THE CRISIS OF CONGESTED COURTS: ONE POTENTIAL SOLUTION

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I. Introduction

In thirteen years of practice, first as a judicial law clerk and thereafter as a general practitioner, I have had the opportunity to observe, first hand, the developing crisis occasioned by the delay in resolving cases through our congested state court system. There is

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The author wishes to dedicate this article to the Honorable David Landau, J.A.D., from whom he unequivocally learned the utility and necessity of having a comprehensive working relationship with the rules of court.

neither an easy nor immediate solution to the dilemma confronting the bench, the bar, and most importantly, the litigants. The purpose of this article is to suggest that there is at least a partial solution ready at hand. The Rules Governing the Courts of the State of New Jersey[1] provide the means by which, if appropriately modified, the current crisis could be greatly ameliorated.[2] The amendment of certain rules, coupled with a more rigorous judicial application of the rules, will result in the expeditious disposition of many cases. The disposition contemplated, however, would be accomplished in large measure by way of dismissal with prejudice for non-compliance with various court rules. This approach, of necessity, raises a question concerning the proper role of court rules.[3]

If, however, a matter is dismissed with prejudice because an attorney violates the court rules, the litigant need not be left without a remedy. The court could amend an existing rule[4] to impose a mandatory obligation to maintain malpractice insurance upon all attorneys admitted to practice in New Jersey.[5] A reasonable objection to such an approach is that this will create yet more litigation in an already overburdened court system. However, this objection is easily rebuked.[6] The enactment of a new rule, analogous to the existing rule concerning fee disputes,[7] could require mandatory ar-

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1 N.J. CT. R. 1:1-1 to 8:12. An alternative to the court rules might be a legislative solution. *See infra* section XI.

2 This problem may be solved perhaps, within the decade, following adoption of the suggestions set forth in this article.

3 The rules of procedure were "promulgated for the purpose of promoting reasonable uniformity in the expeditious and even administration of justice. . . . Such Rules 'should not in themselves be the source of any extensive litigation; they should be subordinated to their true role, *i.e.*, simply a means to the end of obtaining just and expeditious determinations between the parties on the ultimate merits.' " Ragusa v. Lau, 575 A.2d 8, 11-12 (N.J. 1990) (citing Handelman v. Handelman, 109 A.2d 797 (N.J. 1954)).

4 N.J. CT. R. 1:21-1A(a)(3) (requiring attorneys organized as a professional corporation to obtain professional liability insurance).

5 *See infra* notes 179-81 for a discussion of mandatory malpractice insurance; *see also infra* Appendix V, attached to the end of this article, for a proposed bill requiring mandatory malpractice insurance for attorneys.

6 This concern, of course, does not recognize the fact that the bulk of all legal malpractice claims are settled without trial. According to the Administrative Office of the Courts, 98% of all civil dispositions for the three year period ending November 30, 1992, did not require trial for completion. *See* Letter from Mark Davies, Chief, Quantitative Research Unit, Administrative Office of the Courts, State of New Jersey, to Robert Kerekes (Nov. 30, 1992) (on file with the *Seton Hall Legislative Journal*).

7 N.J. CT. R. 1:20A-3 (establishing the procedure for arbitration of attorney fee

bitration of all such malpractice claims.

The so-called "rule of relaxation,"[8] although salutary in purpose, as it is applied causes a great potential to delay the resolution of a pending matter.[9] Courts apply this rule[10] to avoid an "injustice" to the party seeking relaxation of a court rule. One must wonder, however, whether applying the rule, when it results in a delay, does not work an "injustice" on another party to the litigation. It has been long established that "justice delayed is justice denied."[11]

Litigants experience delay through the convergence of several factors. One is the dramatic increase in cases filed nationally. According to a National Center for State Courts' report,[12] over ninety million cases were filed in the state courts in 1991. Approximately

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claims); *see infra* Appendix III for a proposed rule requiring arbitration of malpractice claims.

[8] N.J. CT. R. 1:1-2 provides:

> The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. In the absence of [sic] rule, the court may proceed in any manner compatible with these purposes.

Id.

[9] This potential for delay is, in large measure, a consequence of the philosophy underlying utilization of this rule. Discussing the predecessor to N.J. CT. R. 1:1-2, one court noted "that R.R. 1:27A takes precedence over any limitation contained in 1:27B(a) and (d). . . . " State v. Bowens, 243 A.2d 847, 852 (Essex County Ct. 1968). R.R. 1:27A provided:

> The rules applicable to any court shall be considered as general rules for the government of the court and of the conduct of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any instance where it shall be manifest to the court that a strict adherence to them will work surprise or injustice.

R.R. 1:27A (1954 New Jersey Court Rules), *quoted in* Handelman v. Handelman, 109 A.2d 797, 802 (N.J. 1954). R.R. 1:27B provided "certain rules relating to the time for taking any action may not be enlarged." R.R. 1:27B (1954 New Jersey Court Rules), *quoted in* Fotopak Corp. v. Merlin, 112 A.2d 578, 580 (N.J. Super. Ct. App. Div. 1955).

[10] N.J. CT. R. 1:1-2 (if no applicable rule exists, the court may proceed as it sees fit).

[11] RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 183 (1989) (citing LAWRENCE J. PETER, PETER'S QUOTATIONS 276 (1977)).

[12] NATIONAL CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1991, at 3 (1993). This report was prepared in conjunction with the Conference of State Court Administrators and funded by the State Justice Institute. *Id.*

eighteen million of these were civil actions.[13] From 1984 to 1990, civil caseloads in the state courts increased by thirty percent.[14] During that same period, the national population increased only five percent.[15] Therefore, the increase in case filings is a result of society becoming more litigious than it was in previous decades.

The large number of cases filed and the vastly increased number of attorneys admitted to practice may be coincidental, but economic necessity on the attorneys' part at least suggests a causal relationship. In 1987, there were some 686,200 attorneys admitted to practice in the United States,[16] or 28.45 attorneys for every ten thousand persons in the country.[17] By comparison, in 1960 there were slightly less than 286,000 attorneys admitted to practice in the United States.[18] By 1992, the last year for which data is currently available, the number had increased to 753,000.[19]

It does not appear that this trend will quickly reverse itself. There were 90,300 applicants to ABA-accredited law schools for the 1992-93 school year.[20] Approximately forty-four thousand appli-

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13 *Id.*

14 Henry J. Reske, *Record State Caseloads in 1990*, A.B.A. J., Aug. 1992, at 23. In contrast, criminal caseloads increased by 33%, juvenile by 28%, and traffic caseloads by 12%. *Id.*

15 *Id.*

16 Ray August, *The Mythical Kingdom of Lawyers*, A.B.A. J., Sept. 1992, at 72. The United States has 9.4% of the world's 7.3 million lawyers. *Id.*

17 *Id.* at 73. On a scale of 100, the United States ranks number 35 when comparing the number of attorneys per 10,000 people. *Id.*

18 UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 153 (92d ed. 1971) [hereinafter STATISTICAL ABSTRACT OF THE UNITED STATES: 1971]. This figure includes attorneys who did not report to the census and estimates adjustments to count for duplicates. *Id.* By 1970, that number had risen to more than 355,000. *Id.* That number has been further broken down by city population size. For cities with populations of 500,000 or more, there were 142,137 attorneys. For cities with populations of 250,000-499,999, there were 39,660 attorneys. Lastly, for cities with populations of less than 250,000, there were 173,445 attorneys. *Id.* By 1980, that number had increased to approximately 547,000. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, at 402 (102d ed. 1981) (this number includes judges). Of the total number, 12.8% were female and 4.2% were other minorities. *Id.*

19 UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993, at 405 (113th ed. 1993) (of the total number, 21.4% were female and 4.6% were minorities).

20 Henry J. Reske, *Fewer Law School Applicants*, A.B.A. J., Aug. 1992, at 32. This actually represented a decrease in applicants by 1.8%, from 92,000 down to 90,300. *Id.*

cants were accepted for the 1991-92 school year.[21] Between 1960 and 1991, the number of attorneys admitted to practice in the United States increased over 250%.[22]

The increase in number of attorneys admitted to practice in New Jersey has been even more dramatic. In 1960, there were 9,331 attorneys admitted to practice in New Jersey.[23] This equals a ratio of one attorney for every 644 persons in the State.[24] By 1990, the number of attorneys admitted to practice had risen to 43,775.[25] In approximately the same period during which there was a 250% increase in the number of attorneys admitted to practice nationally, New Jersey's increase was over 500%.

In 1990, the population of New Jersey was 7,730,188.[26] This equals a ratio of one attorney for every 176 residents of the State.[27] In contrast to the national average,[28] there are 56.6 attorneys admitted to practice in New Jersey for each 10,000 residents. This figure is almost double the national average.

In 1990, over one million cases were filed in the Superior Court trial divisions.[29] In the twenty-year period during which the number of attorneys admitted to practice increased almost four-

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21 *Id.* This represents a decrease from the previous year's all time high of 44,104. *Id.*

22 *See supra* notes 18-19.

23 STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, *supra* note 18, at 154 (this figure includes an estimate to take into account duplications and lawyers not reporting).

24 *Id.* (based upon Bureau of Census estimates as of July 1, 1970).

25 *See* Letters from Samuel J. Uberman, Esq., Assistant Secretary to the State of New Jersey Board of Bar Examiners to Robert Kerekes (Sept. 22, 1992 and Mar. 15, 1994) (on file with the *Seton Hall Legislative Journal*). In 1970, there were 11,405 attorneys admitted to practice in New Jersey. That number had risen, by 1980, to 21,748. As of December 1993, there were 53,159 attorneys admitted to practice in New Jersey, an increase of over 22.5% in three years. *Id.*

26 MANUAL OF THE LEGISLATURE OF NEW JERSEY, 205TH LEG. 940 (2d Sess. 1993).

27 *See supra* notes 25-26 and accompanying text.

28 *See supra* note 17 and accompanying text.

29 *See* Letter from Mark Davies, Chief, Quantitative Research Unit, Administrative Office of the Courts, State of New Jersey, to Robert Kerekes (Sept. 18, 1992) (on file with the *Seton Hall Legislative Journal*). This number includes all actions filed in the Law Division, including Civil, Special Civil Part, and Criminal, and all actions filed in the Chancery Division, both General Equity and Family Part. It does not include filings with the Supreme Court or the Appellate Division of the Superior Court, nor does it include actions filed in the Tax Court or the municipal courts of the State. By comparison, in 1970 there were 371,837 filings in the trial courts and in 1980, 649,269 were filed. *Id.*

fold,[30] the number of sitting trial court judges increased from 207 to 321.[31] In 1990, the average time for resolution of a case in all civil matters, from the filing of the complaint, was 13.8 months.[32]

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30 *See* Letter from Samuel J. Uberman, Esquire, Assistant Secretary to the State of New Jersey Board of Bar Examiners to Robert Kerekes (Sept. 22, 1992) (on file with the *Seton Hall Legislative Journal*).

31 *See* Letter from Mark Davies, Chief, Quantitative Research Unit, Administrative Office of the Courts, State of New Jersey, to Robert Kerekes (Sept. 18, 1992) (on file with the *Seton Hall Legislative Journal*).

32 *Id.* This average time for disposition includes matters disposed of within months, if not weeks, of filing and thus cases may be pending for far longer than the average 13.8 months before disposition. This average, however, disguises the true age of many cases pending in the State court trial system. Admittedly, many of these cases are on remand after appeal and perhaps even on consideration by the Supreme Court. The fact remains, however, that in New Jersey it is often far more than 13.8 months from the filing of a complaint to its resolution. *Id.*

The author made inquiry of every assignment judge in the state, although every one did not respond. Those jurisdictions that did respond, however, provided the author with information that provides a definite contrast to a 13.8 month disposition rate noted in a letter from the Administrative Office of the Courts. The 10 oldest civil cases by date of filing of complaint, in the vicinages responding, are as follows:

Atlantic County - Aug. 1985 through Mar. 1989;
Burlington County - Oct. 1987 through July 1988;
Camden County - Apr. 9, 1984 through Aug. 28, 1986;
Hudson County - oldest case 1980 and tenth oldest case 1989;
Hunterdon County - June 26, 1987 through Feb. 28, 1990;
Mercer County- Jan. 1, 1983 through July 8, 1986;
Middlesex County - Aug. 1981 through Jan. 1989;
Monmouth County - July 30, 1985 through Nov. 4, 1987;
Ocean County - oldest case 1986 and tenth oldest case 1989;
Passaic County - Jan. 3, 1985 through June 30, 1987;
Somerset County - Nov. 30, 1988 through Feb. 22, 1990;
Warren County - Oct. 27, 1986 through Sept. 1, 1989.

Letter from Kathryn Cramer-Gallagher, A.T.C.A., Superior Court of New Jersey (Atlantic & Cape May), to Robert Kerekes (Mar. 7, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Harold B. Wells, III, A.J.S.C., Superior Court of New Jersey (Burlington), to Robert Kerekes (Mar. 11, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Linda A. Percival, A.T.C.A., Superior Court of New Jersey (Camden), to Robert Kerekes (Apr. 16, 1993) (on file with the *Seton Hall Legislative Journal*); Letter from Gerald A. Buccafusco, Asst. T.C.A., Superior Court of New Jersey (Hudson), to Robert Kerekes (Mar. 14, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Samuel D. Lenox, Jr., A.J.S.C., Superior Court of New Jersey (Mercer), to Robert Kerekes (Feb. 26, 1993) (on file with the *Seton Hall Legislative Journal*); Letter from James J. Murray, Civil Div. Manager, Superior Court of New Jersey (Middlesex), to Robert Kerekes (Feb. 24, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Lawrence M. Lawson, A.J.S.C., Superior Court of New Jersey (Monmouth), to Robert Kerekes (Mar. 17, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Eugene D. Serpentelli, A.J.S.C., Superior Court of New Jersey (Ocean), to Robert Kerekes (Feb. 18, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Nancy Ladd, Civil Calendar Coordinator, Superior Court of

This average is arrived at in a system in which, during the court term concluding in June 1993, 98.1% of all civil cases were resolved without trial to conclusion.[33]

The dilemma of a congested state court system[34] might appear insoluble.[35] Although some innovative programs have been instituted under our present court system, they are little more than

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New Jersey (Passaic), to Robert Kerekes (Feb. 16, 1994) (on file with the *Seton Hall Legislative Journal*); Letter from Wilfred P. Diana, A.J.S.C., Superior Court of New Jersey (Somerset, Hunterdon & Warren), to Robert Kerekes (Feb. 23, 1994) (on file with the *Seton Hall Legislative Journal*).

33 *See* Letter from Mark Davies, Chief, Quantitative Research Unit, Administrative Office of the Courts, State of New Jersey, to Robert Kerekes (Mar. 10, 1994) (on file with the *Seton Hall Legislative Journal*). This includes both jury and non-jury trials. One may logically conclude that a large proportion of the matters settled by the parties are negotiated, in part, due to the acknowledged delay in obtaining a trial date.

34 This congestion appears to be the result of a combination of an increasing number of lawyers admitted to practice and cases filed, without a commensurate increase in the number of trial judges available to handle such cases.

35 The Legislature has recognized the burgeoning crisis and afforded some optimism that it might provide a means of mitigating it. On June 28, 1988, it enacted legislation entitled, "An Act providing for payment of costs and attorney fees in certain circumstances and supplementing Title 2A of the New Jersey Statutes, L.1988, c. 46," or as it became known, The Frivolous Suit Act. N.J. STAT. ANN. § 2A:15-59.1 (West Supp. 1993). This Act provides:

> a. A party who prevails in a civil action, either as plaintiff or defendant, against any other party may be awarded all reasonable litigation costs and reasonable attorney fees, if the judge finds at any time during the proceedings or upon judgment that a complaint, counterclaim, cross-claim or defenses of the nonprevailing person was frivolous.
>
> b. In order to find that a complaint, counterclaim, cross-claim or defense of the nonprevailing party was frivolous, the judge shall find on the basis of the pleadings, discovery, or the evidence presented that either:
>
> (1) The complaint, counterclaim, cross-claim or defense was commenced, used or continued in bad faith, solely for the purpose of harassment, delay or malicious injury; or
>
> (2) The nonprevailing party knew, or should have known, that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.
>
> c. A party seeking an award under this section shall make application to the court which heard the matter. The application shall be supported by an affidavit stating in detail:
>
> (1) The nature of the services rendered, the responsibility assumed, the results obtained, the amount of time spent by the attorney, any particular novelty or difficulty, the time spent and services rendered by secretaries and staff, other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, an itemization of the disbursements for which reimbursement is sought, and any other factors relevant in evaluating fees and costs; and

> (2) How much has been paid to the attorney and what provision, if any, has been made for the payment of these fees in the future.

Id.

The sanguine hopes of many that the somewhat "draconian" sanctions incorporated into the statute would reduce the flood of litigation were sadly disappointed. In 1993, the New Jersey Supreme Court decided what is likely to become the landmark case on the statute, McKeown-Brand v. Trump Castle Hotel & Casino, 626 A.2d 425 (N.J. 1993). The Supreme Court perceived the following concern: "Because the statute implicates both the regulation of practice and procedure and also the discipline of attorneys, a question arises whether it breaches the separation of powers between the judicial and legislative branches of government." *Id.* at 426. The Court interpreted the statute to permit "the award of counsel fees due to the improper manner in which a party conducts litigation. To this end, the statute comes closer to impinging on this Court's constitutional power over procedural matters." *Id.* at 430. The Court went on to note that "[u]nlike our authority over practice and procedure, which we sometimes share in the spirit of comity, our authority over the discipline of attorneys is not subject to legislative action. This Court's power to regulate attorneys is exclusive." *Id.*

The Court recognized that:

> At first reading [the statute] . . . does not apply to attorneys. On closer reading, however, the statute inevitably would involve lawyers. The statute would award fees if "the nonprevailing party knew, or should have known[,] that the complaint, counterclaim, cross-claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." . . . Generally, parties rely on their attorneys to evaluate the basis in "law or equity" of a claim or defenses. Although the client determines the objectives of an attorney's representation, the attorney determines the means for pursuing those objectives.

