe such persons dangerous to themselves or others, and in that they fail to require (1) that counsel be appointed sufficiently in advance of said hearing adequately to prepare a defense; (2) that persons detained and members of their families be given notice of the probable cause hearing where with reasonable diligence the families can be located prior to the hearing; and (3) that the persons subject to the proceedings have the unwaiverable right to be present and an opportunity to be heard at said probable cause hearing. 379 F. Supp. at 1379.

The Court went on to point out that the necessity for commitment had not yet been established, and remarked that even a short stay in a mental institution, with the stigmatization which accompanies such a stay, can have a long-lasting effect upon the individual.

And in In re Barnard, 455 F. 2d 1370 (D.C. Cir. 1971) the Court of Appeals held that a probable cause hearing was required within the first two days of the D.C. Code provisions for emergency hospitalization for a seven-day term. There, the Court observed that "(w)hen personal freedom is at issue, due process requires that a person's legal status be determined at the earliest possible time." Id., at 1375. In Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975) the three judge Court also found that persons may not be involuntarily detained in the absence of a preliminary probable cause hearing.

Under the New Jersey "emergency" commitment statute, if probable cause can be found to warrant the individual's arrest, the Court could then order that the individual be detained in jail until the individual has been examined by a physician. If no probable cause for arrest is found, the Court would be left with no alternative but to free the individual altogether: a temporary, 20-day commitment under the applicable major statutory provisions is a readily available alternative that could be then instituted.

Secondly, if probable cause for arrest is found, the Court should require by Rule that the Order itself provide detailed evidence that the court issuing the Order for emergency commitment has "made inquiry to determine whether a practicing physician had examined or would examine the person." Without conflicting with the legislative intent of the statute, the Court could require that a diligent search be made: it could be required that the court ordering an "emergency" commitment list on the Order itself the names and addresses of at least six doctors contacted, to no avail, and require in addition that each municipal or county court set up and maintain an active list of at least twelve physicians in the vicinity of the court who are known to be available at all times for examinations under the emergency commitment statute.

Third, the New Jersey Supreme Court could activate use of the clause in the "emergency" commitment statute which states that "(a)n order for an examination at a mental hospital may be made in the absence of a medical examination if the court finds that no physician is able or willing to conduct an examination into the patient's condition." It should be noted that in the wording of the statute itself, such an order for **examination** in a mental hospital is distinctly separate from an order for temporary hospitalization. The first sentence of the very first paragraph of the "emergency" commitment statute points this out clearly: it provides that

(t)he Board of chosen freeholders of every county in this state shall designate one or more mental hospitals, as defined in this chapter as hospitals to which a magistrate or judge of any court upon application by a police official as set forth herein may issue an order for an examination **or** for temporary hospitalization for purposes of observation, examination and treatment. (Emphasis added.)

In practice, often no such distinction is made, and an order for a temporary 15-day confinement is issued, when in fact the statute itself allows for a separate order for examination by hospital physicians. Procedural allowance for such orders of examination by mental hospital physicians would have to be worked out between the individual municipal and county courts and their adjacent hospitals, but in recognition of the fact that the statutory power to issue such an order was specifically given to these courts twelve years ago, when 30:4-26.3 was enacted.

If there is probable cause for arrest, then no civil right would be violated if the individual so charged were sent by the court to a mental hospital for an immediate medical examination, when it has unquestionably been shown that no physician is available in the area immediately adjacent to the court. The Court could be required to order such an examination when no other means of examination is available, and could be required to have the hospital physicians in turn send such certification to the court before the actual fifteen-day commitment order is issued by the court.

The fifteen-day period would, however, commence at the time at which the individual was first arrested by the police, and it would have to be required that certification of illness which the hospital physicians would provide would have to reach the Court within perhaps an outside limit of three days following the initial arrest.

Such requirements as these deal exclusively with practice and procedure, fill in administrative areas left open by the statute, and do not invade the field of substantive law. Such rules would buttress the validity and intent of the emergency commitment statute, substantiating, rather than questioning, its wisdom.

The final requirement which the Court should impose by Rule would be application of Rule 4:74-7, §C, (1), (2), and (3) to any order for temporary emergency hospitalization under N.J.S.A. 30:4-26.3, thus filling out the 15-day emergency commitment order in the same manner as the 20-day commitment orders, including the setting of a place and day for a final commitment hearing at the expiration of the fifteen days, the assignment of counsel, and the right to notice no less than ten days prior to the date set for the hearing. Such requirements, particularly that pertaining to notice, would no doubt further curtail the use of the "emergency" commitment statute to true emergencies, and might cause the municipal courts to turn instead, as the legislature intended, to the temporary 2-day hospitalization procedure set out under other statutory provisions. Such a Rule imposed by the Court would put a stop to the present highly questionable but frequently imposed practice of piling a 20-day temporary commitment upon a 15-day temporary commitment, at the expiration of the 15-day period, causing the individual to be held for up to thirty-five days without any final hearing in which his right to due process of law is preserved.

Such Rules would severely limit the use of N.J.S.A. 30:4-26.3 to the true "emergency" situations for which it was intended. Without the application of such restrictive, procedural rules as these which narrow usage down to the limited purpose for which the statute was intended by the legislature, litigation is certainly invited which might overturn the statute as it is presently used, in its entirety.

Respectfully submitted,
Robert L. Doris, Jr.

Dated: March 23, 1976

Notice To The Bar

All civil causes previously held at various locations throughout Atlantic City will now be held in the new Civil Court House on Bacharach Boulevard in Atlantic City. Criminal matters, with certain exceptions, will continue to be held at the Mays Landing facility.

Russell M. Woods
Court Administrator

REPORT OF THE SUPREME COURT'S COMMITTEE ON RELATIONS WITH THE MEDIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of New Jersey

Your Committee reviewed a number of matters, among which were the following:

1. Proposed ABA Court Procedure for Fair Trial/Free Press Judicial Restrictive Orders. The basic concepts of due process, fair trial, freedom of press and freedom of speech are the subject of much concern, on a national basis, for their somewhat conflicting relationships on the issue of Judicial Restrictive Orders.

The American Bar Association formed a committee of the bar and the judiciary, to work in consultation with representatives of the press, to resolve these concerns. The Committee attempted to recommend a proposed procedure, as a compromise position, for issuance of restrictive orders. However, mounting public controversy on this issue, in light of present litigation pending in the Federal and State courts, has persuaded the ABA Committee to postpone plenary vote on the proposed procedure until August 1976.

Your Committee shares the concerns raised in this issue and will continue to seek resolution of same through its relationship with the counterpart committee of the New Jersey Press Association.

2. Press Access to Pre-hearing Information in Disciplinary Proceedings. The Committee feels that the present policy, which limits access to the press to information in disciplinary proceedings, prior to hearing, serves several purposes. Confidentiality serves to protect from undue damage to the reputation of parties in matters in which it is found that their activities warrant only a reprimand from the Court. Further, the utility of the reprimand procedure would be sharply eroded if pre-hearing disclosure were to be permitted. Finally, the present policy provides more for the full expression, by the parties, of circumstances relating to the matter charged.

Therefore, your Committee recommends that the present policy be maintained.

3. Disclosure of Juvenile Records to the Press. The Committee discussed the concern that there is a lack of uniformity amongst the various juvenile courts in the administration of R. 5:10-7(c) in conjunction with N.J.S.A. 2A:4-65. The Committee feels that discretion on providing information to the press in individual juvenile matters is properly assigned by the rule to the Juvenile and Domestic Relations Court judges. The Committee requested that the 1976 Supreme Court Committee on Juvenile and Domestic Relations Courts take the matter under advisement and request the Juvenile and Domestic Relations Court judges to make judicious application of the rule.

4. The Publication of Information During Grand Jury Investigation Prior to Indictment. The Committee is presently considering various recommendations regarding this problem, in terms both of providing for greater security and discipline in the administration of R. 3:6-7 for all participants in Grand Jury proceedings, as well as in conjunction with our counterpart committee of the New Jersey Press Association, encouraging newspaper editors to refrain from printing information leaked to them in violation of the rule.

It was pointed out that the rule, as presently written, does not apply to witnesses appearing before the Grand Jury, and a revision eliminating the exception was discussed. However, several considerations of constitutional importance require some discussion before any recommendations will be made.

5. The complaint regarding an improper sentence to the publisher of a small newspaper has been satisfactorily disposed of and the improper sentence rescinded. The sentence had required the publisher to editorialize about benefits of gun control legislation. The Committee feels that the actions taken in having the sentence rescinded, as well as the discussion of the complaint at a recent assignment judges meeting, will prevent any recurrence.

6. The Committee has received a complaint from a juror whose name and address had been published following a well-publicized homicide action. The juror had received abusive and threatening phone calls as a result. The Committee notes that the current voluntary "Statement of Principles and Guidelines for the Reporting of Criminal Proceedings" pertains only to pre-trial and not post-trial matters such as these.

The Committee, in joint meeting with the Press Association Committee, agreed to reexamine the Statement and update same where necessary to provide for circumstances such as the above. Consideration will be given also to expanding media input to the Committee by inclusion of representatives from television and radio.

Further, the Committee has observed that there is a present need for some action on its part in further implementing the Guidelines. Various recommendations are before the Committee and will be discussed in due course.

A supplemental report may be filed with respect to the several matters pending before the Committee.

Respectfully submitted,
Bennett H. Fishler, Jr.
Adrian M. Foley, Jr.
Hon. Joseph Halpern
William L. Kirchner
James R. Lacey
William J. Liss
Hon. Ralph V. Martin
Hon. Charles A. Rizzi
Clark C. Vogel
Hon. Joseph F. Walsh
Justice Mark A. Sullivan, Chairman

Dated: March 15, 1976

Notice To The Bar

Re: Bail Applications — Essex County

Please take notice that ordinary bail applications are being handled by the Honorable William F. Harth, room #918, Essex County Courts Building, (201) 961-7229, and homicide bails will be heard by the Honorable Nicholas Scalera, Criminal Assignment Judge, room #608, (201) 961-7270.

Any attorney desiring to make an application for bail must first alert the bail program in room 123, Essex County Courts Building, (201) 961-7774, alert the Prosecutor's Office, and then call the judge assigned for a time to appear and be heard.

Further details may be secured by calling the appropriate judge.

Nicholas Scalera, J.S.C.
Criminal Assignment Judge

Report Of The Supreme Court's Committee On Civil Practice

(Continued from page 17)

initial proceedings with respect to overreaching complaints in accordance with R. 1:20A-4. The fee dispute committee may in its discretion decline to arbitrate fee disputes when the fee in question is allowed or allowable by a court or agency pursuant to any applicable rule or statute. The committee may further decline to arbitrate disputes where persons who are not parties to the arbitration have an interest in the matter which would be substantially affected by the arbitration or where the primary issues in the dispute raise substantial legal questions in addition to the basic fee dispute matter.

1:20A-3. Arbitration

(a) Submission. A fee dispute shall be arbitrated only upon a client's written request or upon his written consent to his attorney's request. The request or consent shall include a stipulation by the client that if an action for payment of the fee is then pending, it shall be stayed pending a determination by the committee and the amount of the fee as so determined shall be entered as a judgment against him, without costs, in the action. The stipulation shall further provide that if no such action is then pending, the attorney may, by summary action brought pursuant to R. 4:67, seek entry of judgment in the amount of the fee as determined by the committee, without costs. If the client refuses to so stipulate, the committee shall take no further action except proceedings pursuant to R. 1:20A-4.

(b) Procedure. All arbitration proceedings shall be conducted in accordance with the provisions of R. 1:20-4(f) (ethics committee hearings), except that proceedings may be sound recorded. The committee shall notify the parties, in writing, of the time and place of hearing and shall have the power, on a party's request, to compel the attendance of witnesses and the production of documents by the issuance of a subpoena. The committee's written determination shall be served upon the parties by ordinary mail within 30 days following the conclusion of the hearing.

1:20A-4. Unethical Conduct; Referral to and by Ethics Committee

Whether or not a client requests or consents to binding arbitration, a fee dispute committee shall preliminarily consider any complaint made against an attorney that a fee charged is so excessive as to constitute a violation of DR 2-106 (D). All preliminary proceedings on a complaint of overreaching shall be taken in accordance with R. 1:20-4(a), (b), and (c). If the committee finds no indication of overreaching, it shall dismiss the complaint and close its file on the ethical issue and the secretary shall promptly and in writing so notify the attorney, the client, and the secretary of the appropriate ethics committee. If the committee finds an indication of overreaching, it shall, on notice to the attorney and client, refer the matter to the appropriate ethics committee for further proceedings by it in accordance with R. 1:20. An ethics committee receiving a complaint of overreaching against an attorney shall refer the matter, on notice to the attorney and client, to the appropriate fee dispute committee and shall take no further proceedings with respect thereto unless it is referred back to it by the fee dispute committee.

