

**IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW JERSEY**

***THE DOs AND DON'Ts OF FEDERAL COURTS
PRACTICE***



The Brown Bag Lunch Series

Presented by the United States District Court for the District of New Jersey in conjunction with the Association of the Federal Bar of New Jersey, and the Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester and Salem County Bar Associations

September 25, 2012

Brown Bag Lunch Series

UNITED STATES DISTRICT COURT
CAMDEN, NEW JERSEY

September 25, 2012

PROGRAM

Moderator

Lisa J. Rodriguez

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DO's and DON'Ts in Federal Court:
From A Judge's Prospective

Session Two

Questions and Answers from The Audience

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Rules Of Professional Conduct

Adopted Effective September 10, 1984.

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NOTE: These rules shall be referred to as the Rules of Professional Conduct and shall be abbreviated as "RPC".

RPC 1.0 Terminology

- (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
- (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent."
- (c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.
- (d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.
- (e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
- (f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.
- (g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
- (h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions
- (i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
- (j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
- (k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
- (l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely adoption and enforcement by a law firm of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.
- (m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
- (n) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
- (o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Note: Adopted November 17, 2003 to be effective January 1, 2004. RPC 1.1 Competence

1.1 Competence

A lawyer shall not:

- (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.
- (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (c) amended, and paragraph (e) deleted and redesignated as RPC 1.4(d) November 17, 2003 to be effective January 1, 2004.

RPC 1.3. Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.4. Communication

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new paragraphs (a) and (d) adopted and former paragraphs (a) and (b) redesignated as paragraphs (b) and (c) November 17, 2003 to be effective January 1, 2004.

RPC 1.5. Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

- (1)** the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2)** the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3)** the fee customarily charged in the locality for similar legal services;
- (4)** the amount involved and the results obtained;
- (5)** the time limitations imposed by the client or by the circumstances;
- (6)** the nature and length of the professional relationship with the client;
- (7)** the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8)** whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

- (1)** any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
- (2)** a contingent fee for representing a defendant in a criminal case.

(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

- (1)** the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and
- (2)** the client is notified of the fee division; and
- (3)** the client consents to the participation of all the lawyers involved; and
- (4)** the total fee is reasonable.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new subparagraph (e)(2) added and former subparagraphs (e)(2) and (e)(3) redesignated as subparagraphs (e)(3) and (e)(4) November 17, 2003 to be effective January 1, 2004.

RPC 1.6. Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).
- (b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:
 - (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;
 - (2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.
- (c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.
- (d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
 - (1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;
 - (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
 - (3) to comply with other law.
- (e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended, new paragraph (c) added, former paragraph (c) redesignated as paragraph (d), and former paragraph (d) amended and redesignated as paragraph (e) November 17, 2003 to be effective January 1, 2004.

RPC 1.7. Conflict of Interest: General Rule

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
 - (2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (3) the representation is not prohibited by law; and
 - (4) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text deleted and new text adopted November 17, 2003 to be effective January 1, 2004.

RPC 1.8. Conflict of Interest: Current Clients; Specific Rules

- (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and
 - (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
- (b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

- (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:
 - (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
 - (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
 - (3) a non-profit organization authorized under R. 1:21-1(e) may provide financial assistance to indigent clients whom it is representing without fee.
- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
 - (1) the client gives informed consent;
 - (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
 - (3) information relating to representation of a client is protected as required by RPC 1.6.
- (g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
- (h) A lawyer shall not:
 - (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or
 - (2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.
- (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.
- (j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.
- (k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.
- (l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted September 10, 1984 to be effective immediately; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; caption amended, paragraphs (a), (b), (c), (f), (g), (h) amended, former paragraph (i) deleted, former paragraph (j) redesignated as paragraph (i), former paragraph (k) deleted, and new paragraphs (j), (k) and (l) added November 17, 2003 to be effective January 1, 2004.

RPC 1.9 Duties to Former Clients

- (a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.
 - (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
 - (1) whose interests are materially adverse to that person; and
 - (2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.
- Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.
- (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
 - (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (b) amended, and new paragraphs (c) and (d) added November 17, 2003 to be effective January 1, 2004.

RPC 1.10. Imputation of Conflicts of Interest: General Rule

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

- (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
- (2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

- (1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;
- (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
- (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

(f) Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: (1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, (2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and (3) the screened attorney is apportioned no part of the fee therefrom.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (b) corrected in *Dewey v. R.J. Reynolds Tobacco Co.*, 109 N.J. 201, 217-18 (1988); caption and paragraphs (a), (b), and (c) amended, paragraph (d) deleted, former paragraph (e) amended and redesignated as paragraph (d), new paragraphs (e) and (f) adopted November 17, 2003

RPC 1.11. Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

- (1) in which the lawyer participated personally and substantially as a public officer or employee, or
- (2) for which the lawyer had substantial responsibility as a public officer or employee; or
- (3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

(b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

- (1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and
- (2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

(c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but absent contrary law a firm with which that lawyer is associated may undertake or continue representation if:

- (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and
- (2) written notice is given promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

(d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

- (1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,

(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended, text of paragraph (b) deleted and new text adopted, new paragraph (c) adopted, former paragraphs (c) and (d) amended and redesignated as paragraphs (d) and (e), and former paragraph (e) merged into redesignated paragraph (e) November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 9, 2008 to be effective September 1, 2008.

Comment by Court (Regarding 2008 Amendment). In *In re ACPE Opinion 705*, 192 N.J. 46 (2007), the Court deferred to the Legislature in the spirit of comity and held that the post-government employment restrictions imposed by the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-17, apply in the context of former State attorneys. The 2008 amendment to paragraph (c) implements that decision.

RPC 1.12. Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk

(a) Except as stated in paragraph (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding have given consent, confirmed in writing.

(b) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral. A lawyer serving as law clerk to such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the person to whom the lawyer is serving as law clerk.

(d) An arbitrator selected by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended, new paragraph (b) adopted, former paragraphs (b) and (c) amended and redesignated as paragraphs (c) and (d) November 17, 2003 to be effective January 1, 2004.

RPC 1.13. Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996.

RPC 1.14. Client Under a Disability

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.

RPC 1.15. Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.16. Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

- (3) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b), (c), and (d) amended November 17, 2003 to be effective January 1, 2004.

RPC 1.17. Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

- (a) The seller ceases to engage in the private practice of law in this jurisdiction.
- (b) The entire practice is sold to one or more lawyers or law firms.
- (c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.
 - (1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.
 - (2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.
 - (3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the *New Jersey Law Journal* and the *New Jersey Lawyer* at least thirty days in advance of the effective date of the transfer.
- (d) The fees charged to clients shall not be increased by reason of the sale of the practice.
- (e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.
- (f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

Note: Adopted October 16, 1992, to be effective immediately; paragraph (f) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended November 17, 2003 to be effective January 1, 2004.

RPC 1.18. Prospective Client

- (a) A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.
- (b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).

(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

(d) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a "prospective client," and if no client-lawyer relationship is formed, is a "former prospective client."

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 2.1. Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 2.2. (Reserved)

Note: RPC 2.2 ("Intermediary") adopted July 12, 1984 to be effective September 10, 1984; caption and rule deleted November 17, 2003 effective January 1, 2004.

RPC 2.3. Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless:

- (1) the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;
- (2) the lawyer consults with the client; and
- (3) the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.

(d) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended and redesignated as paragraphs (a) and (b), former paragraph (b) redesignated as paragraph (d), and paragraph (c) amended November 17, 2003 to be effective January 1, 2004.

RPC 2.4. Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 3.1. Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.

RPC 3.2. Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 3.3. Candor Toward the Tribunal

- (a) A lawyer shall not knowingly:
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;
 - (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
 - (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or
 - (5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.
- (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.
- (c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
- (d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

- (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;
- (b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;
- (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) the person is a relative or an employee or other agent of a client; and
 - (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
- (g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990.

RPC 3.5. Impartiality and Decorum of the Tribunal

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person except as permitted by law; or
- (c) engage in conduct intended to disrupt a tribunal.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 3.6. Trial Publicity

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.
- (b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) the information contained in a public record;
- (3) that an investigation of the matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(1) amended October 1, 1992, to be effective immediately; paragraph (a) amended, paragraph (b) deleted and restated in Official Comment, paragraph (c) amended and redesignated as paragraph (b), and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.

Official Comment by Supreme Court (November 17, 2003)

A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

- (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;
- (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
- (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
- (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
- (5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
- (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

RPC 3.7. Lawyer as Witness

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 3.8. Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

- (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;
- (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;
- (c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (c) and (d) amended and new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

RPC 3.9. Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through (d), RPC 3.4(a) through (g), and RPC 3.5 (a) through (c).

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.

RPC 4.1. Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 4.2. Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996; amended November 17, 2003 to be effective January 1, 2004.

Official Comment by Supreme Court (November 17, 2003)

Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the 'matter' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. See *Michaels v. Woodland*, 988 F.Supp. 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See *State v. Bisaccia*, 319 N.J. Super. 1, 22-23 (App. Div. 1999).

Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

RPC 4.3. Dealing with Unrepresented Person; Employee of Organization

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996.

RPC 4.4. Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document and has reasonable cause to believe that the document was inadvertently sent shall not read the document or, if he or she has begun to do so, shall stop reading the document, promptly notify the sender, and return the document to the sender.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text redesignated as paragraph (a) and new paragraph (b) adopted November 17, 2003 to be effective January 1, 2004.

RPC 5.1. Responsibilities of Partners, Supervisory Lawyers, and Law Firms

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or ratifies the conduct involved; or

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 5.2. Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 5.3. Responsibilities Regarding Nonlawyer Assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or ratifies the conduct involved;

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 5.4. Professional Independence of a Lawyer

Except as otherwise provided by the Rules of Court:

- (a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:
 - (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
 - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;
 - (3) lawyers or law firms who purchase a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price;
 - (4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and
 - (5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.
- (b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation, association, or limited liability entity authorized to practice law for profit, if:
 - (1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;
 - (2) a nonlawyer is a corporate director or officer thereof; or
 - (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a)(2) amended and paragraph (a)(3) adopted October 16, 1992, to be effective immediately; paragraph (d) amended July 10, 1998, to be effective September 1, 1998; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

- (a) A lawyer shall not:
 - (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
 - (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
- (b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:
 - (1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or
 - (2) the lawyer is an in-house counsel and complies with R. 1:27-2; or
 - (3) under any of the following circumstances:
 - (i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;
 - (ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;
 - (iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;
 - (iv) the lawyer associates in a matter with a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or
 - (v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is

admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:

- (1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;
- (2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;
- (3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;
- (4) not hold himself or herself out as being admitted to practice in this jurisdiction;
- (5) maintain a bona fide office in conformance with R. 1:21-1(a), except that, when admitted pro hac vice, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B); and
- (6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, former text designated as paragraph (a), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(3)(ii) and (b)(3)(iii) amended, former subparagraph (b)(3)(iv) redesignated as subparagraph (b)(3)(v) and amended, new subparagraph (b)(3)(iv) adopted, and paragraph (c) and subparagraphs (c)(3) and (c)(6) amended July 23, 2010 to be effective September 1, 2010.

Official Comment by Supreme Court (November 17, 2003)

Three years from the January 1, 2004 effective date of the amendments to RPC 5.5, the Supreme Court will have its Professional Responsibility Rules Committee undertake a comprehensive evaluation of the experience gained in multijurisdictional practice to determine whether any modifications to the RPC 5.5 amendments as adopted are necessary or desirable.

RPC 5.6. Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

- (a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
- (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.1. Voluntary Public Interest Legal Service

Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and text amended November 17, 2003 to be effective January 1, 2004.

RPC 6.2. Accepting Appointments

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.3. Membership in Legal Services Organization

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

- (a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and

(b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.4. Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.5. Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

- (1) is subject to RPC 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and
- (2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), RPC 1.10 is inapplicable to a representation governed by this RPC.

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 7.1. Communications Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

- (1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
- (3) compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or
- (4) relates to legal fees other than:
 - (i) a statement of the fee for an initial consultation;
 - (ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;
 - (iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;
 - (iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;
 - (v) the availability of credit arrangements; and
 - (vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (b) added June 26, 1987, to be effective July 1, 1987; paragraph (a) amended June 29, 1990, to be effective September 4, 1990; paragraph (b) amended January 5, 2009 to be effective immediately; paragraph (a)(3) amended and Official Comment adopted November 2, 2009 to be effective immediately.

RPC 7.2. Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall

be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) amended December 10, 1986, to be effective December 30, 1986; paragraph (c) amended October 16, 1992, to be effective immediately; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 7.3. Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written communication to, a prospective client for the purpose of obtaining professional employment if:

- (1)** the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or
- (2)** the person has made known to the lawyer a desire not to receive communications from the lawyer; or
- (3)** the communication involves coercion, duress or harassment; or
- (4)** the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or
- (5)** the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient; and

(ii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iii) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, New Jersey 08625.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:

- (1)** the promotional activity involves use of a statement or claim that is false or misleading within the meaning of RPC 7.1; or
- (2)** the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:

- (1)** a legal aid office or public defender office:
 - (i)** operated or sponsored by a duly accredited law school.
 - (ii)** operated or sponsored by a bona fide nonprofit community organization.
 - (iii)** operated or sponsored by a governmental agency.
 - (iv)** operated, sponsored, or approved by a bar association.
- (2)** a military legal assistance office.

- (3) a lawyer referral service operated, sponsored, or approved by a bar association.
- (4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:
 - (i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters when such organization bears ultimate liability of its member or beneficiary.
 - (ii) neither the lawyer, nor the lawyer's partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefit from such initiation or promotion.
 - (iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.
 - (iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.
 - (v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense except where the organization's plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.
 - (vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.
 - (vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

(f) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(4) amended June 29, 1990, to be effective September 4, 1990; new paragraph (b)(4) adopted and former paragraph (b)(4) redesignated and amended as paragraph (b)(5) April 28, 1997, to be effective May 5, 1997; paragraph (b)(5) amended November 17, 2003 to be effective January 1, 2004; subparagraph (b)(5)(i) amended July 23, 2010 to be effective September 1, 2010.

RPC 7.4. Communication of Fields of Practice and Certification

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.
- (d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; former rule amended and designated paragraph (a) and new paragraph (b) adopted July 15, 1993, to be effective September 1, 1993; paragraph (a) amended, paragraph (b) redesignated as paragraph (d), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004.

RPC 7.5. Firm Names and Letterheads

- (a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(e), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.
- (b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.

(c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

(d) Lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language.

(f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraphs (a) and (d) amended, paragraph (e) amended and redesignated as paragraph (f) and new paragraph (e) added June 29, 1990, to be effective September 4, 1990; paragraph (a) amended January 5, 2009 to be effective immediately.

RPC 8.1. Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 8.2. Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 8.3. Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:

(i) If the effect of discovered ethics infractions on the practice of an impaired attorney is irreparable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (d) adopted October 5, 1993, to be effective immediately; paragraphs (a) and (b) amended November 17, 2003 to be effective January 1, 2004.

RPC 8.4. Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;
- (g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

Official Comment by Supreme Court (May 3, 1994)

This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. *In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., *In re Vincenti*, 114 N.J. 275 (554 A.2d 470) (1989).

RPC 8.5. Disciplinary Authority; Choice of Law

(a) **Disciplinary Authority.** A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) **Choice of Law.** In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:

- (1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and
- (2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, text amended and redesignated as paragraph (a) with caption added, new paragraph (b) with caption adopted November 17, 2003 to be effective January 1, 2004.

Attorney Advertising Guidelines (As approved by the Supreme Court of New Jersey)

Attorney Advertising Guideline 1

In any advertisement by an attorney or law firm, the advertisement shall include the bona fide street address of the attorney or law firm.

Note: Adopted June 29, 1990, to be effective September 4, 1990.

Attorney Advertising Guideline 2

(a) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) must be at least two font sizes larger than the largest size used in the advertising text.

(b) The font size of notices required by RPC 7.3(b)(5)(ii and iii) must be no smaller than the font size generally used in the advertisement.

(c) When envelopes or self-contained mailers used for sending direct mail solicitations are imprinted or stamped with any message relating to the subject matter of the solicitation, the envelopes or self-contained mailers must also bear the word "ADVERTISEMENT" as required by RPC 7.3 (b)(5)(i).

Note: Adopted March 2, 2005, to be effective immediately.

Commentary: The language in (c) is derived, in part, from CAA Opinion 20, published June 10, 1996. Section (c) excludes the Opinion 20 requirement that the notices under RPC 7.3(b)(5)(ii and iii) be printed on the envelope.

ATTACHMENT 2

Guidelines for Litigation Conduct

August 1998

Preamble

A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms. In fulfilling our duty to represent a client vigorously as lawyers, we will be mindful of our obligations to the administration of justice, which is a truth-seeking process designed to resolve human and societal problems in a rational, peaceful, and efficient manner.

A judge's conduct should be characterized at all times by courtesy and patience toward all participants. As judges we owe to all participants in a legal proceeding respect, diligence, punctuality, and protection against unjust and improper criticism or attack.

Conduct that may be characterized as uncivil, abrasive, abusive, hostile, or obstructive impedes the fundamental goal of resolving disputes rationally, peacefully, and efficiently. Such conduct tends to delay and often to deny justice.

The following Guidelines are designed to encourage us, judges and lawyers, to meet our obligations to each other, to litigants and to the system of justice, and thereby achieve the twin goals of civility and professionalism, both of which, are hallmarks of a learned profession dedicated to public service.

We encourage judges, lawyers and clients to make a mutual and firm commitment to these Guidelines.

We support the principles espoused in the following Guidelines, but under no circumstances should these Guidelines be used as a basis for litigation or for sanctions or penalties.

Lawyers' Duties to Other Counsel

1. We will practice our profession with a continuing awareness that our role is to zealously advance the legitimate interests of our clients. In our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications. We will refrain from acting upon or manifesting bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status toward any participant in the legal process.

APPENDIX R. Guidelines for Litigation Conduct

Introduction

The widely-perceived, accelerating decline in professionalism - often denominated "civility" - has been the subject of increasing concern to the profession for many, years. Twice since 1988, the American Bar Association has urged adoption of, and adherence to, civility codes. What has been lacking, however, is an ABA-endorsed model code. The GUIDELINES FOR LITIGATION CONDUCT fill that void.

These GUIDELINES are consensus-driven and state nothing novel or revolutionary. They are purely aspirational and are not to be used as a basis for litigation, liability, discipline, sanctions or penalties of any type. The GUIDELINES are designed not to promote punishment but rather to elevate the tenor of practice - to set a voluntary, higher standard, "in the hope that," in the words of former ABA President John J. Curtin, "some progress might be made towards greater professional satisfaction."

The GUIDELINES FOR LITIGATION CONDUCT are modeled on the Standards for Professional Conduct adopted by the United States Court of Appeals for the Seventh Circuit, a set of proven aspirational standards. Chief United States District Judge Marvin E. Aspen of Chicago, architect of the Seventh Circuit Standards, has accurately observed that civility in the legal profession is inextricably linked to the manner in which lawyers are perceived by the public - and, therefore, to the deteriorating public confidence that our system of justice enjoys.

Deteriorating civility, in former ABA President Lee Cooper's words, "interrupts the administration of justice. It makes the practice of law less rewarding. It robs a lawyer of the sense of dignity and self-worth that should come from a learned profession. Not least of all, it ... brings with it all the problems ... that accompany low public regard for lawyers and lack of confidence in the justice system."

The problem of incivility is more pervasive, and insidious, than its impact on the legal profession alone. As Justice Anthony M. Kennedy has stressed:

Civility is the mark of an accomplished and superb professional, but it is more even than this. It is an end in itself. Civility has deep roots in the idea of respect for the individual.

The decline in civility is not limited to the legal profession, but this profession has been in the forefront of those addressing this problem. These GUIDELINES are offered in this spirit.

Gregory P. Joseph
Chair, 1997-1998
Section of Litigation
American Bar Association

2. We will not, even when called upon by a client to do so, abuse or indulge in offensive conduct directed to other counsel, parties, or witnesses. We will abstain from disparaging personal remarks or acrimony toward other counsel, parties, or witnesses. We will treat adverse witnesses and parties with fair consideration.
3. We will not encourage or knowingly authorize any person under our control to engage in conduct that would be improper if we were to engage in such conduct.
4. We will not, absent good cause, attribute bad motives or improper conduct to other counsel.
5. We will not lightly seek court sanctions.
6. We will in good faith adhere to all express promises and to agreements with other counsel, whether oral or in writing, and to all agreements implied by the circumstances or local customs.
7. When we reach an oral understanding on a proposed agreement or a stipulation and decide to commit it to writing, the drafter will endeavor in good faith to state the oral understanding accurately and completely. The drafter will provide other counsel the opportunity to review the writing. As drafts are exchanged between or among counsel, changes from prior drafts will be identified in the draft or otherwise explicitly brought to other counsel's attention. We will not include in a draft matters to which there has been no agreement without explicitly advising other counsel in writing of the addition.
8. We will endeavor to confer early with other counsel to assess settlement possibilities. We will not falsely hold out the possibility of settlement to obtain unfair advantage.
9. In civil actions, we will stipulate to relevant matters if they are undisputed and if no good faith advocacy basis exists for not stipulating.
10. We will not use any form of discovery or discovery scheduling as a means of harassment.
11. Whenever circumstances allow, we will make good faith efforts to resolve by agreement objections before presenting them to the court.
12. We will not time the filing or service of motions or pleadings in any way that unfairly limits another party's opportunity to respond.
13. We will not request an extension of time solely for the purpose of unjustified delay or to obtain unfair advantage.
14. We will consult other counsel regarding scheduling matters in a good faith effort to avoid scheduling conflicts.

15. We will endeavor to accommodate previously scheduled dates for hearings, depositions, meetings, conferences, vacations, seminars, or other functions that produce good faith calendar conflicts on the part of other counsel.
16. We will promptly notify other counsel and, if appropriate, the court or other persons, when hearings, depositions, meetings, or conferences are to be canceled or postponed.
17. We will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided our clients' legitimate rights will not be materially or adversely affected.
18. We will not cause any default or dismissal to be entered without first notifying opposing counsel, when we know his or her identity, unless the rules provide otherwise.
19. We will take depositions only when actually needed. We will not take depositions for the purposes of harassment or other improper purpose.
20. We will not engage in any conduct during a deposition that would not be appropriate in the presence of a judge.
21. We will not obstruct questioning during a deposition or object to deposition questions unless permitted under applicable law.
22. During depositions we will ask only those questions we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action.
23. We will carefully craft document production requests so they are limited to those documents we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action. We will not design production requests to place an undue burden or expense on a party, or for any other improper purpose.
24. We will respond to document requests reasonably and not strain to interpret requests in an artificially restrictive manner to avoid disclosure of relevant and non-privileged documents. We will not produce documents in a manner designed to hide or obscure the existence of particular documents, or to accomplish any other improper purpose.
25. We will carefully craft interrogatories so they are limited to those matters we reasonably believe are necessary, and appropriate, for the prosecution or defense of an action, and we will not design them to place an undue burden or expense on a party, or for any other improper purpose.
26. We will respond to interrogatories reasonably and will not strain to interpret them in an artificially restrictive manner to avoid disclosure of relevant and non-privileged information, or for any other improper purpose.