Id. (citations omitted).

The Court additionally recognized that:

> A further problem arises from the possibility that a party sanctioned under *N.J.S.A.* 2A:15-59.1b(2) might seek indemnification from his or her lawyer. Indemnification merely provides an indirect method of sanctioning a lawyer for a claim rooted in the statute. The end result of a claim for indemnification would be payment by the lawyer of an award against the client. Such an award, although indirect, would impinge on the judicial power to discipline attorneys. Consequently, even sanctions against a party under b(2) would run afoul of that power. Implicit in that result is our belief that a client who relies in good faith on the advice of counsel cannot be found to have known that his or her claim or defense was baseless.

Id. at 431. The Court recognized that a nonprevailing party who did not act in bad faith and did act in reliance upon counsel's advice could not be subject to sanctions under the rule. *Id.*

The Supreme Court requested that the Committee on Civil Practice consider the circumstances under which courts may impose counsel fees/costs on attorneys who engage in frivolous litigation. *Id.* at 433. In its January 18, 1994 report, the Supreme Court Committee on Civil Practice advised that it has "commenced a study of the situations in which counsel fees and costs may be imposed on attorneys who engage in frivolous litigation. This study is being undertaken by the Frivolous Litigation Sub-

stop-gap measures.[36]

Certainly, the solution should not be found with those who suggest, in stage whispers, that the bar exam be made more difficult to pass. It would be unconscionable to allow law students to expend the time, energy and money involved in obtaining a Juris Doctor degree and preclude large numbers of them from ever practicing by making a bar exam that is impossible for all but a few to pass.[37] A less draconian potential solution exists in the rules gov-

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committee. . . . Its work will be completed in the next term." *1994 Report of the Supreme Court Committee on Civil Practice*, 136 N.J.L.J. 581, 597 (Feb. 14, 1994).

Although the Court expressly found the statute valid, 626 A.2d at 432, the holding quite explicitly precludes sanctions against attorneys under the statute and insulates the party who acts in good faith reliance upon counsel's advice, regardless of the degree of error in that advice. A fair reading of the case would suggest that the statute has become, for the most part, an issue of intellectual curiosity. While proof that a party acted in bad faith is not impossible, it is perhaps the most difficult of the various elements that provided alternative bases for an award of fees under the statute as initially drafted. One must speculate that while technically upholding the statute, the Supreme Court rather unequivocally affirmed its continuing primacy regarding control of the courts and practice therein.

36 A good example of one of these programs is the one presently in effect in Essex County. The assignment judge, in conjunction with the presiding civil judge and the Civil Bench Bar Committee, have created the so-called "settlement judge" program. As Judge Alvin Weiss notes in his cover letter regarding the program:

> Because of the need to focus on an overwhelming criminal caseload, Essex County for the last two years suffered a shortage of Judges on the civil side coupled with ever-increasing numbers of new filings. . . . [A]s we address the backlog of civil cases we must take some drastic steps and emergency measures, particularly as to those cases over three years old.

Letter from Judge Alvin Weiss, Presiding Judge of the Law Division-Civil Part, Superior Court of New Jersey (Essex), to Robert Kerekes (Oct. 23, 1992) (on file with the *Seton Hall Legislative Journal*). This innovative program requires submission of cases more than three years old to volunteer "settlement judges" who are experienced litigators. If, after mediation by the settlement judge, the matter is not resolved, it is then listed for immediate trial. *Id.*

37 A Juris Doctor degree requires completion of an 85-credit curriculum. It is assumed that a student attending law school on a full-time basis will complete this curriculum in three years. In addition to investing three years of one's life, a substantial financial outlay is required. Tuition, at the two law schools operated under the auspices of Rutgers, the State University, for a full-time student, who is a New Jersey resident, for 1993-94 will total $7,233. The tuition for a full-time student who is not a New Jersey resident is $10,638. *See* Admissions Brochure from Rutgers, The State University of New Jersey, School of Law-Camden (on file with the *Seton Hall Legislative Journal*). The tuition at Seton Hall University School of Law for a full-time student for 1993-94 will total $ 15,870. *See* Letter from Rosemary DiNardo, Secretary to the Bursar, Seton Hall University School of Law, to Robert Kerekes (Feb. 16, 1994) (on file with the *Seton Hall Legislative Journal*). Of course, the cost of books and other required materials must be added to these amounts.

erning practice in the New Jersey courts.[38] This is because certain legislative initiatives presently contemplated do not seem to provide the appropriate response to the backlog crisis.[39]

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[38] N.J. CT. R. 1:1-1 to 8:12.

[39] Senator Gerald Cardinale, Chairman of the New Jersey Senate Commerce Committee, stated at a committee hearing stating that he intends to introduce legislation that he describes as "tort reform." Russ Bleemer, *Bills to Watch*, 136 N.J.L.J. 670, 698 (Feb. 14, 1994).

Senator Cardinale apparently intends to submit a statute explicitly sanctioning attorneys for prosecuting or defending frivolous suits or claims although he acknowledges that this will require a constitutional amendment. *Id.* His comments regarding the amendment relates to the recent Supreme Court holding in McKeown-Brand v. Trump Castle Hotel & Casino, 626 A.2d 425 (N.J. 1993). *See supra* note 35 and accompanying text. Senator Cardinale went on to disclose that the ideas discussed by the Committee include: limitations on punitive damages awards, elimination of joint and several liability and abolition of contingent fees. However, there was no particular tort-reform bill up for vote or even on the agenda of the Committee. Bleemer, *supra* at 698; Herb Jaffe, *Lawyers React Quickly to Counter Tort Reform*, STAR-LEDGER (Newark), Feb. 13, 1994, at 31.

Although there are particular statutory provisions regarding exemplary damages, *see, e.g.*, N.J. STAT. ANN. § 48:5A-63 (West 1988) (liability for governmental disclosure of information); N.J. STAT. ANN. § 2A:58C-5 (West 1987) (products liability); and a specific prohibition of their award against a public entity, N.J. STAT. ANN. § 59:9-2(c) (West 1972), there is no statute of general application under Title 2A dealing with administration of civil and criminal justice that relates to the award of or a limitation upon punitive or exemplary damages. Apparently, the Senator is considering proposing a new bill. With reference to the proposed abolition of joint and several liability, the Senator no doubt proposes amending or repealing N.J. STAT. ANN. §§ 2A:55-1 to -9 (West 1950). Any rule abolishing contingent fee agreements will bring Senator Cardinale squarely into conflict with the Supreme Court, which has enacted a limitation on contingent fee contracts in N.J. CT. R. 1:21-7.

Although it is difficult to make specific comments on proposed legislation not yet promulgated, it certainly seems that one proposal would indeed reduce the court backlog: the abolition of contingent fee contracts. Unfortunately, it would reduce the court backlog by precluding meritorious litigants who were not sufficiently "well heeled" to retain counsel on an hourly basis to prosecute their claims. The New Jersey Chapter of the Association of Trial Lawyers of America, through its President, Lee Goldsmith, refers to this proposed legislation not as "tort-reform" as Senator Cardinale characterizes it, but rather as "tort abolition." Bleemer, *supra* at 698.

On March 7, 1994, Senators Cardinale and Kyrillos introduced a package of seven bills designed to change the State's liability lawsuit system. Tom Hester, *Package Targets Lawsuits*, STAR-LEDGER (Newark), Mar. 8, 1994, at 1. The bills allow defendants in meritless lawsuits to: (1) collect damages from plaintiffs; (2) make the prosecution of medical malpractice suits more difficult; (3) exempt medical personnel and retailers from product liability manufacturing defect suits; and (4) limit punitive damages and eliminate joint and several tort liability. *Id.* The bills were referred to the Senate Commerce Committee, which is chaired by Senator Cardinale. *Id.*

In contradistinction to Senator Cardinale's position is the Supreme Court Committee on Civil Practice's 1994 report. *See 1994 Report of the Supreme Court Committee on Civil Practice*, *supra* note 35, at 581. The Committee recommended an amendment to

The thrust of this article is that a readily available vehicle—the Rules of Court—provides a means of addressing the crisis of our congested State civil courts. To ascertain the manner in which this vehicle may be utilized requires a brief overview of the genesis of our current court rules. This analysis must consider the mechanics of enacting or amending a court rule and what, if any, limitations are imposed upon the rule-making process. This inquiry begins with a discussion of the source of rule-making power.

II. The State Constitution, the Rules of Court and the Winberry *Decision*

On November 4, 1947, the voters of New Jersey ratified the present State Constitution.[40] Article six of that Constitution deals with the state judiciary.[41] Article six, section two, paragraph three states:

> The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.[42]

Rarely in history have two sentences had such impact on a most influential section of society—its lawyers.

The judicial article of the state constitution took effect September 15, 1948.[43] Less than two years later, Chief Justice Vanderbilt sought to obtain judicial powers he had foregone at the constitutional

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the rule governing contingent fee contracts, N.J. CT. R. 1:21-7. As presently constituted, the rule provides for a fee of 33 1/3% of the first $250,000 recovered, 25% of the next $250,000 recovered and 20% of the next $500,000 recovered. *Id.* Any fee on a recovery in excess of $1,000,000 will be awarded only by an attorney's application to the court. *Id.* The Committee recommends that the rule be amended to provide for a fee of 33 1/3% on the first $1,000,000 recovered and 20% on any amount recovered in excess thereof. *Id.* at 583. The Committee noted "the formula proposed, if adopted . . . would still provide New Jersey with the lowest contingent fee structure in the nation." *Id.* In light of the recommendation of this prestigious committee, one may reasonably anticipate vigorous judicial opposition to any Legislative enactment seeking to abolish contingent fee arrangements.

40 N.J. CONST. art. I, para. 1 to art. XI, § VI.

41 *Id.* art. VI, §§ I - VIII (for the Supreme Court, Superior Courts and County Courts).

42 *Id.* art. VI, § II, para. 3.

43 *Id.* art. XI, § IV, para. 14.

convention.[44] This missed opportunity presented itself in *Winberry v. Salisbury*.[45] In *Winberry*, the Appellate Division granted a motion to dismiss an appeal.[46] In so doing, it noted that "[t]he legislature is given the final word in matters of procedure; it may expressly or by implication nullify or modify a procedural rule promulgated by the Supreme Court or it may take the initiative in a matter of procedure when it deems that course wise."[47] It held that only in the absence of a legislative action did the court rules[48] govern the time within which an appeal might be filed.[49]

It is an understatement to suggest that Chief Justice Vanderbilt disagreed with the Appellate Division's position.[50] Chief Justice Vanderbilt believed that the primary purposes of the 1947 Constitution was to establish a court system and to grant it self-functioning authority. He was of the opinion that if the phrase "subject to law" in para-

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44 Chief Justice Vanderbilt's perception of the need for a strong unified court system was implicit in his comment, some years after the *Winberry* decision, that "[t]he first essential of a sound judicial establishment is a simple system of courts, for the work of the best bench and bar may be greatly handicapped by a multiplicity of courts with overlapping jurisdictions." Arthur T. Vanderbilt, *The Essentials of a Sound Judicial System*, 48 Nw. U. L. REV. 1, 2 (1953).

45 68 A.2d 332 (N.J. Super. Ct. App. Div. 1949), *aff'd*, 74 A.2d 406 (N.J. 1950), *cert. denied*, 340 U.S. 877 (1950). Plaintiff brought suit to expunge an alleged libel in a grand jury report. Defendant moved for summary judgment, which the trial court granted on May 25, 1949. On July 26, 1949, Plaintiff served a notice of appeal. Defendant moved to dismiss the appeal as being out of time. 74 A.2d at 408.

46 74 A.2d at 408 (interpreting the phrase "subject to law" found in N.J. CONST. art. VI, § II, para. 3).

47 68 A.2d at 334. Winberry relied upon N.J. REV. STAT. § 2:27-356 (1937) which, he argued, permitted the filing of an appeal within one year after judgment was entered. He argued that in a conflict between that statute and a subsequently enacted court rule, the statute must control. *Id.* at 333. The Appellate Division held, "[w]hen our Supreme Court makes a rule regulating procedure that conflicts with some statutory provision enacted before 1948, the latter does not remain in full force, but is superseded by the rule, altogether or so far as is necessary to permit full scope to the rule." *Id.* at 334.

48 R.R. 1:2-5(b), 4:2-5 (1953 New Jersey Court Rules), *cited in Winberry*, 74 N.J. at 408.

49 The court rules were first adopted by the Supreme Court in 1948. They were comprehensively revised in 1953 and again in 1969. SYLVIA B. PRESSLER, CURRENT N.J. COURT RULES ix-x (1994) (publisher's preface). The rule currently governing time to appeal from a final judgment is N.J. CT. R. 2:2-3.

50 One might reasonably speculate that Chief Justice Vanderbilt was searching for just such a vehicle to express his construction of the Article in question. The case was argued on June 19, 1950, and decided eight days later. Justice Case concluded, in a lengthy opinion concurring in the result only, that the majority gave its interpretation as "a way of reaching a desired result." 74 A.2d at 420 (Case, J., concurring in result).

graph three[51] was interpreted to mean subject to legislative enactments, the rule-making power of the Supreme Court would be *functus officio*.[52] In construing the language of article six, section two, paragraph three, the Chief Justice concluded that use of the phrase "shall make rules" imposed upon the Supreme Court an affirmative and on-going obligation to promulgate such rules.[53] The Chief Justice went on to hold that "the rule-making power of the Supreme Court is not subject to overriding legislation, but . . . it is confined to practice, procedure and administration as such."[54] Thus, the Supreme Court established its primacy regarding the administration of the courts, practice and procedure and admission to and discipline of those admitted to the bar. The Court has resisted numerous challenges in the forty-four years since Winberry's decision.

Although Chief Justice Vanderbilt stated that the rule-making power should not affect the substantive law,[55] in fact this power has had a significant substantive effect on New Jersey's attorneys.

In considering the impact of the authority extended to the

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51 N.J. CONST. art. VI, § II, para. 3.

52 74 A.2d at 408. *Functus officio* is Latin for "a task performed." BLACK'S LAW DICTIONARY 802 (4th ed. 1968). In effect, the Chief Justice felt that allowing legislative enactments to "repeal" previously promulgated court rules would mean the power delegated to make rules was a one-time power. The term is often used in discussing one who has fulfilled a function, discharged an office or accomplished a purpose and therefore has no further force or authority. Chief Justice Vanderbilt clearly saw the rule-making obligation imposed upon the Court as a continuing one.

53 74 A.2d at 409. Chief Justice Vanderbilt, therefore, concluded:

> The only interpretation of "subject to law" that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice. The distinction between substantive law, which defines our rights and duties, and the law of pleading and practice, through which such rights and duties are enforced in the courts, is a fundamental one that is part of the daily thinking of judges and lawyers. Substantive law includes much more than legislation, it comprehends also the rights and duties which have come down to us through the common law. The phrase "subject to law" in Article VI, Section II, paragraph 3 of the Constitution thus serves as a continuous reminder that the rule-making power as to practice and procedure must not invade the field of the substantive law as such. While the Courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power.

Id. at 410.

54 *Id.* at 414.

55 *Id.* at 410.

Supreme Court by its interpretation in *Winberry*, one must accept a basic premise that membership in the bar is a privilege and may be burdened with conditions.[56] Over the years, the Supreme Court has imposed numerous conditions upon the privilege of practicing law in the State through its rule-making function.[57] These conditions have not enjoyed the bar's universal approval over the years.

Like so many Don Quixotes tilting at windmills, the bar has challenged the Supreme Court's authority to enact many of these rules.[58] However, these efforts have yielded as much success as those of that legendary man of La Mancha.

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[56] *In Re* Hyra, 104 A.2d 609 (N.J. 1954) (one essential condition requires the possession of good character).

[57] *See, e.g.*, N.J. CT. R. 1:4-1(b) (requiring, by implication, an attorney to maintain a New Jersey office); N.J. CT. R. 1:11-2 (setting conditions on right of attorney to withdraw from a case, including consent of court); N.J. CT. R. 1:14 (adopting American Bar Association rules of professional conduct); N.J. CT. R. 1:15-1 (limiting practice by attorneys serving as judges, surrogates, clerks, judicial employees, sheriffs, prosecutors and counsel for public bodies); N.J. CT. R. 1:17-1 (limiting political activities of judges and court personnel); N.J. CT. R. 1:19A (regulating attorney's right to advertise); N.J. CT. R. 1:20-1(a) (subjecting attorneys to disciplinary jurisdiction of Supreme Court); N.J. CT. R. 1:20-1(b)-(c) (requiring annual payments to Client Security Fund); N.J. CT. R. 1:20-2 (establishing Office of Attorney Ethics with investigative and prosecutorial powers); N.J. CT. R. 1:20-3 (establishing District Ethics Committees with investigative and prosecutorial authority); N.J. CT. R. 1:20-6(a) (requiring attorneys to voluntarily report when charged with an indictable offense); N.J. CT. R. 1:20-11(b) (establishing immunity for grievants in ethics matters, clients in fee arbitration cases and witnesses in both); N.J. CT. R. 1:20-11(f) (declaring no statute of limitations with respect to disciplinary matters); N.J. CT. R. 1:20A-1 (creating District Fee Arbitration Committees); N.J. CT. R. 1:21-1(a) (setting qualifications for practice of law and making explicit the requirement of maintenance of a bona fide office in New Jersey); N.J. CT. R. 1:21-1A(a)(3) (requiring professional corporations for the practice of law to maintain professional liability insurance); N.J. CT. R. 1:21-2 (setting conditions upon pro hac vice appearances); N.J. CT. R. 1:21-6 (setting requirements for maintenance of attorney bank accounts, including trust accounts and standards for bookkeeping records relative to said accounts); N.J. CT. R. 1:21-7 (imposing restrictions upon maximum permissible fees under contingent fee arrangements); N.J. CT. R. 1:21-7A (requiring written and signed retainer agreements in all family actions); N.J. CT. R. 1:23 (establishing a Board of Bar Examiners); N.J. CT. R. 1:24-1(b) (setting forth requirements for application to sit for bar exam); N.J. CT. R. 1:24-2 (setting forth requirements for admission to bar examination); N.J. CT. R. 1:25 (establishing committee on character to determine fitness to practice law of candidates for admission); N.J. CT. R. 1:26 (requiring the completion of a skills and methods course as condition of eligibility to practice); N.J. CT. R. 1:28 (creating Lawyers' Fund for Client Protection); N.J. CT. R. 1:39 (establishing trial certification program and conditions for certification therein).