1:20A-5. Records

Each fee dispute committee shall maintain such records and file such reports as shall be required by the Administrative Director of the Courts.

DR 2-106. Fees for Legal Services

(A) . . . (no change)

(B) [At the request of a client, a lawyer shall submit a fee dispute to the local ethics committee for resolution. If a legal action is pending for payment of the fee, the client shall request arbitration of the fee dispute within 60 days after service of process or be deemed to have waived such right under this rule. In the event that a timely request for arbitration is made, the attorney shall submit to arbitration of the fee dispute, provided that the client stipulates in the pending legal action that (1) the legal action be held in abeyance pending a determination by the ethics committee and that (2) the amount of the fee, as determined by the ethics committee, be entered as a judgment without costs by the clerk of the court where the legal action is pending.] **At the request of either the client or the lawyer, a fee dispute between them shall be submitted to the appropriate fee dispute committee for resolution pursuant to R. 1:20A.**

(C) . . . (no change)

(D) . . . (no change)

2. Amendment to R. 2:5-1. Notice of Appeal; Order in Lieu Thereof

The Committee unanimously recommends that R. 2:5-1(f) Contents of Notice of Appeal; Certification be amended to the effect that in all actions the notice of appeal shall also certify service of a copy thereof on the trial judge, pursuant to paragraph (b) of this rule. The current R. 2:5-1(b) Notice to the Trial Judge, provides that an appellant shall within three days of filing his notice of appeal mail a copy thereof to the trial judge. The philosophy behind this rule, among other things, is to give a trial judge, who tries a case without a jury, the opportunity to file an amplification of his opinion when advised by appellant that an appeal has been taken from his judgment. It was brought to the Committee's attention by an appellate judge that in appellate litigation, particularly where parties appear pro se, the the appellate court cannot be certain that the trial judge has been notified and has had the opportunity to amplify his decision. This creates an injustice to all parties involved since the appellate court does not have the benefit of the trial judge's views on appeal.

Accordingly, the Committee unanimously recommends the following amendment to R. 2:5-1:

RULE 2:5. HOW TO APPEAL

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

(a) . . . (no change)

(b) . . . (no change)

(c) . . . (no change)

(d) . . . (no change)

(e) . . . (no change)

(f) Contents of Notice of Appeal; Certification. In civil actions the notice of appeal shall set forth the name of the party taking the appeal and his address or the address of his attorney, if he is represented, 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 or agency from which and to which the appeal is taken. In criminal, quasi-criminal and juvenile delinquency actions the notice of appeal shall set forth the name of the appellant and his address or the address of his attorney, if he is represented, 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. **In all actions the notice of appeal shall also certify service of a copy thereof on the trial judge pursuant to paragraph (b) of this rule. In all actions** [W]where a verbatim record of the proceedings was taken, the notice of appeal shall also contain the attorney's certification that he has complied with R. 2:5-3(a) (request for transcript) and R. 2:5-3(d) (deposit for transcript), specifying from whom ordered, the date ordered, and the fact of deposit, affixing a copy of the actual request for the transcript to the notice of appeal. Alternatively, the attorney shall certify that he has filed and served a motion for abbreviation of transcript pursuant to R. 2:5-3(c).

(g) . . . (no change)

(h) . . . (no change)

3. Amendment to R. 4:4-2. Summons: Form

It was brought to the Committee's attention that the recent amendment to R. 4:4-2, effective April 1, 1975, has created an area of confusion and ambiguity in the rule. The rule prior to the April 1, 1975 amendment provided that the summons shall state the time within which the defendant is required to serve his answer and "shall notify the defendant that if he fails to do so, judgment by default may be rendered against him for the relief demanded in the complaint." The 1975 amendment to this rule deleted the words "do so," and substituted in their place "answer or appear in accordance with R. 4:4-6." As a result of this change, R. 4:4-2 currently reads:

The summons shall be in the name of the State, signed in the name of the clerk and directed to the defendant. It shall contain the name of the court and the plaintiff and the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve his answer (or, in matrimonial actions, his appearance or acknowledgment of service) upon the plaintiff or his attorney, and shall notify the defendant that if he fails to **answer or appear in accordance with R. 4:4-6**, judgment by default may be rendered against him for the relief demanded in the complaint. It shall also inform the defendant that he shall file his answer (or in matrimonial actions, his appearance or acknowledgment of service and proof of service thereof with the clerk of the court in accordance with the rules of civil practice and procedure and, in Superior Court actions, that such filing be in duplicate. [Emphasis supplied.]

The direct implication of this amendment is that an appearance may be substituted for an answer in all civil matters. The Committee does not believe that this was the intent of the amendment. Aside from the limited exceptions contained in R. 4:79-3 (Written Appearance in Matrimonial Matters), certain emergent petitions presented to a judge (e.g., protective custody of an abused child, etc.), and certain District Court matters, an appearance is not an acceptable substitute for an answer. Accordingly, the Committee recommends the following amendment to R. 4:4-2:

4:4-2. Summons: Form

The summons shall be in the name of the State, signed in the name of the clerk and directed to the defendant. It shall contain the name of the court and the plaintiff and the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to serve his answer (or, in matrimonial actions, his [appearance or acknowledgment of service] **written appearance in accordance with R. 4:79-3**) upon the plaintiff or his attorney, and shall notify the defendant that if he fails to answer [or appear in accordance with R. 4:4-6,] (or, **in matrimonial actions, fails to file a written appearance in accordance with R. 4:79-3**) judgment by default may be rendered against him for the relief demanded in the complaint. It shall also inform the defendant that he shall file his answer (or in matrimonial actions, [his appearance or acknowledgment of service] **his written appearance**) and proof of service thereof with the clerk of the court in accordance with the rules of civil practice and procedure and, in Superior Court actions, that such filing be in duplicate.

4. Amendment to R. 4:17-4. Form, Service and Time of Answers

The recent case of Seiden v. Allen, 135 N.J. Super. 253 (Ch. Div. 1975), was brought to the Committee's attention. In that case the Chancery Court directed itself to two issues upon a discovery motion: (1) whether a party may answer a written interrogatory by a general reference to a transcript of his deposition, and (2) whether the certification of the answers to interrogatories may be on information and belief.

With respect to the first issue, the court held that the party answering an interrogatory must set forth "a precise factual statement" and cannot, by referring to a deposition transcript, "cast upon his adversary the impossible burden of ferreting out of a deposition transcript that which the answerer intends as his answer." Seiden v. Allen, supra, at page 256. With respect to the second issue, the court held that "R. 4:17-4(a) requires interrogatories to be answered 'under oath.' While the cited rule does not define the form of oath to be supplied, R. 1:4-4(b) inferentially mandates that any oath required by the rules of court must affirm the truth of the answers supplied on the basis of personal knowledge, and not on the basis of hearsay." Seiden v. Allen, supra, at page 256-7.

It is the opinion of this Committee that this decision may unduly curtail the present broad purpose which interrogatories serve. Through the use of interrogatories, one party may inquire of another party about all the contentions and relevant details of the other party's case, not just the information that happens to be within the personal knowledge of the answering party. In all cases there will usually be information a party will advance at trial that is not within his personal knowledge, such as medical data in a personal injury case. If a party may answer interrogatories on information and belief, he can and should provide this information. If he must give information in his answers solely on personal knowledge, he could not set forth this information.

The Seiden v. Allen decision has created a situation where a party served with interrogatories will be precluded from furnishing information that is not within his personal knowledge, thus defeating one of the most important objectives of the interrogatory rule. This decision will preclude from pretrial discovery much valid information necessary to the proper preparation of a case.

In order to overcome this deficiency, the Committee unanimously recommends that R. 4:17-4 (a) be amended as follows:

4:17-4. Form, Service and Time of Answers

(a) Form of Answers; By Whom Answered. Interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if a public or private corporation, a partnership or association, or governmental agency, by an officer or agent who shall furnish all information available to the party [.] , **his agents, employees, and attorneys, unless such information is privileged. The person answering the interrogatories shall designate which of such information is not within his personal knowledge and as to that information shall state the name and address of every person from whom it was received, or, if the source of the information is documentary, a full description, including the location, thereof.** Each question shall be answered separately, fully and responsively in the space following the question or if insufficient, on additional pages or retyped pages repeating each interrogatory in full followed by the answer, in such manner that the final document shall have each interrogatory immediately succeeded by the separate answer. Except as otherwise provided by paragraph (d) of this rule, if in any interrogatory a copy of a paper is requested, the copy shall be annexed to the answer. If the copy is a report of an expert witness or a treating physician, it shall be an exact copy of the entire report or reports rendered by him, and the answering party shall certify that the existence of other reports of that expert, either written or oral, are unknown to him and if such become later known or available, he shall serve them promptly on the propounding party, but in no case later than the time provided by R. 4:17-7.

(b) . . . (no change)

(c) . . . (no change)

(d) . . . (no change)

5. Amendment to R. 4:21-2. Panel of Doctors, Former Judges and Lawyers

The Committee unanimously recommends an amendment to R. 4:21-2 to provide that all former judges of the New Jersey judiciary, excluding municipal judges, be eligible to serve as chairmen of a medical malpractice panel. The present R. 4:21-2 provides for the appointment of "former justices of the Supreme Court and former judges of the Superior Court or county court designated by the Supreme Court." Due to the recent influx of medical malpractice cases, the activity under this rule has increased. Additionally, with the new statutory amendment permitting recall of judges over 70, the roster of eligible names has diminished. The Committee therefore deems that an amendment to this rule to permit the inclusion of retired Juvenile and District Court judges to serve as chairmen would be appropriate. The primary function of a chairman of a medical malpractice subpanel is to moderate and rule on admissions of evidence. Under R. 4:21-4 the chairman only participates in the vote in the case of a tie. It was therefore felt that the inclusion of all judges, excepting municipal judges, for eligibility as chairmen of the subpanels would aid the expeditious and equitable administration of this program without impairing fair adjudication thereof.

Accordingly, the Committee recommends that R. 4:21-2 be amended as follows:

4:21-2. Panel of Doctors, Former Judges and Lawyers

For purposes of R. 4:21, the Administrative Director of the Courts shall maintain **the following panels:** (1) a panel of doctors designated by the Medical Society of New Jersey [and] ; (2) a panel of attorneys **designated by the Supreme Court; and (3) a panel of** former justices [of the Supreme Court] and former judges of [the Superior Court or county court] **all the courts of this State, except the municipal courts, also designated by the Supreme Court.**

6. 4:23-5(a) Failure to Serve Answers to Interrogatories

The Committee recommends an amendment to R. 4:23-5(a) which would limit the time within which the party can make an ex parte application for relief thereunder to 90 days from the date on which said answers became due. This matter was brought to the Committee's attention by an assignment judge, who indicated that an increasing number of ex parte applications for relief under the rule are being submitted many months after the date on which the interrogatories were due.

R. 4:23-5(a) was adopted to alleviate the problems of calendar congestion, postponed trials, and case delays by providing sanctions against those parties causing such delays through their tardiness or lack of cooperation in discovery proceedings. It is the opinion of this Committee that this rule would be better served by also providing a time limitation within which such applications may be brought. While the rule now serves to exp

(Continued on next page)

Report Of The Supreme Court's Committee On Civil Practice

(Continued from previous page)

the discovery by insuring a more prompt response to propounded interrogatories, it does not remedy the situation where excessive delays are caused by the party who originally propounded the questions. If the party who propounded the interrogatories is permitted to delay indefinitely his application for dismissal or suppression pursuant to the present rule, the court must then face the potential problem of a postponed or inadequate pretrial and the subsequent delay in the final disposition of the matter.

Therefore, the Committee by majority vote recommends that R. 4:23-5(a) be amended as follows:

4:23-5. Failure to Serve Answers to Interrogatories

(a) Dismissal or Suppression. If timely answers to interrogatories are not served and no formal motion for an extension has been made pursuant to R. 4:17-4(b), the complaint, counterclaim or answer of the delinquent party shall be dismissed or stricken by the court upon the filing by the party entitled to the answers of an affidavit stating such failure [.] **within 90 days from the date on which said answers became due. Thereafter such relief may be granted only by motion.** The affidavit shall have annexed thereto a form of order of dismissal or suppression. A copy of all such orders with affidavits annexed shall be served upon the delinquent party within 7 days after the date thereof. On formal motion made by the delinquent party within 30 days after service upon him of the order, the court may vacate it, provided fully responsive answers to the propounded interrogatories are presented and the delinquent party pays costs in the amount of $50.00 to the clerk of the county of venue.