27. We will base our discovery objections on a good faith belief in their merit and will not object solely for the purpose of withholding or delaying the disclosure of relevant information, or for any other improper purpose.
28. When a draft order is to be prepared by counsel to reflect a court ruling, we will draft an order that accurately and completely reflects the court's ruling. We will promptly prepare and submit a proposed order to other counsel and attempt to reconcile any differences before the draft order is presented to the court.
29. We will not ascribe a position to another counsel that counsel has not taken.
30. Unless permitted or invited by the court, we will not send copies of correspondence between counsel to the court.
31. Nothing contained in these Guidelines is intended or shall be construed to inhibit vigorous advocacy, including vigorous cross-examination.

Lawyers' Duties to the Court

1. We will speak and write civilly and respectfully in all communications with the court.
2. We will be punctual and prepared for all court appearances so that all hearings, conferences, and trials may commence on time; if delayed, we will notify the court and counsel, if possible.
3. We will be considerate of the time constraints and pressures on the court and court staff inherent in their efforts to administer justice.
4. We will not engage in any conduct that brings disorder or disruption to the courtroom. We will advise our clients and witnesses appearing in court of the proper conduct expected and required there and, to the best of our ability, prevent our clients and witnesses from creating disorder or disruption.
5. We will not knowingly misrepresent, mis-characterize, misquote, or mis-cite facts or authorities in any oral or written communication to the court.
6. We will not write letters to the court in connection with a pending action, unless invited or permitted by the court.
7. Before dates for hearings or trials are set, or if that is not feasible, immediately after such date has been set, we will attempt to verify the availability of necessary participants and witnesses so we can promptly notify the court of any likely problems.

8. We will act and speak civilly* to court marshals, clerks, court reporters, secretaries, and law clerks with an awareness that they, too, are an integral part of the judicial system.

Courts' Duties to Lawyers

1. We will be courteous, respectful, and civil to lawyers, parties, and witnesses. We will maintain control of the proceedings, recognizing that judges have both the obligation and the authority to insure that all litigation proceedings are conducted in a civil manner.

2. We will not employ hostile, demeaning, or humiliating words in opinions or in written or oral communications with lawyers, parties, or witnesses.

3. We will be punctual in convening all hearings, meetings, and conferences; if delayed, we will notify counsel, if possible.

4. In scheduling all hearings, meetings and conferences we will be considerate of time schedules of lawyers, parties, and witnesses.

5. We will make all reasonable efforts to decide promptly all matters presented to us for decision.

6. We will give the issues in controversy deliberate, impartial, and studied analysis and consideration.

7. While endeavoring to resolve disputes efficiently, we will be considerate of the time constraints and pressures imposed on lawyers by the exigencies of litigation practice.

8. We recognize that a lawyer has a right and a duty to present a cause fully and properly, and that a litigant has a right to a fair and impartial hearing. Within the practical limits of time, we will allow lawyers to present proper arguments and to make a complete and accurate record.

9. We will not impugn the integrity or professionalism of any lawyer on the basis of the clients whom or the causes which a lawyer represents.

10. We will do our best to insure that court personnel act civilly toward lawyers, parties, and witnesses.

11. We will not adopt procedures that needlessly increase litigation expense.

12. We will bring to lawyers' attention uncivil conduct which we observe.

Judges' Duties to Each Other

1. We will be courteous, respectful, and civil in opinions, ever mindful that a position articulated by another judge is the result of that judge's earnest effort to interpret the law and the facts correctly.

2. In all written and oral communications, we will abstain from disparaging personal remarks or criticisms, or sarcastic or demeaning comments about another judge.

3. We will endeavor to work with other judges in an effort to foster a spirit of cooperation in our mutual goal of enhancing the administration of justice.

ATTACHMENT 3

Principles of Professionalism for Lawyers and Judges



NEW JERSEY COMMISSION ON
PROFESSIONALISM IN THE LAW

Preamble

Adherence to standards of professional responsibility, along with a broad respect for the law, is a hallmark of an enlightened and effective system of justice. The conduct of lawyers and judges should be characterized at all times by professional integrity and personal courtesy in the fullest sense of those terms. Both are indispensable ingredients in the practice of law, and in the orderly administration of justice by our courts.

The following Principles, which focus on the goals of professionalism and civility, are aspirational in nature and are designed to assist and encourage judges and lawyers to meet their professional obligations. We encourage all judges and lawyers to make a commitment to these Principles, and to conduct themselves in a manner that preserves the dignity and honor of the judiciary and the legal profession.

Principles

Lawyers' Relations With Clients

1. To a client, a lawyer owes diligence, competence, faithfulness and good judgment, in the pursuit of client objectives.
2. Clients must be treated with respect. A lawyer should provide objective advice and strive to represent the client's interests as expeditiously and efficiently as possible. Lines of communication must be kept open and explanations provided for actions taken in the course of representation. Billing practices should be fully explained to a client at the time representation is undertaken.
3. Clients should be advised against pursuing a course of action that is without merit, and should avoid tactics that are intended to harass, or drain the financial resources of the opposing party.
4. Clients should be advised that professional courtesy, fair tactics, civility, and adherence to the rules and law are compatible with vigorous advocacy and zealous representation.

Lawyers' Relations With Other Counsel

1. To opposing counsel, a lawyer owes a duty of respect, courtesy and fair dealing, candor in the pursuit of the truth, cooperation in all respects not inconsistent with the client's interests, and scrupulous observance of all agreements and mutual understandings.
2. A lawyer should respect a colleague's schedule. Agreement should be sought on dates for meetings, conferences, depositions, hearings, trials and other events. A reasonable request for a scheduling accommodation, extension of time, or waiver of procedural formalities should not be refused if the interests of a client will not be adversely affected.

3. Forms of pleading, discovery, motions, or other papers, should not be used as a means of harassment, or for gaining an unfair advantage. The filing or service of motions, pleadings or other papers should not be timed so as to unfairly limit another party's opportunity to respond, or harass counsel.

4. In the conduct of negotiations, or litigation, a lawyer should conduct himself or herself with dignity and fairness and refrain from conduct meant to harass the opposing party. A lawyer should not advance groundless claims, defenses and objections.

Lawyers' Relations With the Court

1. To the court, a lawyer owes honesty, respect, diligence, candor and punctuality. A lawyer has a duty to act in a manner consistent with the proper functioning of a fair, efficient, and humane system of justice.
2. A lawyer must avoid frivolous litigation and non-essential pleading in litigation. Settlement possibilities should be explored at the earliest reasonable date, and agreement should be sought on procedural and discovery matters. Delays not dictated by a competent and justified presentation of a client's claims or defenses should be avoided.
3. As an officer of the court, a lawyer should act with complete honesty; show respect for the court by proper demeanor; and act and speak civilly to the judge, court staff and adversaries, with an awareness that all involved are integral parts of the justice system.
4. A lawyer should strive to protect the dignity and independence of the judiciary, particularly from unjust criticism and attack.

Judges' Relations With Lawyers and Others

1. To lawyers, parties, and all participants in the legal process, a judge owes courtesy, patience, respect, diligence, punctuality and fairness.
2. A judge must maintain control of proceedings, and has an obligation to ensure that proceedings are conducted in a civil manner. Judges should establish a climate of professionalism that upholds the dignity of the bench and bar. A judge should show respect for the bar by treating lawyers with civility and personal courtesy.
3. A judge should ensure that disputes are resolved in a prompt and efficient manner. However, hearings, meetings, conferences and trials should be scheduled with appropriate consideration to the schedules of lawyers, parties and witnesses.
4. A judge should remain knowledgeable of the law, rules and procedure, and apply them in a fair and consistent manner that enables all parties an adequate opportunity to present their cases.

Adopted 1997

Camden County Bar Association Code of Professionalism

PREAMBLE

The Camden County Bar Association has a long and proud history of service to the public, to our system of justice and to its members. The lawyers who have the privilege of being accepted as Association members continue a tradition of treating fellow members and the judiciary before whom they practice in a professional and courteous manner. While this professionalism includes acting with integrity and complying with the ethical standards mandated by the Rules of Professional Conduct, it goes beyond those fundamental obligations and represents the higher standard of conduct that makes the profession of law more than a competitive service industry. As we approach the 21st century, however, the legal profession stands at the crossroads of becoming such a large, impersonal and technologically oriented business that some members lose sight of the traditional values and virtues to which lawyers of the past had always subscribed.

At a time when the complexities of the law and the fast-paced society which it mirrors make practicing our learned art increasingly difficult, the members of the Camden County Bar Association wish to restate their commitment to the standards of professional courtesy, which have guided us and our conduct towards each other for more than a century.

In furtherance of this goal, the members of the Camden County Bar Association do hereby adopt the following Code of Professionalism.

1. I will provide my client with objective advice and will endeavor to represent my client's lawful interests as expeditiously and economically as possible.
2. I will advise my client against pursuing a course of action that is without merit and against tactics which are intended to delay resolution of the matter, or to harass or drain the financial resources of the opposing party.
3. I will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation, and the civility and courtesy to others during the course of representing the client are not to be equated with weakness, but rather are virtues upon which our system of justice is founded.
4. I will treat with civility and courtesy opposing counsel and other lawyers and their staffs, parties, witnesses and the courts and members of the court staff. Professional courtesy is a professional necessity and is entirely compatible with vigorous advocacy and zealous representation.
5. I will never knowingly misstate facts or law, and I shall always act so that other lawyers and judges can trust in and rely upon my oral or written word.

6. I will agree to reasonable extensions of time or for waiver of procedural formalities when the legitimate interest of my client will not be adversely affected.
7. I will endeavor to consult with opposing counsel before scheduling depositions or meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested. I will be punctual in honoring scheduled appearances and in providing notice of cancellation of appointments, depositions or hearings to all concerned parties at the earliest possible time.
8. In the conduct of litigation or negotiation, I will conduct myself with fairness and dignity, refraining from any course of conduct meant to harass the opposing party; from engaging in excessive or abusive discovery, and from advancing groundless objections or committing other acts of rudeness or disrespect.
9. I will be considerate in my communications with others, promptly returning telephone calls and responding to correspondence from clients and other lawyers.
10. While I will be a vigorous advocate on my client=s behalf, I always will be mindful that I am an officer of the court, and that I have an obligation to conduct myself with respect for the court and for my adversaries.
11. In civil proceedings, I will voluntarily withdraw claims or defenses if it becomes apparent that they lack merit, and I will stipulate to non-essential facts as to which there is not genuine dispute. I will cooperate with other lawyers towards the goal of having matters resolved in a prompt and fair fashion.
12. I will not quarrel needlessly over matters of form or style, but will concentrate on matters of substance and content.
13. I will strive to keep current in the areas in which I practice. I will familiarize myself with the Rules of Professional Conduct and adhere to these rules in the everyday practice of my profession.
14. I will be mindful of my obligation to enhance the image of the legal profession in all of my professional actions. I will be so guided in my comments about the judiciary, opposing counsel or the members of any other profession, and in the methods and contents of any advertising which I may pursue.
15. I recognize that the law is a learned profession and that among its desirable goals and devotion to public service, improvement of the administration of justice and the contribution of uncompensated time towards the administration of justice and on behalf of those persons who cannot afford legal assistance.

As a condition of membership in the Camden County Bar Association, I agree to abide by and conduct the practice of law in a manner consistent with this Code.

Adopted November, 1993

CAMDEN COUNTY BAR ASSOCIATION

ATTACHMENT 4

New Jersey State Bar Association

NJ Commission on Professionalism

Note: The Commission does not regulate, investigate or discipline lawyers. For advice on filing a complaint against a lawyer please contact the Office of Attorney Ethics, PO Box 963, Trenton, NJ. You may call them at (609) 530-4010.

Resources

Pro Bono
NJ Lawyers Ass
NJ State Bar Fo
NJICLE
Government Af

Background

The New Jersey Commission on Professionalism in the Law is a unique cooperative venture of the NJSBA, the state and federal judiciary, and New Jersey's three law schools. The Commission was formed in response to increasing displeasure within the bar about the future direction of the profession, and public criticism of lawyers and the legal system. We hope to contribute to a strengthening of the traditional values, and sense of responsibility and public purpose, that have made the practice of law a distinguished profession. Moreover, we hope our work helps to increase public respect for judges and the justice system.

Towards this end the Commission develops programs and initiatives for lawyers, judges, and law students. We sp take positions on professional responsibility issues, and serve as an information resource for bar associations. The Center in New Brunswick.

The Commission's Chair is Superior Court judge Linda R. Feinberg of Mercer County. Members include a member district court judge, representatives of the state trial and appellate courts, the Deans of New Jersey's law schools, from Rutgers College, and a public representative. The Commission's Executive Director is Charles J. Hollenbeck.

Chair

Hon. Linda R. Feinberg
Mercer County Civil Courthouse
175 South Broad Street
P.O. Box 8069
Trenton, NJ 08650

Executive Director

Charles J. Hollenbeck, Esq.

Members

Frank R. Allocca
Hon. Louis J. Belasco
Hon.. Garrett E. Brown Jr.
Hon. Wendel E. Daniels
Dean John J. Farmer Jr.
Susan A. Feeney
Alan I. Gould
Dean Patrick E. Hobbs
Joel A. Leyner
Hon. Joseph F. Lisa
Hon. Stuart Rabner
Dean Rayman L. Solomon
Karol Corbin Walker
James Youngleson

New Jersey State Bar Association

Programs & Projects

Professionalism Counseling Program

Introduction

The primary mission of the Commission on Professionalism in the Law is to foster within the legal community a climate of appropriate professional behavior, respect for others, and commitment to the important values that have long shaped the legal profession. Certainly, the majority of lawyers conduct themselves in such a manner. However, there are other lawyers that show little respect for colleagues, clients, or the courts.

In 1997 the Commission developed a novel approach, the Professionalism Counseling Program, aimed at helping to curb unprofessional behavior and restoring public confidence in the bar. The Commission asked county bar associations across New Jersey to take the lead through the establishment of Professionalism Committees that would have the ability to identify and counsel lawyers whose conduct falls short of accepted levels of professional behavior or competence.

The Professional Counseling Program has been approved by the New Jersey Supreme Court and judges have been urged to cooperate to help ensure that the program's objectives are met. The program, however, is not court controlled nor is it an arm of the lawyer disciplinary system. It is a bar initiative aimed directly at improving the profession.

Objectives

The Professionalism Counseling Program addresses conduct by lawyers that does not rise to the level of a violation of the ethics rules (the Rules of Professional Conduct). Thus, it does not handle any matter that is within the jurisdiction of a District Ethics Committee. For instance, the program deals with such things as harassing conduct, abusive litigation tactics, incivility, inappropriate courtroom conduct, and repeated lack of respect for colleagues, judges, and court staff. The program is educational in nature. No discipline or sanctions are imposed, and all matters are confidential. The only records kept are those relating to the type of complaint addressed.

Operation

The program is operated through Professionalism Committees appointed by county bar associations. The precise composition, structure and operation of a committee is left to the bar association to establish, and different approaches have been taken. Some committees operate under formal operational rules; others deal with complaints on a more ad hoc basis. Another committee has established a mediation program to deal with disputes between lawyers. The commission encourages such experimentation and leaves it to bar associations to determine what type of program best fits the needs of the bench and bar of that county.

Resources

Pro Bono
NJ Lawyers Assistance
NJ State Bar Foundation
NJICLE
Government Affairs

The Commission has, however, set some basic guidelines for Professionalism Committees:

Each committee, and a committee chair, should be appointed by the county bar president.

Lawyer members of committees should be highly regarded and experienced members of the bar with reputations for competence, integrity and civility. Judges, both sitting and retired, are encouraged to participate and should exhibit the same qualities.

The program should offer assistance in the following circumstances:

A lawyer requests assistance in dealing with another lawyer, or in addressing specific conduct of another lawyer

A lawyer requests assistance in dealing with a professionalism issue

A judge requests assistance in dealing with a lawyer, or in addressing specific conduct of a lawyer

The Appellate Division encounters unprofessional behavior and refers an opinion to the Commission, for referral to the appropriate county bar committee.

The program shall not handle complaints from clients, or members of the public.

Generally, complaints are directed to the chair of the Professionalism Committee. Lawyers and judges seeking advice about where to bring a complaint should contact either the president, or executive director, of the bar association where the lawyer in question practices, or where the incident took place. The evaluation of complaints is done pursuant to committee rules and guidelines. Most committees will ask a member to look into a complaint by talking with the lawyers involved. If further action is deemed necessary, committee members will be assigned to counsel the lawyer in question, or the lawyer will be asked to appear before the committee. If a lawyer is reluctant to cooperate, the assignment judge (pursuant to Court Directive #1-97) may be asked to intercede and assist in ensuring the lawyer's cooperation.

Currently, sixteen of New Jersey's twenty-one county bar associations have adopted some form of professionalism counseling. Committees may also refer lawyers to other programs, if the circumstances so warrant. For instance, such referrals have been made in cases where substance abuse problems have been uncovered.

New Jersey State Bar Association

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[Community](#)

[Meetings/Event](#)

[Resources](#)

[Pro Bono](#)

[NJ Lawyers Ass](#)

[NJ State Bar Fo](#)

[NJICLE](#)

[Government Af](#)

Agenda & Accomplishments

In 1998 the Commission received the American Bar Association's Gambrell Award in recognition of outstanding achievement in the design and implementation of a professionalism program.

The Commission has developed or participated in the following initiatives and programs:

An Annual Symposium on Professionalism.

Presentation of professionalism awards to deserving lawyers from across the state.

Principles of Professionalism - guidelines for lawyers and judges.

Professionalism Counseling Program - for use by county bar associations to address situations of egregious or persistent unprofessional behavior.

Revisions to the Skills and Methods Course - Suggested changes so that required courses for new lawyers include professionalism themes.

Lawyers Pledge - a supplement to the traditional oath used to swear-in new lawyers, the Pledge stresses professional responsibility and positive values.

Judges Education - participation in the annual Judicial College for state court judges.

Educational efforts - participation in bar association, law firm, law school, and inns of court seminars.

Articles - periodically issue positions and articles on professionalism issues.

Outreach - continue to meet with individuals and groups from throughout New Jersey's legal community, including federal and state judges, and managing partners from major law firms.

Further information about the Commission and its work may be obtained from the Executive Director, New Jersey Law Center, One Constitution Square, New Brunswick, NJ 08901.

ATTACHMENT 5

PROFESSIONALISM AND INDEPENDENCE

New Jersey Commission on Professionalism in the Law

Just what is “professionalism” anyway? It is a valid and timely question, and one that has generated differing responses. For starters, the term “professionalism”, when applied to lawyers, has much broader connotations than many realize. For instance, professionalism means more than smiling at your adversary, or standing politely at the counsel table when a judge takes the bench.

It is also important to recognize the distinction between professionalism and ethics, even though they go hand in hand. The ethics rules (codified in the Rules of Professional Conduct) are mandatory, black letter standards that establish a minimum level of conduct. Failure to abide by the rules may result in disciplinary sanction. Professionalism, however, is grounded in aspirational goals and traditions that seek to encourage the bar, and bench, towards conduct that preserves and strengthens the dignity, honor, and integrity of the profession. See *Between Law and Virtue*, Joseph P. Tomain and Barbara G. Watts, 71 U.Cin.L.Rev 585 (2003).

Often professionalism is equated with civility, but it is much more than that. A few years ago a New Jersey State Bar Association study committee attempted to come up with a definition, and concluded that professionalism means “not what you have the right to do, but rather to do what’s right.”

United States Supreme Court Justice Sandra Day O’Connor has said that “the essence of professionalism is a commitment to develop one’s skills and to apply them responsibly to the problems at hand. Professionalism requires....a willingness to subordinate narrow self interest in pursuit of the more fundamental goal of public service....Lawyers must temper bold advocacy for their clients with a sense of responsibility to the larger legal system which strives, however imperfectly, to provide justice for all.”

Implied in Justice O’Connor’s definition is a key component in the fabric of a truly professional lawyer -- an understanding that the exercise of independent judgment is essential. Too many lawyers seem to have forgotten that they should not, indeed must not, slavishly do the bidding of a client without regard for the consequences. For instance, the lawyer who has an aggressive and “hands on” client must know better than to heed a client’s advice to “litigate like a mad dog” or “make them not only sweat, but bleed cash.”

RPC 2.1 requires lawyers to provide clients with independent judgment and candid advice. The Principles of Professionalism adopted by the Commission encourage lawyers to advise clients against pursuing a course of action that is without merit, or tactics that are intended to harass or drain the financial resources of an opposing party.

Lawyers must remember that they are counselors, not hired hands or legal technicians. The highly competitive nature of practice results naturally in a desire to please and retain clients. However, the truly professional lawyer knows that unrealistic client expectations must be addressed and effectively managed. In this way, the best interests of the client will be served, and lawyer independence and moral accountability preserved.

This article is one of a series intended by the Commission on Professionalism in the Law to encourage discussion about professionalism issues and problems facing the legal community.

New Jersey Commission on Professionalism in the Law

Recapturing Public Confidence

One of the most crucial problems facing us is the decline of public confidence in the legal profession and our justice system. Recapturing public support has proven to be an elusive goal, but is one of vital importance. Our legal system relies for its survival on public acceptance of its legitimacy. The courts, and the bar, can rely on neither the sword nor the power of the purse to advance the rule of law or obtain public respect for it. We instead must utilize moral suasion, reason, and principled discourse. When the public questions our conduct, practices, motives and abilities, we have a serious problem on our hands.

Public opinion about the bar and bench is linked directly to professionalism. We cannot expect to be popular all of the time, or with everyone; a role as an advocate or decision maker makes this impossible. But, at the same time we should not dismiss all criticism as being misinformed or irrelevant. Public perceptions are often accurate. I need not recount recent surveys that show declining public support for the bar, and the bench.

In an era when it appears that few want to take responsibility for anything, we should not join the crowd and look elsewhere for answers. Instead, we must shoulder some of the blame for our current condition. Despite the tenor of the times and its often negative impact on all segments of society, lawyers and judges should never forget that the public has the right to expect much from us---because each of us has been given much.

We must all begin to think about the kind of profession and justice system we wish to serve, the kind of professionals we wish to be. In short, it is time for us to make a difference. We like to speak of the "noble profession" of the law, but mere words will not do the trick. We must act like the professionals we want to be by never forgetting the core values that define us. We must hold others to the same standards.

Professionalism is not a bumper sticker that says "have you hugged your adversary today?" It is a commitment to the standards and values that have always well served the legal community, the values the public has come to expect lawyers to observe and judges to embody. The public is waiting to see if these standards and values still have meaning to us. Our response will determine the future legitimacy of the legal profession and the justice system it serves.

This article is one of a series authored by the commission and intended to promote professional responsibility and encourage discussion about issues and problems facing the legal community. The commission is a cooperative venture of the NJ State Bar Association, the state's three law schools, and the judiciary. The commission's goal is to improve the professionalism of lawyers and judges through education and other initiatives.