[58] *See supra* note 57.

III. Winberry *Applied—The Contingent Fee Decision*

On December 21, 1971, the Supreme Court adopted a rule regulating contingent fee agreements.[59] Several attorney organizations, both individually and as class representatives, challenged the validity of the rule.[60] In an unreported opinion, the Law Division held the rule unconstitutional because it interfered with an attorney's freedom to contract.[61] The Appellate Division reversed.[62] Specifically addressing an attorney's right to contract, the Appellate Division noted, "[a]ttorneys have never had the right to enforce contractual provisions for more than a fair and reasonable fee. They are not businessmen entitled to charge what the traffic will bear."[63]

The New Jersey Supreme Court affirmed for substantially the same reasons as the Appellate Division.[64] The Court utilized its opinion as an opportunity to address what it perceived to be the basic question: what is the extent of the Court's regulatory power over attorneys?[65] The Court, relying on its constitutional authority, held that power was without limitation.[66] The Supreme Court ex-

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59 N.J. Ct. R. 1:21-7.

60 American Trial Lawyers Ass'n, N.J. Branch v. New Jersey Supreme Court, 316 A.2d 19, 21 (N.J. Super. Ct. App. Div.), *aff'd*, 330 A.2d 350 (N.J. 1974). The plaintiffs argued that the Court adopted N.J. Ct. R. 1:21-7 pursuant to its adjudicatory role and that an evidentiary hearing was necessary before this adoption. 316 A.2d at 21.

61 *Id.* at 20-21 (explaining the holding of the unreported decision below).

62 *Id.* at 28. The Appellate Division specifically rejected the following arguments advanced by the plaintiffs: (1) the Supreme Court had no authority to regulate contingent fee arrangements, *id.* at 22; (2) the procedures used in adopting the rule were improper, *id.* at 25; (3) it violated an attorney's right of freedom to contract, *id.* at 27; (4) it denies equal protection of the laws to lawyers and their clients, *id.*; and (5) it impairs the obligation of existing contingent fee contracts. *Id.* at 28.

63 *Id.* at 27.

64 330 A.2d at 352 (adopting the appellate division decision *in toto*).

65 *Id.*

66 The Court concluded:

> [T]he people, in their constitutional grant of the power of superintendence of those admitted to practice law, did not express a mere gesture or formality. On the contrary, we think they intended that responsibility to extend to every area in which unjust or unethical conduct might afflict the public at the hands of those admitted by the Court to the practice of the law. We believe the people intended that the Court should cope as best it might with interstices, wherever they appear, in the pattern of honest and ethical practice of the law. In this grant of power and reposing of responsibility the people of New Jersey trusted and commissioned the Supreme Court, in effect, to "keep the house of the law in order." The Court in-

plicitly rejected the plaintiffs' argument that an evidentiary hearing was required prior to adopting the challenged rule.[67]

IV. Winberry *Applied—The Fee Arbitration Decision*

On February 23, 1978, the Supreme Court adopted a court rule that created district fee arbitration committees.[68] The rule provides, inter alia, mandatory fee arbitration upon a client's written request.[69] Once again donning its admittedly dented armor and drawing its somewhat blunted lance, the bar challenged the constitutionality of this rule[70] on four separate grounds.[71]

The Court characterized the challenge to the constitutional power to enact the rule as "almost anachronistic."[72] It noted that "[f]or 33 years this Court has exercised plenary, exclusive, and almost unchallenged power over the practice of law in all of its aspects under *N.J. Const.* (1947), Art. VI, § II, par. 3."[73] The Court also noted that "[r]esponsibility for an adversarial judicial system requires responsibility for the adversaries, and control over both."[74] The Court concluded that its constitutional authority to set a procedure for resolving fee disputes was self evident.[75] It reached this conclusion by analogy: if the Court had the ability to limit contingent fees, then it also could require mandatory work

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> tends to fulfill that responsibility, and to fulfill it within the framework of constitutional right.

Id. at 353 (citations omitted).

67 *Id.* at 354.

68 N.J. Ct. R. 1:20A; *See* Pressler, *supra* note 49, at 192-95.

69 N.J. Ct. R. 1:20A-3(a).

70 *In Re* LiVolsi, 428 A.2d 1268, 1271 (N.J. 1981).

71 The four grounds were: (1) that its promulgation was beyond the constitutional authority of the Supreme Court, *id.* at 1272; (2) that it denied lawyers equal protection of the law, *id.* at 1273; (3) that it denied attorneys the constitutional right to a trial by jury, *id.*; and (4) that the inability to appeal the Committee's determination was a violation of the Due Process Clauses of both the Federal and State Constitutions. *Id.* at 1275.

72 *Id.* at 1272.

73 *Id.*

74 *Id.* From this the Court concluded that in its exercise of this responsibility, one of the key goals to be achieved is the maintenance of public confidence in the system. The intended beneficiary of the system, the litigant/client, can realistically only gain access to it through a lawyer. The dissatisfaction of a client over the relationship with the attorney would, therefore, result in a dissatisfaction with the judicial system as such. *Id.*

75 *Id.* The Court reasoned that its fundamental role in all legal matters enabled it to preside over the legal fee issue as well. *Id.*

without fee and disregard fee agreements altogether.[76]

The Court concluded that a "rational basis" test was the appropriate standard of review for plaintiffs' equal protection argument.[77] Citing the United States Supreme Court,[78] the Court held that "[t]he State has a special interest in regulating the legal profession and attorney-client relationships."[79] The Court then addressed plaintiff's claimed deprivation of a right to trial by jury. It engaged in an historical analysis to reach the conclusion that attorney-client fee disputes were historically heard by courts of equity where there was no such right.[80]

Finally, the Court addressed the issue of a plaintiff's right of appeal. In summary fashion, it found no right of appeal in the Fourteenth Amendment.[81] The Court, on what appeared to be policy reasons, likewise determined that the New Jersey Constitution did not require an appeal.[82] "We restate that if appeals as of right from the Committees were taken to the Superior Court, as petitioner and Association urge, such appeals would greatly undermine this Court's *exclusive* jurisdiction over the regulation of the Bar."[83]

The Court went on to uphold, and indeed laud, the mandatory nature of the arbitration rule. It cited a 1974 report by the American Bar Association[84] that commented on numerous disadvantages of a voluntary arbitration system.[85] The Court was quite

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76 *Id.* at 1272-73.

77 *Id.* at 1273.

78 *Id.* (citing Goldfarb v. Virginia State Bar Ass'n, 421 U.S. 773 (1975)).

79 428 A.2d at 1273.

80 *Id.* at 1274. Perhaps the most significant comment the Court made in discussing the right to a jury trial was "recognizing a right in lawyers to demand a trial by jury when clients seek *R.* 1:20A arbitration would greatly undermine this Court's constitutional authority to regulate the Bar." *Id.* at 1275. As a review of the judicial opinions in the preceding section, this section and the following section make clear, it is highly unlikely that the Court would adopt any position that would so "undermine" its authority to regulate the bar.

81 *Id.* at 1275-76.

82 *Id.* at 1276-79.

83 *Id.* at 1279 (emphasis added).

84 *Id.* at 1279-80 (citing AMERICAN BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON RESOLUTION OF FEE DISPUTES 2-4 (1974)).

85 As perceived by the Court, they were: (1) economic limitations on the client's ability to obtain new counsel; (2) inability to advance retainers while awaiting disposition of disputed fee matters; and (3) ability of the "less conscientious" lawyer to thwart the system by failing to submit to a voluntary arbitration. *Id.* at 1280 (citing AMERICAN

explicit in its opinion that

> If it is true . . . that public confidence in the judicial system is as important as the excellence of the system itself, and if it is also true . . . that a substantial factor that erodes public confidence is fee disputes, then any equitable method of resolving those in a way that is clearly fair to the client should be adopted. . . . The least we owe to the public is a swift, fair and inexpensive method of resolving fee disputes. This may not end the dissatisfaction of some with the bar and with the judicial system, but, at the very least, it will minimize the extent of such dissatisfaction. Further, it is important to assure the public that this Court, which has the ultimate power over the practice of the law, will take an active role in making certain that clients are treated fairly in attorney-client disputes.[86]

V. Winberry *Applied—The Immunity Decision*

On January 31, 1984, the Supreme Court adopted a rule providing immunity to ethics complainants, fee arbitration clients and witnesses in both proceedings.[87] Although the armor was now rusty and ill-fitting, the steed somewhat decrepit and the lance broken, the bar once more rose to challenge this enactment. That a challenge would be made was no surprise because the majority in this four-to-three decision readily conceded that the rule would bar libel and slander suits, as well as malicious prosecution suits.[88] The majority acknowledged the controversial nature of both the rule and its history.[89]

BAR ASS'N, REPORT OF THE SPECIAL COMMITTEE ON RESOLUTION OF FEE DISPUTES 2-4 (1974)).

86 *Id.* at 1281.

87 N.J. CT. R. 1:20-11(b). The rule itself provides, in pertinent part, "grievants in ethics matters, clients in fee arbitration cases and witnesses in both . . . shall be absolutely immune from suit . . . for all communications to Committees, Fee Committees, the Director, the Board, or to appropriate staff and for testimony given in ethics or fee arbitration proceedings." *Id.*

88 *See In re* Hearing on Immunity for Ethics Complainants, 477 A.2d 339, 340 (N.J. 1984).

89 The Court reviewed its 1955 holding in Toft v. Ketchum, 113 A.2d 671 (N.J.), *cert. denied*, 350 U.S. 887 (1955). That case held "a complainant in an ethics matter was immune from a malicious prosecution suit by the attorney under circumstances in which the suit would clearly otherwise have been sustainable." 477 A.2d at 340. The Court's rationale, on policy reasons, for denying attorneys the same right of action that any other citizen of the State would have was a concern that the potential liability of the complainant would constitute an impediment to the prosecution of such com-

The majority opinion conceded that the 1956 Supreme Court determination to maintain an effective disciplinary system was as great as that of the present Court.[90] It admitted that the *Toft* Court took no action in response to the subsequent enactment of a statute[91] that authorized attorney actions for malicious prosecution.[92] The Court expressed its opinion, however, that "[a]s a result of many factors the public is much more aware of and concerned with matters affecting the bar and the bench."[93] Although the majority acknowledged that enactment of the rule makes lawyers "second class citizens,"[94] it seemed more concerned that "[t]he ability of attorneys effectively to muzzle potential complainants should not be underestimated."[95] The majority stated the nature of its concern quite explicitly.[96] The majority acknowledged that its opinion, in effect, invalidated the statute[97] passed in response to *Toft*.[98] In con-

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plaints and would have a "chilling effect" on the prosecution of legitimate ethics complaints. *Id.*

The Court went on to note that within a year of its *Toft* decision, the Legislature enacted N.J. STAT. ANN. § 2A:47A-1 (West 1956). 477 A.2d at 340. The statute, in effect, overruled *Toft* by explicitly allowing an action for malicious prosecution by an attorney against the complainant in an ethics complaint. *Id.*

90 *Id.* at 341.

91 *See* N.J. STAT. ANN. § 2A:47A-1 (West 1956).

92 477 A.2d at 340.

93 *Id.* at 341. The Court noted that the number of attorneys had almost doubled to 26,199 in the previous decade. *See supra* note 25 to compare the number of attorneys presently admitted to practice in New Jersey. The Court also noted that while the number of attorneys had increased by 33% since 1979, the number of fee arbitration and ethics complaints had increased by 56%. *Id.* at 341 n.2.

94 *Id.* at 341.

95 *Id.* at 342. Apparently ignoring the concept of opportunity cost, the majority opined that without substantial expenditure attorneys could prosecute numerous actions against ethics complainants under the rule. *Id.* The Court seemed unmoved by either the fact that ethics and fee arbitration complaints were increasing more rapidly than were the number of attorneys or "the apparent rarity with which attorneys have availed themselves of *N.J.S.A.* 2A:47A-1." *Id.*

96 The Court stated:

> Whether [filing of retaliatory lawsuits by attorneys] has happened, is happening, or is likely to happen is less important to us than our belief that it should never happen. We should not tolerate the possibility within our disciplinary system that a potential ethics complainant may be intimidated by an attorney into not filing a complaint. The need for public confidence in the integrity of that system is much too important.

Id.

97 N.J. STAT. ANN. § 2A:47A-1 (West 1956). The Court held the statute to violate the doctrine of separation of powers and thus invalidated it. 477 A.2d at 343-44.

98 The majority's position on attorney discipline was:

clusion, the majority held the adoption of the rule necessary to ensure public confidence, not only in the attorney disciplinary system, but in the bar and bench in general.[99] While the three members of the Court who dissented agreed that the Court possessed the power to adopt the rule, they questioned the wisdom of its exercise.[100] Thus, even over an issue that resulted in a bitterly divided four-to-three opinion, there was no serious question by the Court as to its authority to enact the rule.

One may fairly conclude that since its inception in 1948 the Court has taken an expansive view of its rule-making power. Although Chief Justice Vanderbilt, in *Winberry*,[101] held that the rule-making power should not extend to matters of substantive law,[102] the rule-making power has a significant substantive effect upon attorneys. While the Supreme Court concedes the possibility of constitutional limitation to its rule-making power,[103] this is a hypothetical concession. There are apparently no cases reflecting a successful constitutional challenge to any rule of general application enacted by the Court since 1948. It appears that no rule of general application will ever be the subject of a successful constitutional attack. If this conclusion is correct, it follows that the rules provide a ready vehicle for addressing the crisis of delay due to court congestion. Because existing rules may be amended, or new ones adopted, without the passions and prejudices that might bear upon legislative enactments, it follows that the rules are a most appropriate device for addressing the delay issue.[104]

> This is one area, however, in which our constitutional responsibility is so clear as to leave no doubt of our duty to adopt a Rule that we think is needed, despite its clear conflict with existing legislation. The Court simply cannot *in the least* abdicate its responsibility to exercise exclusive power over the disciplining of attorneys.

Id. at 343 (emphasis added).

99 *Id.* at 344.

100 *Id.* at 345.

101 Winberry v. Salisbury, 74 A.2d 406 (N.J.), *cert. denied*, 340 U.S. 877 (1950).

102 74 A.2d at 410.

103 *See* American Trial Lawyers Ass'n, N.J. Branch v. New Jersey Supreme Court, 330 A.2d 350, 354 (N.J. 1974).

104 This is not to suggest, however, that the Legislature cannot act. A legislative enactment, even if subsequently limited or invalidated by the Court, may force the Court to acknowledge, as it did in *McKeown-Brand* that "[l]ike the Legislature, we are concerned about the cost that baseless litigation imposes on litigants, the Courts and the public." McKeown-Brand v. Trump Castle Hotel & Casino, 626 A.2d 425, 433 (N.J. 1993). The Court in *McKeown-Brand* "[r]equest[ed] that the Committee on Civil

The following sections of this article will examine certain rules as now drafted and applied. Each will be followed by a discussion of either an amendment to the rule or a new approach to its application. A separate section will address one proposed additional rule or, alternatively, a legislative enactment. The proposed amendments and new rule, coupled with directives from the Court as to the application of the existing rules will, within the decade, significantly ameliorate the present crisis created by the backlog of civil cases. Alternatively, a legislative enactment, *see infra* section XI, may suffice to ameliorate the crisis.

VI. R.1:6-2 Appropriate Applications

Justice Clifford once noted:

> Our Rules of procedure are not simply a minuet scored for lawyers to prance through on pain of losing the dance contest should they trip. Those Rules have a purpose, one of which is to assist in the processing of the increasing number and complexity of cases, including appeals in this Court, that we have experienced over the last couple of decades.[105]

In response to Justice Clifford's comments, what is the proper role of the rules of Court? This section, and those following, suggest an answer to the query: the rules, properly applied, will result in a higher standard of attorney competence, more rapid disposition of cases and, with amendment, ensure that no litigant is left without a remedy.

The so-called "rule of relaxation"[106] is a salutary one with many appropriate applications.[107] A good discussion of its appropriate use

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Practice consider the circumstances in which courts may impose counsel fees and costs on attorneys who engage in frivolous litigation." *Id.*

By bringing to the public's attention the crisis proportions of the backlog via the enactment of legislation, the Legislature can perhaps force the Court's hand and the Court may choose to allow the legislation to stand as it initially did with respect to N.J. STAT. ANN. § 2A:47A-1 (West 1956). *See supra* notes 89-97 and accompanying text.

[105] Stone v. Township of Old Bridge, 543 A.2d 431, 438 (N.J. 1988) (Clifford, J., dissenting). Justice Clifford expanded on this position, stating, "[l]ike Justice Frankfurter, I do not perceive procedure as 'just folderol or noxious moss. Procedure — the fair, orderly and deliberative method by which claims are to be litigated — goes to the very substance of the law.' " *Id.* at 439 (Clifford, J., dissenting) (citation omitted).