(b) Failure to Furnish Expert's Report . . . (No change)

7. Amendment to R. 4:64-3. Surplus Moneys

The Committee recommends that this rule be amended to clarify the fact that all defendants must be noticed in a surplus moneys proceeding, even though in the underlying foreclosure action these defendants may have defaulted. A common mistake made by persons presenting a surplus moneys petition is to notify only those defendants who answered or who appeared in the action. However, failure to answer or appear in a foreclosure action does not bar the defaulting defendant from coming in on a surplus moneys proceeding which is a proceeding independent from the foreclosure itself. This amendment simply clarifies the obligation to serve all named defendants.

The proposed amendment reads as follows:

4:64-3. Surplus Moneys

Petitions for surplus moneys in foreclosure actions may be presented at any time after the sale and may be heard by the court on motion and notice to all defendants whose claims are not directed in the execution to be paid out of the proceeds of sale [.] **including defaulting defendants.** If any order is made for the payment of such surplus before the delivery of the deed, the sheriff or other officer making the sale shall accept the receipt or order of the person to whom such surplus, or any part of it, is ordered to be paid, as payment to that extent of the purchase money, or he may pay the same to such person.

8. Amendment to R. 4:74-7. Civil Commitment

In its last year's report, this Committee recommended wide-sweeping modifications to R. 4:74-7. These modifications followed substantively the directive of Chief Justice Hughes, issued November 12, 1974, in which the Court significantly broadened and revised the procedural and substantive due process rights of citizens who face involuntary civil commitment to mental hospitals. The rule as presently adopted also follows the Court guidelines in In re Geraghty, 68 N.J. 209 (1975). During the past several months since the implementation of the 1975 amendments, this Committee has been made aware of several procedural and substantive inadequacies in the present rule. Comments and criticisms on the present rule were brought to the Committee's attention by several judges, attorneys, and psychiatrists who have experienced various difficulties in the administration and implementation of the present rules. Consequently, this Committee recommends further amendment to the rule in order to correct these deficiencies.

It was brought to the Committee's attention that the definition of "psychiatrist" in R. 4:74-7(a) is unduly and unnecessarily restrictive in that the present rule provides that "The term 'psychiatrist' used in these rules means a licensed physician of the State of New Jersey . . ." The intent of the Committee in placing this restriction for psychiatrists being licensed within New Jersey was to insure that the trial judge would have the opinion of a well-qualified expert before ordering or continuing any involuntary commitment. The Committee, perhaps evidencing a parochial attitude, felt confident that the licensing standards of the New Jersey Medical Board would be satisfactory for this purpose. Additionally, the Committee reasoned that a psychiatrist licensed in New Jersey would normally practice within the State and consequently be subject to subpoena if necessary. Further research into the matter has revealed the fact that the National Board of Medical Examiners has adopted a multi-state medical licensing examination procedure. This examination is designed for usage not only by American medical schools, but also for students of foreign medical schools. This multi-state examination procedure was adopted by the New Jersey State Board of Medical Examiners several years ago. Consequently, a doctor licensed in any one of the United States can obtain a New Jersey license upon submission of proper documentation to the New Jersey Board of Medical Examiners. With this assurance of the uniform quality of a physician or psychiatrist licensed by a sister-state, this Committee recommends amendment to R. 4:74-7(a), (b), and (e) to permit the acceptance of medical certificates and the oral testimony by physicians and psychiatrists licensed within any one of the United States. Appropriate rule amendments are delineated herein.

Several psychiatrists and hospital administrators have expressed difficulty in complying with the requirement of subsection (b) of this rule, which presently states:

> An action for commitment shall be commenced by the filing of a written application, signed by the person seeking the commitment, to which shall be attached the typewritten certificates of two licensed physicians . . . .

It has been brought to the Committee's attention that the requirement that the doctor's certificate be typewritten is unduly burdensome, due to the time constraints in which the application for temporary commitment must be brought before the court. The requirement of "typewritten certificates" was mandated to assure that the court would have before it a legible diagnosis upon which to base the order of temporary commitment. Consequently, it is recommended that subparagraph (b) of this rule be amended to permit the acceptance of "legibly hand-printed certificates" in lieu of typewritten certificates. An appropriate rule amendment to effectuate this change is delineated herein.

Under the present rule, the term "psychiatrist" is defined as a physician "who shall be either certified or eligible for certification by the American Board of Neurology and Psychiatry" (see R. 4:74-7(a) as implemented in (e) and (f)). This Committee has considered the advisability of diluting the standard to permit testimony by physicians with lesser psychiatric credentials or by physicians with no formal psychiatric training at all. It is the opinion of this Committee that in order for a trial court to reach a reasoned conclusion that a citizen must be deprived of his personal liberty through institutionalization, it must have before it the best possible expert testimony. Consequently, it was unanimously agreed that the current standard for oral psychiatric testimony at the final hearing, mandated by subsection (e), should not be modified.

The constitutionality of several aspects of the present New Jersey Civil Commitment Rule was recently challenged before a federal district three-judge court. On April 15, 1976, our present rule was upheld in a per curiam decision. See Coll v. Hyland, U.S. District Court, 3rd Circuit, Civil Action #1525-73. In that case, the adequacy of notice to the patient under R. 4:74-7(c)(3) was attacked. While our present rule provides for personal service of notice of the final hearing upon the patient (R. 4:74-7(c)(3)) and permits discovery of "all records relating to the patient's mental condition" by patient's counsel (R. 4:74-7(d)), the plaintiff in Coll argued that effective notice upon the patient should include the service of a copy of the application and statements of the certifying physicians. The federal court rejected this proposition stating, "While it might be preferable that the application and certifications be served upon the patient also,[10] we conclude that availability of this data to counsel saves the procedure from constitutional deficiency." (Coll v. Hyland, supra, slip sheet opinion at p. 11.) Although the federal court's conclusion supports our present procedure, footnote 10 supporting this conclusion is significant. This footnote states, "In those instances in which the certifying physicians felt that disclosure of the contents of their reports would be harmful to the patient, an appropriate statement could be made. The court after consultation with patient's counsel and if satisfied that good cause exists, might then order that the reports not be served upon the patient but only upon the other persons specified in the rule." (Coll v. Hyland, supra, slip sheet opinion at p. 11.) This Committee, having considered the reasoning of the federal court, recommends that R. 4:74-7(c)(3) be amended to provide that notice upon the patient shall include a copy of the application and the two physicians' certifications unless either physician states within the certificate that the patient's mental condition would be adversely affected by his receipt thereof. A rule amendment reflecting this change is delineated herein.

Present R. 4:74-7(f) provides for court review of orders for commitment within six months and twelve months of the initial final commitment and annually thereafter. It was brought to the Committee's attention by several judges, attorneys, and psychiatrists who have been actively involved in this program that the present time schedule for reviews provides neither the best safeguard of the patient's rights nor the most effective utilization of the court's resources. Psychiatric opinion indicates that remission of a psychotic state is most probable within the first year of commitment, and more particularly within the first three months. Consequently, the Committee recommends that subsection (f) of this rule be amended to provide for review within three months, six months and twelve months of the initial final commitment. After further consultation with psychiatrists practicing within both the private and public sector, it was also concluded that plenary reviews for those patients suffering from either severe mental retardation or severe irreversible organic brain syndrome must reach a point of diminishing returns. Consequently, the Committee recommends further amendment to subsection (f) to the effect that if a patient has been diagnosed as suffering from either of the above mental deficiencies, all reviews after the expiration of two years from the date of initial commitment may be summary. However, the summary review will be predicated upon a physical examination of the patient conducted within three months of the review. An appropriate rule amendment is delineated herein.

The Committee considered intensively the adequacy of our present standard for the commitment of minors. This re-evaluation of subsection (j) resulted from the recurring difficulties experienced by judges and psychiatrists in attempting to apply the adult standard for commitment to juveniles and in reconciling the present inability under our rules for a mature adolescent to voluntarily commit himself. Having considered the opinions and advice of judges and psychiatrists participating in this program, the Committee recommends amendment to subsections (b) and (j) of the present rule. These amendments would permit the institutionalization of a minor if the court finds, based upon adequate psychiatric testimony, that the minor is in need of intensive psychiatric therapy which cannot practically or feasibly be rendered in the home, community, or on any outpatient basis. The Committee also recommends that a mature adolescent, 14 years of age or older, be permitted to voluntarily commit himself if the court finds that the minor's request is in fact voluntary. In order to permit the evaluation or diagnosis of a minor's mental condition, the Committee further recommends that subsection (j) be amended to provide for the admission of a minor by his parent, parents, or other person in loco parentis for said diagnostic evaluation without the initiation of court proceedings for a period not to exceed seven days. Appropriate rule amendments are delineated herein.

4:74-7. Civil Commitment

(a) Definitions. The definitions contained in N.J.S.A. 30:4-23 apply to this rule. The classes "A," "B," and "C" referred to in this rule are those defined by N.J.S.A. 30:4-36 to 30:4-38 inclusive. The term "patient" used in these rules means the person whose commitment is sought pursuant to said statutes. The term "psychiatrist" used in these rules means a [licensed] physician **licensed in any one of the United States** [of the State of New Jersey], who shall be either certified or eligible for certification by the American Board of Neurology and Psychiatry.

(b) Commencement of Action. An action for commitment shall be commenced by the filing of a written application, signed by the person seeking the commitment, to which shall be attached the typewritten **or legibly hand printed** certificates of two [licensed] physicians **licensed in any one of the United States** [of the State of New Jersey]. **If the patient is an adult,** [T]the certificates shall state with particularity the facts upon which the physician relies in concluding that the patient if not committed would be a probable danger to himself or the community. **If the patient is a minor, the certificate may state, alternatively, the facts upon which the physician relies in concluding that the patient is in need of intensive psychiatric therapy which cannot practically or feasibly be rendered in the home or in the community or on any outpatient basis.** The form of application shall be prescribed by the Department of Institutions and Agencies subject to the approval of the Administrative Director of the Courts.

(c) Temporary Commitment. A temporary commitment may be ordered based on the application provided for in paragraph (b) of this rule. The order of temporary commitment shall make the following provisions:

1. A place and day certain shall be set for the commitment hearing, which shall be in Class "A" cases not more than 20 days from the filing of the application, in Class "B" cases not more than 20 days from the date of the temporary order of commitment, and in Class "C" cases not more than 20 days from the date of admission of the patient into the institution. The date shall not be subject to adjournment except that in exceptional circumstances and for good cause shown in open court and on the record the hearing may be adjourned for a period of not more than 10 days.

2. If the patient is unrepresented, the temporary commitment order shall assign counsel to represent him. If the patient is a minor, a guardian ad litem shall be appointed **to represent him who shall be a person other than the applicant for the commitment and** who shall be an attorney. If the court, for good cause shown, appoints a guardian ad litem who is not an attorney, counsel for the guardian ad litem shall also be appointed. **The guardian ad litem shall continue to represent the minor in respect of all matters arising under this rule until the minor is either released or reaches his majority and no guardian ad litem appointed pursuant to this rule shall be relieved without court order.** Assigned counsel and guardian ad litem fees shall be fixed by the court after hearing and paid pursuant to paragraph (h) of this rule.

3. The persons to be notified of the time and place of hearing, the mode of service of the notice, and the time within which notice must be served shall be specified. In no case, however, shall notice be served less than 10 days prior to the date of the hearing, nor shall any mode of service of the notice on the patient be permitted other than personal service. In addition to the patient and his counsel or guardian ad litem, notice shall also be given to the applicant, the nearest relatives of the patient, the county adjuster, and where the patient is confined to an institution, the superintendent of the institution. Notice may be further ordered to be served on any other person specified by the court. **The form of notice served upon the patient and his counsel or guardian ad litem shall include a copy of the application and certificates except that if either physician has stated in the certificate that the patient's mental condition would be adversely affected by his receipt thereof, the application and certificates shall be served only upon the patient's attorney or guardian ad litem.**

(d) Discovery. . . . (no change)

(e) Hearing. No permanent commitment order shall be entered except upon hearing conducted in accordance with provisions of these rules. The application for commitment shall be supported by the oral testimony of at least one [licensed] psychiatrist **licensed in any one of the United States** [of the State of New Jersey who shall have conducted at least one examination of the patient subsequent to the date of the temporary order. The patient shall be required to appear at the hearing, but may be excused from the courtroom during all or any portion of the testimony upon application for good cause shown. Good cause shall include testimony by the psychiatrist that the mental condition of the patient would be adversely affected by the patient hearing his candid and complete testimony. The patient shall have the right to testify in his own behalf but need not. The hearing shall be held in camera unless good cause to the contrary is shown. The applicant for the commitment may appear either by counsel retained by him or by the county adjuster. In no case shall the patient appear pro se.