New Jersey Commission on Professionalism in the Law

Learning From Bill McElroy, the Quintessential Professional

Former Judge Bill McElroy died a few months ago. The Commission on Professionalism in the Law dedicates these remarks to him and the beauty of his life. We can all learn from his example.

The Commission recently surveyed judges and bar leaders regarding the state of professionalism in New Jersey's legal community. As might be expected the results were mixed, and the consensus view is that while the topic of professionalism is now on the radar screen, persistent problems still exist.

Senior federal court Judge Dickinson Debevoise brought to the Commission's attention a situation well known to us all, but little examined. It regretfully does not bode well for the future of the profession. The theme – the bottom line/ billable hour orientation of law firms is a familiar one, but with a new spotlight placed upon it. Judge Debevoise suggests that the real root cause of unprofessional conduct can be traced not just to the aberrant behavior of a few individuals but to the way law practice is sometimes conducted today. Simply put, the work demands placed on lawyers make it almost impossible for them to be professionals in the true sense. So, instead of participating in family activities, community affairs, pro bono representation, or religious and charitable causes, lawyers put in extra hours at the office because their professional advancement depends upon it. The judge warns that such intense concentration on the business of the law firm, to the exclusion of all else, is the most serious threat today to lawyer professionalism.

To back up his point he provided us with an important study by the Boston Bar Association entitled *Facing the Grail: Confronting the Cost of Work-Family Imbalance*. The Boston Bar's report catalogues the problems faced by lawyers in attempting to balance work demands with family obligations. The results are troubling. For instance, many law firm partners, associates, and law students believe that being successful in law practice is incompatible with daily involvement in family life. Further, the intense competition for clients has changed the culture of some law firms so that revenue production is the primary measure of success. There are no longer client "relationships" but instead transaction-by-transaction business arrangements.

The implications of the report are clear, but what can be done? The Boston Bar suggests that law firms need to examine their values, policies and culture in tandem with a parallel examination of economic assumptions and incentives. What is the real meaning of "success"? Is it slavish dedication to consistently long hours, or should it be something much broader, including an appropriate balance between work, family and community service? How can lawyers be true "professionals" when they have no time for the things that define that term? Moreover, are the economic assumptions and practices of law firms becoming counterproductive?

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) **Purposes of a Pretrial Conference.** In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

- (1) expediting disposition of the action;
- (2) establishing early and continuing control so that the case will not be protracted because of lack of management;
- (3) discouraging wasteful pretrial activities;
- (4) improving the quality of the trial through more thorough preparation; and
- (5) facilitating settlement.

(b) **Scheduling.**

(1) **Scheduling Order.** Except in categories of actions exempted by local rule, the district judge — or a magistrate judge when authorized by local rule — must issue a scheduling order:

(A) after receiving the parties' report under Rule 26(f); or

(B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference or by telephone, mail, or other means.

(2) **Time to Issue.** The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served with the complaint or 90 days after any defendant has appeared.

(3) **Contents of the Order.**

(A) **Required Contents.** The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.

(B) **Permitted Contents.** The scheduling order may:

- (i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);
- (ii) modify the extent of discovery;
- (iii) provide for disclosure or discovery of electronically stored information;
- (iv) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced;
- (v) set dates for pretrial conferences and for trial; and
- (vi) include other appropriate matters.

(4) **Modifying a Schedule.** A schedule may be modified only for good cause and with the judge's consent.

(c) **Attendance and Matters for Consideration at a Pretrial Conference.**

(1) **Attendance.** A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) **Matters for Consideration.** At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating frivolous claims or defenses;

(B) amending the pleadings if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and limiting the use of testimony under Federal Rule of Evidence 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56;

(F) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(G) identifying witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(H) referring matters to a magistrate judge or a master;

(I) settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule;

(J) determining the form and content of the pretrial order;

(K) disposing of pending motions;

(L) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(M) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(N) ordering the presentation of evidence early in the trial on a manageable issue that might, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(O) establishing a reasonable limit on the time allowed to present evidence; and

(P) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

Civ. RULE 5.3 PROTECTIVE ORDERS AND PUBLIC ACCESS
UNDER CM/ECF

(a) Scope of Rule

(1) This rule shall govern any request by a party to seal, or otherwise restrict public access to, any materials filed with the Court or utilized in connection with judicial decision-making. This rule shall also govern any request by a party or parties to seal, or otherwise restrict public access to, any judicial proceedings.

(2) As used in this rule, "materials" include pleadings as well as documents of any nature and in any medium. "Judicial proceedings" include hearings and trials but do not include conferences in chambers.

(3) This rule shall not apply to any materials or judicial proceedings which must be sealed pursuant to statute or other law.

(4) Subject to this rule and to statute or other law, all materials and judicial proceedings are matters of public record and shall not be sealed.

(b) Discovery Materials

(1) Notwithstanding this rule, parties may enter into written agreements to keep materials produced in discovery confidential and to return or destroy such materials as agreed by parties and as allowed by law.

(2) Parties may submit to a Judge or Magistrate Judge an agreed-on form of order which embodies a written agreement as described above. Any such form of order must be accompanied by an affidavit or attorney certification filed electronically under the designation "affidavit/certification in support of discovery confidentiality order." The affidavit or attorney certification shall describe (a) the nature of the materials to be kept confidential, (b) the legitimate private or public interests which warrant confidentiality and (c) the clearly defined and serious injury that would result should the order not be entered. The affidavit or attorney certification shall be available for public review.

(3) No form of order submitted by parties shall supersede the provisions of this rule with regard to the filing of materials or judicial proceedings. The form of order may, however, provide for the return or destruction of discovery materials as agreed by parties. The form of order shall be subject to modification by a judge or magistrate judge at any time.

(4) Any order under this section shall be filed electronically under the designation "discovery confidentiality order."

(5) Any dispute regarding the entry of, or the confidentiality of discovery materials under, any order under this section shall be brought before a Magistrate Judge pursuant to L. Civ. R. 37.1(a)(1).

(c) Motion to Seal or Otherwise Restrict Public Access

(1) Any request by a party or parties to seal, or otherwise restrict public access to, any materials or judicial proceedings shall be made by formal motion pursuant to L. Civ. R. 7.1. Any such motion shall be filed electronically under the designation "motion to seal materials" or

“motion to seal judicial proceedings,” and shall be returnable on the next available return date.

(2) Any motion to seal or otherwise restrict public access shall be available for review by the public. The motion papers shall describe (a) the nature of the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available. Proposed Findings of Fact and Conclusions of Law shall be submitted with the motion papers in the proposed order required by (c)(5) below. If the information required in this section is not within the knowledge of the movant, supplemental motion papers in support of the motion may be filed by a party, individual or entity having such knowledge not later than fourteen (14) days after the filing of the motion.

(3) Any materials deemed confidential by a party or parties and submitted with regard to a motion to seal or otherwise restrict public access shall be filed electronically under the designation “confidential materials” and shall remain sealed until such time as the motion is decided, subject to Local Civil Rule 72.1(c)(1)(C). When a document filed under seal contains both confidential and non-confidential information, an unredacted version shall be filed under seal, and a version with only the confidential portions redacted shall be filed publicly.

(4) Any interested person may move to intervene pursuant to Fed. R. Civ. P. 24 (b) before the return date of any motion to seal or otherwise restrict public access.

(5) Any order or opinion on any motion to seal or otherwise restrict public access shall include findings on the factors set forth in (c)(2) above as well as other findings required by law and shall be filed electronically under the designation “order or opinion to seal.” Such orders and opinions may be redacted. Unredacted orders and opinions may be filed under seal, either electronically or in other medium.

(6) Notwithstanding the above, on emergent application of a party or parties or sua sponte, a Judge or Magistrate Judge may seal or otherwise restrict public access to materials or judicial proceedings on a temporary basis. The Judge or Magistrate Judge shall do so by order which sets forth the basis for the temporary relief and which shall be filed electronically under the designation “temporary order to seal.” Any interested person may move pursuant to L. Civ. R. 7.1 and Fed. R. Civ. P. 24 (b) to intervene, which motion shall be made returnable on the next available return date.

(d) Settlement Agreements

(1) No party or parties shall submit a proposed settlement agreement for approval by a Judge or Magistrate Judge unless required to do so by statute or other law or for the purpose of retaining jurisdiction.

(2) Any settlement agreement filed with the Court or incorporated into an order shall, absent an appropriate showing under federal law, be deemed a public record and available for public review.

(e) Dockets

No docket shall be sealed. However, entries on a docket may be sealed pursuant to the provisions of this rule.

(f) Web Site

The Clerk shall maintain for public review on the official Court PACER Site a consolidated report which reflects all motions, orders, and opinions described in this rule.

(g) Effective Date

This Rule shall be effective as of the date of adoption and shall apply to all motions to seal or otherwise restrict public access made after that date.

Adopted February 24, 2005. Amended. March 9, 2007; March 1, 2010.

**EXPLANATORY NOTE
LOCAL CIVIL RULE 5.3**

History. In June of 2004, the Board of Judges was presented with a Lawyers Advisory Committee recommendation for the adoption of a local civil rule that would provide for public (i.e., press) notice of requests to seal, among other things, documents and proceedings. Several months before, in February of 2004, the District of New Jersey implemented CM/ECF (Case Management/Electronic Case Filing). This allowed the electronic filing of pleadings, motions, briefs, etc., under descriptive "events." CM/ECF also allowed remote access to dockets and filed materials as well as the creation of compilations or reports on the events.

Recognizing that CM/ECF might have a significant impact on what the Lawyers Advisory Committee recommended, the Board of Judges deferred the recommendation. Thereafter, the proposed local civil rule in its current form ("the Rule") was drafted. It was reviewed on an informal basis by representatives of the Administrative Office of the United States Courts and the Federal Judicial Center. It was also reviewed by Professor Laurie Kratky Dore of Drake University Law School in Des Moines, Iowa. Professor Dore is the author of a leading article on confidentiality, "Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement," 74 *Notre Dame L. Rev.* 283 (1999), and of "Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements," 55 *S.C. L. Rev.* 791 (2004). The Rule was circulated among members of the Committee on Rules on Practice and Procedure of the Board of Judges and thereafter submitted to the Lawyers Advisory Committee. The Rule is intended to reflect Supreme Court and Third Circuit law and does not set forth in detail all standards established by precedent.

Subparagraph (a)(1). This subparagraph describes the scope of the Rule. It applies to any application to seal materials filed with the Court, materials utilized in connection with judicial decision-making, or judicial proceedings. The use of the phrase, "otherwise restrict public access," as used in the Rule, is intended to address any application which might seek less than the complete sealing of materials or proceedings. The phrase, "in connection with judicial decisionmaking," is intended to exclude, among other things, letters to judges which are not substantive in nature. See, for the definition of a "judicial record", *In re Cendant Corp.*, 260 F.3d 183 (3d Cir. 2001), and for the distinction between discovery and nondiscovery pretrial motions, *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir. 1993).

Subparagraph (a)(2). This subparagraph defines "materials" and "judicial proceedings." The definitions are intended to be broad and to allow for the development of case law. For that reason, the word "materials" is used rather than "judicial records," the latter approaching a term of art. Note that judicial proceedings are not intended to encompass in-chambers conferences.

Subparagraph (a)(3). The purpose of this subparagraph is to make clear that the rule is not intended to affect any "statute or other law" that mandates sealing of materials or judicial proceedings (for example, amended Section 205 (c)(3) of the E-Government Act of 2002, Pub. L. No. 107-347, and the qui tam provisions of the False Claims Act, 31 U.S.C. §3729 et seq.).

Subparagraph (a)(4). The right of public access to filed materials and judicial proceedings derives from the First Amendment and federal common law. Consistent with this right, this subparagraph establishes a presumption in favor of public access.

Subparagraph (b). In keeping with the comprehensive nature of the Rule, this subparagraph is intended to apply to unfiled discovery materials and to be consistent with footnote 17 of *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994): "because of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad protective order upon a threshold showing by the movant of good cause. ***. After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be

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confidential, and the party seeking to maintain the seal would have the burden to prove with respect to those documents.” 23 F.3d at 787 n.17 (citation omitted). As a general proposition, there is no right of public access to unfiled discovery materials. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984); *Estate of Frankl v. Goodyear Tire and Rubber and Co.*, 181 N.J. 1 (2004) (per curiam). This subparagraph, however, is not intended to prohibit any interested person from seeking access to such materials.

Subparagraph (b)(1) recognizes the above proposition, allows parties to enter into agreements such as that contemplated by Pansy, and also allows materials to be returned or destroyed. See, with regard to “Agreements on Return or Destruction of Tangible Evidence,” *ABA Section on Litigation Ethical Guidelines for Settlement Negotiations*, Guideline 4.2.4 (August 2002).

Subparagraph (b)(2). This subparagraph describes the procedure which parties must follow in submitting blanket protective orders. Consistent with Pansy, there must be a showing by affidavit or certification of “good cause” and specific information must be provided. The affidavit or certification must also be available for public review. The intent of subparagraph (b)(2) is to allow parties to describe the materials in issue in categorical fashion and thus to avoid document-by-document description. This subparagraph does not go in greater detail as to the contents of the affidavit or certification. The sufficiency of an affidavit or certification is a matter for individual determination by a Judge or Magistrate Judge.

Subparagraph (b)(3). This subparagraph is intended to make plain the distinction between blanket protective orders and orders for the sealing of materials filed with the Court. Blanket protective orders should not include a provision that allows materials to be filed under seal with the Court.

Subparagraph (b)(4). This subparagraph, together with subparagraph (b)(2), describes “events” for purposes of CM/ECF. Affidavits or certifications in support of blanket protective orders as well as the protective orders should be electronically filed using these events.

Subparagraph (b)(5). This subparagraph contemplates that disputes may arise with regard to the terms of blanket protective orders and the designation of materials under such orders. Should such disputes arise, the parties are directed to the procedure set forth in Local Civil Rule 37.1(a)(1) for the resolution of discovery disputes. The Rule is not intended to be applicable to materials submitted with regard to discovery disputes.

Subparagraph (c). This subparagraph establishes the procedure by which applications must be made to seal or otherwise restrict public access to filed materials or judicial proceedings. Such applications may be made in advance of, as part of, or parallel with substantive motions.

Subparagraph (c)(1). This subparagraph provides that any such application must be made by formal motion.

Subparagraph (c)(2). This subparagraph provides that any motion must be available for public access and must set forth, at a minimum, certain specified information.

Subparagraph (c)(3). Under Third Circuit precedent, the filing of otherwise confidential material may make that material a public record and subject to public access. See, e.g., *Bank of America Nat’l Trust and Savings Ass’n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1988). This subparagraph is intended to allow confidential materials to be filed and remain under seal until a motion to seal or otherwise restrict public access is ruled on. Otherwise, arguably confidential materials would be “transmuted” into materials presumptively subject to public access. See *Gambale v. Deutsche Bank A.G.*, 377 F.3d 133, 143 n.8 (2d Cir. 2004).

Subparagraph (c)(4). “[T]he procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.” Pansy, 23 F.3d at 778. Consistent with Pansy, this subparagraph allows a person to move to intervene pursuant to Rule 24 of Federal Rules of Civil Procedure before a motion to seal or to otherwise restrict public access is returnable. This subparagraph is not intended to foreclose any subsequent motion to modify or vacate an order.

Subparagraph (c)(5). This subparagraph serves two functions. First, it identifies the “event” corresponding to a sealing order or opinion, as subparagraph (c)(1) identifies events for sealing motions. Subparagraph (c)(5) also reminds Judges and Magistrate Judges that, as appropriate, opinions and orders on motions to seal or otherwise restrict public access may be filed in redacted and unredacted form.

Subparagraph (c)(6). This subparagraph is patterned after Section 7(a) of the Vermont Rules for Public Access to Court Records. It is intended to address emergent applications by parties where there may be a legitimate need for a temporary sealing order (for example, when an ex parte seizure order is sought in a trademark infringement action). The subparagraph identifies the appropriate CM/ECF event and also provides for motions to intervene.

Subparagraph (d). As a general proposition, settlement agreements are not presented to Judges or Magistrate Judges for “approval.” Such approval has no legal significance. See, e.g., *Pascarella v. Bruck*, 190 N.J. Super. 118 (App. Div. 1983). Moreover, judicial approval of a settlement may make

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that settlement a public record and subject to public access. See *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002). For these reasons, subparagraph (d) (1) provides that settlement agreements will not be approved by Judges or Magistrate Judges unless such approval is required by law (for example, in class actions or actions involving infants). Subdivision (d)(1) does, however, provide for judicial approval of a settlement if the intent of the parties in seeking that approval is to have the Court retain jurisdiction to enforce a settlement agreement. See, e.g., *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994). Subdivision (d)(2) provides that, once filed with the Court or incorporated in an order, a settlement agreement becomes a public record and subject to public access absent an appropriate showing.

Subparagraph (e). Dockets are sources of basic information about civil actions and are historically public records. See, e.g., *United States v. Criden*, 675 F.2d 550 (3d Cir. 1982). Thus, this subparagraph provides that dockets will not be sealed but that, consistent with the Rule, specific docket entries may be. See *Webster Groves School Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371 (8th Cir. 1990).

Subparagraph (f). This subdivision requires the Clerk to maintain a report which reflects all motions, order and opinions described in the Rule. The intent of this subparagraph is that reports be generated based on the "events" referred to in the Rule and be available to the general public through PACER.

SUPPLEMENTAL EXPLANATORY NOTE

After publication on December 20, 2004, several comments were received. These comments led to the addition of language in the Explanatory Note (History and subparagraphs (b), (b)(5), (c) and (c)(4)) intended to clarify the intent of the Rule. Subparagraph (d)(2) of the Rule and the accompanying Explanatory Note were revised to reflect that the appropriate standard may derive from other than Fed.R.Civ.P. 26(c). Finally, a new subparagraph (g) was added to the Rule.

COMMENT

1. Adoption and Scope.
2. Standards for Sealing.
3. Discovery Materials.
4. Filed Materials and Judicial Proceedings.
5. Settlement Agreements.
6. Dockets.
7. Web Access to Reports.
8. Other Confidentiality Issues.
9. Automatic Stay.

1. Adoption and Scope. L.Civ.R. 5.3 was adopted February 24, 2005, and governs all requests by a party to seal or otherwise restrict public access to (a) any materials filed with the Court, (b) any materials used by the Court in connection with judicial decision-making and (c) judicial proceedings themselves. It does not govern the sealing of any materials or proceedings required to be sealed by statute or other law. It therefore excludes, for example, Grand Jury materials sealed under Fed. R. Crim. P. 6(e), under the E-Government Act of 2002, Pub. L. No. 107-347, and the *qui tam* provisions of the False Claims Act, 31 U.S.C. §3729 et seq.

The rule had its genesis in a recommendation of the Lawyers Advisory Committee for a rule providing for public notice of requests to seal. The Court recognized that the advent of electronic filing in the District would impact the proposal and drafted the new rule with an eye towards accommodating that impact. The rule was reviewed informally by the Administrative Office of the United States Courts and the Federal Judicial Center, an expert on judicial confidentiality issues, and the Lawyers Advisory Committee before being published for comment in December 2004. Various comments from the public resulted in changes to the draft rule, and the final rule then adopted effective February 24, 2005.

The term "materials" in the rule includes pleadings and "documents of any nature and in any medium." The term "judicial proceedings" includes hearings and trials but does not include conferences in chambers. The

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scope of the rule includes settlement agreements filed with the Court or incorporated into an order and individual entries on the Court's docket. The docket itself may not be sealed. See L.Civ.R. 5.3(e). The phrase "otherwise restrict public access" is intended to address any application which might seek less than the complete sealing of materials or proceedings. The phrase "in connection with judicial decisionmaking" is intended to exclude, among other things, letters to judges which are not substantive in nature. See e.g. *United States v. Kushner*, 349 F. Supp. 2d 892 (D.N.J. 2005) (Linares) (ordering disclosure of letters sent in connection with sentencing only where the defendant expressly referred to a specific letter in sentencing memorandum or where the Court itself specifically relied upon it). The Explanatory Notes direct attention for the definition of a "judicial record" to *Goldstein v. Forbes*, 260 F.3d 183 (3d Cir. 2001), and for the distinction between discovery and nondiscovery pretrial motions to *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157 (3d Cir. 1993).

Note that the rule is limited in its scope to public access to documents; it does not authorize the Court to seal documents so as to prevent access by other litigants. *Stasicky v. South Woods State Prison*, 2006 U.S. Dist. LEXIS 86461 (D.N.J. Nov. 29, 2006) (Bongiovanni) (declining to reconsider order that documents be provided to pro se plaintiff; "The scope of the rule specifically governs a litigants' necessity to seal materials from the public, not from an adverse party. ...[T]he plain language of Local Rule 5.3 states that its procedure can only be used to seal documents from public access. ... Federal and Local Rules mandate that all motion papers be served on all parties"). See also *Skinner v. Ashan*, 2007 U.S. Dist. LEXIS 15225 (D.N.J. Mar. 2, 2007) (Simandle) (granting motion by prison medical officials to seal plaintiff prisoner's medical records because relevant consideration "weigh in favor of sealing Plaintiff's medical records from public access upon the docket" but denying request "for a protective order preventing Plaintiff from obtaining and viewing his medical records").

2. Standards for Sealing. L.Civ.R. 5.3(a)(4) begins with the presumption that "all materials and judicial proceedings are matters of public record and shall not be sealed." To overcome that presumption, a party seeking to seal materials or judicial proceedings must comply with the mandates of the rule. See *Novo Nordisk A/S v. Sanofi-Aventis US*, 2008 U.S. Dist. LEXIS 7958 (D.N.J. Feb. 4, 2008) (Hughes).

The Explanatory Note to L.Civ.R. 5.3 states that "[t]he Rule is intended to reflect Supreme Court and Third Circuit law and does not set forth in detail all standards established by precedent." In that connection, note that the Third Circuit has greatly limited the grounds for protective orders and has imposed procedural requirements on the district courts through its supervisory powers. In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the Circuit Court limited protective orders to those situations where good cause is found and an adequate record made (though the record itself may be sealed pending appeal). The case involved a challenge by local newspapers to a court order directing confidentiality for a settlement agreement in a civil rights case brought by a former police chief against his municipal employer. The court held, first, that the newspapers and other

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third parties had standing to challenge protective orders. It held, second, that the settlement agreement reached in the case was not a judicial record as to which there would be a right of public access because it was never filed with the court. Turning then to the confidentiality order entered with respect to the agreement, the Circuit Court noted that any such order could be issued only on a showing of good cause after evaluating all relevant factors. It exercised its inherent supervisory authority to direct district courts to render express findings on the record of their balancing of the public interest in disclosure of information against the parties' interests in confidentiality before entering protective orders at any stage of litigation. It noted there should be a presumption against such orders when the matters they would cover would otherwise be discoverable under federal or state Right to Know Laws.