[106] N.J. CT. R. 1:1-2; *see supra* notes 8-11 and accompanying text.

[107] *See* Grubb v. J.C. Penney Co., Inc., 382 A.2d 405, 406 (N.J. Super. Ct. App. Div. 1978), for a good example of an appropriate application of the rule. Plaintiffs appealed a summary judgment dismissing a personal injury action as barred by the statute of limitations. The case, filed before the direct filing provisions of N.J. CT. R. 1:5-6(b) were enacted, involved a situation where an original complaint was inadvertently

and the policies underlying application of the rules generally appears in a 1986 Appellate Division decision.[108]

There, the court noted:

> We appreciate the desirability of the prompt disposal of cases. Courts should not forget, however that they merely provide a disinterested forum for the just resolution of disputes. Ordinarily, the swift movement of cases serves the parties' interests, but the shepherding function we serve is abused by unnecessarily closing the courtroom doors to a litigant whose only sin is to retain a lawyer who delays filing an answer during settlement negotiations. Eagerness to move cases must defer to our paramount duty to administer justice in the individual case. Expedition, in Judge Jayne's words, "must supplant languor but never at the expense of justice."[109]

The language confronts the essential issue that this article addresses: how shall the Court reconcile the laudable objective of resolving cases quickly with the potential injury to a client's position from attorney action or inaction? To the degree our courts have addressed this conflict, they have resolved it by an historically liberal construction of the rule of relation to prevent injury to the client.[110]

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filed only with the county clerk. *Id.* The Court held that the county clerk, as a deputy clerk of the Superior Court, had received the papers within the appropriate limitations period so no prejudice appeared, and that the filing with the county clerk would suffice as a filing for purposes of the limitations period. *Id.* at 406-07. The Court relied upon N.J. Ct. R. 1:1-2 to relax the requirement of filing with the Clerk of the Superior Court in Trenton. *Id.* at 407.

[108] Audubon Volunteer Fire Co. No. 1 v. Church Constr. Co., 502 A.2d 1183 (N.J. Super. Ct. App. Div. 1986). A suit was filed and an extension of time to answer was agreed upon, but settlement negotiations later proved unsuccessful. A consent order to answer out of time was executed and submitted to the court. The court rejected it, advising that a motion was required. The unopposed motion was denied. *Id.* at 1184.

[109] *Id.* (citations omitted). The court applied N.J. Ct. R. 1:1-2 to allow the filing of an answer out of time. It found no prejudice to the plaintiff in part due to the ongoing settlement negotiations. *Id.*

[110] N.J. Ct. R. 1:1-2. *See, e.g.*, State v. Brennan, 551 A.2d 560 (N.J. Super. Ct. App. Div. 1988) (relaxing requirement of N.J. Ct. R. 7:6-1, requiring signature of traffic summons by officer); Viviano v. CBS, Inc., 503 A.2d 296 (N.J. 1986) (relaxing strict compliance with requirement for John Doe practice under N.J. Ct. R. 4:26-4); *In re* Karamus, 461 A.2d 1193 (N.J. Super. Ct. App. Div. 1983) (relaxing, in favor of infant claimant, time requirement of challenge to ex parte probate judgment prescribed by N.J. Ct. R. 4:80-7); Enourato v. New Jersey Bldg. Auth., 440 A.2d 42 (N.J. Super. Ct. App. Div. 1981), *aff'd*, 448 A.2d 449 (N.J. 1982) (relaxing motion time and procedure where matter was of public importance and required prompt disposition); Board of Educ. of Elizabeth v. City Council of Elizabeth, 262 A.2d 881 (N.J. 1970) (relaxing the requirement of exhaustion of administrative relief prescribed by N.J. Ct. R. 2:2-3(a)

VII. Trial Delay and the Rules Concerning Discovery

Our courts acknowledge that "[t]he defendant's right to have the plaintiff comply with procedural rules conflicts with the plaintiff's right to an adjudication of the controversy on the merits."[111] The *Zaccardi* Court noted "the 30 day limit [to move to vacate dismissal for failure to answer interrogatories] should be relaxed very sparingly. Routinely allowing attorneys to ignore the time limits in *R.* 4:23-5(a) would subvert the policy of encouraging expeditious discovery. Attorneys cannot avoid these limits without satisfactory reasons."[112] Despite the egregious violation of the rule in question, the Court held that the prior dismissal should not preclude the second case. "Since dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, . . . or when the litigant rather than the attorney was at fault. . . ."[113]

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to permit direct appeal to Supreme Court from decision of Commissioner of Education).

This approach is not surprising considering the significant litigation background of most trial judges upon appointment. There is an understandable tendency to relax a rule where its strict enforcement might result in imposing liability upon a party's attorney for his or her negligence. However, one must question the viability of such an attitude with reference to the accelerating backlog of civil cases. A more appropriate remedy might be against the erring attorney in an expedited arbitration proceeding. *See infra* notes 185-188 for a discussion of one possible system.

[111] Zaccardi v. Becker, 440 A.2d 1329, 1332 (N.J. 1982). *Zaccardi* is a particularly good illustration of the dilemma that regularly confronts the Court in determining the appropriate response to a party's failure to provide discovery within the time frame provided for by the rules. In *Zaccardi*, a complaint for medical malpractice initially was filed in January 1976 and dismissed on July 28, 1976, for failure to answer interrogatories. *Id.* at 1331. Not until December 28, 1977, did plaintiff move to vacate that dismissal and extend discovery for 60 days. *Id.* The application was granted by the trial court but reversed by the Appellate Division in September 1978. *Id.* Certification was denied. *Id.* In November 1978, plaintiff filed an identical complaint that was dismissed as barred by the statute of limitations. *Id.*

[112] *Id.* at 1332. The Supreme Court reasoned "[a]ttorneys must comply with the time limits in the procedural rules in order to further the public policies of expeditious handling of cases, avoiding stale evidence, and providing uniformity, predictability and security in the conduct of litigation." *Id.*

[113] *Id.* at 1332-33 (citations omitted). One may be left questioning the rationale that provides that where the fault is of the retained expert, the attorney, a lesser sanction is advisable than where the fault of the litigant is involved. The concern of the Court, of course, is "that dismissal of the second complaint will deprive a plaintiff of an adjudication on the merits." *Id.* at 1333. While this may be true, *see infra* section X, such a dismissal need not leave plaintiff without a remedy. That remedy, quite appropriately it would seem, is against the defaulting attorney.

The Court held "[n]o attorney should assume that despite his failure to comply with the rules, the Court will allow the case to proceed."[114] In light of the Court's determination in *Zaccardi*, it is difficult to perceive how an attorney could draw any conclusion other than one diametrically opposed to the Court's cautionary pronouncement.

The rule governing dismissal for failure to answer interrogatories[115] has been substantially modified since the decision in *Zac-*

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[114] *Id.* at 1333. Notwithstanding such strong language, the Court determined that defendant's failure to object to plaintiff's numerous applications for adjournment constituted an implied consent to the continuation of the dismissed case. *Id.* at 1334. One wonders why the consequences of plaintiff counsel's negligence should be visited upon the defendant.

[115] N.J. CT. R. 4:23-5(a). The current version of the rule, effective September 4, 1990, provides:

> 4:23-5. Failure to Serve Answers to Interrogatories
>
> (a) Dismissal
>
> (1) Without Prejudice. If timely answers to interrogatories are not served and no motion for an extension has been made pursuant to R.4:17-4(b), the party entitled to the answers may move, on notice for an order dismissing or suppressing the pleading of the delinquent party. The motion shall be supported by an affidavit reciting the facts of the delinquent party's default and further stating that the moving party is not in default in answering pursuant to R.4:17-4(a), the interrogatories served by the delinquent party. Unless good cause for other relief is shown, the court shall enter an order of dismissal or suppression without prejudice. The delinquent party may move for vacation of the dismissal or suppression order, provided the motion is supported by affidavit stating that fully responsive answers have been served and provided further the delinquent party pays costs in the amount of $100.00 to the Clerk of the Superior Court if the motion is made within 30 days after entry of the order of dismissal without prejudice and $300.00 if the motion is made thereafter.
>
> (2) With Prejudice. If an order of dismissal or suppression without prejudice has been entered and not thereafter vacated, the party entitled to the answers or the court on its own motion may, after the expiration of 90 days for the date of the order, move, on notice, for an order of dismissal or suppression with prejudice. The motion shall be granted unless exceptional circumstances are demonstrated. The attorney for the delinquent party shall, not later than 5 days prior to the return date of the motion, file and serve an affidavit stating that the client has been notified of the pendency of the motion or that the attorney is unable, despite diligent inquiry, to determine the client's whereabouts. The notification to the client shall be in the form appearing as Appendix II-F to these rules, and the attorney's appearance on the return date of the motion shall be mandatory.
>
> (3) General Requirements. All motions made pursuant to this rule shall be accompanied by an appropriate form of order, and all affidavits in support of relief shall include a certification of prior consultation with oppos-

cardi.[116] In *Aujero v. Cirelli*,[117] the Court acknowledged the problems occasioned by late answers to interrogatories, the lack of uniformity of the trial court's response to the problem and the apparent inefficacy of existing sanctions.[118] The Court directed the Civil Practice Committee to address the problems.[119] Based upon the recommendations contained in the Committee's report,[120] the

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> ing counsel as required by R.1:6-2(c). An order of dismissal or suppression shall be entered only in favor of the moving party.

N.J. CT. R. 4:23-5.

The previous version of the rule provided:

> R.4:23-5. Failure to Serve Answers to Interrogatories
>
> (a) Dismissal or Suppression. If timely answers to interrogatories are not served and no formal motion for an extension has been made pursuant to R.4:17-4(b), the complaint, counterclaim or answer of the delinquent party shall be dismissed or stricken by the court upon the filing by the party entitled to the answers of an affidavit stating such failure within 60 days from the date on which said answers became due. Thereafter such relief may be granted only by motion. The affidavit shall have annexed thereto a form of order of dismissal or suppression. A copy of all such orders with affidavits annexed shall be served upon the delinquent party within 7 days after the date thereof. On formal motion made by the delinquent party within 30 days after service upon him of the order, the court may vacate it, provided fully responsive answers to the propounded interrogatories are presented and the delinquent party pays costs in the amount of $50.00 to the Clerk of the Superior Court. An order of dismissal or suppression shall be entered only in favor of the moving party.

N.J. CT. R. 4:23-5 (1990 New Jersey Court Rules).

A comparison of the prior and current version of the rules reflects a substantial move by the courts in the area of attorney accountability. Although one may question the necessity of the moving party bringing an application twice, *see infra* notes 121-22 and accompanying text, the obligation that counsel to whom the motion is directed "file and serve an affidavit stating that the client has been notified of the pendency of the motion" is a most positive step.

116 440 A.2d 1329 (N.J. 1982). N.J. CT. R. 4:23-5(a), as presently drafted, has deleted the provision for ex parte dismissal for failure to answer interrogatories, increased the fee payable to the Clerk of the Superior Court and expressly provided for dismissal with prejudice upon application brought on 90 days after the entry of the original order. *See infra* notes 120-22 and accompanying text.

117 542 A.2d 465 (N.J. 1988).

118 *Id.* at 467-68. The Supreme Court reiterated its perception of "the tension between, on the one hand, the salutary principle that the sins of the advocate should not be visited on the blameless litigant, . . . and, on the other, the courts' strong interest in securing finality in litigation and promoting judicial economy." *Id.* at 468 (citation omitted).

119 *Id.* at 472.

120 The 1990 Report of the Supreme Court Committee on Civil Practice, 125 N.J.L.J. 421 (1990), noted

> [t]he scheme proposed . . . would . . . establish a two-tier motion practice, that is, an initial motion for an order of dismissal *without prejudice* for fail-

Court adopted the rule.[121] This amendment was a conscious and positive attempt to address delay due to non-compliance with the time requirements of our rules concerning civil discovery. However positive a step, the rule does not go far enough. The amended rule retains the obligation, imposed upon the moving party, to certify an attempt to informally resolve the issue.[122] This required effort is an appropriate condition to impose on the initial motion to dismiss. One might justifiably ponder why the onus should remain on the moving party to make such an effort when the party against whom relief was initially obtained has not moved to vacate it for the 90 day period contemplated by the rule.[123]

> ure to answer interrogatories and, where the delinquent party does not successfully move to vacate, a second motion, brought either by the party entitled to answers or by the court 90 days after the initial order, to dismiss or suppress *with prejudice*. . . . It is the contemplation of the committee, however, that only the most extraordinary circumstances would relieve a party of the dispositive consequences of the "with prejudice" dismissal order.
>
> The Committee is of the view that the main objective is to compel the answers rather than to dismiss the case, and believes that this two-tier, 90 day practice, will have a salutary effect because of a key stipulation of the proposal, namely, that an attorney who is served with a notice of motion to dismiss with prejudice must send a letter to the client so advising. . . . The Committee is of the view that responsible practitioners will seek to avoid the necessity of having to send such a letter by seeing to it that answers are forthcoming within the 90 day period. . . . [T]he alternative to sending the letter to the client and so certifying to the court is a certification by the lawyer that he or she cannot locate the client after diligent inquiry.

Id. at 421, *reprinted in* PRESSLER, *supra* note 49, at 984.

[121] PRESSLER, *supra* note 49, at 983.

[122] N.J. CT. R. 1:6-2(c). The rule requires, inter alia, that

> [e]very motion in a civil case . . . involving any aspect of pretrial discovery . . . shall be listed for disposition only if accompanied by a certification stating that the attorney for the moving party has personally conferred orally or has made a specifically described good faith attempt to confer orally with the attorney for opposing party in order to resolve the issues raised by the motion by agreement or consent order and that such effort at resolution has been unsuccessful.

Id.

[123] The January 18, 1994 report of the Supreme Court Committee on Civil Practice proposed an amendment to N.J. CT. R. 4:23-5(3) to provide, as an alternative to the certification presently required, that the application be made on "notice to opposing counsel as required by R. 1:6-2(c)." *1994 Report of the Supreme Court Committee on Civil Practice*, 136 N.J.L.J. 581, 589 (Feb. 14, 1994). The Committee proposed a corresponding amendment to N.J. CT. R. 1:6-2(c) to provide, as an alternative to a certification, when an attorney makes a motion for dismissal with prejudice, the moving party should advise "the attorney for the opposing party by letter, after the default has oc-

Perhaps more importantly, one might question the necessity of a second motion altogether. An intention to compel answers rather than dismiss or suppress pleadings certainly is appropriate at the time of the first motion. Upon proper proof of service of the initial order of dismissal or suppression, dismissal or suppression with prejudice should be entered upon the filing of an ex parte certification by the moving party.[124] An amendment of the rule to so provide is clearly within the competence of the Court.

A relatively minor amendment to the rule governing admissions[125] could do much to expedite the disposition of cases. It provides a mechanism for proof of facts by their admission by an adverse party. The rule specifically provides "[t]he matter is admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . ."[126] As one court noted, the salutary purpose of this rule is not so much to discover facts as to establish those facts as to which there is no genuine dispute.[127] Despite the obvious benefits of such a technique, the rule provides that "the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Court that withdrawal or amendment will prejudice him in

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curred, that continued non-compliance with a discovery obligation will result in an appropriate motion being made without further notice." *Id.* at 582.

124 Both the judicial system and the litigant are better served by competent counsel who are capable of the minimal effort required to comply with the time frames imposed by the rules governing discovery practice. Moreover, N.J. Ct. R. 1:1-2 remains available to relax the impact of the rule in a truly meritorious situation.

In a vacuum, an amendment of the rule as proposed might seem a draconian response. If, however, the Court amends N.J. Ct. R. 1:21-1A(a)(3), as discussed in *infra* notes 179-81 and accompanying text, the obligation of an attorney admitted to practice in New Jersey to maintain malpractice insurance will be made universal. The adoption of the author's proposed rule to require mandatory, binding arbitration of malpractice claims upon the former client's request, as discussed in *infra* notes 185-88 and accompanying text, would provide a forum for the expedited resolution of the malpractice claim without further burdening the civil trial court system.

125 N.J. Ct. R. 4:22 (request for admissions).

126 N.J. Ct. R. 4:22-1.

127 Van Langen v. Chadwick, 414 A.2d 618, 620 (N.J. Super. Ct. Law Div. 1980). The two co-defendants made various discovery motions in a personal injury action arising out of a motor vehicle accident at a shopping mall parking lot. *Id.* The motion to strike plaintiff's request for admissions was denied by the court. *Id.* at 621.

maintaining his action or defense on the merits."[128] It is questionable why the burden should be placed upon the party that took the time to draft the request for admissions and, pursuant to the rule, is entitled to rely upon either the answers given or the deemed admission resulting from an unanswered request.

One option is to amend the rule to provide that where a party moves to amend or withdraw a previously admitted request—either where there is no answer or where amendment of a previously admitted request is sought—relief can be granted only upon the moving party's establishment of extraordinary good cause without fault of the attorney responding to the request. Assessment of counsel fees and costs to the clerk, analogous to the rule governing interrogatories,[129] should be mandatory.

A proper objection to such an amendment, and its strict enforcement, is that it would work an injustice on the litigant. The failure to respond in a timely fashion to a request for admissions, however, could be due to but one of two possibilities. The first is the client's failure to cooperate with his or her attorney. A client should be barred from claiming an injustice for an action taken as a direct consequence of the client's indifference to the requirements of the rules of court. Unfortunately, the more probable scenario is that the situation arises due to the dilatory conduct of counsel. In this circumstance, it is true that the client would be deprived of his or her day in court relative to the adverse party. It would not be true, however, that the client would thereby be left without a remedy.[130]

As they are presently constituted, the rules concerning discovery provide for dismissal or suppression of a pleading as one avail-

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[128] N.J. Ct. R. 4:22-2.