(f) Final Judgment of Commitment, Review. [If t]The court **shall enter a judgment of commit-**

(Continued on page 28, col. 1)

Report Of The Supreme Court's Committee On Civil Practice

(Continued from page 27)

ment to an appropriate institution if it finds from the evidence presented at the hearing that the institutionalization of the patient is required by reason of his being a danger to himself or the community if he is not so confined and treated [, it shall enter a judgment of commitment to an appropriate institution.] **or, alternatively, if the patient is a minor and the court finds that he is in need of intensive psychiatric therapy which cannot practically or feasibly be rendered in the home or in the community or on any out-patient basis. If the patient is an adult,** [T]the judgment shall provide for review of the commitment no later than (1) [six] three months from the date of judgment, and (2) [or] on or before [one year] six months from the date of judgment, and (3) [annually thereafter, if the patient is not sooner discharged.] **on or before one year from the date of the judgment, and (4) at least annually thereafter, if the patient is not sooner discharged. If the patient is a minor, the commitment shall be reviewed every three months from the date of its entry until the minor is discharged or reaches his majority.** All reviews shall be conducted in the manner required by paragraph (e) of this rule [.] **except that if the patient has been diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome, all reviews after the expiration of two years from the date of judgment may be summary, provided all parties in interest are notified of the review date and provided further that the court and all interested parties are furnished with the report of a physical examination of the patient conducted no less than three months prior thereto.**

(g) Judgment of Release. . . . (no change)

(h) Legal Settlement. . . . (no change)

(i) Filing. . . . (no change)

(j) [Commitments of Minors] **Institutionalization of Minors.** [No minor shall be committed except temporarily to a mental institution for treatment and care of an alleged mental condition on the application of his parent or parents or other person in loco parentis except on court order after hearing pursuant to paragraph (e) hereof. A guardian ad litem who shall be a person other than the applicant for the commitment, shall be appointed by the court to represent the interests of the minor at such hearing.] **A minor shall be institutionalized for the treatment of mental illness only upon court order entered in accordance with the procedures prescribed by paragraphs (b) through (g), inclusive, of this rule except that (1) Irrespective of whether or not he meets the standard of involuntary commitment stated by this rule, any minor 14 years of age or over may request his admission to an institution for psychiatric treatment provided the court on a finding that the minor's request is voluntary, enters an order approving the admission. If an order approving a voluntary admission of a minor is entered, the minor may discharge himself from the institution in the same manner as an adult who has voluntarily admitted himself. An order approving a voluntary admission shall be reviewable as provided by paragraph (f) of this rule, and (2) This rule shall not be construed to require any court procedure or approval for the admission of a minor by his parent, parents, or other person in loco parentis to any institution for the evaluation or diagnosis of a mental condition provided the admission does not exceed seven days. If further hospitalization is then required, the applicant shall proceed in accordance with paragraph (e) of this rule. If an application for commitment is made during such admission, the final hearing shall be held within 20 days from such admission, adjournable only in accordance with subparagraph (c)(1) of this rule.**

The representative of the Public Advocate voted against the above proposed amendments for the following reasons:

The Public Advocate is opposed to the adoption of any commitment standard for children which differs from the standard that presently governs the involuntary commitment of both adults and children, i.e., dangerousness to self or others. This opposition is based upon the following considerations:

(a) There has been no documentation of any experience throughout the state as to the commitment of children under the present "dangerousness" standard. There is no record which demonstrates either that the current standard is inappropriate or that the proposed standard is desirable from the standpoint of the community. In the absence of such documentation, it is both premature and inappropriate to impose upon children "the massive, indefinite curtailment of personal liberty involved in involuntary commitment for [a] reason less compelling than protection of society against a substantial threat of conduct by the defendant dangerous to himself or others." State v. Krol, 68 N.J. 236, 249, n. 3 (1975). In addition, the formalization of a new commitment standard for minors is not only premature but it might, as well, inhibit that "judicial flexibility and imagination," Krol, at 261, from which might evolve a comprehensive practice regarding the hospitalization of juveniles.

(b) The current "dangerousness" standard focuses the commitment inquiry on conduct in which society has a demonstrable interest. Insofar as the proposed standard allows a court to confine a non-dangerous child in a mental institution when it feels that he or she "is in need of intensive psychiatric therapy," it may be unconstitutionally vague and at best provides ambiguous guidelines for adjudication. The fact that the proposed standard requires the testimony of a psychiatrist prior to commitment does not solve the problem of ambiguity. Indeed, the psychiatric literature and legal commentary are replete with references and studies which demonstrate the unreliability of psychiatric decisions and the psychiatric tendency toward overdiagnosis on the question of dangerousness.

(c) There is no compelling state interest which would justify disparate commitment standards for adults and children. Moreover, such a differentiation of the status of minors suggests that a minor's interest in incarceration is somehow less worthy of protection than an adult's interest. See, generally, In re Gault, 387 U.S. 1 (1967); Bartley v. Kremens, 402 F. Supp. 1039, (E.D. Pa. 1975), prob. juris. noted — U.S. — (1976).

(d) If the new rule is to be adopted, however, at a minimum, it is believed the following modifications on the draft rule should be made: The new form of certification, while demanding an assertion of "need of intensive psychiatric therapy," should demand certification of mental illness, see, e.g., N.J.S.A. 30:4-44 and N.J.S.A. 30:4-46; the fact that the need for psychiatric therapy is ongoing, and its availability at the institution to which the juvenile may be committed. All of these requirements should be made part of the draft rule.

(e) Further, while the Department specifically approves the rule herein to allow supervised voluntary admissions of minors in an appropriate case, the Department would have preferred the elimination of 14 years as a cut-off point beyond which a minor cannot be considered for voluntary admission. In this experimental area the Court would be better advised to permit the trial courts the capacity to deal with the emotionally mature 13-year-old who appropriately perceives a need of psychiatric in-patient treatment.

With reference to subsection (d), the Public Advocate recommends that the present provision providing for appointment of an independent psychiatric examination of the patient within the court's discretion be amended as follows:

The court shall direct the appointment of an independent psychiatrist upon the motion of the patient's attorney.

The Public Advocate objects to the portion of subsection (e) which provides that the applicant for commitment may appear either by counsel retained by him or by the county adjuster. The rule, as written, fosters a potential conflict of interest by suggesting that county counsel will represent the applicant for commitment as well as the county. The rule should be changed to make clear that the applicant may be a witness but not a party.

The proposed amendment to subsection (f) provides that certain patients ("diagnosed as suffering from either severe mental retardation or severe irreversible organic brain syndrome") may be excluded from full periodic hearing and experience a continuation of confinement after a summary review. While the Department recognizes the need to conserve judicial time, the proposed change raises several problems. It has not, for example, been established that plenary reviews of these severely impaired individuals have proven uniquely burdensome to the courts. Further, it might well be that such severely impaired individuals are precisely those most in need of judicial assistance since the chronic nature of their illness can lead to a lowered expectation of success on the part of the hospital and a consequent jeopardizing of these patients' interest in treatment. While it is understood that the chief focus of periodic review is on the issue of confinement, nevertheless, issues of treatment are frequently intimately related to that issue. See In re D.D., 118 N.J. Super. 1 (App. Div., 1972); see generally, Bazelon, "Implementing the Right to Treatment," 36 U. Chi. L. Rev. 742 (1969). Further, apart from the due process issues respecting the fairness of summary disposition, the action of the committee raises both equal protection problems and overriding problems of medical-legal jurisprudence.

The proposed differentiation of patients according to medical diagnoses raises serious problems of equal protection of the law. It is to be doubted whether or not this distinction advances a compelling state interest, cf., Worden v. Mercer County Bd. of Elections, 61 N.J. 325, 346, (1972); Boddie v. Connecticut, 401 U.S. 371 (1971), or even whether the differentiation has a demonstrable basis in an interest which the Court can defend. See Newark, "Realizing the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classification," 62 Geo. L.J. 1071 (1974), cited with approval in State v. Krol, 68 N.J. 236, 253 (1975).

Since members of the hospital staff will be reviewing patients prior to scheduled periodic review hearings, the proposed revised rule gives the psychiatric staff the power to determine which patients shall receive plenary and which shall receive summary reviews. While, concededly, relationship of the doctor and the involuntary patient is not totally adversary, nevertheless the Court should look with extreme caution upon any procedure which allows a physician to decide which of his patients is and which is not to receive a plenary hearing.

Moreover, the provisions of this rule, for the first time, incorporates diagnostic categories and nomenclature of the medical model. It should be recalled that the traditional jurisprudence of mental health law has found it appropriate for the law to use its own nomenclature by use of terms such as "incompetence" and "insanity." The adoption of psychiatric nomenclature is a momentous step and worthy of debate in and of itself.

9. Elimination of R. 4:79-1. Application for Orders and Amendment to R. 4:78-1. Personal Service Within and Outside the State

In its report of last year, this Committee recommended several substantial changes in matrimonial service to the effect that service in matrimonial actions should be the same as in all other civil matters. The Committee unanimously favored the substitution of provisions of R. 4:4-4 and R. 4:4-5 for use in matrimonial actions, rather than continuing a special rule. Subsequent thereto the Supreme Court adopted these recommendations, which became effective as rule changes on September 8, 1975.

The recent amendment to R. 4:78-1 provides that, "Service of process in all matrimonial actions shall be made in accordance with the applicable provisions of R. 4:4." By reference to R. 4:4, the rule applies to defendants who may be served both within and without the State, and to service on any defendant by either personal, constructive, or substituted service. Where the residence of the defendant cannot be ascertained, publication in accordance with R. 4:4-5 (c) would be appropriate. Service via publication, pursuant to this rule, does not require court order.

In its prior report, this Committee inadvertently failed to recommend a corresponding amendment to R. 4:79-1. This rule still provides "Applications for orders for publication . . . may be made to the court." The practical result of the above is that attorneys, upon reading R. 4:79-1, continue to submit orders for publication citing R. 4:4-5(c) as the applicable rule, where in reality, R. 4:4-5(c) requires no order.

In order to eliminate this area of confusion and to bring the rules of service in matrimonial actions in full accord with those for other civil actions, this Committee recommends the deletion of R. 4:79-1 and an appropriate amendment to R. 4:78-1, which shall read as follows:

RULE 4:79. GENERAL MATRIMONIAL MATTERS

[4:79-1. Applications for Orders.

Applications for orders for publication and special substituted service and for orders dispensing therewith and applications for interlocutory orders relating to process, venue and guardians ad litem may be made to the court.]

4-79-[2] 1. Trial Fees . . . (number change only)

4-79-[3] 2. Entry of Written Appearance by Defendant; Hearing on Special Issues . . . (number change only)

4-79-[4] 3. Application Pendente Lite . . . (number change only)

4-79-[5] 4. Discovery . . . (number change only)

4-79-[6] 5. Previous File or Record . . . (number change only)

4-79-[7] 6. Corroboration . . . (number change only)

4-79-[8] 7. Custody of Children . . . (number change only)

4-79-[9] 8. Alimony and Support Payments; Enforcement . . . (number change only)

4-79-[10] 9. Delay in Prosecution; Order to Proceed . . . (number change only)

4-79-[11] 10. Listing for Trial; Claims for Equitable Distribution of Property . . . (number change only)

4:78-1. [Personal] Service in Matrimonial Actions [Within and Outside the State]

Service of process in all matrimonial actions shall be made in accordance with the applicable provisions of R. 4:4. **If personal service cannot be obtained pursuant to R. 4:4-4, service shall be made in accordance with R. 4:4-5.**

B. PROPOSED RULE AMENDMENTS RETAINED FOR FURTHER CONSIDERATION

The Civil Practice Committee has commenced study of two proposed rule amendments. However, due to the significant impact which amendment would bring, it has retained these matters for in-depth analysis. The Committee anticipates reporting upon its recommendations in its 1977 Report.

1. Amendment to R. 4:32. Class Actions

This Committee was asked to consider the question of whether it would be advisable to allow the award of counsel fees in class actions. For the reasons stated below, this Committee respectfully recommends that no change should be made at this time; however, it wishes to retain this question for further consideration.

The Committee concluded that no further rule amendment should be made to the class action rule until the impact of the 1974 amendments, which were effective April 1, 1975, has been assessed. Prior to amendment, the New Jersey class action rule was analogous to the Federal Rule of Civil Practice 23. In 1974, our court Rule 4:32 was amended in response to the United States Supreme Court decision in Eisen v. Carlisle & Jacquelin, 417 U.S. 15 (1974), to allow notice costs to be allocated to any party before the court, pending final disposition of the case; to allow fluid class recovery; and to require that members of the class receive "the best notice practicable under the circumstances consistent with due process of law."

The impact of the 1974 amendments is not yet clear, but they appear to facilitate class actions in situations where the class is large and possibly ill-defined. The amendments will generate meritorious class actions; they may generate frivolous litigation as well. Since New Jersey imposes no minimum jurisdictional amount in controversy, there is no obstacle to aggregating numerous small claims which, practically, would not have been pressed under the former rule. Class action plaintiffs' "bootstrap": they can institute an action relying on their ability to convince the court that notice costs should be borne by the defendant. In amending R. 4:32, this Committee recommended and the Supreme Court concluded that utility of the amendment outweighed the chance that unscrupulous plaintiffs would use the new rule to extract settlements from defendants fearful of potential notice costs. Whether that conclusion was correct has not yet been ascertained. It seems unwise to add the threat of counsel fees to plaintiff's arsenal when it is still unclear whether notice costs will produce abuse. The threat of counsel fees is a potent one; the harder a defendant fights, the greater his potential liability.