See also the Circuit Court's opinion in *Glenmede Trust Co. v. Thompson*, 56 F.3d 476 (3d Cir. 1995), where the appellate panel affirmed a trial court's decision to disclose documents that one side had submitted only after the parties had entered into a confidentiality agreement. The other party had sought their disclosure and the District Court agreed that there was insufficient cause to consider them confidential. The decision underscores the increasing resistance of the courts to enforce confidentiality agreements over documents produced without a prior judicial showing as to why the produced materials deserve such protection.

Nevertheless, L.Civ.R. 5.3 does provide general guidance as to the standards to be applied.

a. Standards for Sealing Discovery Materials. L.Civ.R. 5.3(b)(2) requires that parties seeking judicial approval of a written agreement to keep materials produced in discovery confidential must submit an affidavit or attorney certification describing "(a) the nature of the materials to be kept confidential, (b) the legitimate private or public interests which warrant confidentiality and (c) the clearly defined and serious injury that would result should the order not be entered." Note that "just because a document is marked confidential and subject to a protective order, does not automatically mean a document can be sealed. The document must still satisfy the standard set forth in Rule 5.3." *Vista India v. RAAGA*, 2008 U.S. Dist. LEXIS 24454 (D.N.J. Mar. 27, 2008) (Salas). And see generally *Zavala v. Wal-Mart Corp.*, 2007 U.S. Dist. LEXIS 67282 (D.N.J. Sept. 12, 2007) (Arleo), holding that "there may be no common law presumptive access to ... disputed [discovery] materials," but that once there is a challenge to the "confidential" designation of materials under a stipulated Discovery Confidentiality Order, the burden shifts to the party seeking confidential status "to show good cause exists to warrant confidentiality, and thus, the sealing of the disputed documents."

b. Standards for Sealing Other Materials or Judicial Proceedings. L.Civ.R. 5.3(c)(2) requires that any motion seeking to seal or otherwise restrict public access to filed materials or to judicial proceedings must include in the motion papers a description of "(a) the nature of the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available." See *Schatz-*

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Bernstein v. Keystone Food Prods., 2009 U.S. Dist. LEXIS 34700 (D.N.J. Apr. 17, 2009) (Schneider) (denying motion because “[d]efendants’ contentions regarding the alleged harm they would suffer from the disclosure of plaintiffs’ motion are general, overbroad and conclusory. Defendants do not cite to any specific examples of harm they would suffer. Defendants’ averments simply do not satisfy their burden of proof under Rule 5.3 and applicable case law”). As to the procedures for sealing records of judicial proceedings, see Comment 4, below.

Where the standard is clearly met, sealing orders are often granted. See *Bullock v. Ancora Psychiatric Hosp.*, 2011 U.S. Dist. LEXIS 92307 (D.N.J. Aug. 18, 2011) (Kugler) (granting motion to seal medical records); *Victaulic Co. v. SprinkFlex*, 2011 U.S. Dist. LEXIS 77175 (D.N.J. July 15, 2011) (Shwartz) (sealing part of brief and certification containing sensitive business information); *Locascio v. Balicki*, 2011 U.S. Dist. LEXIS 66679 (D.N.J. June 21, 2011) (Kugler) (sealing medical records filed as court exhibits); *Demby v. Balicki*, 2011 U.S. Dist. LEXIS 29780 (D.N.J. Mar. 23, 2011) (Hillman) (sealing state presentence report); *Hicks v. Wegmans Food Mkt.*, 2011 U.S. Dist. LEXIS 13047 n. 2 (D.N.J. Feb. 10, 2011) (Irenas) (sealing non-party’s medical records attached to brief); *Wyeth v. Abbott Labs.*, 2010 U.S. Dist. LEXIS 76569 (D.N.J. July 29, 2010) (Bongiovanni) (granting motion to seal a deposition that was a motion exhibit which contained sensitive business information); *Harris v. Nielsen*, 2010 U.S. Dist. LEXIS 58993 (D.N.J. June 15, 2010) (Kugler) (sealing prisoner’s medical records); *Atlantic City Assocs. v. Carter & Burgess Consultants*, 2010 U.S. Dist. LEXIS 32135 (D.N.J. March 31, 2010) (Hillman) (granting motion as to information that “is confidential in nature, not subject to freedom of information laws or statutes requiring its disclosure, and the party to benefit is a private entity”); *Levine v. Voorhees Bd. of Education*, 2009 U.S. Dist. LEXIS 119263 (D.N.J. Dec. 23, 2009) (Bumb) (sealing summary judgment filings discussing plaintiff’s medical condition); *Frazier v. N.J. State Parole Bd.*, 2009 U.S. Dist. LEXIS 23572 (D.N.J. Mar. 25, 2009) (Martini) (granting motion to seal mental health and similar records); *Mt. Holly Citizens in Action v. Twp. of Mount Holly*, 2009 U.S. Dist. LEXIS 11061 (D.N.J. Feb. 13, 2009) (Hillman) (granting motion to seal sensitive personal information of non-parties); *Archbrook Laguna v. New Age Electronics*, 2008 U.S. Dist. LEXIS 61074 (D.N.J. Aug. 4, 2008) (Shipp) (granting motion to seal complaint because plaintiff established “(1) a substantial and compelling interest in confidentiality; and (2) that divulgence would work a clearly defined and serious injury to Plaintiff”); *Metropolitan Life v. Bennett*, 2008 U.S. Dist. LEXIS 36394 (D.N.J. May 1, 2008) (Bongiovanni) (sealing portions of complaint outlining medical records); *Vista India v. RAAGA*, 2008 U.S. Dist. LEXIS 24454 (D.N.J. Mar. 27, 2008) (Salas) (granting a sealing order as to license agreements containing trade-sensitive data and pages of hearing transcript directly discussing terms of such agreements, noting that “[p]rice is not the only term in a contract that can be deemed confidential”); *Cima Labs, Inc. v. Actavis Group HF*, 2007 U.S. Dist. LEXIS 41516 (D.N.J. June 7, 2007) (Debevoise) (granting unopposed motion to seal where court found defendant’s certification that “trade secrets would be lost if competitors gained access to the materials ... satisfied the factors set forth in L. Civ. R.

5.3(c)(2)"); *Oliver v. N.J. State Parole Bd.*, 2007 U.S. Dist. LEXIS 21136 (D.N.J. Mar. 26, 2007) (Hochberg) (granting defendant's motion to seal diagnostic and evaluative assessment of plaintiff prisoner because there was no less restrictive alternative to protect the prisoner's privacy interest); *Mars, Inc. v. JCM American Corp.*, 2007 U.S. Dist. LEXIS 9819 (D.N.J. Feb. 13, 2007) (Schneider) (granting part of motion to seal reply brief where plaintiff's "interest in protecting the referenced confidential business information outweighs the public interest in gaining access to the documents"); *Foley v. Boag*, 2006 U.S. Dist. LEXIS 34879 (D.N.J. May 31, 2006) (Bongiovanni) (granting in part, denying in part, application to seal records); *Faulman v. Security Mut. Fin. Life Ins. Co.*, 2006 U.S. Dist. LEXIS 35875 (D.N.J. May 31, 2006) (Thompson) (same). Proposed findings of fact and conclusions of law setting out the basis must be submitted with a proposed form of order that could be entered pursuant to L.Civ.R. 5.3(c)(5).

Merely stating that the standards of the rule are met is not sufficient. See e.g. *Shine v. TD Bank*, 2011 U.S. Dist. LEXIS 84712 (D.N.J. Aug. 2, 2011) (Kugler) (failure to show absence of less restrictive alternative and specific harm required denial of motion to seal settlement agreement); *MEI v. JCM*, 2010 U.S. Dist. LEXIS 121662 (D.N.J. Nov. 17, 2010) (Kugler) ("A party does not establish good cause by merely providing broad allegations of harm, unsubstantiated by specific examples or articulated reasoning") (internal citations omitted); *O'Brien v. BioBancUSA*, 2010 U.S. Dist. LEXIS 72599 (D.N.J. July 19, 2010) (Kugler) ("Plaintiff has a duty to particularly explain his statement, and he has not done so. The general, cursory summary of the harms he supplied fails to satisfy the burden under Local Rule 5.3(c) and controlling precedent"); *Warren Distrib. Co. v. InBev USA*, 2010 U.S. Dist. LEXIS 36141 (D.N.J. Apr. 13, 2010) (Kugler) (denying motion as to certain materials where parties "fail to provide the necessary evidence pursuant to L. Civ. R. 5.3(c)(2) to support a good cause showing" and noting that "statements that the movant will suffer a 'serious harm to business interests' without stating the *specific* harm do not satisfy the requirements of L. Civ. R. 5.3(c)(2)"); *Opperman v. Allstate*, 2009 U.S. Dist. LEXIS 111733 (D.N.J. Nov. 13, 2009) (Bumb) (defendant "has not overcome the strong public interest in transparent judicial proceedings by its mere generalized assertions (even if made by affidavit) that the materials are confidential and proprietary"); *Johnson v. Sullivan*, 2009 U.S. Dist. LEXIS 67398 (D.N.J. July 29, 2009) (Simandle) (denying motion where defendant said release of materials could compromise institutional staff and security but were "silent as to what information ... is 'confidential' or how its disclosure could impact institutional security"); *Osteotech v. Regeneration Technologies*, 2009 U.S. Dist. LEXIS 18174 (D.N.J. Mar. 6, 2009) (Bongiovanni) (denying motion to seal where the party claiming the confidentiality interest did not offer reasons); *Newman v. GMC*, 2008 U.S. Dist. LEXIS 105492 (D.N.J. Dec. 31, 2008) (Hayden) (affirming Magistrate Judge Shwartz's denial of defendants' motion to seal, stating that the public's interest in viewing court records, transcripts, and opinions outweighed General Motors' interest in keeping sealed documents that would (1) expose defendant's trial strategy; (2) disclose work product

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concerning client privileges in unrelated matters; and (3) possibly injure defendant's reputation); *Celgene Corp. v. Abrika Pharms., Inc.*, 2007 U.S. Dist. LEXIS 36202 (D.N.J. May 17, 2007) (Wigenton) (denying motions to seal where "[n]either motion provides legitimate public or private reasons for the documents to be kept from the public, and neither motion sufficiently identifies a clearly defined and serious injury that would result if the motion is not granted, nor do the motions adequately explain why a less restrictive alternative is unavailable" and rejecting blanket statement by parties that "there was an agreement to file the documents under seal, and that they are 'aware of no less restrictive alternative available'"); *FTC v. Lane Labs-USA, Inc.*, 2007 U.S. Dist. LEXIS 6430 (D.N.J. Jan. 29, 2007) (Cavanaugh) ("the Rule requires that the moving party establish a clearly defined and serious injury that can only be avoided by sealing the information at issue. Plaintiff's motion merely states that the Defendants would be injured if certain information were made available to its competitors. The general statement of concern over competitors possible access to Defendants financial data is far from 'clearly defined'"). The party seeking the sealing order "bears the burden of 'justifying the confidentiality of each and every document sought to be covered by a protective order.'" *United States v. Sunoco, Inc. (R&M)*, 2007 U.S. Dist. LEXIS 41435 (D.N.J. June 7, 2007) (Rodriguez). See also *Osteotech v. Regeneration Technologies*, 2008 U.S. Dist. LEXIS 9754 (D.N.J. Feb. 11, 2008) (Bongiovanni) ("while the Court can imagine the competitive damage that would befall [plaintiff] if its confidential information is disclosed, it cannot presume such injury, but rather Osteotech bears the burden of setting forth what that injury is"). And see *Telebrands Corp. v. Sennits*, 2009 U.S. Dist. LEXIS 26615 (D.N.J. Mar. 31, 2009) (Shwartz) (denying motion without prejudice because the request was "not narrowly tailored as required by L. Civ. R. 5.3").

Where a less restrictive alternative exists, a motion to seal will fail. Thus, for example, in *Hershey Co. v. Promotion in Motion*, 2010 U.S. Dist. LEXIS 43322 (D.N.J. May 4, 2010) (Arleo), the Court found that redacting certain specific confidential information from two pages of a deposition was less restrictive than sealing the two pages. See also *Connor v. Sedgwick Claims Mgmt.*, 2011 U.S. Dist. LEXIS 67998 (D.N.J. June 24, 2011) (Hillman) (redaction a less-restrictive alternative than sealing); *Wolpert v. Abbott Labs.*, 2011 U.S. Dist. LEXIS 33173 (D.N.J. Mar. 25, 2011) (Simandle) (redacting specific information a less restrictive alternative than sealing documents). Nor does the fact that the adversary does not oppose the sealing motion ensure that it will be granted where the moving party fails to substantiate all of the factors set out in the rule. See *Huertas v. Galaxy Asset Mgmt.*, 2010 U.S. Dist. LEXIS 21325 (D.N.J. March 9, 2010) (Kugler), *aff'd* 641 F.3d 28 (3d Cir. 2011), (denying unopposed motion to seal).

Moreover, the fact that an earlier sealing order was entered does not control the decision on any subsequent application, even as to the same or

similar information. *Emmanouil v. Roggio*, 2007 U.S. Dist. LEXIS 28831 (D.N.J. April 19, 2007) (Bongiovanni) (“The Court must determine whether the sensitivity of the information meets the high burden of sealing under the conditions of this case as they currently exist, rather than blindly relying on a prior sealing order”). Nor will the fact that the parties previously agreed to keep certain information confidential control the question as to whether a filed document will be sealed. *Hershey Co. v. Promotion in Motion*, 2010 U.S. Dist. LEXIS 43322 (D.N.J. May 4, 2010) (Arleo). Likewise, the mere fact that a document was previously marked “confidential” by someone in the course of litigation is not dispositive and a motion under this rule must be brought. *Major Tours v. Colorel*, 2011 U.S. Dist. LEXIS 70669 (D.N.J. June 29, 2011) (Simandle). By the same token, the fact that some of the material a party wishes to have sealed is already part of the public record does not preclude the entry of a sealing order where “it is not feasible to separate the available information from the sealable information that harms a legitimate private interest.” *Id.* See also *Harris v. Nielsen*, 2010 U.S. Dist. LEXIS 58993 (D.N.J. June 15, 2010) (Kugler), where the Court noted that the submission by defendants in a prisoner civil rights case of plaintiff’s entire medical history file along with a motion to seal was overbroad: “Instead of seeking to seal irrelevant materials that will be filed, a party should simply choose not to file them—a less restrictive option.” However, since the documents were submitted by defendants and not by plaintiff, no less restrictive option than sealing the entire file was available in that case.

Even where a general order permitting sealing of non-public information that is commercially or personally sensitive or proprietary exists, parties “should not seal documents that do not fall into this category.” *In re FleetBoston Fin. Corp. Securities Litigation*, 253 F.R.D. 315, 323 n.7 (D.N.J. 2008) (Brown) (admonishing parties for filing under seal “all ... declarations and exhibits, including officially filed court documents and even printouts of legal opinions available from online services”).

3. Discovery Materials. L.Civ.R. 5.3(b) recognizes that, with continuing frequency, issues arise as to the use to which the parties themselves may put materials obtained through discovery, and protective orders to limit such use are commonly sought. See e.g. *Graham v. Carino*, 2010 U.S. Dist. LEXIS 54964 (D.N.J. June 4, 2010) (Donio) (granting in part, denying in part a protective order as to financial information to be produced during discovery as to punitive damages); *Jones v. DeRosa*, 238 F.R.D. 157 (D.N.J. 2006) (Hughes) (granting protective order to limit access to internal police documents to counsel and retained experts); *United States v. Lightman*, 988 F. Supp. 448, 456 n.12 (D.N.J. 1997) (Simandle) (protective order granted to prevent deposition of corporate officer); *Todd v. South Jersey Hosp. System*, 152 F.R.D. 676 (D.N.J. 1993) (Rosen) (protective order issued for internal hospital review records); *Princeton Economics Group v. AT&T*, 768 F. Supp. 1101, 1108-09 (D.N.J. 1991) (Lechner) (confidentiality agreement sought for discovery materials); *Stamy v. Packer*, 138 F.R.D. 412, 417 (D.N.J. 1990) (Wolfson) (protective

order and gag order sought in case brought by former patient alleging abuse by psychotherapist); *Leonen v. Johns-Manville*, 135 F.R.D. 94 (D.N.J. 1990) (Wolfson) (protective order sought covering documents produced in a different case with similar facts and legal issues); *J.T. Baker, Inc. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 86 (D.N.J. 1989) (Simandle) (protective order sought by plaintiff); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 129 F.R.D. 483, 484 n.4 (D.N.J. 1990) (Wolfson) (noting “a trend among counsel” whereby parties are “seeking protective orders with increasing regularity”); *Curley v. Cumberland Farms, Inc.*, 728 F. Supp. 1123, 1140-1141 (D.N.J. 1989) (Brotman) (affirming Magistrate Judge’s order fixing a procedure whereby the parties could designate materials to be treated as confidential); *In re First Peoples Bank Shareholders Litigation*, 121 F.R.D. 219, 228-230 (D.N.J. 1988) (Simandle) (directing that information as to attorneys’ fees could be reviewed only by counsel under protective order). See also *United States ex rel. Stinson v. Prudential*, 736 F. Supp. 614, 619 (D.N.J. 1990) (Wolin), *aff’d* 944 F.2d 1149 (3d Cir. 1991) (relying in part on the mandate of former Rule 15D, L.Civ.R. 26.1(c)(2), that materials are public once filed unless otherwise ordered in a *qui tam* claim case).

The degree to which discovery materials can become the focus of controversy is perhaps best demonstrated by the case of Anthony and Rose Cipollone, who sued tobacco companies for damages when Mrs. Cipollone, who smoked for many years, contracted cancer (she died during the pendency of the litigation). A sweeping protective order that, among other things, barred plaintiffs’ counsel from using the materials except as necessary for this one case was entered by then-Magistrate (now Circuit Judge) Cowen. On *de novo* review, Judge Sarokin substantially modified the scope of the order. *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985) (Sarokin). The Third Circuit issued a writ of mandamus, and reversed and remanded the District Court’s decision on the grounds that review of the Magistrate’s order was not *de novo* under the circumstances of the case. 785 F.2d 1108 (3d Cir. 1986), *cert. den.* 479 U.S. 1043 (1987). On remand, portions of the Magistrate’s order were affirmed; others were modified. 113 F.R.D. 86 (D.N.J. 1986) (Sarokin). The tobacco companies again sought a writ of mandamus, but the District Court’s order was affirmed. 822 F.2d 335 (3d Cir.), *cert. den.* 484 U.S. 976 (1987).

Trial resulted in a verdict for the plaintiff, the question of legal liability was ultimately decided by the U.S. Supreme Court, 505 U.S. 504 (1992), and the case remanded to the District Court for retrial. In the interim, however, another similar case was filed, also assigned to Judge Sarokin, and issues arose there involving access to discovery and other materials. Once again, the Judge ordered disclosure, *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992) (Sarokin), and once again the order was appealed. However, on this occasion the Third Circuit not only reversed the disclosure order, but directed that the case be assigned to a different District Judge to avoid the appearance of impropriety given certain strong remarks contained in the opinion. 975 F.2d 81 (3d Cir. 1992). Thereafter, Judge Sarokin entered his own order recusing himself from the remanded Cipollone case as well: “I fear for the independence of the judiciary if a powerful litigant can cause the removal of a judge for speaking the truth

based upon the evidence in forceful language that addresses the specific issues presented for determination. If the standard established here had been applied to the late Judge John Sirica, Richard Nixon might have continued as President of the United States.” *Cipollone v. Liggett Group, Inc.*, 799 F. Supp. 466 (D.N.J. 1992) (Sarokin). The great irony of the *Cipollone* case is that it was discontinued by plaintiffs before retrial.

L.Civ.R. 5.3(b)(1) is intended to address many of the issues that have arisen in such cases, and permits parties to enter into written agreements to keep materials produced during discovery confidential and to return or destroy such materials thereafter. It is intended to apply to materials that are not filed with the Court and recognizes the general proposition that there is no right of public access to unfiled discovery materials. To protect the confidentiality of such materials, an order requiring production during discovery by one party to another may require that a motion to seal be filed before filing any produced document with the court. See e.g. *V.A. v. N.J. Nat’l Guard Challenge Youth Program*, 2007 U.S. Dist. LEXIS 23512 (D.N.J. Mar. 29, 2007) (Schneider) (“any documents produced in response to this Order shall be deemed confidential and may only be disclosed to attorneys, parties and experts involved in this litigation and may only be used for purposes of this litigation. If any party wishes to attach or reference the information within these documents in any filing with this court, the party shall first file a Motion to Seal the documents pursuant to Local Civil Rule 5.3(c)”). And see *In re A&B Ingredients*, 2010 U.S. Dist. LEXIS 7438 (D.N.J. Jan. 29, 2010) (Shipp) (granting discovery conditioned on protective order protecting confidentiality); *Schmulovich v. 1161 Rt. 9 LLC*, 2007 U.S. Dist. LEXIS 59705 (D.N.J. Aug. 15, 2007) (Bongiovanni) (ordering document production but noting that privacy concerns “may be cured if the parties were willing to enter into a confidentiality protective order pursuant to L.Civ.R. 5.3 to ensure that the produced materials will remain confidential” and encouraging the parties “to discuss an agreement to ensure the proper maintenance of confidential person information pursuant to the Rules of the Court and relevant case law”).

A standardized form of order governing the confidentiality of discovery materials was developed by the Court and adopted as Appendix S to the Court’s Local Rules, effective January 1, 2009, and may be entered in any case in which the parties do not agree on alternate language. The order provides for confidential treatment of any document or thing “(a) that contains trade secrets, competitively sensitive technical, marketing, financial, sales or other confidential business information, or (b) that contains private or confidential personal information, or (c) that contains information received in confidence from third parties, or (d) which the producing party otherwise believes in good faith to be entitled to protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure and Local Civil Rule 5.3.” It further provides for “Attorney’s Eyes Only” treatment for “any document or thing that contains highly sensitive business or personal information, the disclosure of which is highly likely to cause significant harm to an individual or to the business or competitive position of the designating party.” The Order sets out a procedure for

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handling disputes over the designation of such materials and requires compliance with L.Civ.R. 37(a)(1) before filing a formal motion.

Note, however, that the rule specifically contemplates the intervention of an "interested person" under L.Civ.R. 5.3(c)(4) and that any interested party is not precluded from seeking access to such materials. See *Osteotech v. Regeneration Technologies*, 2008 U.S. Dist. LEXIS 9754 (D.N.J. Feb. 11, 2008) (Bongiovanni) (noting that the court would reexamine its findings should an interested party move to intervene with respect to the plaintiff's motion to seal). See also *Charlie H. v. Whitman*, 213 F.R.D. 240 (D.N.J. 2003) (Hughes) (motion to compel public disclosure of discovery materials sealed in action brought by children against state Division of Youth and Family Services); *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50 (D.N.J. 1991) (Debevoise), stay denied 949 F.2d 653 (3d Cir. 1991) (on application by intervenor public interest organizations, ordering unsealing of certain documents and a bar on filing of further documents under seal without advance approval of Magistrate Judge).