[129] N.J. Ct. R. 4:23-5. If a pleading is dismissed or suppressed for failing to answer interrogatories, a mandatory fee must be paid to the clerk as a condition of restoration. This mandatory fee for restoration of a case increases after a lapse of 30 days from the entry of an order of dismissal. A similar provision could be enacted relative to a desire to amend an admission. If the amendment is sought within a designated time period (perhaps the same 30 days as reflected in N.J. Ct. R. 4:23-5(a)(1)), a fee of $100 could be imposed. The fee could thereafter increase, as does the fee relative to restoring a pleading dismissed or suppressed for failing to answer interrogatories, to $300. By way of further analogy to N.J. Ct. R. 4:23-5, if a period of 90 days were to elapse after the admissions were due (120 days from their service), no motion to amend would thereafter be allowed.

[130] *See infra* section X for discussion of the malpractice remedy of the client.

able alternative sanction in several contexts.[131] As it is now constituted, dismissal or suppression of a pleading is but one alternative available to a judge confronted with a party's failure to conduct discovery. Pursuant to the direction of the Supreme Court,[132] lower courts should utilize it only in the most extreme circumstances. The sanction provisions of the rule[133] should be amended to provide that the presumptive sanction for failure to make discovery shall be dismissal or suppression.[134] The burden should be on the party opposing discovery to justify why some lesser sanction should be appropriate.

As presently constituted, many of the discovery rules provide for an award of costs, including counsel fees, in conjunction with a motion to compel discovery.[135] Some of these rules state that the

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131 N.J. CT. R. 4:23. These specific instances are: failure of a party or representative of a party or one designated pursuant to the discovery rules to testify on behalf of a party to obey an order to provide or permit discovery, including any order pursuant to N.J. CT. R. 4:23-1 or fails to submit to a physical or mental examination, N.J. CT. R. 4:23-2(b)(3); failure of a party, representative of a party or person designated by the rules to testify to appear to give testimony, or to respond to a request for inspection, or to comply with a demand for production of documents, N.J. CT. R. 4:23-4; and, as already discussed, failure to answer interrogatories, N.J. CT. R. 4:23-5(a)(2).

132 *See* Zaccardi v. Becker, 440 A.2d 1329, 1332-33 (N.J. 1982). An order by the court dismissing a medical malpractice complaint for plaintiff's failure to respond to interrogatories did not bar the filing of a second complaint where the order did not specify that the dismissal was with prejudice. *Id.* at 1333.

133 N.J. CT. R. 4:23 (sanctions for failure to make discovery).

134 If, as seems likely, *see supra* notes 12-33 and accompanying text, delay in our court system and the consequent unfairness to litigants involved in it is reaching critical proportions, a radical remedy is required. With a fair, and well publicized, amount of advance notice to the bar that "the Rules have changed," it is not unreasonable to expect licensed professionals to abide by the rules of court. There is no difficulty with a judicial climate in which the attorney who disregards the rules does so at peril of a malpractice claim subject to resolution in a mandatory arbitration proceeding. Assuming adequate advance notice, it does not seem unreasonable that the trained and licensed professionals who operate within the judicial system be required to adhere to the rules or disregard them at their own risk. Knowledge of this possibility, on the part of the practicing bar, that will work a small miracle in expediting the disposition of cases. Moreover, N.J. CT. R. 1:1-2 remains available to the court to provide relief from the presumptive sanction in the truly meritorious situation.

135 The rules in question are N.J. CT. R. 4:10-3 (protective orders) ("The provisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion."); N.J. CT. R. 4:14-4 (motion to terminate or limit examination at deposition) ("The provisions of R. 4:23-1(c) shall apply to the award of expenses incurred in making or defending against the motion."); N.J. CT. R. 4:14-8 (failure to attend deposition or serve subpoena) ("[C]ourt may order the party giving the notice to pay such other party the reasonable expenses incurred by him or his attorney in attending, including reasonable attorney's fees."); N.J. CT. R. 4:17-5(d) (costs and fees on motion to com-

court "may" award fees, thereby making their award discretionary.[136] Even those rules that direct that the court "shall" award counsel fees[137] still provide the court with discretion to decline an award of fees if it deems it appropriate. Practicing attorneys, understandably, are reluctant to aggressively pursue awards of fees against fellow attorneys. Moreover, with former practitioners sitting on the bench, courts are likewise reluctant to impose such sanctions. This reluctance, admirable in the concern it evidences for other members of the profession, does little to expedite the resolution of cases.

It is suggested that the rules concerning sanctions relative to the discovery process[138] be amended. Such an amendment should require mandatory payment of actual costs[139] to the Court and counsel fees to the successful movant or opponent. The amendment could also provide that the award of counsel fees be against the attorney and not the party.[140] Opposing counsel, obviously, is

pel answers to or to strike interrogatories) ("[C]ourt may order the offending party to pay the amount of reasonable expenses, including attorney's fees, incurred by the other party in making or resisting the motion."); N.J. Ct. R. 4:18-1(b) (production of documents and inspection) ("[P]arty submitting the request may move for an order under R. 4:23 with respect to any objection to or other failure to respond to the request... or any failure to permit inspection."); N.J. Ct. R. 4:22-1 (request for admissions) ("[P]rovisions of R. 4:23-1(c) apply to the award of expenses incurred in relation to the motion."); N.J. Ct. R. 4:23-1(c) (motion for order compelling discovery) ("If the motion is granted, the Court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless . . . circumstances make an award of expenses unjust.") (analogous provision in favor of opponent where motion denied); N.J. Ct. R. 4:23-2(b) (failure to comply with order) ("[C]ourt shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless . . . circumstances make an award of expenses unjust."); N.J. Ct. R. 4:23-3 (expenses on failure to admit) ("If a party fails to admit... and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees."); and N.J. Ct. R. 4:23-4 (failure to attend own deposition or comply with demand to produce or respond to request to inspect) ("[T]he Court shall require the party failing to act to pay the reasonable expenses, including attorney's fees, caused by the failure, unless . . . circumstances make an award of expenses unjust.").

[136] N.J. Ct. R. 4:14-8, :17-5(d), :18-1(b).

[137] N.J. Ct. R. 4:14-4, :18-1(b), :23-1(c), :23-2(b), :23-3, :23-4.

[138] N.J. Ct. R. 4:23.

[139] *See infra* notes 146-48 and accompanying text for a discussion of this concept.

[140] This concept is hardly without precedent. A court rule currently provides for the "imposition of costs or attorney's fees or such other penalty as may be assessed

not privy to the fee agreement between a party and the attorney to whom counsel fees would be awarded. The authority of the Court, however, to set a "reasonable fee" is well established.[141] To be effective, such an amendment would also require a provision to ensure compliance by an attorney against whom fees were awarded. The successful party could be required to certify to the court, within thirty days of service of the order awarding fees, whether they have been paid.[142]

On an initial reading, these proposed revisions to the discovery rules may seem unduly harsh. The serious delay occasioned by an indifferent attitude towards the rules of discovery, however, warrants a serious resolution. Our Appellate Division has long recognized the problems occasioned by a lax attitude concerning the rules governing discovery. "Unquestionably failure to complete discovery within the time allotted by the Rules represents one of the paramount causes for trial delay."[143] The court acknowledges

personally against the attorney." N.J. Ct. R. 2:9-9; *see* Paxton v. Misiuk, 170 A.2d 16, 19 (N.J. 1961) ("[T]he litigant should not be burdened with his attorney's derelictions. An appropriate step is to impose a counsel fee payable by the offending attorney personally. . . ."). Obviously, where the attorney can satisfy the court that the issue that necessitated the motion was due to the litigant's conduct, such an award could appropriately be against the litigant and not counsel.

141 *See* N.J. Ct. R. 4:42-9(b). The factors enumerated by N.J. Rules of Professional Conduct Rule 1.5(a) (1984) are:

(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.

Id.

142 Many attorneys will be most reluctant to accept an award of such fees. Our Supreme Court, in *Paxton v. Misiuk*, addressed this possibility as well. 170 A.2d 16 (N.J. 1961). It suggested that any order concerning fees contain "the proviso that if the adversary declines to accept payment, as is often the case, payment shall be made to the clerk of the court." *Id.* at 19. *See infra* Appendix I attached to the end of this article for a form of certification regarding the award of counsel fees.

143 Crews v. Garmoney, 357 A.2d 300, 301 (N.J. Super. Ct. App. Div. 1976). The court acknowledged the conflict between "the need to instill firmness and meaning to the provisions of our discovery rules, thereby maintaining a consistent and predictable sense of order in the calendaring of litigation . . . [and the] general disinclination

that "[a]ll parties are entitled to an early resolution of the issues of their case. An unreasonable delay in bringing a matter to trial is one of the foremost causes of injustice."[144] If this position was valid at a time when there were less than 20,000 attorneys admitted to practice in New Jersey, and over 200 judges to hear their cases, how much more valid is it when the number of attorneys has more than doubled and the number of judges available to hear their cases has increased to but 321.[145] In a reported opinion, the court has partially notified the bar of the possibility of significant sanctions for discovery rules violations by their imposition.[146] That decision issued a very specific warning in holding that "[i]t necessarily follows, if such rules are to be effective, that the Courts impose appropriate sanctions for violations thereof."[147] Perhaps the most equitable and expeditious way to prevent delay based upon violations of the discovery rules is a clear and unequivocal warning to the bar that after a date certain, the provisions concerning the completion of discovery will be strictly enforced.[148]

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to invoke the ultimate sanction of dismissal where the statute of limitations has run." *Id.* at 301.

144 *Id.*

145 *See* Letter from Mark Davies, Chief, Quantitative Research Unit, Administrative Office of the Courts, State of New Jersey, to Robert Kerekes (Sept. 18, 1992) (on file with the *Seton Hall Legislative Journal*).

146 Oliviero v. Porter Hayden Co., 575 A.2d 50 (N.J. Super. Ct. App. Div. 1990). The case provides authority for several of the arguments made in this article. In pretrial discovery, plaintiff's attorney had failed to submit the name of a witness called at trial (although the witness's name was included on a witness list submitted 10 days prior to trial). *Id.* at 51. At trial, defendants successfully moved for a mistrial premised upon plaintiff's failure to name the witness called. *Id.* Upon retrial, the plaintiffs were not allowed to produce the witness whose testimony had necessitated the previous mistrial. *Id.* The trial ruling was reversed on appeal. *Id.* The opinion of the Appellate Division also "instructed the Law Division to 'assess reasonable costs, payable by plaintiffs' counsel to the Superior Court Clerk and not to be reimbursed by plaintiffs for the waste of publicly supported judicial resources occasioned by counsel's default and the resulting mistrial order.' " *Id.* Defendants' attorneys also moved for counsel fees. *Id.* The trial judge awarded a total of $9600 in counsel fees and $2346 in court costs. *Id.*

147 *Id.* at 53. It is particularly noteworthy that the court implicitly upheld the right of the trial judge to set what she felt was a reasonable hourly fee in conjunction with the award. *Id.* at 53-54. The court also upheld the imposition of court costs based upon information received from the court administrator as to the daily operating expense of the court and paying its personnel multiplied by the number of days of trial prior to the mistrial. *Id.* at 54-55. Thus, should the rules be amended in accordance with the suggestions set forth in this article, a previously judicially approved formula for assessing costs and counsel fees is available.

148 N.J. CT. R. 4:24-1. The rule requires that all discovery in a pending matter,

Johnson v. Mountainside Hospital,[149] a 1985 Appellate Division decision, provides a good summary of both the inefficacy of the current sanctions governing discovery and prevailing judicial philosophy as to their application. Between June 1982 and March 1983 dismissals for failing to provide discovery were entered against all defendants.[150] In July 1983, plaintiff moved to vacate the dismissal of one defendant.[151] The case was restored against that defendant in October 1983 and listed for trial in January 1984.[152]

Plaintiff's attorney failed to appear at the trial call.[153] The Court denied plaintiff's request for an adjournment to retain new counsel.[154] The Appellate Division reversed and remanded for a determination as to the prejudice suffered by defendants.[155] Incredibly, this case was filed two years after the 1979 events giving rise to the complaint and was returned to the trial court by a decision rendered in February 1985. Even assuming defendants prevailed on remand, in terms of counsel fees incurred, "justice delayed is [indeed] justice denied."[156] It appears from what little factual information the case presented that the litigant himself was without fault, and that the delay was occasioned entirely by the dil-

excepting only requests for admissions and appointment of impartial medical experts, depositions before an action or pending appeal, and professional liability claims shall be completed as to each defendant within 150 days of service of the original complaint on him. *Id.* Under another rule, however, depositions may be commenced before a complaint or pending an appeal. N.J. Ct. R. 4:11.

149 488 A.2d 1029 (N.J. Super. Ct. App. Div. 1985). The alleged malpractice occurred on November 17, 1979, and suit was instituted on November 17, 1981. *Id.* at 1030.

150 *Id.* at 1030-31.

151 *Id.* at 1031.

152 *Id.*

153 *Id.*

154 *Id.* On appeal the court noted

> when a plaintiff has violated a discovery rule or court order the paramount issue is whether a lesser sanction than dismissal would suffice to erase the prejudice suffered by the non-delinquent party. The trial court must first determine the prejudice suffered by each defendant and then determine whether dismissal with prejudice is the only reasonable and just remedy available.

Id. at 1032. Of necessity, to protect the rights of the litigant, the logical order of events is turned on its head. Although plaintiff's attorney does not comply with the rules, the burden is, in effect, upon the complying parties to prove irremediable prejudice as a result of this noncompliance.

155 *Id.*

156 *See supra* note 11 and accompanying text.

atory and unprofessional conduct of counsel. The question arises, however, how appropriate it is to visit the sins of plaintiff's counsel upon defendants rather than upon plaintiff's counsel? This article proposes alternative answers to that very question.

VIII. R. 4:21A Arbitration—An Admirable But Under-Utilized Option

Another obvious attempt to address the civil case backlog was the enactment of a rule requiring arbitration of certain cases.[157] The rule provides for mandatory arbitration of certain automobile negligence and other personal injury actions.[158] This rule, with minor amendment, could provide a potent tool for the expeditious and inexpensive disposition of civil cases.

As now constituted, the rule applies to those automobile negligence actions in which plaintiff's total medical expenses do not exceed $4500.[159] The rule likewise applies to other personal injury actions only when plaintiff's total medical expenses are less than $4500.[160] Until January 2, 1989, the rule was limited to automobile negligence actions.[161] The November 7, 1988 amendment[162] expanded the scope of the rule to other personal injury actions, but still excludes medical malpractice, products liability, toxic torts or intentional torts.[163] While the November 1988 amendment was a significant step towards clearing the court backlog, the limitations incorporated in the rule preclude the arbitration remedy from be-

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157 N.J. CT. R. 4:21A (arbitration of certain personal injury actions).

158 The rule was adopted effective January 1986. PRESSLER, *supra* note 49, at 973-74. The rule was amended effective January 1989 to provide for arbitration of all classes of personal injury actions, other than auto negligence, up to a $20,000 amount in controversy. *Id.*

159 N.J. CT. R. 4:21A-1(a)(1). In these cases, the amount in controversy is presumed, based upon the amount of medical expenses incurred, to be under $ 15,000. *Id.*

160 N.J. CT. R. 4:21A-1(a)(2). The relevant text of the rule itself provides:

> All actions for personal injury not arising out of the operation, ownership, maintenance or use of an automobile in which the amount in controversy . . . does not exceed $20,000 shall be submitted to arbitration in accordance with these rules. . . . The amount in controversy shall be presumed to exceed $20,000 if the cause of action involves medical malpractice, products liability, a toxic tort or intentional tort or if the plaintiff's total medical expenses . . . exceed $4,500.

Id.

161 N.J. Ct. R. 4:21A-1(a) (1988 New Jersey Court Rules).

162 PRESSLER, *supra* note 49, at 973.

163 N.J. Ct. R. 4:21A-1(a)(2) (1991 New Jersey Court Rules).

ing available to resolve some of the more complex cases filed in the system.[164]

Simply amending the scope of the rule, however, would not suffice to guarantee it would resolve those cases in which the arbitrator's determination was a reasonable one. As a result of their own experience, practicing attorneys should readily recognize when the arbitrator's decision is reasonable. They also should realize, however, that a better result might be available from a jury.

The time-hallowed right to trial by jury should not be infringed. However, the refusal to abide by a reasonable determination of an arbitrator constitutes an abuse of the jury trial right and contributes to the delays inherent in our present civil trial system. How, then, might one deter an unreasonable refusal to abide by an arbitrator's decision, yet preserve a litigant's right to proceed to trial where the arbitrator's decision appears an unrealistic one?

Happily, the mechanism to resolve this dilemma already exists. A court rule[165] provides the terms upon which a party may seek a trial subsequent to the arbitrator's determination.[166] The limitations imposed upon an award of costs[167] provides little incentive to accept a reasonable arbitration award. It is suggested that the rule be amended to impose upon a party a substantially more significant burden if the arbitration award is rejected. The provision that

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164 According to the last full year figures available from the Administrative Office of the Courts in 1993, approximately 2.5% to 3% of all civil filings involved medical malpractice, products liability or toxic torts. Rocco Cammarere, *War Declared on 'Reformers': Citing New Figures, Lawyers Say Tort 'Crisis' is Nonexistent*, 3 N.J. LAW. 341 (Feb. 21, 1994). As any trial lawyer knows, these are some of the most complex and bitterly contested cases in the system. Pursuant to the rule, they are beyond the reach of resolution by arbitration.