In short, the 1974 amendments will probably generate more class litigation; awarding counsel fees in class actions could generate still more. This step should not be taken until the validity of the 1974 amendments to R. 4:32 is established and until the courts have had experience with litigation thus generated.

This Committee is aware, however, of the interest in counsel fees in class actions, which has recently been expressed by the American Bar Association, Litigation and Young Lawyers' sections, as well as a special committee of the American Bar Association, have recently endorsed a proposal to regulate the award of counsel fees in class actions. The endorsed proposal reads:

(1) In any civil action

(Continued on next page)

Report Of The Supreme Court's Committee On Civil Practice

(Continued from previous page)

nder a statute of the United tates or the Constitution, the ourt may, in the interest of ustice, allow reasonable attorneys' fees and other costs of litigation to a party who substantially prevails if the court determines that (a) the action results in a substantial public benefit; and (b) (1) the economic interest of the party is small in comparison to the costs of effective participation, or (2) the party does not have sufficient resources adequately to compensate counsel.

As a consequence of this recent activity, this Committee wishes to retain jurisdiction of counsel fees in class actions for further consideration next year.

Amendment to R. 2:11-4. Attorney's Fees on Appeal
and
R. 4:42-9. Counsel Fees

The Civil Practice Committee presently has under consideration a review of R. 2:11-4 to consider the appropriateness of amending said rule to include counsel fees on appeal involving actions on liability or indemnity policies of insurance, as is already provided for under R. 4:42-9(a)(6). See Corcoran v. Hartford Fire Insurance Co., 132 N.J. Super. 234 (App. Div. 1975) at p. 246.

Other paragraphs of R. 4:42-9, as to which there is no parallel provision in R. 2:11-4, are also being reviewed. This effort will encompass an analysis of pertinent statutes which presently allow counsel fees. Upon conclusion of this study, this Committee will forward its recommendations thereon to the Supreme Court.

C. PROPOSED RULE AMENDMENTS REJECTED

The Committee considered several proposed rule amendments which, for the reasons stated below, are not recommended at this time.

1. Amendment to R. 1:6-2. Form of Motion

The Committee considered amending R. 1:6-2 to provide that all motions shall have appended a statement setting forth the following dates: the filing of the complaint, the issuance of summons, the filing of the last pleading and the assigned trial date, if any. This proposal was advanced by an assignment judge who felt that this information should be taken into consideration in the disposition of calendar control motions, such as extension of discovery, joinder of parties, consolidation, amending the pleadings, etc. It was advanced that this type of information was more readily ascertainable by the proponent of the motion than by court personnel.

The suggestion was rejected at this time since it was felt that requiring an additional attachment to motions was unnecessary and unduly burdensome on attorneys since this historical data is readily available to the courts through (1) the answers filed to such motions, (2) the reproduction of such information on computerized court motion calendars, and (3) oral response on the return date of the motion.

2. Amendment to R. 1:10-5. Relief to Litigant

An attorney complained that utilization of R. 1:10-5 by an attorney for the purpose of recovering a fee which had been awarded to him constitutes an improper application of the rule. It was the unanimous opinion of the Committee that this use was indeed proper and that no rule amendment was warranted.

3. Amendment to R. 2:6-11. Time for Serving and Filing Briefs; Appendices; Transcript

R. 2:6-11(a) presently provides that where an appeal is taken from an agency ruling, an appellant has 45 days within which to file a brief ". . . after the service of the statement of the items comprising the record on appeal required by R. 2:5-4(b) . . . ." A letter was received from an attorney which suggests that the time limitation imposed in submitting the brief causes some difficulty in the context of many agency appeals because, under the practice of most agencies, a separate demand must be made for actual copies of the items comprising the record on appeal after the statement of items is received. This must necessarily delay the submission of the brief. The suggestion was made that the rule be amended to provide that briefs be due 45 days after the receipt of the items comprising the record, rather than the statement of the items comprising the record. This matter was reviewed with the clerk of the Appellate Division, who advised that applications for extension to file briefs were treated benevolently when attributable to these circumstances. The Committee unanimously agreed that the problem presented was being well handled administratively and therefore did not warrant a rule change.

4. Amendment to R. 4:10-2. Discovery

An unpublished opinion of the Superior Court Law Division was brought to the Committee's attention. In that opinion the judge expressed his concern that R. 4:10-2 has perhaps been drawn too strictly. The judge felt that the rule as drawn inhibits an attorney from frank consultation with his experts, depriving him of the benefit of free discussion or exchange of correspondence. The judge suggests that R. 4:10-2(d) should be broadened to allow an expert's "mental impressions" (as opposed to his factual report) to be privileged insofar as they are revealed to the attorney engaging him.

The Committee unanimously concluded that the present rule was suitably drawn to insure full disclosure of all relevant expert opinion. An amendment to the rule was unanimously rejected.

5. Amendment to R. 4:42-1. Form; Settlement

An attorney suggested an amendment to R. 4:42-1(b) (the so-called "Five-Day Rule"), to provide that, in the event any party upon whom a motion is served does not appear in opposition thereto, it shall not be required that a copy of the proposed order be served upon said party advising him that he may make a specific objection within five days. The attorney complained of situations wherein other attorneys will agree or consent to an order without appearing in court, but when the order is submitted under the present Five-Day Rule, will then raise an objection to the form, thereby gaining an additional hearing to object to the proposed order.

The Committee rejected this proposed rule change since it felt that dispensing with the requirement to serve a copy of the proposed order on a party failing to appear in opposition thereto would result in a great deal of confusion and would also work an injustice in a majority of the situations. Whether or not both parties have appeared in an action, the written word does not always duplicate the spoken word; it was deemed far more advisable to retain the right to object to a proposed written order of the court prior to its signing.

6. Amendment to R. 4:48-1. Execution and Delivery of Warrant of Satisfaction.

An attorney suggested that R. 4:48-1 is presently being misconstrued by the clerk of the Superior Court in that the clerk requires, in addition to the attorney's signature, a certification by the attorney in lieu of affidavit. It was unanimously agreed that this rule was being properly applied by the clerk of the Superior Court and requires no further amendment or modification.

7. Amendment to R. 4:58. Offer of Judgment.
and
R. 6:6-1. Applicability of Superior Court Rules.

A suggestion was made to amend R. 6:6-1 to include by reference the Offer of Judgment rule (R. 4:58) in District Court practice. The argument was offered that such an amendment would eliminate frivolous, low-magnitude District Court litigation commenced against a corporate or unincorporated defendant who is represented by counsel. Application of this rule would eliminate unwarranted settlements induced by the cost of defense. It is also argued that this inclusion of the Offer of Judgment rule would encourage pretrial settlement. Concurring with the opinion of the District Court Committee, this Committee unanimously rejected this proposed rule change for the reason that such a rule would adversely affect pro se defendants.

8. Amendment to R. 4:78-3. Notice to Correspondent
and
R. 4:4-6. General Appearance; Acknowledgment of Service

An attorney suggested that R. 4:78-3 and R. 4:4-6 be amended to specifically mention the special appearance in matrimonial actions brought pursuant to R. 4:79-3. The Committee feels that a special appearance in matrimonial actions is equivalent to a general appearance, since the defendant submits generally to the jurisdiction of the court and, though he files no answer, reserves the right to be heard on the issues he so specifies. Consequently, it was unanimously agreed that this situation did not warrant rule amendment.

9. Amendment to New Jersey Rule of Evidence 56(2)

The representative of the Public Advocate proposed that New Jersey Rule of Evidence 56(2) be extended to include the language of the Federal Rule of Evidence 703, which includes "The 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 him at or before the hearing. **If of a type reasonably relied on by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence."**

The present New Jersey rule provides that expert testimony in the form of opinion or inferences is limited to that data which the judge finds is based primarily on facts or other expert opinion established by evidence at trial or is within the scope of the special knowledge, skill, experience, or training possessed by the witness.

The Committee agreed, by a vote of 12-2, that there was no substantial reason to amend the present New Jersey Rule of Evidence 56(2) to coincide with the Federal Rule of Evidence 703.

II. ADMINISTRATIVE MATTERS

The Committee was requested to study and recommend change in several areas of present court procedure. The Committee specifically studied the problem of the present caseload congestion in the Appellate Division and submits herein its recommendations.

A. Proposals for Reducing the Case Backlog in the Appellate Division

The New Jersey Superior Court, Appellate Division, has faced an increasing caseload congestion for the past several years. At the request of the Supreme Court, this Committee seriously considered and discussed several varying proposals to effectuate a reduction in the present appellate court backlog.

The Court, as presently constituted, consists of seven three-judge panels who hear fourteen cases per week for every three weeks out of four, totalling 31 regular sessions. It was the unanimous opinion of the Committee that it would not be feasible to increase the appellate caseload above fourteen cases without other procedural relief. Everyone agreed that the appellate parts could not handle this additional caseload without a detrimental impact on the quality of justice rendered.

The Committee first considered the creation of an eighth appellate part. This was rejected at this time for the following reasons. It was felt that the loss of three additional trial judges would impact detrimentally on the also crowded trial calendar. Moreover at a time of fiscal economy, the financial burden of establishing and staffing an additional appellate part, as well as providing increased support staff in the Appellate Court Clerk's Office, would not be warranted if other viable alternatives could be found.

The Committee next considered the proposal for the establishment of a one-judge appellate panel. Under this proposal each judge would initially review six cases per week. The focus of this review would be to evaluate whether the case presented a debatable issue requiring determination by a three-judge panel. If the one judge felt that the case presented no issue requiring determination by a three-judge panel, the case would be retained by him on his calendar for decision by him. If the judge found a debatable issue warranting a three-judge review, he would certify the case for transfer to a three-judge calendar.

It was noted that this procedure might impair the constitutional right of appeal to the Supreme Court where there is a dissent within the Appellate Division. It was felt that this procedural problem could be overcome by providing that a litigant dissatisfied with the opinion of the one-judge panel would be entitled to a rehearing before a three-judge panel. After extensive discussion of this matter, the Committee was of the opinion that a one-judge panel does not present the best alternative solution. The Committee therefore recommends against the adoption of this procedure by a vote of 14-3.

A variation on the theme of a one-judge panel was also considered wherein parties who consent to be heard by a one-judge panel would then be entitled to priority in calendaring. This consent must be made prior to the assignment of this case to a particular judge in order to avoid the problem of judge-shopping. Where all parties have agreed to be heard in this manner, there would be a final appellate determination without right to rehearing by a three-judge panel. The Committee concluded that the requirement of blind consent prior to the assignment of the case would not be palatable to the Bar in general. It was felt that this procedure would be rarely utilized and therefore would be of little effect. The Committee recommends against the adoption of this procedure by a vote of 13-4.

The Committee next considered the institution of a petition for certification procedure in the appellate division similar to that presently utilized by the Supreme Court. This proposal was unanimously rejected as being an impairment of the constitutional right to appeal.

There was consideration given to a proposal to expand the recent amendment to R. 2:11-3(e) to the effect that where our present three-judge panels decide to affirm, the litigant be advised of the affirmance without further written opinion. This proposal was generally rejected as being unsatisfactory since it would provide little guidance to the trial courts and trial bar and could produce a semblance of cursory justice in the eyes of the litigants of the appeal.

A proposal was raised to permit the oral argument of cases before the Appellate Division prior to in-depth preparation of the case. This concept is analogous to the procedure presently utilized by the New York appellate courts. Oral argument in cases would be heard based upon a memorandum prepared by a law clerk. The advantage of this procedure would be to greatly reduce the judicial time spent on review and consideration of the briefs and records submitted prior to hearing. This concept was generally rejected since this procedure would diminish the ability of the appellate judges to obtain clarification from attorneys of debatable issues raised within their briefs.

Another modification to the present oral argument procedure would be to permit the appellate court to render its judgment from the bench on the date of oral argument. Oral decisions would, of course, reduce to zero the time-lapse between oral argument and the final disposition of the case. It would also save judicial time presently spent on writing formal opinions. This proposal was generally rejected since it was felt that oral opinions would have to be prepared prior to oral argument, thereby eviscerating the ability of counsel to persuade the court on issues raised within their briefs.

Consideration was given to the adoption of a summary judgment procedure on appeals. This procedure is also known as a motion for affirmance. This concept was generally rejected as being counterproductive since it would require an initial review by the Appellate Division on the motion and then a second review for full hearing where the motion was denied.