Procedurally, the rule requires that parties entering into such blanket protective orders who want to make them enforceable in the action to submit an agreed-on form of order to the judicial officer embodying their written agreement. Such orders are intended to be consistent with the suggestion in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 n.17 (3d Cir. 1994), that, on a showing of good cause, protective orders may be entered governing unfiled discovery materials. The form of order must be accompanied by an affidavit or attorney certification showing the grounds for the sealing order that must be filed electronically and will be available for public review. See L.Civ.R. 5.3(b)(2). Note, however, that the parties may describe materials "in categorical fashion and thus ... avoid document-by-document description." Explanatory Note to L.Civ.R. 5.3(b)(2). The order itself will also be filed electronically under the designation "discovery confidentiality order." L.Civ.R. 5.3(b)(4).

No order entered under this section of the rule can override the provisions of L.Civ.R. 5.3 generally as to public access to filed materials or judicial proceedings. L.Civ.R. 5.3(b)(3). The order may, however, provide for return or destruction of discovery materials. Moreover, any order under this section is subject to modification by the Court "at any time."

Disputes with respect to the entry or enforcement of any order under L.Civ.R. 5.3(b) must be presented to a Magistrate Judge pursuant to L.Civ.R. 37.1. See L.Civ.R. 5.3(b)(5).

4. Filed Materials and Judicial Proceedings. L.Civ.R. 5.3 contains a presumption, based on First Amendment considerations and the common law right of access to judicial records, see *Nixon v. Warner Communications*, 435 U.S. 589 (1978), that materials filed with the Court and judicial proceedings are open to the public. See generally the discussion of access rights in *United States v. Kushner*, 349 F. Supp. 2d 892, 903 (D.N.J. 2005) (Linares); and *In re Gabapentin Patent Litigation*, 312 F. Supp. 2d 653, 661 (D.N.J. 2004) (Lifland) (court acknowledged right of access but denied intervenor review of sealed summary judgment briefs and declarations marked confidential under protective order without

first redacting confidential information in pharmaceutical patent case). See also *Houston v. Houston*, 2010 U.S. Dist. LEXIS 59028 (D.N.J. June 14, 2010) (Salas) (citing treatise).

A motion to seal or restrict public access to a judicial proceeding or the transcript of such proceeding should be made prior to the proceeding itself. As explained in *Pfizer v. Teva Pharmaceuticals*, 2010 U.S. Dist. LEXIS 67631 (D.N.J. July 7, 2010) (Falk):

...[T]he onus is on the parties to request sealing of the courtroom prior to a hearing that will involve the discussion of allegedly confidential information and to satisfy the requirements of Rule 5.3 at that time. It does not seem appropriate for the parties to engage in an open discussion on the record, without asking the Court to restrict public access, then follow the open discussion with an ex post facto application to seal the record. ...

In other words, there should be no backdoor attempt to “seal the courtroom.” Once a hearing is conducted in open court, information placed on the record is just that: information that is on the record. Cf. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 n.11 (2d Cir. 2004) (“Once the cat is out of the bag, the ball game is over.” (quoting *Calabrian Co. v. Bangkok Bank, Ltd.*, 55 F.R.D. 82 (S.D.N.Y. 1972))). Ex-post facto sealing should not generally be permitted. See *id.* at 144 (“But however confidential it may have been beforehand, subsequent to publication it was confidential no longer. . . . We simply do not have the power, even were we of the mind to use it if we had, to make what has thus become public private again.”). ...

... [T]he parties should be prepared to move to seal proceedings at their outset, not attempt to redact the transcript after the proceeding has concluded. ... [S]tatements in open court will be part of the record and will not be sealed after the fact absent extraordinary circumstances.

A motion to seal or restrict public access to materials filed with the Court may be made before, as part of or at the same time as substantive motions. Under L.Civ.R. 5.3(c)(1), there are two essential requirements for any such motion. First, it must be filed as a formal motion. See *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 2007 U.S. Dist. LEXIS 51828 (D.N.J. July 18, 2007) (Bongiovanni) (“Although there is often confusion with the various routes a litigant may take to request that materials be sealed, the single constant is that any request to seal must be made by formal motion pursuant to L.Civ.R. 7.1”). Second, the motion must be filed electronically. See *Johnson v. Sullivan*, 2009 U.S. Dist. LEXIS 67398 (D.N.J. July 29, 2009) (Simandle) (“electronic filing of documents deemed confidential is the requirement, and paper filing or other submission is the exception to be allowed upon application and judicial approval, like any other required procedure”). Note that some judicial officers want paper copies of such electronically filed materials delivered in sealed envelopes to chambers. See Appendix 2 for a survey of judicial officer preferences. Moreover, in *Johnson v. Sullivan*, Judge Simandle acknowledged that “despite the clarity of the confidential document filing rule and the Electronic Case Filing Policies and Procedures, ... the practice is varied

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throughout the district among judicial officers, some of whom permit paper filings upon request or by a chambers policy, and others of whom require electronic filing.” The rule was amended in 2010 to reinforce the requirement that the motion and materials submitted in support of it be filed electronically. L.Civ.R. 5.3(c)(3).

The motion itself will be available to the public for review and must set forth in detail the grounds for sealing the materials or proceedings at issue. L.Civ.R. 5.3(c)(2). See e.g. *Pfizer v. Teva Pharmaceuticals*, 2010 U.S. Dist. LEXIS 67631 (D.N.J. July 7, 2010) (Falk), where the Court required that “[f]or each and every line of a document the parties seek to have sealed, the parties shall create a chart identifying the document and explaining: (a) the legitimate private or public interests which warrant the relief sought; (b) the clearly defined and serious injury that would result if the relief sought is not granted; (c) why a less restrictive alternative to the relief sought is not available...; and (d) the position of the adverse party concerning the request to seal, and the reason why the request to seal is opposed.”

Materials deemed confidential by any party that are submitted in connection with a motion to seal are filed under the designation “confidential materials” and are sealed until the motion is decided. L.Civ.R. 5.3(c)(3). Note that a literal reading of this section of the rule suggests that, at the moment a motion to seal is denied, confidential documents submitted in connection with that motion automatically and immediately be converted to public status. Counsel should be aware that, while some judges are providing a brief additional time period, up to 10 days, within which the document will be continued in its confidential status while a party may appeal the denial of the motion to seal, other judges do not provide an automatic stay. For that reason, an application to stay the disclosure of the confidential material may be necessary and is clearly advisable. Where the sealing motion is made to a Magistrate Judge and denied, L.Civ.R. 72.1(c)(1)(C) as amended in 2007 provides for an automatic stay to permit the filing of a notice of appeal to the District Judge.

Note as well that the Court has expressly advised that, “unless otherwise provided by federal law, nothing may be filed under seal unless an existing order so provides or 5.3(c)(3) is complied with. FAILURE TO COMPLY WITH LOCAL CIVIL RULE 5.3 MAY RESULT IN A WAIVER OF ANY OTHERWISE VALID BASIS FOR SEALING AND MAY RESULT IN THE DOCUMENT IN ISSUE BECOMING PUBLICLY AVAILABLE. Also, please note that any properly sealed document will, absent further order, be available to all other counsel of record in the particular civil action.” See *Securimetrics v. Iridian Technologies*, 2006 U.S. Dist. LEXIS 22297 (D.N.J. March 30, 2006) (Kugler) (“filed documents are not technically considered sealed until a party files a formal motion to seal and the Court issues an Order permitting the documents to be maintained under seal”). The warning arises in part from the fact that filing of otherwise confidential material may, by itself, make the material a judicial record subject to public access. See, e.g., *Bank of America Nat’l Trust and Savings Ass’n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1986).

Note further that under the CM/ECF guidelines, documents to be sealed in civil cases must be submitted in electronic format; such documents may not be submitted in hard copy paper format. See Guideline 12(a), set out following L.Civ.R. 5.2. By contrast, documents to be sealed in criminal cases must be submitted in paper form, in an envelope clearly marked "sealed," accompanied by a disk or CD-ROM containing the document in PDF format. See Guideline 12(b). Moreover, where a motion to seal is filed, it should not be in redacted format. See *Bracco Diagnostics, Inc. v. Amersham Health, Inc.*, 2007 U.S. Dist. LEXIS 51828 (D.N.J. July 18, 2007) (Bongiovanni), where the court described the filing of redacted documents as an "insidious process [that] is wholly violative of the long established doctrine which states that documents filed with the Court are presumptively public in nature" and condemned what it called an attempt "to make an end run around the Court's policies by submitting a multitude of redacted documents on the docket which ... restricts public access to the portions the parties wished to have sealed, irrespective of the Court's decision." However, L.Civ.R. 5.3(c)(3) was amended in 2010 to provide that "[w]hen a document filed under seal contains both confidential and non-confidential information, an unredacted version shall be filed under seal, and a version with only the confidential portions redacted shall be filed publicly."

The rule permits any interested person to move under Fed. R. Civ. P. 24(b) to intervene in the motion to seal. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994). The intervention motion may be filed at any time before the return date of the sealing motion. L.Civ.R. 5.3(c)(4). Although the rule does not speak to the matter, intervention may also be permitted to seek the unsealing of materials. See *Leap Systems v. Moneytrax*, 2010 U.S. Dist. LEXIS 53167 (D.N.J. June 1, 2010) (Wolfson), *aff'd* 638 F.3d 216 (3d Cir. 2011).

As noted at Comment 2b, the motion must be supported by a statement of specific grounds including but not limited to a description of "(a) the nature of the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available." See e.g. *Novo Nordisk A/S v. Sanofi-Aventis US*, 2008 U.S. Dist. LEXIS 7958 (D.N.J. Feb. 4, 2008) (Hughes) (granting motion to seal confidential documents but not privilege log as to certain documents). Any order or opinion issued on a sealing motion must include findings on those factors, and will be filed electronically. Such documents may be redacted and unredacted versions may be filed under seal electronically or on paper. L.Civ.R. 5.3(c)(5). Note that, as amended in 2007, the rule now requires that the proposed form of order submitted with a motion to seal under the rule be accompanied by proposed findings of fact and conclusions of law. See L.Civ.R. 5.3(c)(2).

Note that the rule expressly provides for emergent applications for sealing. L.Civ.R. 5.3(c)(6). If granted, an order on such application must set forth the basis for the relief and will be filed electronically. The rule permits interested persons to move to intervene, and the intervention motion will be returnable on the next available motion day.

5. Settlement Agreements. L.Civ.R. 5.3(d)(1) provides that settlement agreements are not to be submitted to the Court for approval unless judicial approval is required by law (such as in a class action or a settlement on behalf of an infant) or unless the parties are asking the Court to retain jurisdiction post-settlement.

Where a settlement agreement is filed or incorporated into an order, it will be deemed a public record unless sealed by the Court on an appropriate showing. L.Civ.R. 5.3(d)(2). Discussions about settlement on the public record can also be expected to be public. See *Jackson v. Delaware River and Bay Auth.*, 224 F. Supp. 2d 834 (D.N.J. 2002) (Simandle), where the parties to a discrimination case reached a settlement. The Court held, 224 F. Supp. 2d at 838, that “[t]he right of the public to inspect and copy judicial records antedates the Constitution Access is more than the ability to attend open court proceedings; it is also the qualified right of the public to inspect and copy judicial records.” Since the court appearance at which the parties informed the court of the settlement was not sealed, the Court ruled that the transcript of those proceedings was a public document. However, since the actual settlement agreement was never filed with the Court, it was not a judicial record “even if the court places an order of confidentiality over it or reviews its terms.” *Id.* at 839.

Where a settlement was placed on the record but sealed at the time, it may remain sealed where it contains confidential and proprietary information. *Leap Systems v. Moneytrax*, 2010 U.S. Dist. LEXIS 53167 (D.N.J. June 1, 2010) (Wolfson), *aff’d* 638 F.3d 216 (3d Cir. 2011) (ordering transcript of settlement redacted to protect confidential information). Where a settlement agreement is filed but is not relevant and was filed in error, it may be removed from the public docket. See *Walsh Securities v. Cristo Prop. Mgt.*, 2010 U.S. Dist. LEXIS 66399 (D.N.J. June 30, 2010) (Shipp). Of course, where the legal requirements for sealing are met, filed documents relating to a settlement may be sealed. See *Davis v. Quality Carriers*, 2009 U.S. Dist. LEXIS 119392 (D.N.J. Dec. 23, 2009) (Shipp).

In an appropriate case, a protective order may also cover settlement discussions. See *Lesal Interiors Inc. v. RTC*, 153 F.R.D. 552, 554 n.1 and 560 (D.N.J. 1994) (Rosen) (issuing protective order to prevent disclosure of ongoing settlement discussions in a case then pre-trial before Magistrate Judge Kugler).

6. Dockets. L.Civ.R. 5.3(e) flatly precludes the sealing of an entire Court docket. The Explanatory Note explains that “[d]ockets are sources of basic information about civil actions and are historically public records.” However, specific entries on a docket may be sealed on application of a party and on an appropriate showing.

7. Web Access to Reports. L.Civ.R. 5.3(f) requires the Clerk’s Office to maintain a consolidated report on the official Court PACER website reflecting all motions, orders or opinions issued on matters brought under the rule.

8. Other Confidentiality Issues. Note that many of the same factors controlling public access to court records and discovery materials may also

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be at play when less comprehensive protective orders are sought. See *Vista India v. RAAGA*, 2008 U.S. Dist. LEXIS 24454 n.2 (D.N.J. Mar. 27, 2008) (Salas) (“just because a document is marked confidential and subject to a protective order does not automatically mean a document can be sealed. The document must still satisfy the standard set forth in Rule 5.3”). For example, in *Fanelli v. Centenary College*, 211 F.R.D. 268 (D.N.J. 2002) (Hughes), a plaintiff sought a protective order to bar the defendant from videotaping her deposition, claiming it would put her under undue stress. The court cited the rule in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994), that “good cause is established on a showing that disclosure [here, videotaping] will work a clearly defined and serious injury to the party seeking closure. The injury must be alleged with specificity.” It concluded that the videotaping would add little more stress than the deposition itself and that videotaping could provide valuable information for the jury at trial, and rejected the request for a protective order.

The issue of confidentiality can arise at the outset of the case where parties seek to litigate using pseudonyms. See e.g. *Doe v. Hartford Life & Acc. Ins. Co.*, 237 F.R.D. 545, 549 (D.N.J. 2006) (Linares), permitting a litigant in a mental health disability claim against an insurer to use a pseudonym and adopting a “balancing of the equities-type test, where the strong interest in ensuring public access to judicial proceedings is balanced against the private interests favoring anonymity.” See also *A.A. v. New Jersey*, 176 F. Supp. 2d 274, 278-279 n.1 (D.N.J. 2001) (Irenas), aff’d 341 F.3d 206 (3d Cir. 2003), in which sex offenders challenging New Jersey’s sex offender registration system were permitted to use pseudonyms and to file certain documents under seal to protect their identities. In another case, the *Pansy* showing requirements were held applicable to a complaint alleging sexual abuse where plaintiff sought to proceed anonymously and with the complaint under seal. See *WGC, Jr. v. Roman Catholic Diocese of Paterson*, Civ. No. 95-2145 (D.N.J. letter op. filed December 4, 1995) (Hedges), report and recommendation not adopted on other grounds (D.N.J. memorandum filed February 20, 1996) (Lifland). The Clerk in that case had sealed a complaint where plaintiff noted that a state statute permitted anonymous pleading. The Magistrate Judge relied on *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994) and similar cases to conclude that sealing should occur only on court order, and not automatically by the Clerk, and only after thorough consideration of the right of public access to court documents as set out in *Pansy*, *Miller v. Indiana Hospital*, 16 F.3d 549, 511 (3d Cir. 1993); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 n.6 (3d Cir. 1993); and *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991). The anonymous filing in that case was ultimately permitted by the District Court. And see *Medical Soc. of New Jersey v. Herr*, 191 F. Supp. 2d 574, 576 n.1 (D.N.J. 2002) (Bissell) (plaintiff doctor permitted to plead using pseudonym in challenge to licensing conditions applied to doctors with substance abuse problems). But see *Amaya v. New Jersey*, 766 F. Supp. 2d 533, 535 n.1 (D.N.J. 2011) (Debevoise) (plaintiff challenging enforcement of state money laundering statutes not permitted to proceed anonymously).

(b) Scheduling and Case Management Orders

(1) At or after the initial conference, the Magistrate Judge shall, after consultation with counsel, enter a scheduling order which may include, but need not be limited to, the following:

(A) dates by which parties must move to amend pleadings or add new parties;

(B) dates for submission of experts' reports;

(C) dates for completion of fact and expert discovery;

(D) dates for filing of dispositive motions after due consideration whether such motions may be brought at an early stage of proceedings (i.e., before completion of fact discovery or submission of experts' reports);

(E) a pretrial conference date; and

(F) any designation of the case for arbitration, mediation, appointment of a special master or other special procedure.

The scheduling order may further include such limitations on the scope, method or order of discovery as may be warranted by the circumstances of the particular case to avoid duplication, harassment, delay or needless expenditure of costs.

(2) [Deleted by order of 9/23/97].

(3) The Magistrate Judge shall advise each party of the provisions of L.Civ.R. 73.1(a).

(4) In a civil action arising under 18 U.S.C. §§1961-1968, the Judge or Magistrate Judge may require a RICO case statement to be filed and served in the form set forth in Appendix O.

(c) Initial Conferences -- L.Civ.R. 201.1 Arbitration Cases

At the initial conference in cases assigned to arbitration pursuant to L.Civ.R. 201.1(c) the Magistrate Judge shall enter a scheduling order as contemplated by L.Civ.R. 16.1(b) except that no pretrial date shall be set. Only an initial conference shall be conducted prior to a demand for trial *de novo* pursuant to L.Civ.R. 201.1(g), except that the Magistrate Judge may conduct one or more additional conferences if a new party or claim is added, or an unanticipated event occurs affecting the schedule set at the initial conference.

(d) [Deleted by order of 9/23/97].

(e) Trial Briefs

Trial briefs shall be served upon counsel and delivered to the Court as directed in the pretrial order or otherwise.

(f) Conference to Resolve Case Management Disputes

(1) Counsel shall confer to resolve any case management dispute. Any such dispute not resolved shall be presented by telephone conference call or letter to the Magistrate Judge. This presentation shall precede any formal motion.

(2) Cases in which a party appears *pro se* shall not be subject to L.Civ.R. 16.1(f)(1) unless the Magistrate Judge so directs. In such cases case management disputes shall be presented by formal motion consistent with L.Civ.R. 16.1(g).

(g) Case Management -- Motions

(1) Case management motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised

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by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall set forth the date and method of communication used in attempting to reach agreement.

(2) L.Civ.R. 7.1 shall apply to case management motions, except that no reply papers shall be allowed except with the permission of the Magistrate Judge. Unless oral argument is to be heard under L.Civ.R. 16.1(g)(3), the Magistrate Judge may decide the motion on the basis of the papers received when the deadline for submitting opposition has expired.

(3) No oral argument shall be heard except as permitted expressly by the Magistrate Judge assigned to hear the motion. In the event oral argument is required, the parties shall be notified by the Court. Oral argument may be conducted in open court or by telephone conference, at the discretion of the Magistrate Judge. Any party who believes that a case management motion requires oral argument shall request it in the notice of motion or in response to the notice of motion, and so notify the Court in writing at the time the motion or opposition thereto is filed.

Source: L.Civ.R. 16.1(a) - G.R. 15.A.; L.Civ.R. 16.1(b) - G.R. 15.B.3-6; L.Civ.R. 16.1(c) - G.R. 15.C.; L.Civ.R. 16.1(d) - G.R. 15.D.; L.Civ.R. 16.1(e) - G.R. 27.C.; L.Civ.R. 16.1(f) - G.R. 15.E.2-3; L.Civ.R. 16.1(g) - G.R. 15.F.1, 3-4.

Note. L.Civ.R. 16.1(b)(2) and (d) deleted effective September 23, 1997.
Amended. March 1, 2010.

COMMENT

1. 1997 Renumbering; History.
2. Civil Case Control Generally.
3. Case Management Motions.
4. Management of Civil RICO Cases.
5. Filing of Trial Briefs.

1. 1997 Renumbering; History. Former General Rule 15 served as the source rule for most of L.Civ.R. 16.1, with only a few basic editorial changes. L.Civ.R. 16.1(a) was drawn from G.R. 15.A; L.Civ.R. 16.1(b) from G.R. 15.B.3-6; L.Civ.R. 16.1(c) from G.R. 15.C; L.Civ.R. 16.1(d) from G.R. 15.D; L.Civ.R. 16.1(f) from G.R. 15.E.2-3; and L.Civ.R. 16.1(g) from G.R. 15.F.1 and 3-4. L.Civ.R. 16.1(e) was drawn from G.R. 27.C. See Comment 1 to L.Civ. R. 7.2 for the disposition of the bulk of former G.R. 27.

Note that former General Rule 15 had covered both discovery practice and motions and case management practice and motions. In the 1997 renumbering, the rule governing those issues was divided, with case management issues allocated to this rule and discovery issues allocated to either L.Civ.R. 26.1 or L.Civ.R. 37.1. See Comment 1 to L.Civ.R. 26.1 and Comment 1 to L.Civ.R. 37.1 for an analysis of their source rules.

The rule was amended effective September 23, 1997 to delete L.Civ.R. 16.1(b)(2) and (d). See Comment 2(b)(2) below. It was further amended in 2010 to clarify that case management motions are subject to the time requirements of L.Civ.R. 7.1.

2. Civil Case Control Generally. L.Civ.R. 16.1 is one of the key rules by which the Court most directly works to control the pace of federal

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litigation. Its provisions result in most significant respects from 1991 and 1993 amendments to the District's local rules to accommodate the case management mandates of the Civil Justice Reform Act of 1990. Note that L.Civ.R. 26.1 is drawn from the same predecessor rule, General Rule 15, with case management issues allocated to this rule and discovery issues allocated to L.Civ.R. 26.1.

The provisions of this rule are strictly enforced by the Court, and all counsel and all pro se litigants are notified in the Notice of Allocation and Assignment of each civil case that the Court will strictly enforce the rule and impose sanctions up to and including dismissal of a complaint or suppression of a defense for violations of the rule. See Appendix 22 to this volume. Thus, for example, failure to list an exhibit or witness in the Final Pretrial Order may result in the exclusion of the evidence at trial. *Armstrong v. Burdette Tomlin Mem. Hosp.*, 2003 U.S. Dist. LEXIS 13989 (D.N.J. August 13, 2003) (Brotman); *Exxon Corp. v. Halcon Shipping Co., Ltd.*, 156 F.R.D. 589, 591 (D.N.J. 1994) (Wolin). See also *Foley v. Mitchell*, 2008 U.S. Dist. LEXIS 5922 (D.N.J. Jan. 25, 2008) (Martini) (refusing to reconsider an order dismissing summary judgment motions for failure to abide by scheduling order); *Whiting v. Computer Associates*, 2001 U.S. Dist. LEXIS 23566 (D.N.J. Oct. 31, 2001) (Hedges) (recommending dismissal of a complaint for failure to abide by scheduling order). Note that failure to comply with L.Civ.R. 16.1 may be relevant under the factors listed by the Third Circuit for dismissing a case in *Poulis v. State Farm*, 747 F.2d 863, 868 (3d Cir. 1984). *Johnson-Shavers v. MVM*, 2008 U.S. Dist. LEXIS 6320 (D.N.J. Jan. 29, 2008) (Walls) (plaintiff's failure to comply with Magistrate Judge's letter order pursuant to Rule 16.1 satisfies the first factor of *Poulis*).

a. Civil Justice Reform Act of 1990. The Civil Justice Reform Act of 1990, Title I of P.L. 101-650, became effective on December 1, 1990. See generally *Northland Insurance Co. v. Shell Oil Co.*, 930 F. Supp. 1069, 1072-1073 (D.N.J. 1996) (Rosen) (analyzing Congress' intent in enacting the legislation and the act's interplay with the Local Rules). This sweeping statutory mandate for expediting federal civil litigation required the Court to analyze its entire approach to case management and discovery and to revise its rules, principally the former General Rule 15, to comply with the new law. As set out at Comment 1, above, the case management provisions of former G.R. 15 were carried over with only minor modifications into L.Civ.R. 16.1.