165 N.J. CT. R. 4:21A-6.

166 *Id.* As presently drafted those conditions are the payment of a fee of $150 to the Treasurer, and the State of New Jersey, and the possibility of an award of costs, including attorney's fees. That award, however, is subject to the following limitations: no costs shall be awarded unless the party demanding trial de novo obtains a verdict at least 20% more favorable than the award; no costs shall be awarded where arbitration denied money damages unless the party seeking trial de novo obtained a verdict of at least $250; total attorney's fees awarded shall not exceed $750, with a daily limitation of $250; and compensation for witness costs, including experts, shall not exceed $500. An application for costs may be denied or the costs awarded may be reduced where the assignment judge determines that such award will result in substantial economic hardship. N.J. CT. R. 4:21A-6(c).

167 N.J. CT. R. 4:21A-6(c)(5). This ignores the possibility of their waiver entirely by the assignment judge. *Id.*

a party obtain a verdict at least 20% more favorable than the award[168] could be retained. So could the provision relating to a rejected arbitration award that denied money damages.[169] The balance of the rule, however, could be readily amended to provide for the imposition of actual counsel fees, witness costs (including experts) and court costs.[170] Regarding court costs awards, the Court could follow a formula similar to that used by Judge Reavey in *Oliviero.*[171] This amendment to the rule would not deter the conscientious practitioner who is satisfied that for, whatever reason, the arbitrator's award was erroneous. The risk of exposing counsel and clients to the substantial sanctions involved in requesting a trial de novo would guarantee an honest assessment of the case and a realistic appraisal of the arbitration award. Such an amendment would largely deter the less conscientious practitioner, who might now feel the relatively minimal sanctions justify "shooting craps" with the jury.

IX. The Offer of Judgment—A Potentially Potent Procedure

With minor modification, another rule[172] could act as an in-

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168 N.J. Ct. R. 4:21A-6(c)(1).

169 N.J. Ct. R. 4:21A-6(c)(2).

170 This amendment would come perilously close to imposing the so-called "English Rule." In essence, the English Rule imposes costs and counsel fees upon the nonprevailing party. There is, concededly, considerable debate regarding the appropriacy of such a rule in the American civil litigation system. *See, e.g.*, Herbert M. Kritzer, *Searching for Winners in a Loser Pays System*, A.B.A. J., Nov. 1992, at 55. However, the incentive to realistically evaluate cases rather than "shoot craps" on the vagaries of the jury system, could well warrant the adoption of such a rule amendment. It should be recalled, however, that a good faith error in evaluating a case would be protected by the 20% differential provision presently reflected in N.J. Ct. R. 4:21A-6(c)(1).

171 Oliviero v. Porter Hayden Co., 575 A.2d 50 (N.J. Super. Ct. App. Div. 1990); *see supra* notes 146-48.

172 N.J. Ct. R. 4:58. The rule provides a mechanism whereby a party may file and serve upon any adverse party an offer to either take judgment in favor of that party or allow judgment to be taken against that party for the amount stated in the offer or for specific property or whatever effect was specified in the offer. The rule also provides that where it is not accepted and the offering party obtains a verdict at least as favorable as the offer, he shall be awarded costs of suit, 8% interest on money recovery from the date of the offer (or completion of discovery, whichever is later) and a reasonable attorney's fee not to exceed $750. N.J. Ct. R. 4:58-2.

Where the claim is for unliquidated damages or in a negligence action, no attorney's fees are allowed to the offerer unless the recovery is in excess of 120% of the offer. *Id.*

If the offer is made by a party who is not a claimant and the determination is at

centive to the timely and reasonable disposition of civil cases pertaining to offers of judgments. If its provisions were amended to provide for the imposition of actual court costs,[173] as well as actual counsel fees subsequent to the rejection of the offer, practitioners would consider carefully the adequacy of the offer.

One note of caution needs to be raised here. Alternatively, a client may have unreasonable expectations as to either the worth of a claim or the validity of a defense. Any amendment of this rule, as well as the rule governing arbitration, should acknowledge this fact. The Committee on Civil Practice should develop an appropriate form of certification (to be incorporated into the Appendix to the rules) for the client/litigant's execution. The certification could provide an appropriate factual recitation regarding either an arbitration award or the making of an offer of judgment, the recommendation by counsel that client accept same and client's rejection of same. The client would execute the certification to be held by counsel until the disposition of the case and then file with the court prior to its imposition of sanctions under the amended rule.[174] The rule might be further amended to establish a presumption, in the absence of such a signed certification, that the rejection of the arbitration award or offer to take judgment was

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least as favorable as the offer, an attorney's fee not to exceed $750 shall be awarded. Where the action is for negligence or unliquidated damages, the offerer must obtain a result that is less than 80% of the original offer. N.J. Ct. R. 4:58-3.

The January 18, 1994 report of the Supreme Court Committee on Civil Practice proposed an amendment to the rule deleting the $750 limitation discussed above and substituting an obligation to pay attorney's fees "for such subsequent services as are compelled by the non-acceptance. . . ." *1994 Report of the Supreme Court Committee on Civil Practice*, *supra* note 123, at 590.

173 This method of computing court costs is in accordance with the theory of Judge Reavey in the *Oliviero* case. *See supra* notes 146-47.

174 It could be legitimately argued that such a requirement would create an impossible conflict between the client's best interest and the attorney's interest in avoiding the imposition of sanctions. An analogous argument has been made regarding the concept of the contingent fee agreement itself. *See In Re* Quinn, 135 A.2d 869 (N.J. 1957). The contingent fee concept, however, is universally recognized in the United States as a means whereby the indigent may obtain quality legal services. This potential conflict is of less consequence than the unconscionable situation in which an attorney initially engages in "puffery" regarding the value of a client's case and later browbeats that client into a settlement. With the court's clear enunciation of the new rules, attorneys could (and would be well advised to) inform their clients of these amended procedures so that both parties would approach the case with an objective, realistic attitude. *See infra* Appendix II for a proposed form of certification relative to an offer of judgment.

counsel's determination. While our system of practice contemplates the expenditure of all reasonable efforts to ensure a litigant a disposition on the merits,[175] the client should not be allowed to escape the sanctions contemplated when rejecting the reasonable advice of his or her attorney.

This article contemplates a more rigorous application of the court rules with more significant sanctions for noncompliance than has heretofore been the case. It contemplates the dismissal of cases, often on essentially procedural grounds, to a far greater degree than has been the norm. How can such an approach be reconciled with the legitimate concern that a litigant's rights be protected? The next section of this article details the proposed resolution of this very dilemma.

X. *Towards a New Concept of Attorney Responsibility*

It is well settled "that admission to our Bar is a *privilege* granted in the interests of the public, for the purpose of protecting the unwary and the ignorant from injury at the hands of persons unskilled or unlearned in the law. . . ."[176] It is true that in 1990, in the State of New Jersey, there was one attorney admitted for every 176 residents.[177] By definition, though, the other 175 had not been granted the privilege to practice law. The "privilege" of registering a motor vehicle in New Jersey is far less exclusive than the privilege to practice law. None, however, challenge the State's authority to impose a condition on this privilege. The condition in question is the compulsory maintenance of motor vehicle liability insurance coverage.[178] The Legislature's authority in this regard is, of course, subject to judicial review.

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175 The court stated that "[T]he crucial factor in reviewing sanctions for attorney misconduct is whether the client has had a hearing on the merits." Crispin v. Volkswagenwerk, A.G., 476 A.2d 250, 255 (N.J. 1984). To the same effect was then Judge (later Justice) Sullivan's comment that "[t]he handling of this case by plaintiffs' then attorney has been described as inexcusable. It is more than that, but I question whether a litigant must suffer because of counsel's utter incompetence." McLaughlin v. Bassing, 241 A.2d 237, 239 (N.J. Super. Ct. App. Div. 1967) (Sullivan, J., dissenting), *rev'd*, 241 A.2d 450 (N.J. 1968).

176 Cape May County Bar Ass'n v. Ludlam, 211 A.2d 780, 782 (N.J. 1965) (emphasis added).

177 *See supra* notes 25-27.

178 N.J. STAT. ANN. § 39:6B-1 (West 1972). No successful challenge to the Legislature's authority to impose such a requirement has been maintained.

Our present rules of court do not impose a mandatory obligation to maintain malpractice insurance coverage as a condition to practice law.[179] However, as a review of sections II through V of this article suggest, it is within the scope of the Supreme Court's rule-making power to impose a universal obligation to maintain professional liability insurance coverage upon all attorneys admitted to practice in New Jersey. It is suggested that the rule[180] could readily be amended to impose such an obligation.[181]

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[179] N.J. CT. R. 1:21-1A(a)(3) imposes an obligation to maintain professional liability insurance only upon professional corporations for the practice of law. *Id.* Even that provision only requires maintenance of coverage

> for each claim of at least $100,000 multiplied by the number of attorneys employed by the corporation with an aggregate maximum limit of liability per policy year for all claims in the amount of at least $300,000 multiplied by the number of attorneys employed by the corporation, provided that the maximum coverage shall not be required to exceed $500,000 for each claim and $5,000,000 for all claims during the policy year. . . .

Id.

Thus, the sole practitioner professional corporation need maintain no more than $300,000 worth of coverage per year. The negligent handling of a basic residential real estate closing could result in damages in excess of this amount. *See also* NEW JERSEY STATE BAR ASS'N, LAWYERS PROFESSIONAL LIABILITY INSURANCE SURVEY UPDATE: FALL 1993 (1993) (providing a comparison of the rates and premiums of six legal malpractice insurers providing coverage to New Jersey attorneys).

Presently, only Oregon requires mandatory malpractice insurance for attorneys admitted to practice there, and has done so since 1978. David Z. Webster, *Mandatory Malpractice Insurance*, A.B.A. J., Nov. 1993, at 44. Rhode Island has adopted a compromise position requiring malpractice insurance for court appointed attorneys. *Id.*

[180] N.J. CT. R. 1:21.

[181] It is suggested that mandatory coverage limits per attorney be significantly higher than those now required. There are a limited number of insurers that provide professional liability coverage and a negative claim record could result in the carrier offering coverage only with a high deductible. Due to their knowledge of the law, attorneys are particularly capable of removing their assets from the reach of their creditors and any rule amendment in this regard must carefully address the question of deductible provisions. It may well be that based upon claim records, some attorneys could not obtain professional liability coverage. Perhaps, then, it would not be inappropriate to suggest that the market has determined these are not attorneys who should remain in practice. This, however, seems an unduly harsh result.

A practical solution might exist in the creation of something analogous to an "assigned risk" pool under the auspices of the Administrative Office of the Court. Those attorneys who could not obtain professional liability coverage in the required amounts from a commercial insurer would then have the option of obtaining such insurance through the court system itself at a higher premium. The attorney obtaining insurance through such a program would not be heard to complain of the unreasonableness of any premium assessed because it was that attorney's conduct that precluded an ability to obtain coverage from a commercial insurer. If such coverage was cost prohibitive, the attorney would retain the option to retire from practice,

The preceding section of this article ended with a query. In essence, it was how to resolve the conflict between a more rigorous application of the rules (with a consequently higher number of dismissals with prejudice) and the rights of a litigant to recover on a meritorious claim. The easier aspect of this dilemma is where the court is satisfied that the dismissal with prejudice is a consequence of the client's conduct. Even as presently applied, our court rules, and the cases under them, acknowledge as appropriate a dismissal with prejudice where the circumstances of the dismissal are occasioned by the client's conduct.[182] The more difficult situation is presented when the court is confronted with the question of whether "to deny plaintiff, because of his attorney's trial tactics, a trial on the merits of his claim . . . 'because of counsel's utter incompetence.' "[183] Obviously, the answer must be no; the client should not suffer. It should be equally obvious, however, that it is inequitable for the opposing party to suffer. What is the appropriate solution? The answer seems clear—to provide the client with a

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either temporarily until able to obtain coverage from a commercial insurer, or permanently.

The concern with high deductible provisions could likewise be addressed through such a fund. Perhaps a given attorney would be able to obtain, through a commercial insurer, the mandated coverage required by an amended rule, but not the deductible said rule imposed. In this situation, a limited policy, for the deductible only, might be made available through the Administrative Office of the Courts' program.

Of course, any such program enacted should require proof of insurance analogous to that imposed by N.J. Ct. R. 1:21-1A(b). It should also require an attorney who permanently withdraws from practice to obtain a policy covering prior acts.

182 The court stated that

> We recognize that reinstatement [of a complaint dismissed for failure to answer interrogatories] should be permitted despite noncompliance when infractions are minor. Certainly one of the purposes of R. 1:1-2 is to provide a safety valve against an overly mechanical application of the rule. However, we deem the facts in this case to be aggravated. Plaintiff's failure to respond to five written communications (none of which was returned) from her attorney indicates an indifference to her cause of action and a total disregard of court rules. We feel this constitutes gross inattention. Moreover, plaintiff's failure to supply defendant with the details of her medical claim prejudiced defendant.
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> . . . .
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> Accordingly we find that the trial judge acted well within his discretionary power and properly denied plaintiff's motion to vacate the dismissal of the complaint and restore the matter to the trial calendar.

Crews v. Garmoney, 357 A.2d 300, 301-02 (N.J. Super. Ct. App. Div. 1976).

183 Crispin v. Volkswagenwerk, A.G., 476 A.2d 250, 255 (N.J. 1984) (citation omitted).

viable claim against the attorney whose conduct occasioned the dismissal.

Some may argue that this is an illusory solution. It certainly would be without the enactment of a rule requiring mandatory professional liability coverage, as previously discussed. Far more importantly, a resolution under the rules as presently constituted does little to decrease the civil case backlog. It could logically be argued that such an approach would have quite the contrary effect; it could occasion an increase in the civil case backlog as a result of the necessity of filing an action against prior counsel.[184] What this legitimate concern does not address, however, is the comprehensive nature of the Supreme Court's rule-making power.

If, through the rules, the Supreme Court can impose mandatory (albeit non-binding) arbitration as to certain personal injury cases[185] and mandatory and binding arbitration of attorney-client fee disputes,[186] certainly the Supreme Court could enact a rule concerning claims of professional negligence against attorneys. In fact, the various provisions of the fee arbitration rule[187] provide a readily available model for how such a rule might be structured.

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184 This theory ignores the intuitively logical conclusion that most legal malpractice cases will be settled, at least where there is insurance, rather than expose an attorney to the "tender mercies" of a jury verdict.

185 N.J. CT. R. 4:21A.

186 N.J. CT. R. 1:20A.

187 *Id.* Another issue to be addressed, of course, is the concept of the "case within the case." Theoretically, professional negligence cannot damage a client who does not have a meritorious claim. As the malpractice concept is now litigated, the underlying claim, impaired because of the professional negligence of the attorney, is determined in the lawsuit brought upon the allegation of professional negligence itself. Any rule providing for arbitration of claims of professional negligence would likewise have to encompass the determination of such a claim. It is suggested that if the Supreme Court can remove the attorney's right to litigate a fee-related issue from the jurisdiction of the civil courts, it could likewise remove jurisdiction from the civil courts for the determination of the underlying claim allegedly impaired by an act of professional negligence. It is recognized that this, effectively, deprives the client of a trial by jury on the underlying claim. This is a necessary compromise in exchange for the expedited disposition of the malpractice claim. Moreover, because the client would retain the right to seek arbitration, he would retain, by implication, the right to bring a more conventional malpractice action in the civil courts. It is hoped that as public confidence in the arbitration system grew, fewer clients would feel the need to proceed against prior counsel through the civil courts. A proposed court rule, liberally borrowed from N.J. CT. R. 1:20A-1, is attached to the end of this article as Appendix III.

Although such a rule would be challenged by the organized bar, there is little doubt that it would be no more successful than the challenges to the contingent fee rule, the fee arbitration rule or the immunity granted to those who participate in ethics complaints or fee arbitration matters. The simple fact remains that "[t]he Supreme Court shall make rules governing the administration of all Courts in the State and, subject to law, the practice and procedure in all such Courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."[188]

XI. An Alternate Approach

If the Supreme Court, through its rule-making power, is unwilling to take the admittedly drastic steps necessary to resolve the burgeoning delay crisis, an alternative solution exists. It would operate through legislative initiative commencing with a constitutional amendment of the current source of the Court's rule-making power.[189] The key difference between the amended constitutional provision and the existing one is removing from the Supreme Court the authority to govern practice in the courts.

Should such a constitutional amendment become law, the Legislature could readily enact its own "State Trial Court Delay Act."[190] It could likewise readily enact the various measures cur-

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[188] N.J. CONST. art. VI, § II, para. 3.

[189] *Id.* The amended Constitutional provision would read as follows: The Supreme Court shall make rules governing the administration of all courts in the State and subject to law the procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of the law and the discipline of persons admitted.

Thus, the amended constitutional provision would in no way effect the Court's various powers as set forth in N.J. CT. R. 1:20, particularly the District Ethics Committees, District Fee Arbitration Committees, Disciplinary Review Board, Ethics Financial Committee and Office of Attorney Ethics established by N.J. CT. R. 1:20-1(a). Certainly such an amendment would not effect the authority of the Supreme Court to be the final arbiter of attorney discipline now retained in N.J. CT. R. 1:20-5.

Such an amendment could, however, result in the removal from the Supreme Court of certain powers now retained by it in N.J. CT. R. 1:21 dealing with the practice of the law and N.J. CT. R. 1:22 dealing with the unauthorized practice of law. It seems clear that this amendment would allow the abolition of contingent fee agreements, as proposed by Senator Cardinale, *see supra* note 39 and accompanying text, which are currently governed by N.J. CT. R. 1:21-7.