In reviewing this entire problem, the Committee was made aware of the fact that approximately fifty per cent of the appellate calendar involves matters of a criminal nature. These criminal cases involve not only full plenary appeals on the merits of the trial, but also appeals for excessive sentence and post-conviction relief.

It was generally felt that many of these appeals were brought by the Public Defender in order to afford the defendant his constitutional right to appellate review, without regard to the merit of the appeal. It was noted that a major factor in delay of disposition of criminal appeals is the present understaffing of the Public Defender's Office. Nevertheless, due to the calendaring priority given to criminal cases, the time from perfection of the appeal to court decision has remained static in criminal cases over the last two calendar years; whereas the time lapse in civil cases has increased dramatically.

It was therefore proposed that certain panels within the present three-judge part be assigned exclusively to criminal matters with an increased calendar of up to twenty cases per week. The establishment of criminal parts in the Appellate Division would generate increased expertise, consistency, and expeditious disposition. These criminal parts would be better able to weed out appeals which lack merit for an affirmance without opinion, thereby enabling them to concentrate on serious issues. Moreover, restricting the number of panels who hear criminal matters would tend to lessen the present diversity in opinions.

This concept was generally rejected. It was felt that specialization would have an adverse effect upon judicial and legal creativity.

After extensive discussion and rejection of the above proposals, the Committee now wishes to recommend two alternative concepts which it believes could alleviate the present appellate congestion without substantial detrimental impact upon the quality of justice. The first and preferred proposal is to create two-judge panels. The present twenty-one appellate judges would be reassigned into ten two-judge parts. Each two-judge part would continue to hear and decide cases as heretofore with all the present appellate procedural rights being maintained. On a

(Continued on page 30, col. 1)

REPORT OF THE SUPREME COURT'S COMMITTEE ON JUVENILE AND DOMESTIC RELATIONS COURTS

(Continued from page 17)

of such custodian if process fails to produce his attendance. If the juvenile is not represented by counsel at the hearing and if the court continues his detention or shelter care after the hearing, the court shall forthwith schedule a second detention or shelter care hearing to be held within 2 court days thereafter at which the juvenile shall be represented by counsel as provided by R. 5:3-3(a). An order continuing the detention or shelter care shall provide for its periodic review at intervals not to exceed 14 days and shall schedule a hearing on the complaint within 30 days. No order for detention or shelter care shall be entered either at the first or second detention or shelter care hearing except in accordance with the provisions of paragraph (e) of this rule. **Where a juvenile has been charged with delinquency and has been placed in detention, there must be a probable cause determination within a reasonable period of time.**

(e) . . . no change

(f) Probable Cause Determination. No juvenile may be held in a detention center for more than a reasonable period of time, unless, from the evidence, it appears to the court that there is probable cause to believe that an act of delinquency has been committed and that the juvenile has committed it.

Although the Committee believes that Juvenile Court judges do implicitly pass on the question of probable cause during detention hearings, it is felt that there should be express recognition of this due process right by formal Rule of Court. Consideration of whether to afford opportunity to confront and cross-examine witnesses and whether to admit or exclude hearsay evidence should be left for determination and development on a case by case basis. It is submitted that the proposed amendment would mandate for juveniles who are charged with delinquency and detained a probable cause determination on the basis of court considered evidence within a reasonable period of time following commitment to detention.

3. In response to the Chief Justice's recent statement of concern regarding violent street crime, the Committee recommends that the Administrative Director of the Courts issue a directive providing that all Presiding Judges of the several Juvenile and Domestic Relations Courts should take appropriate steps to assure that all cases involving 16 and 17 year old juveniles accused of a violent offense or of an offense against the person are carefully screened for possible referral to the county prosecutor pursuant to N.J.S.A. 2A:4-48 and R. 5:9-5. The Administrative Office of the Courts should insure that every Juvenile Court has an established system to screen all juvenile matters and to schedule hearings as to waiver of jurisdiction to the adult court in appropriate cases.

4. **Fines.** Your Committee recognizes that there are many instances where the imposition of some reasonable sanction would assist in rehabilitation by bringing home to the juvenile an awareness that misconduct results in undesired consequences, though the nature of the act would not warrant confinement or probationary supervision. Examples of such conduct would include possession of small amounts of marihuana, violations of local ordinances and motor vehicle offenses committed by those not yet 17 years of age.

The Committee recommends revision of N.J.S.A. 2A:4-61 to grant the Juvenile and Domestic Relations Court the authority to assess fines against juvenile delinquents in appropriate cases. It is contemplated that payment would usually be a condition of probation. Although it is anticipated that Juvenile Court judges would exercise discretion in tailoring a fine to the juvenile's ability to pay, it is urged that maximum fines should be established by legislation (perhaps the minimum fine to be imposed against an adult).

5. **Restitution.** Since a juvenile's development of an awareness of the value of property is an essential element of rehabilitation in many cases, the Committee recommends the revision of N.J.S.A. 2A:4-61 to express specifically the Juvenile Court's authority to order reasonable restitution as a condition of probation in appropriate instances. Periodic payments during probation should be considered when necessary to make compliance possible.

6. **Family Therapy.** Frequently, major underlying factors contributing to delinquent conduct by many juveniles are the attitude, conduct or actions of the parents of the juveniles. Therefore, the Committee recommends that there be a revision of N.J.S.A. 2A:4-61 and 2A:4-62 to recognize, expressly, the authority of the Juvenile Court to order the parents, as well as the juvenile, to participate in a suitable therapy or counselling program as a condition of probation. This would make clearer the Court's power to assure participation in such a program once that rehabilitative measure has been deemed appropriate and has been ordered.

7. **Disclosure of Juvenile Records.** The Committee strongly opposes general dissemination of juvenile court, law enforcement and probation records. This would destroy the confidentiality of the juvenile justice process which is essential to rehabilitation and reintegration of the juvenile into the community. However, a law enforcement agency should be permitted to make information available to another law enforcement agency during the course of a particular investigation.

A majority of the Committee opposes the publication of juveniles' names except where the matter has been transferred to the adult court. It was felt that disclosure of juveniles' names can only serve to impede and render ineffective the rehabilitation plan which the Court has ordered for the juvenile. In the past, such information has been used against a juvenile offender when seeking employment and induction into the Armed Services. It was felt that if public recognition of punishment is appropriate, then the juvenile probably should be referred to the adult court.

Various matters of a practical or administrative nature were also reviewed by this Committee. Since there were matters of limited, as opposed to general, application and will be reported upon to the Supreme Court through the Office of the Administrative Director of the Courts, they need not be included in this annual report.

Respectfully submitted,
Hon. Horace S. Bellfatto
Mr. Richard Bennett
Hon. Steven J. Bercik
Hon. Peter J. Cass
Hon. Frances M. Cocchia
Hon. Charles R. DiGisi
Ms. Lorraine Gerson
Hon. John J. Grossi
Hon. William H. Huber
Hon. B. Thomas Leahy
Hon. Robert W. Page
Ms. Marcia R. Richman
(dissenting, in part)
Hon. Irving W. Rubin
Mr. Edward S. Snyder
Hon. Leo Weinstein
Hon. Yale L. Apter, Chairman

Dated: March 12, 1976

Report Of The Supreme Court's Committee On Civil Practice

(Continued from page 29)

rotational basis the twenty-first judge would be assigned to handle all motions, emergent applications, dismissal lists, peremptory orders, temporary stays, etc., thereby eliminating these interruptions for the panels handling cases.

The constitutional question of affording a right to Supreme Court review where there is a disagreement within the two-judge panel could be met in one of two ways. First, disagreement within the two-judge panel would entitle litigants to a rehearing before a three-judge panel. This is the preferred recommendation of the Committee. Second, as an alternative, disagreement within the two-judge panel could be considered a dissent, thereby entitling the litigants to their constitutional right to appeal to the Supreme Court. If the appellant elects not to appeal further, the decision would be recorded as affirmed by an equally divided court.

If the Court finds that two-judge panels would not be advisable, the Committee alternatively recommends the adoption of an administrative screening procedure. Under this proposal the present three-judge panels would be maintained but their caseload would be increased to 18 cases per week. Each judge within the panel would be assigned to review six cases and report thereon to his co-panelists. This report would evaluate whether the case presented one or more debatable issues which would require substantive review and consideration by all three judges. If, after discussion by the three judges, the case was deemed not to present a debatable issue for appeal, the matter would not be further studied or reviewed by the other two judges. Where oral argument is waived, the case would be affirmed without opinion. Where oral argument was requested, all three judges would participate on the basis of the screening memorandum. The Committee was closely divided on this proposal and its recommendation is based upon a vote of eight in favor; seven opposed; and two abstentions.

For the reasons expressed above, the Committee respectfully recommends that serious consideration be given to the utilization of two-judge appellate parts until a substantial diminution of the appellate backlog is achieved.

B. **Jury Trials in Civil Matters**

The Committee is presently studying the utilization of juries in civil litigation. Extensive research and discussion have been generated within the Committee concerning the advisability and feasibility of eliminating or retaining jury trials in the civil sphere. The debate has focused on the quality, uniformity, and efficiency of justice found in jury and court decisions. At this juncture, the Committee is still strongly divided on the question. Since it is one of great public importance to all citizens of this State, the Committee earnestly solicits the comments and advice of the designees to the 1976 Judicial Conference on the question.

Respectfully submitted,
Arthur J. Blake
Murry D. Brochin
Peter Buchsbaum
Robert Carter
Alfred C. Clapp
Donald S. Coburn
Milton B. Conford
Hugh P. Francis
Burton J. Ironson
Joseph H. Kenney
Merritt Lane, Jr.
Paul A. Lowengrub
Florence R. Peskoe
Sylvia B. Pressler
Morris M. Schnitzer
Stephen L. Skillman
Howard Stern
Richard M. Thiele, Jr.
Julius Wildstein
Samuel A. Larner, Chairman

MINORITY REPORT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of New Jersey

I respectfully request that the Court consider the following minority report of the Supreme Court Committee on the Juvenile and Domestic Relations Courts.

1. **Probable Cause Hearing in Juvenile Matters.** While the majority of the committee approved a proposed amendment to R. 5:8-6, providing for a probable cause determination in juvenile delinquency matters where the juvenile has been detained, I must dissent from the amendment to R. 5:8-6(d) and (e).

As the Court is probably aware, the Office of the Public Defender has filed an amicus brief in the pending case of Sims et al v. State of New Jersey, Civil Action #75-1316. I have enclosed a copy of this brief. [Ed. note: omitted for reasons of space.] To summarize the position of the Office of the Public Defender, it is that the constitutional mandate of promptness can be readily satisfied with no appreciable disruption of the present juvenile justice system by simply requiring that the probable cause hearing be incorporated into the first detention hearing at which a juvenile is represented by counsel. R. 5:8-2(d)(2) requires a detention determination to be made no later than the morning following a juvenile's initial detention. If the juvenile is not represented by counsel at the time this determination is made, and the court continues his detention, the juvenile must receive a detention hearing within two court days at which he or she must be represented by counsel. R. 5:8-6(d). By requiring that the probable cause hearing be incorporated into the latter detention hearing, the constitutional mandate of promptness can be satisfied and neither speed nor efficiency in ultimate adjudication will be sacrificed. This is not to suggest that if some disruption in New Jersey's juvenile justice system were to occur as a result of the imposition of adversary safeguards at the detention hearing, this would provide justification for not requiring them. In those instances where the juvenile has not been detained, the reasonable time standard of R. 3:4-3 would appear appropriate.

It is further the position of this Office that the Fourth Amendment, the due process and equal protection requirements of the Fourteenth Amendment dictate certain procedural requisites of the probable cause hearing. There can be no doubt that confrontation and cross-examination enhance the reliability of such a determination, the need for imposition of adversary safeguards with the probable cause hearing to enhance the reliability and prevent wrongful detention are critical in juvenile matters in New Jersey. A juvenile has no right to bail and a finding of probable cause can result in a child's continued detention, without the safeguards of bail to negate the harm attending pre-trial detention of a presumptively innocent child. To offset the lack of bail in the juvenile justice system, the imposition of adversary safeguards at a probable cause determination is critical.

In addition to this lack of bail, there are other significant distinctions between the juvenile justice system and the adult justice system. In New Jersey, juvenile delinquency complaints may be signed by "Any person" N.J.S.A. 2A:4-53. Thus, the complainant may be a relative, a neighbor or other individual who may well be acting out a personal self-interest thereby raising serious questions as to the reliability of statements made in a complaint. When one reviews an adult complaint the elements of the violation charged are clearly defined by statute. In the juvenile system, it is well settled that a juvenile delinquency complaint need not be drawn with the same exactitude as an adult criminal complaint. State in the Interest of L.N., 109 Super. 278 (App. Div. 1970), aff'd 57 N.J. 165 (1970) cert. den. sub. nom. Norman v. New Jersey, 402 U.S. 1009 (1971).