The statute required specifically the development of a civil justice expense and delay reduction plan in every Federal District Court. P.L. 101-650, §103(a) (codified at 28 U.S.C. §471). The Congressional findings incorporated in the statute included the conclusion that:

[A]n effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including --

(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;

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(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

(D) utilization of alternative dispute resolution programs in appropriate cases.

P.L. 101-650, §102(5).

Thus, the statute required (in what is now 28 U.S.C. §473) that the District consider the inclusion in its plan of a number of elements, including but not limited to:

- A speedy trial plan for civil cases intended to bring as many cases as possible to trial within 18 months of the date on which the complaint is filed;
- A tracking system for civil cases based on the complexity of the issues raised, the number of parties involved, the time required for pretrial and trial proceedings and the like;
- Hands-on participation in and control of pretrial matters by a judicial officer from the outset of the case;
- Control by a judicial officer of the extent and timing of discovery;
- The holding of discovery-case management conferences, including settlement conferences, at which counsel with authority to bind the party would be required to attend; and
- Expansion of arbitration programs and adoption of mediation and other alternative dispute resolution programs.

b. District Response to Statute. Because this District has long had a hands-on approach to case management with a wide variety of tasks delegated to the Magistrate Judges, the changes necessary here to respond to the Congressional mandate were not as broad as other federal districts may experience. The Court appointed an advisory committee shortly after the effective date of the federal legislation (see Standing Order of January 31, 1991); the advisory committee rendered its report and recommendations on October 1, 1991; and the District of New Jersey adopted its Civil Justice Expense and Delay Reduction Plan on December 19, 1991; it became effective December 31, 1991. See Appendix 20 for the full text of the plan. By completing its revisions on that time schedule, the District qualified as an Early Implementation District and thus is entitled to priority for Congressional funding that may become available. See P.L. 101-650, §106(a) (December 1, 1990).

All of the elements mandated by the statute were expressly addressed in the Civil Justice Expense and Delay Reduction Plan. It included increased hands-on control of litigation by the Magistrate Judges through a series of required conferences and discovery control; case tracking by type and complexity; and substantial emphasis on the utilization of arbitration and other alternative dispute resolution techniques, including -- in this district -- mandatory mediation. Fundamentally, the changes acknowledged and addressed the fact that a substantial portion of litigation cost and delay results from vituperative adversarial conduct. The rule thus mandated

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consultation and cooperation among counsel, and forced counsel to become more intimately involved in the litigation at an earlier stage.

(1) *Case Conferences.* One key element of what is now L.Civ.R. 16.1 is its mandate of a series of conferences with the Magistrate Judge assigned to the case that will serve to direct and control civil litigation, with the onus placed on practitioners to be thoroughly prepared for each conference and thus each phase of the litigation.

First, the rule requires an initial conference within 60 days of the filing of the initial answer in a civil case unless deferred by the Magistrate Judge due to the pendency of a dispositive or other motion. L.Civ.R. 16.1(a)(1). Each Magistrate Judge sends out an order scheduling an initial conference pursuant to Fed. R. Civ. P. 16 and L.Civ.R. 16.1(a)(1) for a designated date. That order details the obligations of counsel under the mandatory disclosure requirements of the newly amended Fed. R. Civ. P. 26, the "meet and confer" mandates and other limitations on discovery devices. The order makes clear the Court's adoption of the Federal Rules of Civil Procedure. The focus of the initial conference is on discovery management, see L.Civ.R. 26.1, although attention is mandated to the rule permitting parties to consent to disposition before the Magistrate Judge, see L.Civ.R. 73.1, and consideration of alternative dispute resolution methods, see Comment 2b(3) below. The intended result of the conference is a comprehensive scheduling order. See L.Civ.R. 16.1(b)(1). Note that the scheduling order is given great weight by the District Judges. See e.g. *ABB Air v. Reeco*, 167 F.R.D. 668 (D.N.J. 1996) (Wolfson) (barring expert testimony on specific issue for failure to comply with scheduling order); *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 1992 U.S. Dist. LEXIS 11692 (D.N.J. July 20, 1992) (Fisher) ("This court reminds Aetna that a Magistrate Judge's scheduling order 'is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril'"). See also *Bosworth v. Ehrenreich*, 823 F. Supp. 1175, 1178 (D.N.J. 1993) (Bassler) (when party disregarded a scheduling order by then-Magistrate Judge Cavanaugh, the Court noted "it will not condone further disregard of such an order"). The order cannot be modified except on a showing of good cause, and "[t]he moving party must show that despite its diligence, it could not reasonably have met the scheduling order deadline." *Hutchins v. UPS*, 2005 U.S. Dist. LEXIS 15625 (D.N.J. July 26, 2005) (Martini) (affirming Magistrate Judge Hedges who refused to allow amendment to complaint in violation of scheduling order). See also *Globespanvirata v. Texas Instruments*, 2005 U.S. Dist. LEXIS 16348 (D.N.J. July 11, 2005) (Hughes) ("...scheduling orders are the heart of the case management [and cannot] be flouted... [they] are designed to offer a degree of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed and the case will proceed", quoting *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 n.4 (3d Cir. 1990)).

Second, the rule grants the Magistrate Judge carte blanche to conduct "such other conferences as are consistent with the circumstances of the particular case." L.Civ.R. 16.1(a)(2). This flexibility establishes the continuing control of the court over the litigation. See e.g. *Standard Fire Ins. Co. v. MTU Detroit Diesel*, 2010 U.S. Dist. LEXIS 30567 (D.N.J.

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March 29, 2010) (Bongiovanni) (sua sponte extending the deadline for a motion to amend answer to complaint where the deadline for filing had already expired by the time defendant filed its initial answer).

Third, the rule permits the Magistrate Judge to conduct a settlement conference at any time during the litigation either on request of a party or at his or her own initiation, and requires that the parties to the case be available during such conference either in person or by telephone. L.Civ.R. 16.1(a)(4).

Note that L.Civ.R. 16.1(a)(3), applicable to all conferences, requires that counsel attending any conference "have full authority to bind that party in all pretrial matters." This change was necessitated by the common occurrence that counsel would appear at conferences without having previously reviewed the case status with their clients, or who had been sent to cover the conference by a colleague and knew little or nothing about the case. Because of the extent of the matters to be reviewed at the initial conference, see Comment 3 below, counsel must be prepared to "hit the ground running" from the outset of the litigation. And because of the significance of the pretrial order, prepared in part as the result of the final pretrial conference, counsel must never let up in preparation. See e.g. *Metal Processing Inc. v. Humm*, 56 F. Supp. 2d 455, 460 (D.N.J. 1999) (Bassler) (where exhibits not produced in accordance with pretrial order, court refused to consider exhibits at non-jury trial); *Lodato v. Township of Evesham*, 782 F. Supp. 957, 960 n.1 (D.N.J. 1992) (Lifland) (because an issue was not referenced either factually or legally in the pretrial order, "the court will not address" it); *Fineman v. Armstrong World Industries, Inc.*, 774 F. Supp. 225, 230 (D.N.J. 1991) (Bissell), mod. 980 F.2d 171 (3d Cir. 1992), cert. den. 507 U.S. 921 (1993) ("In this Court and in the Third Circuit, the Pretrial Order governs the ensuing litigation").

(2) *Case Tracking*. A second key element in the Rule as adopted in 1991 and as amended in 1993 was a tracking system for civil cases, to flag those cases which would require more frequent monitoring. Complex litigation, including class actions, antitrust, securities, environmental, patent, trademark and multi-district cases were presumptively designated as Track II, requiring greater supervision, while all other cases were presumptively Track I, requiring less supervision.

The Court's experience with the tracking system, however, showed that it was simply unnecessary. As the Civil Justice Reform Act Advisory Committee noted in its Fifth Annual Assessment (June 20, 1997) at p.19, "[I]ndividual judicial officers, in the exercise of their discretion and without regard to the designation of a particular case into one or another track, recognize the complexity of a case and the need for greater (or less) supervision." Therefore, on the recommendation of the Committee, the Court amended L.Civ.R. 16.1 on September 23, 1997, deleting both rule provisions dealing with tracking -- L.Civ.R. 16.1(b)(2) and 16.1(d).

(3) *Alternative Dispute Resolution*. A third key element, not merely in this rule but echoed in L.Civ.R. 201.1, in the district's arbitration guidelines (Appendix M) and in what is now a mandatory mediation program under L.Civ.R. 301.1, is the emphasis on alternative dispute resolution techniques. The District of New Jersey had mandatory arbitration of relatively simple cases long before the Civil Justice Act was

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adopted, and its 1991 amendments to its arbitration rule expanded the cases that to be arbitrated. More significantly, however, the requirement of attention to alternative dispute resolution (ADR) in the conferences conducted by the Magistrate Judge pursuant to L.Civ.R. 16.1 is intended to encourage parties to consent voluntarily to any one of a wide variety of ADR methods. See generally L.Civ. R. 201.1 (arbitration) and 301.1 (mediation).

3. Case Management Motions. Note specifically the mandate of L.Civ.R. 16.1(f)(1) that no case management motion may be filed until counsel for all parties have conferred in an attempt to resolve the dispute without judicial intervention. Further, if such conference fails to resolve the dispute, the matter must be presented to the Magistrate Judge by telephone conference call or by letter before a motion can be filed. See e.g. *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 (D.N.J. 2002) (Hughes) ("The parties originally brought this dispute to the attention of the Court by letter memorandum and conference call, which is the proper method, by local rule, order and custom in this District").

Under L.Civ.R. 16.1(f)(2), cases involving pro se litigants are subject to the L.Civ.R. 16.1(f)(1) conference requirement only on court order.

In the event that a motion is required, L.Civ.R. 16.1(g) is the relevant provision to be consulted. Although the requirements of L.Civ.R. 7.1 apply to case management motions, see L.Civ.R. 16.1(g)(2), there are certain key differences between motion practice generally and L.Civ.R. 16.1(g) motions.

First, L.Civ.R. 16.1(g)(1) requires that case management motions be accompanied by an affidavit setting forth the specific efforts made by the moving party to resolve the issues with opposing counsel before resorting to the intervention of the Court. Misstatement, misrepresentation or bad faith in such efforts to resolve the issue or in the affidavit itself may subject the affiant attorney to disciplinary sanctions under L.Civ.R. 104.1 as well as other sanctions under Fed. R. Civ. P. 11.

Second, while case management motions are subject to the requirements of L.Civ.R. 7.1, no reply papers are permitted without leave of Court, see L.Civ.R. 16.1(g)(2), and no oral argument will be heard unless directed by the Court, see L.Civ.R. 16.1(g)(3). Either side to a motion can request oral argument, either in the notice of motion or opposing papers, and must also so notify the Court in writing when the motion or opposition is filed. If granted, oral argument may be formally in open court or informally by telephone conference. Many judicial officers are amenable to telephone conferences to resolve motions; several prefer such conferences. See Appendix 2. In such case, of course, counsel are advised to request that the judicial officer either use the telephone recording equipment provided or have a court reporter present so that a record will be created, particularly for purposes of an appeal of a Magistrate Judge's order to the District Court under L.Civ.R. 72.1(c)(1).

Third, L.Civ.R. 16.1(g)(2) expressly authorizes a decision on the motion based solely on the papers in the Court's hands when the deadline for submitting opposing papers has expired.

4. Management of Civil RICO Cases. The practice and experience of individual judicial officers showed that special case management considerations were presented by civil RICO cases. Thus, the memo outlined in Appendix O to the Court's Rules and authorized by the 1991 amendment to what is now L.Civ.R. 16.1(b)(4) was adapted from a standard Order for civil RICO cases developed by then-Magistrate Judge Simandle and Magistrate Judge Rosen. The order required plaintiffs to flesh out their allegations with sufficient particularity to determine at the outset of the case whether the RICO claim had merit. Their experience with that practice rule was overwhelmingly positive and the Court adopted it as a general, authorized practice in September of 1991. See e.g. *HT of Highlands Ranch v. Hollywood Tanning Sys.*, 590 F. Supp. 2d 677, 681 n.3 (D.N.J. 2008) (Simandle). Note that the Appendix itself, which sets out the required data to be submitted, has been amended to require even greater specificity of pleading. See Appendix O, paragraph 13(c). This requirement for specificity of pleading has been noted, with apparent approval, by the Third Circuit. See *Lum v. Bank of America*, 361 F.3d 217 (3d Cir. 2004), cert. den. 543 U.S. 918 (2004).

Counsel should be aware that "[t]he RICO Case Statement is not merely an exercise in reorganizing the Complaint [It] is considered a pleading and therefore, falls within the scope of [Fed.R.Civ.P.] Rule 11." *Mruz v. Caring, Inc.*, 991 F. Supp. 701, 719 n.26 (D.N.J. 1998) (Orlofsky) (granting in part and denying in part defendants' motion to dismiss a civil RICO claim in connection with alleged Medicaid and tax fraud without ruling on adequacy of fraud pleading). See also *Grant v. Turner*, 2010 U.S. Dist. LEXIS 108413 (D.N.J. Oct. 12, 2010) (Brown); *HT of Highlands Ranch v. Hollywood Tanning Sys.*, 590 F. Supp. 2d 677, 692 (D.N.J. 2008) (Simandle) ("Plaintiffs' RICO Case Statement... is 'equivalent to a supplemental pleading,' L. Civ. R. Appx. O"; *Darrick Enterprises v. Mitsubishi Motors*, 2007 U.S. Dist. LEXIS 72956 (D.N.J. Sept. 28, 2007) (Hillman) ("the RICO case statement... serves as a pleading"). Note, however, that the RICO statement is to be filed "only when a judicial officer has requested that the plaintiff file a RICO case statement" and, where filed without judicial authority, is a supplemental pleading that will not be considered on a motion to dismiss. *Crete v. Resort Condos. Int'l.*, 2011 U.S. Dist. LEXIS 14719 (D.N.J. Feb. 14, 2011) (Sheridan).

Because it is considered a pleading, misstatements in the Statement and assertions or allegations made without an appropriate factual investigation may subject counsel to sanctions. See also generally *Darrick Enters. v. Mitsubishi Motors Corp.*, 2007 U.S. Dist. LEXIS 4054, 9-11 (D.N.J. Jan. 19, 2007) (Hillman) ("The statement 'is equivalent to a supplemental pleading which shall include the facts the plaintiff is relying upon to initiate this RICO complaint as a result of the 'reasonable inquiry' required by Fed. R. Civ. P. 11"). And see *Jatras v. Bank of America*, 2010 U.S. Dist. LEXIS 40074 (D.N.J. Apr. 22, 2010) (Kugler) (conditioning grant of motion to amend complaint on the filing of a RICO Case Statement "to fully illuminate their RICO claims").

The RICO case management order and its requirement that greater specificity as to the RICO claim be provided to the court and defense counsel was challenged by the plaintiff in *Northland Insurance Co. v. Shell*

Civ. RULE 26.1 DISCOVERY**(a) Discovery - Generally**

All parties shall conduct discovery expeditiously and diligently.

(b) Meeting of Parties, Discovery Plans, and Initial Disclosures

(1) The requirements currently codified in Fed. R. Civ. P. 26(a) and (f) pertaining to required disclosures, meetings of parties, and submission of discovery plans, shall apply to all civil cases filed after December 1, 1993 and to all civil cases pending on December 1, 1993 that have not had their initial scheduling conference prior to January 20, 1994; except that these requirements shall not apply to those civil cases described in L.Civ.R. 72.1(a)(3)(C) in which scheduling conferences are not normally held, unless the judicial officer otherwise directs. The judicial officer may modify or suspend these requirements in a case for good cause.

(2) The initial meeting of parties as required in Fed. R. Civ. P. 26(f) shall be convened at least 21 days before the initial scheduling conference, and the proposed discovery plan under Fed. R. Civ. P. 26(f)(3) shall be generated at that meeting and delivered to the Magistrate Judge within 14 days after the meeting of parties. The parties shall submit their Fed. R. Civ. P. 26(f) discovery plan containing the parties' views and proposals regarding the following:

- (a) Any changes in timing, form, or requirements of mandatory disclosures under Fed. R. Civ. P. 26(a);
- (b) The date on which mandatory disclosures were or will be made;
- (c) The anticipated substantive scope of discovery, including both discovery relevant to the claims and defenses and discovery relevant to the subject matter of the dispute;
- (d) Whether any party will likely request or produce computer-based or other digital information, and if so, the parties' discussions of the issues listed under the Duty to Meet and Confer in L. Civ. R. 26.1(d)(3) below;
- (e) The date by which discovery should be completed;
- (f) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure, local rule, or standing order;
- (g) Any orders, such as data preservation orders, protective orders, etc., which should be entered;
- (h) Proposed deadline for joining other parties and amending the pleadings;
- (i) Proposed dates for filing motions and for trial;
- (j) Whether the case is one which might be resolved in whole or in part by voluntary arbitration (pursuant to L. Civ. R. 201.1 or otherwise), mediation (pursuant to L. Civ. R. 301.1 or otherwise), appointment of a special master or other special procedure.

The parties shall make their initial disclosures under Fed. R. Civ. P. 26(a)(1) within 14 days after the initial meeting of the parties, unless otherwise stipulated or directed by the Court. Such discovery plans and disclosures shall not be filed with the Clerk.

(c) Discovery Materials

(1) Initial and expert disclosure materials under Fed.R.Civ.P.26(a)(1) and 26(a)(2), transcripts of depositions,

interrogatories and answers thereto, requests for production of documents or to permit entry onto land and responses thereto, and requests for admissions and answers thereto shall not be filed until used in a proceeding or upon order of the Court. However, all such papers must be served on other counsel or parties entitled thereto under Fed.R.Civ.P.5 and 26(a)(4).

(2) Pretrial disclosure materials under Fed.R.Civ.P.26(a)(3) shall be incorporated by reference into the order entered after any final pretrial conference under Fed.R.Civ.P.16(d).

(3) In those instances when such discovery materials are properly filed, the Clerk shall place them in the open case file unless otherwise ordered.

(4) The party obtaining any material through discovery is responsible for its preservation and delivery to the Court if needed or ordered. It shall be the duty of the party taking a deposition to make certain that the officer before whom it was taken has delivered it to that party for preservation and to the Court as required by Fed. R. Civ. P. 30(f)(1) if needed or so ordered.

(d) Discovery of Digital Information Including Computer-Based Information

(1) Duty to Investigate and Disclose. Prior to a Fed. R. Civ. P. 26(f) conference, counsel shall review with the client the client's information management systems including computer-based and other digital systems, in order to understand how information is stored and how it can be retrieved. To determine what must be disclosed pursuant to Fed. R. Civ. P. 26(a) (1), counsel shall further review with the client the client's information files, including currently maintained computer files as well as historical, archival, back-up, and legacy computer files, whether in current or historic media or formats, such as digital evidence which may be used to support claims or defenses. Counsel shall also identify a person or persons with knowledge about the client's information management systems, including computer-based and other digital systems, with the ability to facilitate, through counsel, reasonably anticipated discovery.

(2) Duty to Notify. A party seeking discovery of computer-based or other digital information shall notify the opposing party as soon as possible, but no later than the Fed. R. Civ. P. 26(f) conference, and identify as clearly as possible the categories of information which may be sought. A party may supplement its request for computer-based and other digital information as soon as possible upon receipt of new information relating to digital evidence.

(3) Duty to Meet and Confer. During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters, including the following:

(a) Preservation and production of digital information; procedures to deal with inadvertent production of privileged information; whether restoration of deleted digital information may be necessary; whether back up or historic legacy data is within the scope of discovery; and the media, format, and procedures for producing digital information;

(b) Who will bear the costs of preservation, production, and restoration (if necessary) of any digital discovery.

(c) Protective Orders

Procedures for discovery-related protective orders are set forth in L.Civ.R. 5.3:

Source: L.Civ.R. 26.1(a) - G.R. 15.E.1; L.Civ.R. 26.1(b) - G.R. 15.B.1-2; L.Civ.R. 26.1(c) - G.R. 15.G.
Amended. March 14, 2001; October 6, 2003; February 24, 2005; March 1, 2010.

COMMENT

1. 1997 Renumbering; Amendments.
2. Discovery Control Generally.
3. Civil Discovery - The Initial Conference.
4. Discovery Disputes.
5. Filing and Confidentiality of Discovery Materials.
6. Deposition Practice Restrictions.

1. 1997 Renumbering; Amendments. The portions of former General Rule 15 dealing specifically with discovery issues other than discovery motions were allocated to L.Civ.R. 26.1. General Rule 15.E.1, with no changes, became L.Civ.R. 26.1(a); G.R. 15.B.1-2 with only editorial changes became L.Civ.R. 26.1(b); and G.R. 15.G, also with only editorial modifications, became L.Civ.R. 26.1(c).

Note that former General Rule 15 had covered both discovery practice and motions and case management practice and motions. In the 1997 renumbering, the rule governing those issues was divided, with discovery matters other than motions allocated to this rule, discovery motion issues to L.Civ.R. 37.1 and case management issues to L.Civ.R. 16.1. See Comment 1 to L.Civ.R. 16.1 and Comment 1 to L.Civ.R. 37.1 for an analysis of their source rules.

The rule was first amended in 2001. At that time, L.Civ.R. 26.1(c)(1) was changed to require that discovery materials only be filed when "used in a proceeding or upon order of the Court." L.Civ.R. 26.1(c)(2) was added at that time to require that pretrial disclosure materials under Fed. R. Civ. P. 26(a)(3) be incorporated by reference into the final pretrial order in a case. See generally Comment 5, below.

In 2003, the rule was amended in several key ways. First, the time for the initial discovery meeting of the parties was increased from 14 days before the initial scheduling conference to 21 days before the conference, and the time to deliver the proposed discovery plan to the Judge was increased from 10 days after the initial meeting to 14 days after the initial meeting. Second, the scope of issues to be addressed in the proposed discovery plan was increased. See Comment 3(a), below. Third, L.Civ.R. 26.1(d) was added to address the emerging issue of discovery of digital information, including computer-based data. See Comment 3(a), below.