[190] *See infra* Appendix IV for a proposed model bill. Of course, the existence of delay and court congestion is not unique to New Jersey. Sister states, however, do not

afford exclusive domain in their Supreme Courts, as they construe their State Constitutions, in matters of practice and procedure. Even where a sister state's court system is responsible for matters of practice and procedure, legislatures have formally expressed their opinion on the situation.

Thus, for example, on March 19, 1993, the Hawaii State Senate introduced Resolution No. 104 urging the State Judiciary to study options to reduce court congestion. S. Res. 104, 17th Haw. Leg., 1st Sess. (1993). On February 24, 1993, the Hawaii State Legislature introduced House Resolution No. 104 requesting the judiciary to conduct an efficiency study of its operations. H. Res. 104, 17th Haw. Leg., 1st Sess. (1993).

One of the more significant legislative responses to court congestion and concurrent delay was found in the enactment of California's Trial Court Delay Reduction Act. CAL. GOV'T. CODE §§ 68600 to 68620 (West 1990). The statute requires the State Judicial Council to

> adopt standards of timely disposition for the processing and disposition of civil and criminal actions. The standards shall be guidelines by which the progress of litigation in the superior court of every county may be measured. In establishing these standards, the Judicial Council shall be guided by the principles that litigation, from commencement to resolution, should require only that time reasonably necessary for pleadings, discovery, preparation and court events and that any additional elapsed time is delay and should be eliminated.

Id. § 68603.

The section dealing with the responsibilities of the judiciary under the statute provides:

> In accordance with this article and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action. The judges of the program shall, consistent with the policies of this article:
> (a) Actively monitor, supervise and control the movement of all cases assigned to the program from the time of filing of the first document invoking court jurisdiction through final disposition.
> (b) Seek to meet the standards for timely disposition adopted pursuant to Section 68603.
> (c) Establish procedures for early identification of cases within the program which may be protracted and for giving those cases special administrative and judicial attention as appropriate, including special assignment.
> (d) Establish procedures for early identification and timely and appropriate handling of cases within the program which may be amenable to settlement or other alternative disposition techniques.
> (e) Adopt a trial setting policy which, to the maximum extent possible, schedules a trial date within the time standards adopted pursuant to Section 68603 and which schedules a sufficient number of cases to ensure efficient use of judicial time while minimizing resetting caused by overscheduling.
> (f) Commence trials on the date scheduled.
> (g) Adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all states of the litigation.

rently being discussed by State Senator Cardinale.[191]

Pursuant to such a constitutional amendment, the Legislature

Id. § 68607.

In furtherance of these responsibilities, the statute provides that

> [j]udges shall have all the powers to impose sanctions authorized by law, including the power to dismiss actions or strike pleadings, if it appears that less severe sanctions would not be effective after taking into account the effect of previous sanctions or previous lack of compliance in the case. Judges are encouraged to impose sanctions to achieve the purposes of this article.

Id. § 68608(b).

The statute provides for the creation and administration of a program to train the courts in the administration of delay reduction programs. *Id.* § 68610.

The statute further directs that

> [j]udges shall, in consultation with the bar of the county to the maximum extent feasible develop and publish the procedures, standards and policies which will be used in the program, including time standards for the conclusion of all critical steps in the litigation process, including discovery, and shall meet on a regular basis with the bar of the county in order to explain and publicize the program and the procedures, standards and policies which shall govern cases assigned to the program.

Id. § 68612. The statute also sets certain time limitations within which various actions must be taken although, interestingly enough, by setting time frames the Legislature has guaranteed that given actions will not be taken in *shorter* time period. *Id.* § 68616. *See* Davan Maharaj, *Civil Justice is Speedier in Courts These Days*, L.A. TIMES (Orange County Edition), Oct. 26, 1993, at B1. The article noted, "[i]n Orange County, civil cases now get to trial in about seventeen months, compared to the three to five year wait before 1991, recently compiled Superior Court statistics show." *Id.* The article expressed the opinion that the:

> fast-track system had revolutionized the way law suits were been [sic] handled for decades, placing the pace of litigation in the hands of the judges—instead of lawyers.
>
> Under the old court procedures, different phases of a complex case were argued before different judges.
>
> But now . . . state civil court judges are assigned law suits at the time of filing and oversee cases from pretrial machinations through trial. The courts have also adopted rules that set up stricter deadlines for attorneys. And judges can sanction lawyers who slow down the process.

Id.

According to statistics provided by the Orange County Superior Court, of all cases filed as of January 1991, 98% of them had been resolved within 30 months and 56% of them had been resolved within one year. *Id.* Moreover, the average time spent in trying a civil case had declined from 8.5 days in 1990 to 5.6 days in 1992. *Id.*

But for the apparently impenetrable roadblock of the Supreme Court's construction of the constitutional grant of rule-making power to it, see *supra* sections II-V, the statute could serve as a model for the New Jersey Legislature in addressing the delay and congestion prevailing in our civil court system. Just as the California Tort Claims Act provided a model for N.J. STAT. ANN. §§ 59:1-1 to :12-3 (West 1972), a New Jersey Trial Court Delay Reduction Act could be closely modelled on the California statute.

191 *See supra* note 39 and accompanying text.

certainly could enact legislation requiring mandatory malpractice insurance as a condition of maintaining the right to practice and providing for the mandatory binding arbitration of all malpractice claims.[192] There is one serious problem regarding the appropriacy of legislative, rather than judicial, action to effectuate the proposed changes in the civil court system: with the adoption of the Constitution, the people of New Jersey also adopted a method of selecting the judiciary[193] that effectively insulated the judges from political pressure. Although other states utilize an electoral process for selecting their judiciaries, the New Jersey Constitution did not incorporate that approach.

To provide the legislature, pursuant to a constitutional amendment, the authority to regulate the civil court system would be in direct opposition to the philosophy implicit in the constitution. Once appointed to the bench, a judge is subject to re-confirmation after seven years,[194] and once re-confirmed, has so-called "good behavior" tenure[195] until mandatory retirement at age seventy.[196] This tenure, intuitively, allows the judiciary to confront the unpopular issues likely to come before the court without being swayed by prevailing popular passions and prejudices.

Members of the Legislature must of necessity be far more sensitive to prevailing political currents than the judiciary. The delegation to the Legislature of the wholesale authority to shape the civil justice system could well result in a system in which legislation is enacted, or existing legislation amended, in response to popular criticism of a given court decision.

The separation of powers so cherished in the American system of jurisprudence could be in serious jeopardy in New Jersey should the legislative alternative to a judicial reform of its own house be the course pursued.

XII. Conclusion

It is beyond argument that there exists a crisis of congestion in

192 *See infra* Appendix V attached to the end of this article for a proposed model bill.

193 N.J. CONST. art. VI, § 6, para. 1.

194 *Id.* para. 3.

195 *Id.*

196 *Id.*

New Jersey's civil courts.[197] It is likewise beyond argument that the crisis will worsen with the passage of time.[198] Sincere attempts have been made to mitigate the impact of congested court calendars.[199] Effective July 1, 1991, all Superior Court filing fees were substantially increased.[200] The avowed purpose of this increase in fee was to fund additional judicial positions. However, the simple reality is that the geometric increase in the number of attorneys admitted to practice in New Jersey[201] precludes a resolution to the congestion by simply adding judges to the bench. Realistically, elevating a member of the bar to the bench is not an overnight procedure.[202] Moreover, such an act requires funding not only the judicial position, but appropriate support staff and, equally important, appropriate courtroom space. Elevating enough individuals from the bar to bench would further exacerbate the rather heated dispute as to who shall be responsible for the funding of the court system.

The delay in our civil court system merely will increase general public antipathy to bar and bench alike. The solutions proposed in this article are drastic ones, but the problem they seek to address is also extreme. It is not suggested, even if the proposals set forth in this article were adopted wholesale, that they would provide a panacea for the immediate resolution of the difficulties confronting our civil court system. These proposals have the benefit, however, of being enacted within the framework of a system that instills the Supreme Court with rule-making authority, while requiring neither the approval nor concurrence of any other person or entity.

These proposals are an admittedly radical departure from the previously prevailing philosophy. In fairness to the practicing bar, it is suggested that such dramatic revisions of the rules receive the widest possible publicity. In fairness to counsel, it is also proposed that such rules be made effective only a reasonable length of time after their enactment to allow civil practitioners an opportunity to "clean house." Under the circumstances, it would not be inappro-

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197 *See supra* notes 29-33 and accompanying text.
198 *Id.*
199 *See supra* note 36 (regarding Essex County "settlement judge" program).
200 N.J. STAT. ANN. §§ 22A:2-6 to -12 (West Supp. 1993).
201 *See supra* notes 23-28 and the accompanying text.
202 *See* N.J. CONST. art. VI, § VI, para. 1.

priate for the court to send notice by mail to every attorney admitted to practice in New Jersey.

Over time it is anticipated that the amendment of existing rules and adoption of new ones contemplated by this article will not only significantly diminish the prevailing backlog in civil litigation, but also improve the overall competency and professionalism of the practicing bar. It will also concurrently decrease the all too widespread public antipathy towards the judicial system.

Should the Supreme Court prove unwilling to utilize its authority pursuant to the existing Constitution to revise and amend the rules in accordance with the suggestions set forth in this article, an alternative solution exists. This is the legislative solution. Clearly, any legislative action to address the crisis of delay and congestion in our civil court system would require an amendment to the New Jersey Constitution. A proposed form of the amended constitutional provision[203] has been set out in this article.[204]

Once such a constitutional amendment was enacted, the Legislature could then enact statutes significantly impacting upon the practice of law and concurrently reducing delay and congestion in the court system without impairing litigants' rights. The Appendices to this article reflect some proposed statutes that might be enacted pursuant to such a constitutional amendment.

New Jersey has a forty-four year tradition of exclusive jurisdiction over the practice of law by the Supreme Court through its rule-making power.[205] Public dissatisfaction with the present court system, however, and proposed legislative initiatives in response thereto,[206] are mounting. Should the Court fail to act pursuant to its rule-making power, the public clamor may suffice to generate the support necessary to amend the Constitution. There are legitimate concerns with legislative jurisdiction over the practice of law. It is hoped the Supreme Court candidly will recognize the nature and extent of the crisis and move expeditiously to address it through the rule-making power. Should they fail to do so, it is highly probable, pursuant to constitutional amendment, that the Legislature will.

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[203] N.J. CONST. art. VI, § II, para. 3.

[204] *See supra* note 189 and accompanying text.

[205] *See supra* sections II to V.

[206] *See supra* note 39 and accompanying text.

APPENDIX I

CERTIFICATION WITH REGARD TO AWARD OF COUNSEL FEES

Name:
Address:
Telephone No.:
Attorney for

	SUPERIOR COURT OF NEW JERSEY
Plaintiff(s)	LAW DIVISION: COUNTY DOCKET NO.
-VS-	CIVIL ACTION
Defendant(s)	CERTIFICATION REGARDING AWARD OF COUNSEL FEES

The following Certification is made with reference to an award of counsel fees pursuant to N.J. Ct. R. 4:23 made on ______________, 199___:

1. I am attorney for (Plaintiff/Defendant) in this matter.

2. On ______________, 199___, I was awarded a counsel fee of $___ by order of the Honorable ______________, J.S.C.

3. (Check applicable box below):

_______ (a) More than 30 days have passed since the date of the order and I have not received payment of the counsel fee awarded.

_______ (b) On ______________, 199___, I received the counsel fee awarded me by the order of ______________, 199___.

4. (Optional) I choose not to retain the counsel fee awarded me and enclose herewith my check in the amount of the awarded fee, $___, made payable to the Clerk of the Superior Court.

5. I make this Certification to satisfy the requirements of N.J. Ct. R. 4:23 with reference to the award of counsel fees.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements I made are wilfully false, I am subject to punishment.

Date: ______________________

Attorney for (Plaintiff/Defendant)

APPENDIX II

CERTIFICATION PURSUANT TO N.J. CT. R. 4:58

Name:
Address:
Telephone No.:
Attorney for

	SUPERIOR COURT OF NEW JERSEY
Plaintiff(s)	
	LAW DIVISION: COUNTY DOCKET NO.
-VS-	
	CIVIL ACTION
Defendant(s)	
	CERTIFICATION RELATIVE TO OFFER OF JUDGMENT PURSUANT TO N.J. CT. R. 4:58

The following Certification is made with reference to the offer (to take judgment) (to allow judgment to be taken) made by (Plaintiff/Defendant) in the above matter:

1. I am the (Plaintiff/Defendant) in this matter.
2. (Check applicable box below)

________ (a) On ________________, 199____, Plaintiff made an offer to take judgment in the amount of $____. My attorney recommended that I allow judgment to be taken against me in this amount.

________ (b) On ________________, 199____, Defendant offered to allow judgment to be taken against him in the amount of $____. My attorney recommended that I take judgment against Defendant in this amount.

3. After consultation with my attorney, I have chosen to proceed to trial in this matter, despite the offer made pursuant to N.J. CT. R. 4:58. I am aware that significant penalties may be imposed upon me personally as a result of this decision.
4. I make this Certification pursuant to the requirements of N.J. CT. R. 4:58.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements I made are wilfully false, I am subject to punishment.

Dated: ______________________________

(Plaintiff/Defendant)

APPENDIX III

N.J. CT. R. 1:21A. DISTRICT PROFESSIONAL NEGLIGENCE ARBITRATION

COMMITTEES

1:21A-1. APPOINTMENT AND ORGANIZATION

The Supreme Court shall appoint a Professional Negligence Arbitration Committee (hereinafter referred to as Malpractice Committee) to serve in each Disciplinary District established pursuant to R. 1:20-3(a). The following provisions of R. 1:20-3 shall apply to and govern the organization of and practice before Malpractice Committees:

R. 1:20-3(a) Disciplinary Districts

R. 1:20-3(b) Appointments

R. 1:20-3(c) Officers; Organization

R. 1:20-3(d) Office.

Unless specifically directed to the contrary by the Board or by the Director, a Malpractice Committee shall not act upon malpractice arbitration requests involving an attorney whose principal office is not within the District, but shall refer that information to the Director for appropriate referral. A Malpractice Committee shall not render advisory opinions. On request of a Malpractice Committee or *sua sponte*, the Director may transfer any matter to another Malpractice Committee.

1:21A-2. JURISDICTION

Each Malpractice Committee shall, pursuant to these rules, have jurisdiction to arbitrate claims of professional negligence, and to make factual determinations relating to the actions in which it is alleged professional negligence occurred, against attorneys admitted to practice in New Jersey. Subject to any appropriate "discovery rule," a Malpractice Committee shall decline to arbitrate claims of professional negligence in respect to a matter in which the representation of the complainant by the attorney against whom arbitration is sought terminated more than six (6) years prior to the date of request.

1:21A-3. ARBITRATION

(a) Submission. A claim of professional negligence shall be arbitrated only upon a client's written request. Malpractice Committees shall have authority to consider such a request regardless of whether the attorney has resigned or has been suspended, disbarred or transferred to "disability inactive" status since the alleged professional negligence occurred. The request shall include a stipulation by the client that if a civil action for malpractice is then pending, it shall be stayed pending a determination by the Malpractice Committee, and the amount of the arbitration award shall be entered as a judgment in that action. The stipulation shall further provide that if no such action is then pending, the client may, by summary action brought pursuant to R. 4:67, obtain judgment in the amount of the award as determined by the Malpractice Committee in accordance with *N.J.S.A.* § 2A:24-1 *et seq.* All requests for professional negligence arbitration shall be made upon forms approved by the Director and a copy of each request so filed shall be promptly transmitted to the Office of Attorney Ethics.

(b) Procedure.

(1) Hearing Panel; Burden of Proof. All arbitration proceedings shall be heard before a hearing panel of at least three (3) members of the Malpractice Committee, a majority of whom shall be attorneys. The determination of the matter shall be made by a majority of the membership sitting on the hearing panel. When by reason of absence, disability or disqualification the number of members of the panel able to act is fewer than three (3), with the consent of the client and the attorney the hearing may proceed before two (2) members of the panel. The Secretary of the Committee shall not be eligible to sit on any hearing panel. The determination of a matter shall be made in accordance with the rules of professional conduct, NEW JERSEY RULES OF PROFESSIONAL CONDUCT 1.1 *et. seq.*, and applicable statutory law and case decisions. The burden of proof of commission of an act of professional negligence shall be upon the client by a preponderance of the evidence. Within thirty (30) days after the filing of a request for malpractice arbitration a client may, in writing, notify the Secretary of a withdrawal from the proceeding; thereafter, a client shall have no right of withdrawal.

(2) Notice; Attorney Response. The Malpractice Committee

shall notify the parties at least ten (10) days in advance, in writing, of the time and place of the hearing, and shall have the power, at a party's request and for good cause shown, or on its own motion, to compel the attendance of witnesses and the production of documents by the issuance of subpoenas in accordance with R. 1:20-3(o) and guidelines of the Director. The Secretary of the Malpractice Committee shall serve upon the attorney a copy of the client's written request for malpractice arbitration, and any supplemental documentation supplied to the panel. The Secretary shall also forward to the attorney for completion an Attorney Malpractice Response form in a form approved by the Director. The Secretary shall also serve a copy of the client's request for malpractice arbitration and an Attorney Malpractice Response upon the law firm, if any, of which the original attorney is a member. The attorney shall specifically set forth in the Attorney Malpractice Response the name of any other third party attorney or law firm with whom the original attorney was associated in the practice of law at the time the legal services were rendered to the client which the original attorney claims is liable for all or a part of the client's claim. The attorney shall file with the Secretary the completed Attorney Malpractice Response, together with any supplemental documentation, within twenty (20) days of receipt of the client's written request for malpractice arbitration; the attorney shall certify that a true copy of the Attorney Malpractice Response has been served upon the client or the client's counsel. Failure to file the Attorney Malpractice Response shall not delay the scheduling of a hearing; however, in such case, the panel may, in its discretion, refuse to consider evidence offered by the attorney which would reasonably be expected to have been disclosed on the Attorney Malpractice Response.