Therefore, it is apparent that many of the considerations underlying the holding in Gerstein v. Pugh, 420 U.S. 103, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) are simply not applicable to New Jersey's juvenile justice system. Accordingly, it is our position that the Fourth Amendment requiring that juveniles be entitled to a probable cause hearing must include a right to be present and to present evidence, the right to be represented by counsel or appointed counsel if indigent, and the right to cross-examine adversary witnesses. The Fourteenth Amendment due process requirements have been articulated with specificity in the U.S. Supreme Court decision of Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S. Ct. 1756 (1973). These cases outline the minimum requirements of procedural due process when a private citizen is involuntarily detained. Because of the loss of liberty inherent in such detention, the due process clause requires a reasonably prompt preliminary hearing clothed with the following adversary safeguards: (a) prior notice of the time and place of the hearing together with a statement of the specific facts upon which the detention is based and notice of the right to request representation by counsel; (b) a right to appear and to present evidence at the hearing; (c) a right to confront and cross-examine witnesses; (d) an independent decision-maker; and (e) a written statement of the reasons for the determination and the evidence relied on by the hearing officer.

The reasons for requiring substantial adversary safeguards at the probable cause hearing in juvenile matters are even more compelling than in parole-probation revocation. This was expressly recognized by the Supreme Court in Gagnon:

> A juvenile charged with violations of a generally applicable statute is differently situated from an already-convicted probationer or parolee and **is entitled to a higher degree of protection.** 411 U.S. at 789 n. 12 (emphasis added).

It is for these reasons that the proposed rule amendment does not, in my judgment, adequately provide appropriate direction as to the nature of the probable cause hearing to be granted nor does the rule as proposed guarantee that the probable cause hearing will comport with the constitutional mandate of promptness.

2. **Fines.** As to recommendation 4 of the Annual Report, this issue has been resolved by the New Jersey Supreme Court in State in the Interest of M.L., 64 N.J. 438 (1974) and no revision to N.J.S.A. 2A:4-61 is recommended.

3. **Restitution.** In light of the pending case of State in the Interest of D.G.W., Docket No. 127-75, argued February 10, 1975, the Office of the Public Defender will not recommend the revision of N.J.S.A. 2A:4-61 since the question of legality and appropriateness of restitution in a juvenile matter has been briefed and argued in that case.

Respectfully submitted,
Marcia R. Richman
Assistant Public Defender

Notices To The Bar

All mail addressed to the Middlesex County Juvenile and Domestic Relations Court should be addressed to Post Office Box No. 575, New Brunswick 08903 in order to avoid serious delays and undue cost and handling to the Postal Service.

James S. Winston
Court Administrator

The Sussex Avenue address listed for the Essex County Juvenile Court on page 47 of the 1976 Lawyers Diary is used only on an emergency basis. All inquiries and mail should be directed to the other listed address: Old Court House, rm. 318, Newark 07102; (201) 961-7770, 1, 2 and 3.

George T. Donahue
Administrative Clerk

Report Of The Supreme Court's County District Courts Committee

1. Rule 6:6-2. Entry of Default in District Court.

The Committee recommends that because of the time allowed to serve an Answer by mail (See R. 1:3-3) District Court clerks not enter defaults until four days after the expiration of the time to answer. This recommendation was implemented by an item in Monthly Bulletin Letter #2-76 issued by the Administrative Office of the Courts. An excerpt from said Letter is attached hereto.

2. Rule 6:7-2. Supplementary Proceedings Regarding Pro Se Litigants.

It was suggested to the Committee that a pro se judgment creditor be entitled to have supplementary proceedings in his home or, in the alternative, that a facility be provided in the Court House for such proceedings. The Committee resolved that no rule change was necessary and that the court can accommodate those supplementary proceedings pursuant to Rule 6:7-2.

3. Rule 6:4-3 and Rule 4:17-2. Service of Interrogatories with Complaint by Constable or Sergeant at Arms.

It was urged that Rule 4:17-2 requires that the Sheriff serve Interrogatories with Complaints, and, therefore, that Rule 6:4-3 requires a Constable or a Sergeant at Arms of the District Court to serve Interrogatories with the Complaint. The Committee determined that Rule 4:17-2 deals only with time requirements and does not impose an obligation on a Sheriff, Constable or Sergeant at Arms to serve Interrogatories. Furthermore, service of papers other than summons and complaint by a Constable and Sergeant at Arms would require certification of service, filing of copies of same with the court and a statutory fee schedule, where none now exists. However, if Rule 4:17-2 obligates the Sheriff to serve Interrogatories with the Complaint, the Committee requests a change to Rule 6:4-3 to provide that Rule 4:17-2 when applied to District Court practice does not obligate a Constable or Sergeant at Arms to serve Interrogatories with the Complaint.

4. Premature Trial Listings.

The problem of premature trial listings was called to the attention of the Committee. Often District Court cases are listed for trial prior to the expiration of the one hundred day period for discovery (See Rule 6:4-5). The Committee voted to request the Administrative Office of the Courts to forward a memorandum to all District Court clerks directing them not to list District Court cases for trial within the one hundred day discovery period.

5. Rule 4:58-1. Offer of Judgment.

The question of whether this Rule should be applied to District Court practice was again presented to the District Court Committee. The Committee unanimously reaffirmed the position it had taken in previous years that said Rule should not be applicable to the District Court. The primary reason for the Committee's position is that such a Rule could be used as a bludgeon against pro se defendants.

6. Rule 6:3-1. Applicability of Superior Court Rules.

The Committee unanimously voted that Rule 6:3-1 should be amended to specifically incorporate Rules 4:18 and 4:23 (discovery sanctions) into District Court practice, except for the portions of these Rules which are specifically made inapplicable to District Court practice by other Rules of Court.

7. Rule 6:3-1. Extension of Time by Consent.

It was proposed to the Committee that Rule 6:3-1 be amended to allow an extension of time to answer by consent similar to upper court practice (see Rule 4:6-1(c)). The Committee voted against such an amendment, in view of Rules 6:6-2 and 6:6-3 (automatic entry of default by the clerk). District Court clerks are not in a position to correlate such voluntary extensions of time with the mandatory entry of default.

8. Rule 1:21-1(a), N.J.S.A. 2A:18-51.

By a vote of twelve to two, the Committee passed a motion recommending that an agent be prohibited by Court Rule from maintaining a summary dispossess action on behalf of himself or of the owner he represents unless the complaint is filed by an attorney and an attorney appears at the trial of said action. The majority of the Committee believes that this position comports with that taken by the Unauthorized Practice of Law Committee in its Opinion #18 (New Jersey Law Journal, Nov. 6, 1975).

9. Rule 6:5-3. Right to Trial by Jury in Summary Dispossess Actions.

This matter was held over until the Committee's 1976-1977 term.

10. District Courts Providing Form Complaints to Plaintiffs and Defendants in Landlord-tenant Cases.

The Committee defeated a motion that District Courts provide landlords in landlord-tenant cases with form complaints which would state that the tenant may have a good defense to the complaint if the landlord had failed to comply with the provisions of N.J.S.A. 46:8-27 et seq. or of N.J.S.A. 46:8-19 et seq. or if the premises are not fit for human habitation. The vote on the motion was two in favor and twelve opposed.

By a vote of seven to six, with one abstention, the Committee passed a motion that District Courts not provide form complaints to landlords or tenants in landlord-tenant cases. The minority's position on this question is set forth in a memorandum to the Honorable Nicholas Albano, Jr. A copy of that memorandum is attached hereto.

The majority of Committee members believe that the Committee's positions, if adopted, should be implemented by a directive or directives issued by the Administrative Office of the Courts.

The Committee unanimously agreed to submit the Committee's recommendations to the Association of District Court Judges for its comments thereon.

11. Rule 6:3-4.

The Committee considered the question of permitting the filing of Counterclaims and Third Party Claims in landlord-tenant dispossess actions. The Committee feels that these problems are tied in with the consideration of having jury trials in summary dispossess actions. Therefore, the Committee held over this matter until its 1976-1977 term.

12. Proposed Court Rule to Implement N.J.S.A. 46:8-27 et seq.

This Statute requires the landlord to file, post and provide to each tenant certain information as a condition precedent to the entry of judgment for possession. The Committee is of the opinion that there is no need for the promulgation of a Court Rule restating the provisions of any Statute.

Respectfully submitted,
Nicholas Albano, Jr.
Herbert S. Alterman
Bennett I. Bardfeld
Louis R. DiLieto
I. V. DiMartino
Theodore Gardner
George A. Gray
David Leff
Robert A. Longhi
Aldan O. Markson
Henry B. McFarland, Jr.
John J. McLaughlin
Gerald E. Monaghan
Sheldon H. Pressler
Warren Smith
Charles Crabbe Thomas
Joseph F. Walsh
Daniel A. O'Donnell,
Chairman

Dated: March 15, 1976

* * *

5. Service of Process in Landlord-Tenant Cases

To effectuate the provisions of R. 6:6-3(b) and eliminate questions or ambiguities concerning the date of mailing of said notice, all district court clerks are directed to note upon the file jacket and court docket the date of mailing of notice to tenants, pursuant to R. 6:6-3(b).

* * *

To: Honorable Nicholas Albano, Presiding Judge
From: David P. McGraw, District Court Clerk
Re: Continuation of the Clerk's Office to Supply Landlord-Tenant Forms

It has been called to my attention that the District Court Supreme Court Committee is considering the question of whether the District Court clerk's office should make available to the public, landlord and tenant complaint forms.

I am in favor of the continuation of the policy for the following reasons:

The District Court clerk's office benefits greatly by reason of the fact that there is uniformity of the summons and complaint filed in Tenancy Court. This uniformity enables us to process a large number of cases in a very efficient manner. When one considers that 25,041 suits were commenced in this court in the year 1975, I think the Committee will realize the importance of uniform complaints. Another benefit is the fact that the process server knows where salient information is located on a uniformed summons and complaint and when a process server from the District Court is handling several hundred summonses a week this saves valuable time.

There are other factors to consider, whether it is fair for a landlord, who avails himself of this court only once or twice a year, to be forced to buy a large number of complaints from a stationery store and again whether forms would be conformed to our standards. I think in all probability landlords would come up with homemade summons and complaint forms and this would present a multitude of problems.

There are other reasons which I think should be considered and this is only my personal opinion. However, I think, based on my experience here, they have some merit. Landlords (and I don't mean the owners of many multiple family dwellings only) feel that the scales of justice, government, etc. are tilted against them by the very fact that the government supplies free legal services to many of their tenants and the right to appeal without cost is also available to them. I have been told in excess of one hundred times by landlords, and again I must state people who own one or two houses, that the system is weighed heavily against them and that it is frustrating to attempt to evict a tenant for non-payment of rent or any other reason.

Compiling the above facts, I come to only one conclusion, this small service we do for the public, which is also beneficial to the clerk's office and the court, should not be discontinued.

Very truly yours,
David P. McGraw
District Court Clerk

SUPPLEMENTARY REPORT OF THE SUPREME COURT'S COUNTY DISTRICT COURT COMMITTEE

1. Assembly Bill 3103 (1974-1975 Session).

The Committee considered Assembly Bill 3103 which provides for counsel fees to be taxed against a plaintiff on behalf of a successful defendant. The matter had been before the Committee during its 1974-1975 term, with vote of thirteen to one against the Bill. After further discussion and consideration during this term, the Committee voted seven to three in favor of no fees for either plaintiffs or defendants in District Court matters.

2. Assembly Bill 598, Deposits of Rent into Court.

Many Committee members expressed their belief that the Bill substantially restates present law as set forth in N.J.S.A. 2A:42-85 et seq. The main differences between the Bill and N.J.S.A. 2A:42-85 et seq. appear to be that the Bill (1) explicitly vests jurisdiction in the County District Courts, (2) makes the remedy available to cure conditions detrimental to health, and (3) requires that the receiver be an attorney. The Committee unanimously agreed that any changes in existing law should be made by amending N.J.S.A. 2A:42-85 et seq. rather than by enacting Assembly Bill 598 which would supplement Article 9 of Title 2A of the New Jersey Statutes.

3. Assembly Bill 951, Service on Tenants.

The Committee agreed that there should be no position taken on this Bill since the Bill would not change present practice in any material respect. A motion was unanimously passed to recommend that the Administrative Office of the Courts issue a directive or publish an item in the Monthly Bulletin Letter directing all District Court clerks to note upon the file jacket and docket the date of mailing of notice to tenants pursuant to Rule 6:2-3(b). This recommendation was implemented by an item in Monthly Bulletin Letter #2-76 issued by the Administrative Office of the Courts. A copy of said letter is attached hereto.

4. Small Claims Procedure in New York State.

A motion to adopt the New York statutory procedure of permitting a plaintiff in small claims court to collect treble damages from a corporation which has three or more unsatisfied judgments against it was defeated by a vote of seven to three.