In 2005, L.Civ.R. 26.1(e) was added to make it clear that then-newly adopted L.Civ.R. 5.3 governed discovery-related protective orders as well as other protective orders in civil matters.

L.Civ.R. 26.1(b)(2) was amended in 2010 principally to conform to amendments to the Federal Rules of Civil Procedure which took effect December 1, 2009, changing the time frames for many court filings. As amended, the rule requires the parties to make their initial disclosures

within 14 days after their initial meeting, rather than 10 days as previously provided.

2. Discovery Control Generally. L.Civ.R. 26.1, like L.Civ.R. 16.1, is a critical rule by which the Court most directly works to manage cases with an eye towards speeding them through the federal system. The key predecessor to both rules, General Rule 15, was redrafted in its entirety in 1984 to provide a flexible yet supervised approach to discovery management, and was revised again in 1991, 1993 and 1994 in many significant respects effective to accommodate the mandates of the Civil Justice Reform Act of 1990 and amendments thereafter to Fed. R. Civ. P. 16, 26, 30, 31 and 33. As emphasized by the court in *Kirsch v. Delta Dental*, 2008 U.S. Dist. LEXIS 11545 (D.N.J. Feb. 14, 2008) (Shipp), the frequency or extent of use of the discovery methods otherwise permitted by the federal civil rules or by the local civil rules "shall be limited by the court if the burden or the expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues."

Like those of L.Civ.R. 16.1, the provisions of this rule are strictly enforced by the Court. Sanctions for violations of the rule can include dismissal of a complaint or suppression of a defense, and notice that such consequences can result is given to all counsel and all pro se litigants in the Notice of Allocation and Assignment of each civil case. See Appendix 22 to this volume.

a. The 1984 Revision. The 1984 revision to former General Rule 15 was the result principally of changes to two Federal Rules of Civil Procedure -- 16 and 26. The intent of the U.S. Supreme Court and Congress in adopting those rules was to provide a direct and powerful mechanism for district courts to control the orderly completion of discovery and, thus, the pace of federal litigation.

When the District Court here considered its discovery rule in light of the changes in Fed. R. Civ. P. 16 and 26, it had to choose between two approaches to its control of discovery: (a) a limited rule designed to further uniformity of federal practice and avoid unnecessary complexity; or (b) a detailed and well-defined rule tailored to recognize discovery problems specific to the District of New Jersey. In contrast to the choice made elsewhere, see e.g. the local rules of the United States District Court for the Central District of California, the Court here chose the former option. It did so because it concluded that the federal civil rules generally provided a workable balance between flexibility allowed to the bar and control centered in the Court, particularly through the United States Magistrate Judge. See generally *Chalick v. Cooper Hosp./University Med. Center*, 192 F.R.D. 145, 150 (D.N.J. 2000) (Kugler). The Court decided that it did not need to impose across-the-board limits on the number of interrogatories served, the number of depositions taken and the like. Instead, it concluded that its local rule should reflect its expectation that counsel would act responsibly under the watchful eye of the Court through intense utilization of the Magistrate Judge pursuant to Fed. R. Civ. P. 16 and its local rule delegating authority to the Magistrate Judges, now L.Civ.R. 72.1.

The system imposed by the District's local rule thus defined the special needs of a case early in the litigation yet provided for a flexible format for limiting discovery if the circumstances of the case required it. It directed the parties to submit a discovery status report outlining any case-sensitive problems as part of the initial scheduling conference; it provided for broad discretion by the Magistrate Judge to set discovery plans and impose necessary limits as part of that initial scheduling conference; and it controlled discovery motions by requiring that counsel confer and attempt to reach agreement before filing a motion and that no oral argument be held unless required by the Magistrate Judge or Judge to whom the motion was assigned.

The Court's experience in the wake of its 1984 revision justified its choice of the limited rule, and, until adoption of the Civil Justice Reform Act of 1990, the rule was changed only in relatively minor ways. In 1986, for example, it put discovery motions on a time schedule more in tune with the normal motion schedule, and in 1987, it added a requirement that discovery motions be captioned as such on the front cover page. This allowed the Clerk to monitor such motions within the time parameters of the rule and distinguished them from other motions.

b. The 1991 and 1993 Revisions. In 1991, essentially all of former General Rule 15 was revised in accordance with the mandates of the Civil Justice Reform Act of 1990, Title I of P.L. 101-650. The bulk of the changes made to the predecessor rule in both 1991 and 1993 dealt with case management issues. See Comment 2 to L.Civ.R. 16.1 for an overview. The discovery-related changes required by the act involved the early involvement of the Magistrate Judges in controlling the extent and timing of discovery and the holding of case management conferences at which discovery issues would be expressly addressed and resolved.

c. The 1994 Revision. In response to the Civil Justice Reform Act of 1990 a wide variety of amendments to the Federal Rules of Civil Procedure became effective on December 1, 1993. The heart of the changes in response to the Civil Justice Reform Act were incorporated in Fed. R. Civ. P. 16, 26, 30, 31 and 33. The changes to these Rules were interrelated and are intended to achieve the act's goal of reducing cost and delay particularly in response to what has been perceived as abuses of the discovery process.

As noted above, former General Rule 15 was amended nearly in its entirety in late 1991 to incorporate the recommendations of the Advisory Committee to Implement the Civil Justice Reform Act of 1990. Additional case management amendments to the rule followed in early 1993. Once the amendments to the Federal Rules of Civil Procedure became effective on December 1, 1993, however, the Court was required to reconsider its position on a number of issues and chose to retain uniformity with the Federal Rules of Civil Procedure in essentially all cases where it could have opted for a different local practice. Some of the amendments to the Federal Rules of Civil Procedure were already included in the Court's local rule, but essentially each change in the Federal Rules of Civil Procedure permitted local District Courts to opt out in favor of individualized practices. Despite indicators that such opting-out might be

expected, it simply did not occur, and the 1994 amendments to the local rule were relatively minor in scope and effect.

In particular, Fed. R. Civ. P. 26 and 30 -- which were among the ones that received the most intense Congressional scrutiny -- permitted each local federal district court to elect to adopt, reject or modify the mandates of the Federal Rules. Fed. R. Civ. P. 26(a)(1) allowed each court, by local rule, to either adopt, reject or modify the mandatory disclosure requirements. In drafting the Civil Justice Reform Act Implementation Plan for the District of New Jersey both the Advisory Committee and the Court considered whether to require early disclosure of these initial "core" documents and rejected such a proposal. Once the Federal Rule took effect, however, the Court would have had to readdress this issue by rule in order to opt out of requiring such mandatory disclosure of core documents. It did not do so. To the contrary, the District of New Jersey "adopted the new Rule 26(a) in its entirety." *Chalick v. Cooper Hosp./University Med. Center*, 192 F.R.D. 145, 150 (D.N.J. 2000) (Kugler). In *Tarlton v. Cumberland Co. Corr. Facility*, 192 F.R.D. 165, 169-170 (D.N.J. 2000) (Kugler), Magistrate Judge Kugler emphasized that "[t]his District does not take compliance with [Civil] Rule 26(a) lightly" and pointedly explained the voluntary disclosure requirements of that Rule and the obligation of counsel thereunder:

The purpose of voluntary disclosures is to streamline discovery and thereby avoid the practice of serving multiple, boilerplate interrogatories and document requests, which themselves bring into play a concomitant set of delays and costs. They also serve the purpose of preventing a party from improperly withholding relevant documents on the grounds that the opposing party has not specifically asked for them. The federal discovery rules, Fed. R. Civ. P. 26 through 37, in conjunction with Fed. R. Civ. P. 16 governing a court's authority to manage a case through status conferences and scheduling orders, were carefully designed to structure the pretrial process in a way to move a case or controversy to resolution on the merits in the fairest and most efficient way possible. A party's attempt to circumvent this process in the name of litigation strategy does a serious disservice to this system and will be met with the imposition of sanctions, as provided for in the rules.

Litigants are warned not to "indulge in gamesmanship with respect to the disclosure obligations."

Similarly, Fed. R. Civ. P. 30, which limits the number of depositions in any given case, and Fed. R. Civ. P. 33, which limits interrogatories to 25 including all subparts, raised issues specifically considered and rejected by both the Advisory Committee and the Court in adopting the district's Civil Justice Reform Act Plan. Again, while the Federal Rules allowed each local court through the use of a local rule to reject limitations on particular discovery devices, no such opt-out rule was forthcoming; the Court chose, instead, to allow the amended Federal Rules to become effective here in their entirety.

Thus, while many practitioners had predicted that this District would decline to follow the lead of the national rules, the revision to the District's

local rule merely provided certain effective dates (the rules adopted or amended then applied to all civil cases filed after December 1, 1993 and all civil cases pending on that date which were not scheduled for initial conference prior to January 20, 1994; see what is now L.Civ.R. 26.1(b)(1)) and sets a schedule for the initial meeting of the parties as called for by Fed. R. Civ. P. 26(f). See L.Civ.R. 26.1(b)(2).

d. The 2000 Amendment to Fed. R. Civ. P. 26. Note that an amendment to Fed. R. Civ. P. 26, effective December 1, 2000, removed the discretion of individual District Courts to opt out of the early disclosure requirements of that rule. It further barred the District Courts from adopting local rules at variance with the limits on the number of depositions and interrogatories under Fed. R. Civ. P. 30. See Fed. R. Civ. P. 26, set out in its entirety as part of the Federal Rules of Civil Procedure later in this volume, for the current version of that rule.

Taking all of these changes together -- in the local and national rules -- what is most important for the practitioner to understand is that, since December 1, 1993 there have been dramatic changes in the way discovery is conducted in all federal courts including the District of New Jersey.

An obvious safety valve for the amended Federal Rules, even with the change in Fed. R. Civ. P. 26, is the discretion that the Magistrate Judges have in the Rules to implement them on a case-by-case basis pursuant to the Magistrate Judge's case management authority. That authority was not diminished by the 2000 amendment to Fed. R. Civ. P. 26.

3. Civil Discovery - The Initial Conference. One of the key underpinnings of the Court's approach to discovery generally is reflected in the first sentence of L.Civ.R. 26.1(a): "All parties shall conduct discovery expeditiously and diligently." This requirement, carried over verbatim from the prior version of the rule, includes a mandate for counsel to personally confer before the initial conference and to submit a joint discovery plan.

a. Joint Discovery Plan. L.Civ.R. 26.1(b) requires counsel in all cases to confer at least 21 days in advance of the first scheduling conference held pursuant to L.Civ.R. 16.1 to prepare a joint discovery plan. L.Civ.R. 26.1(b)(2) provides a non-exhaustive list of topics counsel must discuss together and address in the joint discovery plan. The list of matters to be considered was amended in 2003 to include a wider variety of matters, including but not limited to issues arising from the mandatory scheduling requirements of Fed.R.Civ.P. 26(a), scheduling issues including deadlines, scope and form of discovery including computer-based or digital information, bifurcation, and whether the case is one which might be resolved in whole or in part by voluntary arbitration, mediation, appointment of a special master or use of other ADR methods. See L.Civ.R. 26.1(b)(2)(a)-(k) for the full list of matters that must be addressed in the initial discovery plan.

L.Civ.R. 26.1(b)(2) then requires submission of the joint plan, and a statement of any inability to reach agreement, to the Magistrate Judge within 14 days after the conference by counsel (therefore, at least four days before the initial scheduling conference to be held pursuant to L.Civ.R. 16.1). Every discovery-related problem will be discussed at that initial scheduling conference and all issues identified will be addressed in the

scheduling order pursuant to L.Civ.R. 16.1(b)(1). See e.g. *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 614 (D.N.J. 1989) (Simandle) (order included dates by which expert reports were to be disclosed). For these reasons, the discovery plan and early identification of discovery-related issues is critical and L.Civ.R. 26.1's mandates must be read in conjunction with L.Civ.R. 16.1.

In particular, L.Civ.R. 16.1(b)(1)(F) contemplates the highlighting of areas where it would be desirable to limit discovery at an early stage of the case due to the nature of the issues raised in the litigation or the amount in controversy. Not only the schedule for completion of discovery will be fixed in the order but also any appropriate curtailment of the scope, method or order of discovery warranted by the circumstances of the case. Moreover, in the wake of the Third Circuit's decision in *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994), the order may well control the issue of confidentiality of discovery materials since the district courts now must make specific findings as to the merits of protective orders. As a result, the parties are now required to consider the issue in their initial meeting and the Magistrate Judge will address it at the initial conference. A standard form of order governing confidentiality of discovery materials may be entered at that time. See Appendix S (adopted effective January 1, 2009). Note as well that Fed. R. Civ. P. 26(f)(3) specifically requires consideration by the parties of "any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order." See generally Comment 5, below. See also L.Civ.R. 5.3 and comments thereto governing protective orders generally.

Another issue now required to be raised in the conference is the *form* discovery materials may take, whether paper or electronic. See e.g. In re *Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 444 (D.N.J. 2002) (Hughes), in which issues arose over the costs of document production where the producing party was both scanning each document for its own use and producing a paper copy for its adversary. The Magistrate Judge ultimately held that the adversary was entitled to receive a copy of the documents in electronic form as well as paper on payment of the costs of the scanning media. In so holding, the Court noted: "Although there may be room for clearer direction in existing rules and orders that explicitly address cost allocation in production of paper and electronic information, counsel should take advantage of the required Rule 26(f) meeting to discuss issues associated with electronic discovery. As the eve of electronic case filing (ECF) is upon us, in this and most other Districts, the production of electronic information should be at the forefront of any discussion of issues involving discovery and trial, including the fair and economical allocation of costs."

This issue, as to the discovery of digital information, including computer-based information, was specifically addressed in an amendment to L.Civ.R. 26.1, adding L.Civ.R. 26.1(d). Under the new rule, prior to a discovery conference, counsel has the duty to review with every client all of the client's information management systems including computer-based and other digital systems "in order to understand how information is stored

and how it can be retrieved.” L.Civ.R. 26.1(d)(1). This review must include current and historical data systems including back-up and archival systems, and all digital evidence that may be used to support or defend claims. *Id.* The rule further requires that counsel identify those persons who have knowledge about the systems to facilitate discovery. *Id.* Counsel seeking discovery of digital information must notify opposing parties “as soon as possible, but no later than the Fed. R. Civ.P. 26(f) conference” and must identify categories of information sought “as clearly as possible”. L.Civ.R. 26.1(d)(2). Finally, during the Fed. R. Civ.P. 26(f) conference, counsel must confer and attempt to agree on methods to preserve and produce digital information and deal with claims of privilege, and on allocation of the costs of preserving, producing and, to the extent necessary, restoring such information. L.Civ.R. 26.1(d)(3).

Note that failure to secure digital information for discovery purposes may result in spoliation sanctions. Applying L.Civ.R. 26.1, the Court in *MOSAID Technologies Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 339 (D.N.J. 2004) (Martini), affirmed a spoliation inference jury instruction and monetary sanctions imposed by the magistrate judge on defendant. Judge Martini was unequivocal:

The duty to preserve potentially relevant evidence is an affirmative obligation that a party may not shirk. When the duty to preserve is triggered, it cannot be a defense to a spoliation claim that the party inadvertently failed to place a “litigation hold” or “off switch” on its document retention policy to stop the destruction of that evidence. As discoverable information becomes progressively digital, e-discovery, including e-mails and other electronic documents, plays a larger, more crucial role in litigation.

The Court reasoned that the defendant “knew that its technical e-mails were potentially relevant” and “chose to do nothing about the spoliation of those e-mails” thereby causing prejudice to the other side. 348 F. Supp. 2d at 339. The Court added that “[u]nless and until parties agree not to pursue e-discovery, the parties have an obligation to preserve potentially relevant digital information,” or they face the risk of facing spoliation sanctions. *Id.* See also *Lentz v. Graco Inc.*, 2007 U.S. Dist. LEXIS 59282 (D.N.J. Aug. 13, 2007) (Bongiovanni), where the court “remind[ed] the parties of their obligations under the Local and Federal Rules to adequately preserve evidence” and warned that it would “not hesitate to impose sanctions for any intentional spoliation of evidence.” And see *Katiroll Co. v. Kati Roll & Platters*, 2011 U.S. Dist. LEXIS 85212 (D.N.J. Aug. 3, 2011) (Brown) (granting in part and denying in part spoliation sanctions). See also *Medeva Pharma Suisse v. Roxane Labs.*, 2011 U.S. Dist. LEXIS 8417 (D.N.J. Jan. 28, 2011) (Bongiovanni) (noting that “the Court has authority to impose spoliation sanctions pursuant to both the Federal Rules of Civil Procedure and its inherent authority, and the choice of which sanction should be imposed rests in the sound discretion of the Court”)

Note as well that Fed. R. Civ. P. 26(f) specifically requires consideration by the parties of “any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.”

RULE 26.1

LOCAL CIVIL RULES

b. Special Masters. L.Civ.R. 26.1(b)(2) requires that the parties discuss the use of special procedures including the appointment of a special master. L.Civ.R. 16.1(b)(1)(F) allows the Magistrate Judge to include such designation in the initial scheduling order. In holding that reference to a special master should be “the exception and not the rule,” the Third Circuit in *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 991 F.2d 1080, 1084 (3d Cir. 1993) announced strict standards for such an appointment. For an example of a case where those standards were met, see *Interfaith Community Org. v. Honeywell International*, 263 F. Supp. 2d 796, 874 (D.N.J. 2003) (Cavanaugh) (appointing a special master in complex environmental case “due to the extensive nature of the cleanup and Honeywell’s continued recalcitrance in effectuating an appropriate cleanup”), *aff’d* 399 F.3d 248 (3d Cir.), *cert. den.* 545 U.S. 1129 (2005). Note that these standards do not apply to the appointment of a Magistrate Judge as special master where the parties consent to the appointment. Fed. R. Civ. P. 53(h); L.Civ.R. 72.1(a)(10).

Because Fed. R. Civ. P. 53(g) directs that the Court fix the compensation of a special master and determine how the special master should be paid, the potential apportionment of a special master’s fees and expenses among the parties is an issue to be discussed at the initial meeting of counsel mandated by L.Civ.R. 26.1(b)(1) and to be addressed in written submissions pursuant to L.Civ.R. 26.1(b)(2), to address the relative abilities of the parties to pay that compensation. In general, where “one party voluntarily suggested appointment of the Special Master, and the other party voluntarily concurred ... an even split between the parties was the proper allocation.” *Ingersoll-Rand Co. v. Barnett*, 2007 U.S. Dist. LEXIS 5000 (D.N.J. Jan. 23, 2007) (Debevoise). Where the appointment of a special master is the result of “unreasonable behavior” by one side, however, the court has the authority to require that party to “pay the entirety of the Special Master’s fees.” *Wachtel v. Health Net*, 239 F.R.D. 81, 112-113 (D.N.J. 2006) (Hochberg).

In those cases where a special master is appropriately appointed, although L.Civ.R. 72.1(a)(10) allows appointment of a Magistrate Judge as special master, the individual is usually chosen from the community. For example, a former District Judge was appointed special master in litigation involving the Bayside Prison. *Bayside State Prison Litig. (Floyd Larry) v. Fauver*, 2008 U.S. Dist. LEXIS 87746 (D.N.J. Aug. 15, 2008) (report by Special Master Bissell). A former state Assignment Judge was appointed as special master for discovery in a complex and lengthy securities case. *In re Cendant Corp. Securities Litigation*, 569 F. Supp. 2d 440, (D.N.J. 2008) (Walls). A former Magistrate Judge was appointed as special master in a dispute over the privileged status of more than 1000 documents in a patent dispute. *Net2Phone v. eBay*, 2008 U.S. Dist. LEXIS 50451 (D.N.J. June 26, 2008) (Shwartz). A community leader, Gustav Henningburg, was selected as special master in a case involving low income housing in Newark. See *Newark Coalition v. Newark Redev. and Housing Authority*, 524 F. Supp. 2d 559, 563 (D.N.J. 2007) (Debevoise). A former New Jersey Appellate Division judge was appointed special master to resolve discovery disputes over claims of privilege; he was “granted the authority equivalent to that of a Magistrate Judge [and] was also

designated as mediator of any issue which the parties voluntarily agreed to mediate." *Ingersoll-Rand Co. v. Barnett*, 2007 U.S. Dist. LEXIS 5000 (D.N.J. Jan. 23, 2007) (Debevoise). A former District Court Judge was selected as special master in a class action case alleging employment discrimination. *Gutierrez v. Johnson & Johnson*, 227 F.R.D. 255, 257 (D.N.J. 2005) (Walls). Likewise, Judge Pisano appointed a former District Court judge as a special master in determining jurisdiction over securities claims by foreign investors. *In re Royal Dutch Shell Transport Secs. Litigation*, 522 F. Supp. 2d 712, 714 (D.N.J. 2007) (Pisano). Similarly, Judge Debevoise appointed a former District Court judge as a special master in a complex patent case where many relevant documents had been destroyed by the plaintiff. *Struthers Patent Corp. v. Nestle Co., Inc.*, 558 F. Supp. 747, 756 (D.N.J. 1981) (Debevoise). See also *Essex County Jail Annex Inmates v. Treffinger*, 18 F. Supp. 2d 418, 421 (D.N.J. 1998) (Ackerman) (special masters assigned task of reviewing motion to disqualify plaintiff-inmates' counsel); *Unihealth v. U.S. Healthcare, Inc.*, 14 F. Supp. 2d 623 (D.N.J. 1998) (Pisano) (special master appointed to assist parties through mediation to arrive at a settlement of disputed charges and, if parties cannot agree, special master to conduct hearings and submit report and recommendation to court); *Bridgeman v. NBA*, 838 F. Supp. 172, 173-174 (D.N.J. 1993) (Debevoise) (using special master in sports case involving contract provisions). Judge Ackerman appointed special masters in several cases where inmates challenged the conditions of their confinement. See *Camden County Jail Inmates v. Parker*, 123 F.R.D. 490, 491 (D.N.J. 1988) (Ackerman) (noting appointment of former New Jersey Supreme Court Justice); *Monmouth County Corr. Inst. Inmates v. Lanzaro*, 595 F. Supp. 1417, 1419 & n.2 (D.N.J. 1984) (Ackerman) (noting service as special master by former New Jersey Attorney General); *Union County Jail Inmates v. Scanlon*, 537 F. Supp. 993, 998 (D.N.J. 1982) (Ackerman), rev'd on other grds 713 F.2d 984 (3d Cir. 1983), cert. den. 465 U.S. 1102 (1984) (noting appointment of former New Jersey Supreme Court Justice). Judge Sarokin named a special master to evaluate individual damage claims after ruling that the City of Plainfield had violated firefighters' rights by compelling them to submit to drug urinalysis; the report -- to which no objections were filed -- was adopted in its entirety. *Johnson v. City of Plainfield*, 731 F. Supp. 689, 691 (D.N.J. 1990) (Sarokin). He also appointed a Yale Law School professor as a special master to resolve remaining issues including amounts due to claimants after ruling that can manufacturers had violated employees' rights under ERISA. *McLendon v. Continental Group, Inc.*, 749 F. Supp. 582, 612 (D.N.J. 1989) (Sarokin). And see *In re Prudential Ins. Co. Sales Practices Litigation*, 106 F. Supp. 2d 721, 725, 733-34 (D.N.J. 2000) (Wolin) (private attorney appointed as fee master in class action case where ultimate fee award was \$90 million). Courts also have authority to appoint special fiscal agents as opposed to special masters when circumstances warrant. *Leone Inds. v. Associated Packaging, Inc.*, 795 F. Supp. 117, 120-121 (D.N.J. 1992) (Bassler).