(3) Third Party Practice. In the event that the attorney has named a third party attorney or law firm as potentially liable in whole or part for the fee, the original attorney shall, within the time for filing the Attorney Malpractice Response with the Secretary, serve a copy of the client's request for malpractice arbitration and a copy of the Attorney Malpractice Response on the third party attorney or law firm, stating clearly in a cover letter that a third party malpractice dispute claim is being made against them. A copy of such letter shall be filed with the Secretary, who shall forward to the third party attorney or law firm for completion an At-

torney Malpractice Response form, which shall be filed with the Secretary and served by the third party attorney upon the client and the original attorney as provided for in the case of the original attorney. A third party attorney or law firm so noticed shall be deemed a party with all of the rights and obligations of the original attorney.

(4) Conduct of Hearing; Determination. All arbitration hearings shall be conducted formally and in private and pursuant to the New Jersey Rules of Evidence. All witnesses including all parties to the proceeding shall be duly sworn, and a stenographic or other similar record shall be made. Both the client and the attorney whose malpractice is alleged shall have the right to be present at all times during the hearing with their attorneys, if any. The written determination of the hearing panel shall be in a form approved by the Director and shall have annexed a brief statement of reasons therefor. If a stay of a proceeding pending in court has been entered prior to the Malpractice Committee's determination, when the determination is rendered the Secretary of the Malpractice Committee shall send a copy of the determination to the Clerk of the Court who is to vacate the stay and relist the matter. Where a third party attorney or law firm has been properly joined the arbitration determination shall clearly state the individuals or entities liable for the malpractice. It shall be served upon the parties and filed with the Director by ordinary mail within thirty (30) days following the conclusion of the hearing or from the end of any time period permitted for the filing of supplemental briefs or other materials. Both the attorney and the client shall have thirty (30) days from receipt to comply with the determination of the Malpractice Committee.

(c) Appeal. No appeal on the merits from the determination of a Malpractice Committee shall lie. An appeal may be taken to the Board by the client or the attorney to the Disciplinary Review Board if the client or attorney alleges that:

(1) any member of the Malpractice Committee hearing the professional negligence dispute failed to be disqualified in accordance with the standards set forth in R. 1:12-1; or

(2) the Malpractice Committee failed substantially to comply with the procedural requirements of R. 1:21A; or

(3) there was actual fraud on the part of any member of the Malpractice Committee.

(d) Procedure on Appeal. The party taking an appeal shall file a notice of appeal in the form prescribed by the Board within thirty (30) days after the parties' receipt of the Malpractice Committee's written arbitration determination. The notice of appeal shall be filed with the Board and shall include a statement of the ground for appeal and an affidavit or certification stating the factual basis therefor. The notice shall also request a transcript of the record made of the Malpractice Committee proceedings. Copies of the notice of appeal shall be served on the other parties and the Secretary of the Malpractice Committee by the party appealing who shall certify such service in the notice of appeal. The filing of a notice of appeal from the Malpractice Committee determination shall act as a stay of execution of any judgment obtained as a result of a professional negligence arbitration process. That stay shall not be lifted until final conclusion of the professional negligence arbitration proceedings. The Hearing Panel Chair of the Malpractice Committee shall, within thirty (30) days of receipt of the notice of appeal, furnish to the Board a specific reply to the facts in the notice of appeal, setting forth the alleged grounds for appeal and shall serve a copy of the reply on all other parties. Within the same time, the Secretary of the Malpractice Committee shall file with the Board the record of proceedings before the Malpractice Committee and any briefs or other papers filed with the Malpractice Committee. Within thirty (30) days after filing and service of Notice of Appeal any other party to the professional negligence proceeding may file a response with the Board and shall certify service upon all other parties, the Secretary and the Hearing Panel Chair. The Board shall dismiss the appeal on notice to the parties if it determines that the notice of appeal fails to state a ground for appeal specified in paragraph (c) of this rule or that the affidavit or certification fails to state a factual basis for such ground. If the notice of appeal and supporting affidavit or certification comply with these rules, the Board shall review the challenge to the arbitration. If it finds there has been a violation of R. 1:21A-3(c), the Board shall remand the professional negligence dispute to a Malpractice Committee for a new arbitration hearing, or determine the matter itself if it deems such an action appropriate.

(e) Enforcement. Whenever a Malpractice Committee deter-

mines, or the parties by signed stipulation of settlement agree, that an award should be made and the attorney fails to appeal or comply with such determination within thirty (30) days of receipt of the arbitration determination, the matter shall be referred to the Director for such action as may be appropriate, in accordance with R. 1:20-4(j) [this new rule would provide for enforcement of malpractice arbitration committee determination or stipulation by the same possibility of a recommendation of temporary suspension of the attorney until compliance with the determination or stipulation as is now provided for failure to abide by a fee arbitration determination or stipulation in R. 1:20-4(i)]. In the event of an appeal, no enforcement of the Malpractice Committee's determination will occur while that appeal is pending before the Board.

1:21A-4. REFERRAL TO DISTRICT ETHICS COMMITTEE

When a grievance involves aspects of both a professional negligence dispute and a charge of unethical conduct, the Malpractice Committee shall first determine whether professional negligence occurred unless it clearly appears to the Malpractice Committee, or to the Director, that there is presented an ethical question of a serious or emergent nature, in which the Malpractice Committee shall hold the professional negligence dispute in abeyance and transmit the file to the Secretary of the appropriate district ethics committee for processing. At the conclusion of the ethics proceeding so referred, the Secretary shall notify the Malpractice Committee Secretary of the results, whereupon the professional negligence dispute shall be reactivated. In all cases it shall be the duty of each Malpractice Committee, after hearing and determination of the professional negligence dispute, to refer any matter that it concludes may involve unethical conduct to the appropriate district ethics committee for preliminary investigation in accordance with R. 1:20-3(f). Such referrals shall be made in letter form detailing the facts known to the Malpractice Committee and shall include a complete copy of the Malpractice Committee's file. Nothing in this rule shall preclude a client from making an independent complaint to an ethics committee at the conclusion of a professional negligence dispute proceedings.

1:21A-5. RECORDS; CONFIDENTIALITY

Each Malpractice Committee shall maintain such records and file such reports as shall be required by the Director. Except as may be otherwise necessary for compliance with these rules or to take ancillary legal action with respect thereof, all records, documents, files, hearings, transcripts or recordings of hearings, if any, and proceedings made and conducted in accordance with these rules, shall be confidential. They shall not be disclosed to or attended by anyone unless (1) the Board so directs following written application to the Board with notice to the Director and attorney whose professional negligence was questioned; or (2) upon order of the Supreme Court.

1:21A-6. COMMITTEE MEMBERSHIP

Only attorneys admitted to practice for ten (10) or more years or claims adjusters employed by professional negligence insurers with five (5) or more years experience shall be eligible for appointment to the Malpractice Committees. Such appointee shall be entitled to reasonable compensation at a rate to be set by the Director. Such compensation shall be funded from a fund to be created by the collection of a fee, in an amount to be set by the Supreme Court, upon every attorney as a condition of continued admission to practice in the State of New Jersey, except for those attorneys who are exempted from payment to the New Jersey Lawyers' Fund for Client Protection pursuant to R. 1:28-2(b).

APPENDIX IV

TRIAL COURT DELAY REDUCTION ACT

SENATE/ASSEMBLY No. 1234

STATE OF NEW JERSEY

AN ACT SUPPLEMENTING TITLE 2A OF REVISED STATUTES AND AMENDING P.L. 1948, c. 327

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. This Act shall be known and may be cited as the New Jersey Trial Court Delay Reduction Act.

2. The Legislature finds and declares that:

a. Since 1970, the number of attorneys admitted to practice in the State of New Jersey has more than quadrupled. Since 1990, over one million new cases a year have been filed in the Superior Court, Trial Division. There are cases currently pending in the New Jersey court system that were filed before January 1, 1986, and which remain unresolved.

b. The Legislature declares that the delay and congestion in the New Jersey Superior Court trial system has eroded public confidence in the system and created a climate in which the public holds the judiciary and the State's attorneys-at-law in contempt.

c. Whereas by vote in the general election held in November 1994, the people of New Jersey have adopted an amendment to Article VI, § II, para. 3 of the New Jersey Constitution to remove from the State Supreme Court exclusive jurisdiction over the practice of law in the State of New Jersey, and pursuant to this newly delegated constitutional authority to act, the Legislature declares that there is hereby established the New Jersey Trial Court Delay Reduction Act.

3. STANDARDS OF TIMELY DISPOSITION OF CIVIL AND CRIMINAL ACTIONS; ADOPTION

a. The Supreme Court Committee on Civil Practice shall adopt standards of timely disposition for the processing and disposition of civil actions. The standards shall be guidelines by which the progress of litigation in the Superior Court of every county may be measured. In establishing these standards, the Supreme Court Committee shall be guided by the principles that litigation, from commencement to resolution, should require only that time rea-

sonably necessary for pleadings, discovery, preparation, and court events, and that any additional elapsed time is delay and should be eliminated.

b. The Supreme Court Committee shall adopt rules effective September 1, 1995, to be used by all courts, establishing a case differentiation classification system based upon the relative complexity of cases. The rules shall provide longer periods for the timely disposition of more complex cases. The rules may provide a presumption that all cases, when filed, shall be classified in the least complex category.

4. STATISTICS REGARDING COMPLIANCE WITH STANDARDS OF TIMELY DISPOSITION; COLLECTION AND MAINTENANCE; METHOD

The Supreme Court Committee on Civil Practice shall collect and maintain statistics, and shall publish them at least on a yearly basis, regarding the compliance of the Superior Court of each county with the standards of timely disposition adopted pursuant to Section 3. In collecting and publishing these statistics, the Supreme Court Committee shall measure the time required for the resolution of civil cases from the filing of the first document invoking court jurisdiction. The Supreme Court Committee shall report its findings and recommendations to the Legislature in a biennial Report on the State of New Jersey's Civil Justice System.

5. JUDGES; RESPONSIBILITIES

In accordance with this Act and consistent with statute, judges shall have the responsibility to eliminate delay in the progress and ultimate resolution of litigation, to assume and maintain control over the pace of litigation, to actively manage the processing of litigation from commencement to disposition, and to compel attorneys and litigants to prepare and resolve all litigation without delay, from the filing of the first document invoking court jurisdiction to final disposition of the action.

The judges of the program shall, consistent with the policies of this Act:

a. Actively monitor, supervise and control the movement of all cases assigned to the program from the time of filing the first document invoking court jurisdiction through final disposition.

b. Seek to meet the standards for timely disposition adopted pursuant to Section 3.

c. Establish procedures for early identification of cases within the program that may be protracted and for giving those cases special administrative and judicial attention as appropriate, including special assignment.

d. Establish procedures for early identification and timely and appropriate handling of cases within the program that may be amenable to settlement or other alternative disposition techniques.

e. Adopt a trial setting policy that, to the maximum extent possible, schedules a trial date within the standards adopted pursuant to Section 3 and that schedules a sufficient number of cases to ensure efficient use of judicial time while minimizing adjournments caused by overscheduling.

f. Commence trials on the date scheduled.

g. Adopt and utilize a firm, consistent policy against continuances, to the maximum extent possible and reasonable, in all stages of litigation.

6. SANCTIONS FOR NONCOMPLIANCE

Judges shall have all the powers to impose sanctions authorized by law, including the award of counsel fees against opposing counsel or litigants, as appropriate under the facts of the case, and the power to dismiss actions or strike pleadings. Judges are encouraged to impose sanctions, including particularly the dismissal of actions or the striking of pleadings, to achieve the purposes of this article. The presumed sanction for failure to comply with the time frames established pursuant to Section 3 of this Act shall be the dismissal of actions or striking of pleadings.

7. TRAINING JUDGES; PROGRAM

The Supreme Court Committee on Civil Practice, in conjunction with other interested groups as it determines appropriate, may prepare and administer a program, consistent with the policies and requirements of this article, for the training of judges in administering the delay reduction program.

8. PROCEDURES, STANDARDS AND POLICIES; DEVELOPMENT AND PUBLICATION; RULES OF COURT REQUIREMENTS

Judges shall, in consultation with the bar of the state and county, to the maximum extent feasible develop and publish the procedures, standards, and policies that will be used in the program, including time standards for the conclusion of all critical

steps in the litigation process, including discovery, and shall meet on a regular basis with the bar of the state and county to explain and publicize the program and the procedures, standards, and policies that shall govern cases assigned to the program. The procedures, standards, and policies to be used in the program shall be published in the "New Jersey Law Journal" and the "New Jersey Lawyer."

9. PROCEDURE; TIME LIMITATIONS

Delay reduction rules shall not require shorter time periods than as follows:

a. Service of the complaint within 20 days after filing. Exceptions, for longer periods of time, may be granted only upon order of the court for good cause shown.

b. Service of responsive pleadings within 30 days after service of the complaint. Exceptions, for longer periods of time, may be granted only upon order of the court for good cause shown.

c. No status conference, or similar event, other than a challenge to the jurisdiction of the court, may be required to be conducted sooner than 30 days after service of the first responsive pleadings.

d. Pre-trial discovery shall be governed by N.J. CT. R. 4:24-1 and any enlargement of the time frames contained therein shall be only by order of the court upon good cause shown.

e. This section applies to all cases filed on or after September 1, 1995.

10. This Act shall take effect on the 60th day after its adoption.

APPENDIX V

ATTORNEY MALPRACTICE INSURANCE AND ARBITRATION ACT

SENATE/ASSEMBLY No. 5678

STATE OF NEW JERSEY

AN ACT CREATING THE ATTORNEY MALPRACTICE INSURANCE AND ARBITRATION ACT SUPPLEMENTING TITLE 2A OF THE REVISED STATUTES AND AMENDING P.L. 1903, C. 247

Be it enacted by the Senate and General Assembly of the State of New Jersey:

1. This Act shall be known as the Attorney Malpractice Insurance and Arbitration Act.

2. The Legislature finds and declares that:

a. By vote of the people of the State of New Jersey in the general election of November 1994, Art. VI, § II, para. 3 was amended to remove regulation of the practice of law in the State of New Jersey from the exclusive jurisdiction of the State Supreme Court.

b. Pursuant to the authority so delegated by the constitutional amendment, this Legislature has enacted the New Jersey Trial Court Delay Reduction Act, N.J. STAT. ANN. § 2A: (West 1995), that contemplates the dismissal of actions and the striking of pleadings for failure to comply with the delay reduction measures adopted pursuant to the Act.

c. To protect the interest of the members of the public represented by attorneys whose actions are dismissed or pleadings stricken for failure to comply with the Act, it is therefore an appropriate purpose that as a condition precedent to being allowed to practice law in the courts of New Jersey that all attorneys seeking to so practice shall maintain insurance to provide indemnification for acts of attorney professional negligence in the amounts and on the terms and conditions set forth hereafter.

3. There shall be created a category of attorneys known as Malpractice-Inactive for those attorneys admitted to practice in the State of New Jersey who choose not to comply with the terms and conditions of this Act. No attorney who has the status of Malpractice-Inactive shall be eligible to practice before any part of the State Superior Court system, the State Supreme Court, any Municipal Court of any municipality located in the State of New Jersey, and

the Tax Court of the State of New Jersey. This ineligibility can be terminated at any time by such attorney by bringing himself into compliance with the terms and conditions of the Act.

4. Every attorney admitted to practice in the State of New Jersey who chooses not to obtain Malpractice-Inactive status shall maintain professional liability insurance against liability imposed by law for damages resulting from any claim made against said attorney by his clients arising out of the performance of professional services in the capacity of attorney. Said insurance shall be in a minimum amount of at least $500,000 for each claim, with an aggregate maximum limit of liability per policy year for all claims in the amount of at least $3,000,000. It is further provided that the deductible provision of such insurance shall not exceed $2,500.

5. Every attorney who does not elect Malpractice-Inactive status shall, within 90 days of the effective date of this Act, provide to the Attorney General of the State of New Jersey a certificate of insurance, issued by the insurer, setting forth the name and address of the insurance company writing the insurance policy required by Section 4 and policy number and policy limits.

6. Should an attorney not elect Malpractice-Inactive status, but be unable to obtain a policy of insurance, either as to limits of liability or deductible, from a commercial insurance company, said attorney may make application to the Office of the Attorney General of the State of New Jersey to purchase insurance from the Malpractice Assigned Risk Pool, which is hereby created. The Attorney General, pursuant to regulation, shall develop a premium schedule for such insurance or limited policy of insurance in conjunction with a commercial policy issued with deductible limits that do not comply with Section 4 of this Act. All attorneys admitted to practice in the State of New Jersey, who do not elect Malpractice-Ineligible status, shall be charged a one-time fee in the amount of $1,500, payable in 3 annual installments commencing the 30th day after this Act takes effect, to provide an initial fund for the Malpractice Assigned Risk Pool Program. Any attorney who initially elects Malpractice-Ineligible status and thereafter seeks to practice in the courts specified in Section 3 of this Act shall likewise be obligated to make the one-time $1,500 contribution on the terms and conditions set forth herein.

7. The Legislature, having enacted the New Jersey Trial Court Delay Reduction Act to reduce the delay and congestion in

the courts of New Jersey, declares that all claims of professional negligence may, at the option of the aggrieved client, be resolved through mandatory binding arbitration. The Attorney General of the State of New Jersey is hereby directed to promulgate administrative regulations creating such an arbitration program including the qualifications for the arbitrators who shall be chosen from attorneys admitted to practice in the State of New Jersey and professional negligence insurance adjusters, as well as the procedures for such arbitration proceedings.

8. This Act shall take effect on the 60th day after its adoption.