5. Prohibiting Landlords from Obtaining Judgments Under Certain Circumstances.

The Committee voted seven to two against a proposal to prohibit a landlord from obtaining judgment to dispossess in a summary dispossess action if there exists in the same County District Court an unsatisfied small claims judgment against said landlord grounded upon the landlord's failure to return a security deposit to any tenant.

6. Retention of Jurisdiction after Docketing in a County Court or in the Superior Court Pursuant to N.J.S.A. 2A:18-32 et seq.

This matter was held over until the Committee's 1976-1977 term.

7. Night Court for Small Claims Division.

The Committee voted 12 to 3 against Night Court for the Small Claims Division.

8. Calculation of Commission for a Sergeant at Arms on an Execution Where the Garnishee Accepts 5% Compensation Pursuant to N.J.S.A. 2A:17-53.

This matter was held over until the Committee's 1976-1977 term. Consideration will then also be given to the broader question of whether a manual on executions should be prepared for use by constables and sergeants at arms.

Respectfully submitted,
Nicholas Albano, Jr.
Herbert S. Alterman
Bennett I. Bardfeld
Louis R. DiLieto
I. V. DiMartino
Theodore Gardner
George A. Gray
David Leff
Robert A. Longhi
Aldan O. Markson
Henry B. McFarland, Jr.
John J. McLaughlin
Gerald E. Monaghan
Sheldon H. Pressler
Warren Smith
Charles Crabbe Thomas
Joseph F. Walsh
Daniel A. O'Donnell, Chairman

Dated: March 15, 1976

Monthly Bulletin Letter No. 2-76—February 1, 1976

* * * *

1. Judicial Conference of New Jersey—Rule 1:35

Pursuant to Rule 1:35, the Judicial Conference of New Jersey will be held on May 14, 1976 at the Ramada Inn, East Brunswick. The purpose of the Conference is to assist the Supreme Court in the consideration of improvements in the practice and procedure in the courts and in the administration and organization of the judicial branch of government.

Additional information will be forwarded directly to all delegates from Richard L. Saks, Esq., Chief of Judicial Education, Administrative Office of the Courts.

2. Judges Seminar

The New Jersey Judges Seminar will be held on September 8, 9 and 10, 1976 at the Cherry Hill Hyatt House, Cherry Hill, New Jersey. The purpose of the Seminar is to raise the standards of judicial performance and to make more uniform the operation and administration of the courts of the State.

3. Judicial Seminars — Out-of-State Resident Programs 1976

Pursuant to the Chief Justice's memorandum of February 10, 1975, support of continuing judicial education activities will continue to be limited in view of budget constraints. Preference will be given to applicants in prior years who could not be accommodated because of lack of funds. A balancing of courts and vicinages is required, and thus, any applicants not accommodated this year will be given preference in future years insofar as possible.

* * * *

A few spaces remain available for the following 1976 courses:

Course	For Whom	Dates
National College of Juvenile Justice Regular Two Week Reno, Nevada	Judges, Juvenile Court	August 1-13 or August 15-27
National College of Juvenile Justice Regular One Week Gulf Shores, Alabama	Graduates	June 20-25
National College of the State Judiciary Regular Four Week Reno, Nevada	Judges, General Jurisdiction	June 13- July 9 or July 18- August 13
National College of the State Judiciary Criminal Law & Sentencing Reno, Nevada	Graduates or 5 years on bench	June 13-25
National College of the State Judiciary New Trends in the Law, the Trial and Public Understanding Reno, Nevada	Graduates or 5 years on bench	July 18-30
National College of the State Judiciary Court Administration Reno, Nevada	Assignment Judges	December 5-17

(Continued on page 32, col. 1)

Report Of The Trustees Of The Clients' Security Fund

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court:

Pursuant to R. 1:28-4(a), the Trustees of the Clients' Security Fund of the Bar of New Jersey submit herewith their report and annual audit for 1975.

A. Organization of the Fund: The first meeting of the year was convened January 24, 1975, and was attended by the Trustees and staff members from the Administrative Office of the Courts. A. Arthur Davis, 3rd, and Richard L. Amster were re-elected Chairman and Treasurer, respectively. Theodore J. Savage was reappointed Counsel; Barbara L. Greenberg, Secretary; and Michael F. Kocan, Assistant Secretary-Treasurer.

B. Administration and Policy: At the request of the Trustees, the Supreme Court adopted R. 1:28-8, entitled "Custodial Receivers," which provides specific authority in limited situations for the Trustees to make application for the appointment of a custodial receiver for a defalcating attorney. The trustees had requested the adoption of this rule in order to preserve Fund monies by attempting to assure the availability of a defalcating attorney's own assets for distribution to his or her clients. It has been determined by the Trustees that in an emergent situation any one Trustee, after making reasonable efforts to contact as many Trustees as possible, could make the findings required by the rule before seeking the appointment of a custodial receiver. Where an attorney is presumed to be fleeing the jurisdiction, the Trustees directed Counsel to request that the Attorney General obtain a temporary restraining order. In May, 1975, pursuant to R. 1:28-8, the Trustees sought and obtained the appointment of a custodial receiver for an attorney on whose account claims had been filed with the Fund. Although the receiver has not yet filed his final accounting in this matter, it appears that no Fund monies will be required to reimburse the clients of this attorney.

In a supplementary report to the 1974 report and annual audit, the Trustees requested the Court to amend R. 1:28-2 to provide for an increase in the annual fee payment and to eliminate several of the exemptions from payment of this fee. Essentially, this recommendation was made as a result of the increased number of claims filed with the Fund and the substantially increased value of these claims. Further, the Trustees believed that full restitution should be made in more cases, in order to accomplish the purpose of the Fund. On July 17, 1975, the Supreme Court amended R. 1:28-2 to be effective September 8, 1975.

In response to inquiries concerning Trustee policy with regard to claims filed on account of attorneys who offered questionable investment advice, the Trustees, with Supreme Court approval, amended regulation 3.2 of the rules and regulations governing the Fund to clarify and to make known their policy. Pursuant to the Rules of Court, the Trustees may consider for payment only those claims arising out of an attorney/client or fiduciary relationship. Losses resulting from business investments may be cognizable by the Trustees, however, where an attorney is in the possession of the client's monies which have been obtained by the attorney for that client as a result of legal representation, where the attorney has requested the client's permission to invest these monies and where the attorney then converts these monies to his use.

On September 17, 1975, the Supreme Court approved the Trustees' request that they be permitted to exceed the $200,000 limitation on payment of claims filed on account of one particular attorney who, by virtue of his prestige and reputation in his community, was able to steal substantial amounts of monies from many of his clients.

Also on September 17, 1975, the Court approved a policy statement to be followed by the Trustees with regard to making available to the press and to the public information concerning claims filed with the Fund. Essentially, no information on a particular claim is to be made available to the press or the public while the Trustees are considering or acting upon that claim. When the Trustees have reached a final decision, with few exceptions, basic information with regard to each claim may be made available.

There continues to be a marked increase in the number of pending claims. On December 31, 1974, there were 82 claims awaiting final disposition. In 1975, 120 new claims were filed, more than twice the number filed in 1974 and nearly half as many claims as were filed in 1969-1974. The Trustees acted on 79 claims: 62 were approved; 6, closed; 1, withdrawn; and 10, rejected. As of December 31, 1975, 123 claims totaling $2,904,031.00 were pending final Trustee action. If on account of these claims the Trustees were to award the full amount allowed under the present regulations ($15,000 for each claimant and $200,000 in the aggregate on account of each attorney), the total assets of the Fund would be exhausted.

As a result of the increased filings with the Fund, and the amendment to R. 1:28-2, substantial and new administrative and clerical burdens have been placed upon Fund staff. The Trustees very much appreciate the fine work of the staff members and thank them for their invaluable assistance. It is apparent, however, that some additional staff is now required and that more may be required if the number of claims continues to increase at the present, marked rate. The Trustees intend to report to the Court on this subject in the near future.

C. Collection of Attorney Payments: During 1975, annual fee payments of $15.00 each were collected from 13,126 members of the Bar of New Jersey; 3,284 attorneys were granted exemptions from the payment of these fees; and 49 attorneys were declared to be ineligible to practice law in this State for their failure to comply with R. 1:28-2.

D. Claims Against the Fund:
(see next column)

E. Conclusion: The Bar of New Jersey, through the Fund, is attempting to preserve the integrity of the profession, and the Trustees are grateful for the continuing support of this endeavor by the Court. In particular, they appreciate the approval by the Court of the several rule amendments which will enable the Trustees to accomplish more nearly the purpose of the Fund.

Respectfully submitted,
Richard L. Amster
William R. Blair
Bennett H. Fishler, Jr.
Walter N. Read
A. Arthur Davis, 3rd, Chairman

Dated: March 11, 1976

CLAIMS AGAINST THE CLIENTS' SECURITY FUND OF THE BAR OF NEW JERSEY

	Claims Filed	Attorneys Involved	Loss Claimed	Claims Approved	Payments Approved
1969	6	5	$ 38,989	0	$ 0.00
1970	67	10*	1,471,908**	13***	55,020.00
1971	43	27*	369,360	33***	142,765.93
1972	27	15*	258,367	10***	27,004.82
1973	70	14*	1,209,570	27***	131,920.87
1974	59	19*	1,092,006	28***	164,339.20
1975	120	30*	2,196,331	62***	307,342.74
Totals	392				$828,393.56

*Some of the attorneys on account of whose actions claims were filed in 1970-1975 are attorneys whose conduct gave rise to claims in previous years.

**The conduct of a single attorney accounted for $1,366,814.00 of the 1970 claims.

***Claims were not necessarily approved for payment in the calendar year in which they were filed.

[With reference to * above, between January 1, 1969, and December 31, 1975, claims were received by the Fund on account of 75 attorneys, and as of December 31, 1975, claims had been paid on account of 25 attorneys.]

EXCERPT FROM ANNUAL AUDIT REPORT
CLIENTS' SECURITY FUND OF THE BAR OF NEW JERSEY
STATEMENT OF REVENUES & EXPENSES & FUND BALANCE
FOR THE YEARS ENDED DECEMBER 31, 1975 & 1974

	1975	1974
Revenues:		
Current year	$196,890	$183,690
Prior years	765	1,065
Interest:		
Bonds	56,451	36,658
Savings	4,792	4,187
Amortization of bond premiums and discounts	(1,423)	(1,045)
Subrogation payments	6,110	7,846
Totals	263,585	232,401
Expenses:		
Claims paid	321,204	120,552
Salaries and employee benefits	35,249	29,088
Professional fees	3,464	1,500
Postage	2,600	2,300
Stationery, supplies and miscellaneous expenses	3,238	3,485
Data processing	834	1,756
Treasurer's bond	125	125
Totals	366,714	158,806
Excess revenues (expenses)	(103,129)	73,595
Fund balance:		
Beginning of year	571,111	497,516
END OF YEAR	$467,982	$571,111

NOTE: A complete copy of the annual audit report from which the information above was excerpted will be made available to any attorney who requests it for review. Requests should be made to Theodore J. Savage, Counsel, in the Administrative Office of the Courts.

SUPPLEMENTARY REPORT OF THE SUPREME COURT'S COUNTY DISTRICT COURT COMMITTEE

(Continued from page 31)

In order to avoid calendar problems, it will be necessary for all interested judges to first obtain approval by the assignment judge of the vicinage and then contact Richard L. Saks, Chief of Judicial Education in the Administrative Office of the Courts prior to April 5, 1976.

4. Default From the District Court—R. 6:6-2

In entrance of defaults pursuant to R. 6:6-2, all district court judges are requested to remind their personnel of the applicability of R. 1:3-3, permitting a three-day extension for mail service.

5. Service of Process in Landlord/Tenant Cases

To effectuate the provisions of R. 6:6-3(b) and eliminate questions or ambiguities concerning the date of mailing of said notice, all district court clerks are directed to note upon the file jacket and court docket the date of mailing of notice to tenants, pursuant to R. 6:6-3(b).

6. Compilation and Summary of Administrative Directives

A Compilation and Summary of the Administrative Directives, memoranda from the Administrative Office of the Courts, and Summary of Assignment Judges' Meetings pertaining to administration and procedures of our courts will be distributed to all judges and trial court administrators before the end of February. A loose leaf binder rather than a fixed binder has been provided. It is recommended that each recipient of the Compilation and Summary place in the binder those directives, memoranda and these Monthly Bulletin Letters as received until the next revision is made to the Compilation and Summary. It is planned that the revisions will be by page rather than by whole Summary.

Arthur J. Simpson, Jr.

Notice Re Essex Courts

Presiding Judge Nicholas Albano, Jr. requests that all adjournments, written or oral, be made at least 48 hours prior to the trial date. In the event the adjournment is denied or objected to, counsel must appear at the trial date calendar call.

David P. McGraw, Clerk
Essex County District Court