The utility of the special master was perhaps best demonstrated by the case of *Rosefield v. Falcon Jet Corp.*, a complex antitrust action in which substantive motions were still being filed and resolved years after the

matter had first been filed. See e.g. 701 F. Supp. 1053 (D.N.J. 1988) (Lechner), where the trial judge noted that the case had been filed in November of 1982 (before Judge Whipple), had been assigned in turn to Judges Lacey, Barry and himself and was en route to being transferred to Judge Wolin. Judge Wolin promptly appointed a retired Judge of the Superior Court, Appellate Division, as special master to oversee approximately 30 days of argument on pending motions; the bulk of the case was settled after the master's rulings.

No specific rule governs procedures for appeals from the report of a special master, while Fed. R. Civ. P. 53 sets out the standard of review. Generally, the standard of review of the master's findings of fact is whether they are clearly erroneous; legal findings are reviewed de novo. In re Royal Dutch Shell Transport Secs. Litigation, 522 F. Supp. 2d 712, 716 (D.N.J. 2007) (Pisano); Essex County Jail Annex Inmates v. Treffinger, 18 F. Supp. 2d 418, 421 (D.N.J. 1998) (Ackerman); Monmouth County Corr. Inst. Inmates v. Lanzaro, 695 F. Supp. 759, 761 (D.N.J. 1988) (Ackerman). However, a class action motion to toll the statute of limitations that was referred to a special master was treated as entirely dispositive and reviewed de novo in Sperling v. Hoffman-LaRoche, Inc., 145 F.R.D. 357, 358 (D.N.J. 1992) (Ackerman), aff'd 24 F.3d 463 (3d Cir. 1994). On occasion, a special master may by order be granted "authority equivalent to that of a magistrate judge" and the master's decisions then will be reviewable under the ordinary rules governing appeals of decisions by magistrate judges. See e.g. Gutierrez v. Johnson & Johnson, 227 F.R.D. 255, 257 (D.N.J. 2005) (Walls).

4. Discovery Disputes. L.Civ.R. 37.1 governs the disposition of discovery disputes brought as motions after the entry of the scheduling order. See that rule and the comments thereto. In general, it mandates a conference between counsel to attempt to resolve the dispute without requiring judicial intervention. Moreover, counsel must present disputes unresolved by the mandated conference to the Magistrate Judge by telephone conference call or letter before a discovery motion can even be filed. The thrust, clearly, is to force counsel to work together and to avoid, to the extent possible, discovery abuses.

The Court's power to police discovery abuses continues throughout the pendency of a case, and sanctions can range from monetary penalties, see Fed. R. Civ. P. 37; Harris v. New Jersey, 259 F.R.D. 89, 94-95 (D.N.J. 2007) (Schneider) (ordering defendant to pay costs of depositions, including attorneys fees, necessitated by late production of discovery documents); Tarlton v. Cumberland Co. Corr. Facility, 192 F.R.D. 165 (D.N.J. 2000) (Kugler) (imposing sanction of nearly \$6,000 in attorneys' fees where undisputed evidence showed relevant documents had been withheld repeatedly without any claim of privilege), to limits on the use of particular evidence. E.g. Inter-City Tire and Auto Center v. Uniroyal, Inc., 701 F. Supp. 1120, 1122 (D.N.J. 1988) (Politan), aff'd mem. 888 F.2d 1382 (3d Cir. 1989) (affirming order by Magistrate Judge imposing limits on use of documents and expert testimony where plaintiff was "remiss in its discovery obligations"); Exxon Corp. v. Halcon Shipping Co., Ltd., 156 F.R.D. 586, 588 (D.N.J. 1994) (Pisano) (barring use of late-named expert), aff'd 156 F.R.D. 589 (D.N.J. 1994) (Wolin). And see Chalick v. Cooper

Hosp./University Med. Center, 192 F.R.D. 145, 150 (D.N.J. 2000) (Kugler) (failure to abide by the voluntary disclosure requirements of Fed. R. Civ. P. 26 by providing adequate information on potential party held sanctionable; court refused to allow defendants to claim potential party did not have notice of lawsuit for purposes of relating amendment of complaint back).

Moreover, the propriety of considering lack of diligence in considering sanctions such as refusal to permit further discovery has been expressly affirmed by the Circuit Court. E.g. *Public Loan Co. v. Federal Deposit Ins. Corp.*, 803 F.2d 82, 86-87 (3d Cir. 1986) (where party did nothing to comply with former Rule 15A's time limits for discovery, Magistrate Perretti refused to allow discovery to be taken; her order affirmed with the terse comment, "Any prejudice the appellants suffered from denial of discovery resulted from a self-inflicted wound").

5. Filing and Confidentiality of Discovery Materials. L.Civ.R. 26.1(c) serves to prevent the Office of the Clerk from being overwhelmed by the sheer volume of paper generated in cases as the Court's civil docket exploded. L.Civ.R. 26.1(c)(1) provides that materials generated under the early disclosure provisions of Fed. R. Civ. P. 26, depositions, interrogatories, requests for documents or admissions and answers and responses thereto are not to be filed, although of course such must be served on all parties under Fed. R. Civ. P. 5 and 26. As amended in 2001, L.Civ.R. 26.1(c)(1) requires that such materials only be filed when "used in a proceeding or upon order of the Court." L.Civ.R. 26.1(c)(2), added in 2001, requires that pretrial disclosure materials under Fed. R. Civ. P. 26(a)(3) be incorporated by reference into the final pretrial order in a case. L.Civ.R. 26.1(c)(4) (renumbered in 2001 from L.Civ.R. 26.1(c)(3)) imposes on the party who obtains any material through discovery the responsibility of preserving it and delivering it to the Court as needed or ordered. It was amended in form but not substance in 1993.

In addition to keeping the Clerk's office from drowning in a sea of paperwork, the prohibition against filing discovery materials generally keeps discovery information out of the public domain. The issue of public disclosure arises, however, when discovery materials are required to be filed where needed in a particular pretrial proceeding or on order of the Court. L.Civ.R. 26.1(c)(3) (renumbered in 2001 from L.Civ.R. 26.1(c)(2)) provides that, in such instances, the materials are to be placed "in the open case file unless otherwise ordered." Moreover, materials filed under the Court's Case Management/Electronic Case Filing (CM/ECF) system are retrievable by any member of the public having access to a computer. Thus, a party wishing to protect certain discovery information from public review must apply to the Court for an order sealing that portion of the Clerk's file. As noted by Judge Fisher in *Short v. Western Elec. Co., Inc.*, 566 F. Supp. 932, 933 (D.N.J. 1982) (Fisher): "It is beyond question that this court has discretionary power to control and seal, if necessary, records and files in its possession."

L.Civ.R. 26.1(e), adopted in 2005, makes L.Civ.R. 5.3, governing protective orders generally, applicable to discovery-related protective orders. See L.Civ.R. 5.3 and comments thereto.

6. Deposition Practice Restrictions. Two persistent issues as to deposition practice, although not addressed by local rule, have been addressed by case law in the district. Those issues are as to communications between attorney and witness during a deposition and as to production of an appropriate corporate witness pursuant to Fed. R. Civ. P. 30(b)(6).

a. Communications with witness. In the District of New Jersey, judicial officials generally follow the restrictions against attorney-witness communication set down by Judge Gawthrop of the Eastern District of Pennsylvania in *Hall v. Clifton Precision*, 150 F.R.D. 525, 531-32 (E.D.Pa. 1993) (Gawthrop). Thus, "As with trial testimony, discussions between counsel and the witness may not occur because 'once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth.'" *Ngai v. Old Navy*, 2009 U.S. Dist. LEXIS 67117 (D.N.J. July 31, 2009) (Shwartz) (holding that off-the-record text messages between a witness and counsel during a deposition were not protected by the attorney-client privilege). See also *Kelleher v. Wells Fargo Ins. Servs.*, 2011 U.S. Dist. LEXIS 13074 (D.N.J. Feb. 10, 2011) (Williams) (ordering that "All depositions are to be conducted in accordance with the procedures set forth in the order of Judge Gawthrop, in *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D.Pa. 1993)"); *Chassen v. Fid. Nat'l Title Ins.*, 2010 U.S. Dist. LEXIS 141852 (D.N.J. July 21, 2010) (Salas) ("While it is true that *Hall* is not universally followed in all jurisdictions, the United States District Court, District of New Jersey has adopted its language to restrict attorney-client conferences once a deposition has begun"); *McCoy v. Sam's Club*, 2008 U.S. Dist. LEXIS 51334 (D.N.J. July 8, 2008) (Schneider) (ordering compliance with *Hall* procedures); *Material Techs. v. Carpenter Tech. Corp.*, 2005 U.S. Dist. LEXIS 32087 (D.N.J. June 28, 2005) ("Plaintiffs' counsel's discussion of Hershberger's testimony, with Hershberger, during the lunch break, was itself inappropriate and contrary to Fed. R. Civ. P. 30(c) and *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D.Pa. 1993), which require that depositions be conducted as close to actual trial presentation as possible").

b. Corporate witness. Pursuant to Fed.R. Civ. P. 30(b)(6), a public or private corporation, a partnership, an association, a governmental agency, or other entity noticed for a deposition must designate a witness to appear who is capable of answering for the entity with respect to the issues central to the litigation. "The organizational entity has the duty to designate, produce, and prepare the Rule 30(b)(6) deponent. ... This duty includes preparing the witness to state the organization's position, knowledge, subjective beliefs, and opinions on identified topics." *In re Neurontin Antitrust Litig.*, 2011 U.S. Dist. LEXIS 6977 (D.N.J. Jan. 24, 2011) (Shwartz), *aff'd* 2011 U.S. Dist. LEXIS 62032 (D.N.J. June 9, 2011) (Hochberg). Failure to produce a witness properly prepared to testify will result in sanctions. The Neurontin court assessed attorney's fees and costs against the corporate party there.

Objections must be made "with particularity." *Leksi, Inc. v. Federal Ins. Co.*, 129 F.R.D. 99, 105, 108 (D.N.J. 1989) (Rosen). As an example of an acceptable level of particularity may be found in *Canadian Imperial Bank of Commerce v. Boardwalk Regency Corp.*, 1985 U.S. Dist. LEXIS 23943 (D.N.J. Sept. 13, 1985) (Simandle), *aff'd* 108 F.R.D. 737 (D.N.J. 1986) (Cohen), where objections were raised to production of documents on grounds of attorney-client privilege and work product. As to the documents where attorney-client privilege was cited, the objector was required to specify (a) identity of the preparers, (b) recipients, (c) dates, (d) subject matter, (e) whether direct quotes or paraphrases of advice from counsel were identified, and (f) whether such quotes or paraphrases could be redacted, leaving non-privileged information. As to each report claimed to be work product, the objector was required to provide specifics as to (a) identity of the authors, (b) recipients, (c) dates, (d) purpose of the report, and (e) the dates and purposes of the relationship between the authors and plaintiff's counsel with sufficient particularity to sustain plaintiff's burden to show the applicability of the doctrine. See also generally Comment 4 to L.Civ.R. 33.1.

Civ. RULE 37.1 DISCOVERY MOTIONS

(a) Conference to Resolve Disputes

(1) Counsel shall confer to resolve any discovery dispute. Any such dispute not resolved shall be presented by telephone conference call or letter to the Magistrate Judge. This presentation shall precede any formal motion.

(2) Cases in which a party appears *pro se* shall not be subject to L.Civ.R. 37.1(a)(1) unless the Magistrate Judge so directs. In such cases discovery disputes shall be presented by formal motion consistent with L.Civ.R. 37.1(b).

(b) Discovery Motions

(1) Discovery motions must be accompanied by an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court and that the parties have been unable to reach agreement. The affidavit shall set forth the date and method of communication used in attempting to reach agreement.

(2) Discovery motions shall have annexed thereto copies of only those pertinent portions of depositions, interrogatories, demands for admission and responses, etc., which are the subject matter of the motion.

(3) L.Civ.R. 7.1 shall apply to discovery motions, except that no reply papers shall be allowed except with the permission of the Magistrate Judge. Unless oral argument is to be heard under L.Civ.R. 37.1(b)(4), the Magistrate Judge may decide the motion on the basis of the papers received when the deadline for submitting opposition has expired.

(4) No oral argument shall be heard except as permitted expressly by the Magistrate Judge assigned to hear the motion. In the event oral argument is required, the parties shall be notified by the Court. Oral argument may be conducted in open court or by telephone conference,

at the discretion of the Magistrate Judge. Any party who believes that a discovery motion requires oral argument shall request it in the notice of motion or in response to the notice of motion, and so notify the Court in writing at the time the motion or opposition thereto is filed.

Source: L.Civ.R. 37.1(a) - G.R. 15.E.2-3; L.Civ.R. 37.1(b) - G.R. 15.F.
Amended. March 1, 2010.

COMMENT

1. 1997 Renumbering; Amendments.
2. Discovery Conferences.
3. Discovery Motions.
4. Court's Use of Discovery Powers.

1. 1997 Renumbering; Amendments. The portions of former General Rule 15 dealing specifically with discovery motions were allocated here to L.Civ.R. 37.1. General Rule 15.E.2-3, with only minor editorial changes, became L.Civ.R. 37.1(a) while G.R. 15.F, again with only editorial changes, became L.Civ.R. 37.1(b).

Note that former General Rule 15 had covered both discovery practice and motions and case management practice and motions. In the 1997 renumbering, the rule governing those issues was divided, with discovery motions allocated to this rule, discovery matters other than motions to L.Civ.R. 26.1 and case management issues to L.Civ.R. 16.1. See Comment 1 to L.Civ.R. 16.1 and Comment 1 to L.Civ.R. 26.1 for an analysis of their source rules.

L.Civ.R. 37.1(b) was amended in 2010 to clarify that discovery motions are subject to the requirements of L.Civ.R. 7.1.

2. Discovery Conferences. The experience of the Court has shown that the vast majority of discovery disputes may be settled by the parties if they confer and negotiate a resolution in good faith. Therefore, under L.Civ.R. 37.1(a)(1), no discovery motion may even be filed until counsel for all parties have conferred in an attempt to resolve the dispute without recourse to the Court. Moreover, if the parties fail to resolve the dispute at their conference, then before a motion can be filed, they must present the matter to the Magistrate Judge by telephone conference call or by letter. See e.g. *RLA Mktg. v. Wham-O, Inc.*, 2007 U.S. Dist. LEXIS 16629 (D.N.J. Mar. 5, 2007) (Salas) (citing treatise and noting that "no discovery motion may even be filed until counsel for all parties have conferred in attempt to resolve the disputes without recourse to the Court"); *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 (D.N.J. 2002) (Hughes) ("The parties originally brought this dispute to the attention of the Court by letter memorandum and conference call, which is the proper method, by local rule, order and custom in this District"); *HPD Labs. v. Clorox Co.*, 202 F.R.D. 410 (D.N.J. 2001) (Chesler) ("the parties raised their issues in a series of letters, which resulted in a conference call with the Court. See L.Civ.R. 37.1(a)"). And see *Wachtel v. Health Net*, 239 F.R.D. 81, 94 n.29 (D.N.J. 2006) (Hochberg). Note that bad faith in the efforts to resolve the issue may subject counsel to disciplinary sanctions under L.Civ.R. 104.1 as well as other sanctions under Fed. R. Civ. P. 11. The requirement that counsel confer on discovery issues has proved to be an effective screening device for inconsequential and petty disagreements.

Even after a discovery motion has been filed, the court has the discretion to order a further conference of the parties pursuant to L.Civ.R. 37.1(a)(1) where it deems it necessary or advisable. See e.g. *In re Human Tissue Prods. Liab. Litig.*, 255 F.R.D. 151, 163 (D.N.J. 2008) (Falk), *aff'd* 2009 U.S. Dist. LEXIS 34436 (D.N.J. Apr. 23, 2009) (Martini) (where the parties in a dispute over privileged documents failed to follow a mutually agreed upon list of categories, the court directed the parties "to meet and confer in an attempt to resolve their disputes regarding these categories of documents, in accordance with Local Civil Rule 37.1(a)(1)").

Failure to adhere to the procedures set forth in the rule may prevent consideration of a motion to dismiss for failure to comply with discovery pursuant to Fed. R. Civ. P. 37. In *FDIC v. Modular Homes, Inc.*, 859 F. Supp. 117, (D.N.J. 1994) (Wolin), the court found that a complaint letter sent to plaintiff's attorney "cannot be construed as a conference between the parties that led to a dispute.... Furthermore, [defendant] did not return to the Court to seek relief after this 'dispute' arose and before the institution of this cross-motion. Therefore, this Court is not at liberty to dismiss the case at hand prior to [defendant's] compliance with the Local District Court Rules." Accord, *Locascio v. Balicki*, 2010 U.S. Dist. LEXIS 135803 (D.N.J. Dec. 23, 2010) (Kugler) ("Simply sending a letter to opposing counsel complaining about outstanding discovery does not satisfy Rule 37's good faith requirement"). See also *Technology Dev. Co. v. Onischenko*, 2009 U.S. Dist. LEXIS 93034 (D.N.J. Oct. 5, 2009) (Goodman) (refusing to excuse counsel's failure to confer due to scheduling issues, noting: "The Local Civil Rules are not optional; a party is not at liberty to ignore or avoid compliance because of other obligations"); *Huertas v. City of Camden*, 2008 U.S. Dist. LEXIS 90219 (D.N.J. Nov. 6, 2008) (Hillman) (motion for sanctions for discovery abuse denied where "Plaintiff did not made a good faith effort to obtain the information without the Court's intervention"); *Durst v. FedEx Express*, 2006 U.S. Dist. LEXIS 36031 (D.N.J. June 2, 2006) (Simandle) (spoliation instruction not available as to evidence where party failed to use procedures of rule to resolve discovery issues); *Methode Electronics v. Adam Technologies*, 2005 U.S. Dist. LEXIS 16025 (D.N.J. July 28, 2005) (Thompson) (denying defendants' motion to strike where defendants "failed to provide 'an affidavit certifying that the moving party has conferred with the opposing party in a good faith effort to resolve by agreement the issues raised by the motion without the intervention of the Court' pursuant to L. Civ. R. 37.1(b)(1)"). Alternatively, where the court finds that the efforts to resolve the matter have been inadequate, it may deny an award of attorneys' fees that might otherwise have been granted. *Kinney v. Trustees of Princeton Univ.*, 2007 U.S. Dist. LEXIS 14452 (D.N.J. Feb. 28, 2007) (Hughes) (Plaintiff denied attorneys' fees on a discovery motion because "Plaintiff made no meaningful effort to meet and confer regarding this issue prior to filing a motion for sanctions" and merely "sent two email communications and waited only a couple of hours for a response prior to filing the present motion"). At a minimum, it will be commented on with disapproval by the Court, *Lentz v. Graco Inc.*, 2007 U.S. Dist. LEXIS 59282 (D.N.J. Aug. 13, 2007) (Bongiovanni) ("In the present matter, there has been no indication that the parties attempted a 'meet and confer' and there has not been any informal presentation of the

issues to the Court”), and may lead to sanctions. *Cannon v. Cherry Hill Toyota*, 190 F.R.D. 147, 161, 163 (D.N.J. 1999) (Kugler) (included in litany of local rules violations potentially warranting sanctions against counsel).

Note that under L.Civ.R. 37.1(a)(2), the conference and presentation requirements do not apply to cases involving pro se litigants unless the Court specifically so orders. Discovery disputes in such cases are presented by formal motion pursuant to L.Civ.R. 37.1(b).

3. Discovery Motions. In cases where a motion is required, L.Civ.R. 37.1(b) governs motion practice. Many of L.Civ.R. 7.1’s general motion requirements apply to discovery motions. See L.Civ.R. 7.1(c). L.Civ.R. 37.1(b) adds specific requirements for discovery motions only. However, the Court’s supervisory authority to dismiss a case for persistent discovery abuses certainly does extend to pro se cases, and will be exercised in an appropriate case. See e.g. *Hennessey v. Atlantic Co. Dep’t. of Pub. Safety*, 2009 U.S. Dist. LEXIS 55365 (D.N.J. June 30, 2009) (Hillman) (dismissing pro se claims for failure to abide by discovery orders).

The most important of those requirements is the mandate of L.Civ.R. 37.1(b)(1) that all discovery motions be accompanied by an affidavit setting out the specific efforts made by the moving party to resolve the matter before filing the motion. The affidavit must certify compliance with the conference requirement of L.Civ.R. 37.1(a)(1) and that the parties were unable to reach agreement. The date and method of all efforts used to reach agreement must be set out with specificity in the affidavit. See e.g. *Gilligan v. Cape May County Corr.*, 2006 U.S. Dist. LEXIS 86551 (D.N.J. Nov. 28, 2006) (Bumb) (“Correctional has complied with Local Civ. Rule 37.1(b)(1) by supplying the requisite affidavit detailing Correctional’s efforts to resolve discovery issues without the intervention of the Court”). Failure to file the affidavit by itself is grounds for denying a discovery motion. See *H.A. v. Camden Bd. of Education*, 2011 U.S. Dist. LEXIS 82652 (D.N.J. July 28, 2011) (Simandle) (except for judicial economy reasons, court would deny motion “on these grounds alone”).

Just as bad faith in the conference can subject counsel to sanctions, misstatement or misrepresentation in the affidavit itself may also subject the affiant attorney to sanctions. See *Cannon v. Cherry Hill Toyota*, 190 F.R.D. 147 (D.N.J. 1999) (Kugler). As with other rules, of course, the requirements of L.Civ.R. 37.1(b)(1) may be relaxed in the interests of justice. See *Thomas & Betts v. Richards Mfg. Co.*, 2010 U.S. Dist. LEXIS 57291 (D.N.J. June 10, 2010) (Shipp) (“while this Court does not condone Plaintiff’s failure to abide by this Court’s procedural requirements for discovery disputes and motions, this Court will not deny the motion on purely procedural grounds”). Even where excused, however, violation of this rule may lead to reduction or denial of an attorney’s fee award. See *United States v. NCH Corp.*, 2010 U.S. Dist. LEXIS 94486 (D.N.J. Sept. 10, 2010) (Wigenton) (denying fees for discovery motion where counsel had violated L.Civ.R. 37.1(b)).

Under L.Civ.R. 37.1(b)(2), the parties are limited in annexing portions of discovery materials to their motion papers. It provides that “only those pertinent portions” of such materials which are “the subject matter of the motion” are to be annexed to papers. In theory, this limitation could